

Symptoms of Bad Writing

So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

But who can correct or condemn without first recognizing? It's not hard. The disease of bad writing has many symptoms, five of which a child could spot. The first shows up chiefly in statutes; the second in contracts and similar documents; the third, fourth, and fifth in briefs and judicial opinions.

First, the dread *provided that*. Use a proviso and you show that you hadn't thought through what you wanted to say before starting to write. You came to the end with matter left unexpressed. Rather than begin again and weave the unexpressed matter into your text where it belongs, you tack a *provided that* into your last sentence, vexing the reader and convicting yourself of slovenly intellectual habits. For example:

No person who has not attained the age of twelve years shall be competent to testify, provided that, if the court finds that any such person understands the nature and obligation of the oath, such person shall be competent to testify.

This statute should have been rewritten as follows:

Every person above the age of twelve years is competent to testify, but a person beneath that age is also competent if the court finds that the person understands the nature and obligation of an oath.

Second, the unnecessary *herein*, *hereinabove*, and *hereinafter*. These are show-off words. Anyone who uses them wants the

world to see that it's a lawyer talking, for only lawyers use such words. There's no need to remind the world that you're a lawyer, and there's no need for *herein*. When asked where's the library, you don't reply, "Two streets down in this city." "Two streets down" suffices, because no one will mistake your meaning. So strike the *hereinabove* from *as defined in paragraph 2 hereinabove*. "Paragraph 2" can't refer to some other document unless you say that it does, in which case you'll write, for example, "as defined in paragraph 2 of the master lease of December 20, 1985."

Third, the screaming adverb or adjective. Here, you wish to convey to the court the intensity of your feelings. You do so by adverbs and adjectives that neither communicate nor convince. They merely register your dudgeon, which an experienced advocate knows serves only to mark the offending brief as beginner's work. For example, in "This ruling was outrageously unfair and is a blatant violation of due process," the adverb *outrageously* and the adjective *blatant* are screamers. Delete them.

Fourth, humorless exaggeration. When Mark Twain says of *Huckleberry Finn* that "persons attempting to find a plot in [this narrative] will be shot," we laugh. No judge so much as smiles at the solemn overstatement that many lawyers seem to think is the way to argue a case. It isn't. Humorless exaggeration merely leaves the judge suspicious of the trustworthiness of a brief replete with the likes of this:

The evidence demonstrates that [the university] has consistently appointed to tenured professorships so few [members of an identifiable group] as to constitute only about half of their representation in the population at large. This is naked racism, amounting to genocide.

Naked is a screamer, and in the circumstances, it's absurd for counsel to be speaking of "racism" and "genocide." Avoid humorless exaggeration.

Fifth, egregious legalisms. Legalisms, the jargon of the law, have a limited utility. Employ them within those limits. Beyond those limits, use plain English. This memorandum by an appellate court is an example of how not to do it:

The order of the trial court denying appellant-appellant-respondent's motion for summary judgment and granting respondent-respondent-respondent's cross motion for, inter alia, leave to amend the complaint and for leave to serve a late notice of claim, nunc pro tunc, against respondent-respondent-appellant is reversed, respondent-respondent-respondent's motion denied, and appellant-appellant-respondent's motion for summary judgment granted.

Substitute *plaintiff* or *defendant*, *Jones* or *Smith*, for those whirling *appellants* and *respondents*, and you've mitigated the memorandum's opacity. ♦

This article originally appeared in the May 1986 issue of the ABA Journal and is now included in a collection called Persuasive Writing, published by The Professional Education Group, Inc. It is reprinted with permission from the ABA Journal and from The Professional Education Group, Inc. (800-229-CLE1).

Irving Younger, now deceased, was a professor at the New York University School of Law and the University of Minnesota Law School.

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. The assistant editor is George Hathaway. We seek to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For more information about plain English, see our website—www.michbar.org/committees/penglish/pengcom.html.
