Collected by Bryan A. Garner

Judges on Effective Writing: The Importance of Plain Language

I trust that, after more than 20 years, some of the Plain Language columns are worth reprinting. This one appeared in March 1994.

As I noted then, the survey that Mr. Garner mentions in his introduction is the same one that we first did in Michigan, with very similar results. See the October 1987 and May 1990 columns.

The judges are identified by their judicial positions when they make their remarks.

—JK

Lawyers are notoriously poor at gauging what judges prefer in legal writing. Too many of us believe, for example, that judges expect us to use legalese. In 1991, when the Texas Plain-Language Committee surveyed all the state district and appellate judges in Texas, we found that more than 80 percent prefer plain language *(Plaintiff complains of Defendant and says)* over legalese *(Now comes the Plaintiff, by and through his attorneys of record, Darrow and Holmes, and for his Original Petition in this cause would respectfully show unto the Court the following).* Indeed, several judges responded to the survey with a plea that we stamp out legalese once and for all.

The results of that survey surprised many Texas litigators—and many changed the form of their court papers. But many more have persisted in the old, legalistic style—perhaps out of a fondness akin to what some people feel for the language of the King James Version of the Bible. Judge Lynn Hughes of Houston speaks directly to those litigators: "Anyone who thinks *Comes now the Plaintiff* is anything like the King James Version has no sense of poetry."

Literary tastes may differ, of course, but it's worth knowing what judges say—and have been saying for a long time—about the language we lawyers use. Following are some choice quotations I've recently collected.

Bryan A. Garner

Judicial Diagnoses

"Lawyers spend a great deal of their time shoveling smoke."

Hon. Oliver Wendell Holmes[1]
U.S. Supreme Court

"[Too many lawyers believe that] it is essential to legal English that one write as pompously as possible, using words and phrases that have long since disappeared from normal English discourse."

Hon. Antonin Scalia[2]
U.S. Supreme Court

"The reason legal writing has gotten to such a low point is that we have had very bad teachers—judges who wrote years ago and wrote badly. We learned bad habits from them and their opinions in law school."

Hon. William Bablitch[3]
Supreme Court of Wisconsin

Stick to the Mother Tongue

"[The advocate] will stock the arsenal of his mind with tested dialectical weapons. He will master the short Saxon word that pierces the mind like a spear and the simple figure that lights the understanding. He will never drive the judge to his dictionary. He will rejoice in the strength of the mother tongue as found in the King James version of the Bible, and in the power of the terse and flashing phrase of a Kipling or a Churchill."

Hon. Robert H. Jackson[4]
U.S. Supreme Court

"[A]void as much as possible stilted legal language, the thereins, thereofs, whereinbefores, hereinafters, *and what-have-yous. Use English wherever you can to express the idea as well and as concisely as in law or Latin. A healthy respect for the robust Anglo-Saxon appeals more than does the Latin, whether or not it is Anglicized. The home-grown product in this case is better than the imported, not to say smuggled, one."*

Hon. Wiley B. Rutledge[5]
U.S. Supreme Court

"Write so that you're understood. English is a hard language to learn, but it's an easy language to communicate in. There's no reason to put Latin in your brief."

Hon. Craig T. Enoch[6]
Fifth Court of Appeals, Dallas

"Don't use legalese. It causes you to put your contentions in stale ways."

Hon. Thomas Gibbs Gee[7]
U.S. Court of Appeals for the Fifth Circuit, 1974-91

"Legalese is an impediment to clear, logical thinking."

Hon. F. Lee Duggan[8]
First Court of Appeals, Houston

"It's easier for a judge when you're using common usage. Judges are only human, after all."

Hon. Carolyn Wright[9]
Family District Court, Dallas

Simplify, Simplify!

"For a hundred years, good lawyers have been writing without all the garbage and in a simple, direct style."

Hon. Lynn N. Hughes[10]
U.S. District Court, Houston

"A lawyer should write the brief at a level a 12th grader could understand. That's a good

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rule of thumb. It also aids the writer. Working hard to make a brief simple is extremely rewarding because it helps a lawyer to understand the issue. At the same time, it scores points with the court."

Hon. William Bablitch[11]
Supreme Court of Wisconsin

"When a judge finds a brief which sets up from twelve to twenty or thirty issues or 'points' or 'assignments of error,' he begins to look for the two or three, perhaps the one, of controlling force. Somebody has got lost in the underbrush and the judge has to get him—or the other fellow—out. That kind of brief may be labeled the 'obfuscating' type. It is distinctly not the kind to use if the attorney wishes calm, temperate, dispassionate reason to emanate from the cloister. I strongly advise against use of this type of brief, consciously or unconsciously. Though this fault has been called overanalysis, it is really a type of underanalysis."

Hon. Wiley B. Rutledge[12]
U.S. Supreme Court

"The key is to make the brief easy for the judge to follow."

Hon. Lloyd Doggett[13]
Supreme Court of Texas

Cut the Verbiage

"You want your brief to be as readable as possible.... If I pick up a brief of 49 and a half pages, it has a little less credibility than one that succinctly argues its points in 25 pages.... There's nothing better to read than a well-written brief from a really good lawyer."

Hon. Jerry E. Smith[14]
U.S. Court of Appeals
for the Fifth Circuit

"Eye fatigue and irritability set in well before page 50."

Hon. Patricia M. Wald[15]
U.S. Court of Appeals
for the D.C. Circuit

"A brief should manifest conviction.... [That] is virtually impossible... if it contains an excessive number of quotations or is larded with numerous citations to the authorities. Short quotations sometimes clinch a point, but long ones fail in that objective."

Hon. George Rossman[16]
Supreme Court of Oregon

"Start in the very first sentence with the problem in this case. Put it right up front. ***Start early.*** *Don't bury it under a lot of verbiage and preliminaries."*

Hon. Nathan L. Hecht[17]
Supreme Court of Texas

Does Style Matter?

"Style must be regarded as one of the principal tools of the judiciary and it thus deserves detailed attention and repeated emphasis."

Hon. Griffin B. Bell[18]
U.S. Court of Appeals
for the Fifth Circuit

"Lawyers are excused from the necessity of interesting their readers, and all too often—let's face the evidence—they take advantage of this enviable exemption."

Hon. Jerome Frank[19]
U.S. Court of Appeals
for the Second Circuit

"Is good writing rewarded? I used to think it doesn't matter much, in comparison with legal authority, justice, and the like. Now I know better: Good writing is rewarded so automatically that you don't even think about it."

Hon. Murry Cohen[20]
Fourteenth Court of Appeals, Houston ✦

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FOOTNOTES

1. Oral remark frequently attributed to Justice Holmes.
2. Oral remarks delivered to Colorado Bar Association, September 1990 (as quoted in USA Today, September 17, 1990).
3. Quoted in Mark Rust, *Mistakes to Avoid on Appeal,* ABA J., Sept. 1, 1988, at 78, 80.
4. *Advocacy Before the United States Supreme Court,* 37 Cornell L.Q. 1 (1951).
5. "The Appellate Brief," in *Advocacy and the King's English* 429, 438-39 (George Rossman ed. 1960).
6. Oral remarks delivered at Appellate Practice Conference, sponsored by the University of Texas, Austin, Texas, June 5, 1992.
7. Oral remarks delivered at Advanced Litigation Drafting seminar, sponsored by LawProse, Inc., Houston, Texas, September 26, 1991.
8. Oral remarks delivered at Advanced Litigation Drafting seminar, sponsored by LawProse, Inc., Houston, Texas, March 26, 1992.
9. Oral remarks delivered at Advanced Litigation Drafting seminar, sponsored by LawProse, Inc., Dallas, Texas, October 10, 1991.
10. Oral remarks delivered at Advanced Litigation Drafting seminar, sponsored by LawProse, Inc., Houston, Texas, September 26, 1991.
11. Quoted in Mark Rust, *Mistakes to Avoid on Appeal,* ABA J., Sept. 1, 1988, at 78, 80.
12. "The Appellate Brief," in *Advocacy and the King's English* 429, 434 (George Rossman ed. 1960).
13. Oral remarks delivered at Appellate Practice Conference, sponsored by the University of Texas, Austin, Texas, June 5, 1992.
14. Oral remarks delivered at Appellate Practice Conference, sponsored by the University of Texas, Austin, Texas, June 5, 1992.
15. Quoted in Mark Rust, *Mistakes to Avoid on Appeal,* ABA J., Sept. 1, 1988, at 78, 78.
16. "Appellate Practice and Advocacy," in *Advocacy and the King's English* 241, 246 (George Rossman ed. 1960).
17. Oral remarks delivered at Advanced Litigation Drafting seminar, sponsored by LawProse, Inc., Dallas, Texas, October 10, 1991.
18. *Style in Judicial Writing,* 15 J. Pub. Law 214, 214 (1966).
19. Quoting John Mason Brown, a literary critic, in "Some Reflections on Judge Learned Hand," in *Advocacy and the King's English* 858, 865-66 (George Rossman ed. 1960).
20. Oral remarks at Appellate Practice Seminar, sponsored by The University of Texas, June 5, 1992.