# Finding the Right Words

By Bryan A. Garner

When people learn that the name of my recently published book is *A Dictionary of Modern Legal Usage* (Oxford University Press 1987, $35), they commonly ask one of three questions: How did you go about writing a dictionary? Why write a legal dictionary, when everyone knows that *Black's Law Dictionary* is a standard reference? How did you, a full-time lawyer, find the time to write a dictionary? (Or, less politely, how could a 29-year-old lawyer have written a dictionary?)

Usually the short-form answers suffice. First, I compiled the materials for the dictionary by noting down every word or phrase I encountered that had some unique application in law, that was a source of confusion to legal writers, or that could be more simply or precisely expressed. Second, as a dictionary of usage, *DMLU* (as Robert Burchfield, the editor of the *Oxford English Dictionary,* calls it) does not compete directly with *Black's;* rather than merely defining words, it shows how they are most effectively used. Third, I began when I was 22, during my first year of law school, and completed the manuscript just as I began to practice law.

Since, however, the editors of this column have invited me to go somewhat beyond the simple answers, I shall do so. Let me say at the outset that, although I was quite aware and supportive of the plain-English movement in law, I had no idea that *DMLU* would touch such a nerve within the legal community. Now in its sixth month since publication last fall, the book is nearing its third (substantial) printing by Oxford and has received what I would have considered unimaginable endorsements from Charles Alan Wright, Irving Younger (rest his soul), and the *Harvard Law Review.*

***Bryan A. Garner has written a landmark reference on legal usage and style. Everyone who reads it likes it. You will, too.***

***The Editor***

Having written a thesis on Shakespearean language as an undergraduate and published a number of articles on the subject, I was as fascinated in law school by the language of Anglo-American jurisprudence as I was by its substance. When my first-year classmates at the University of Texas Law School began to notice that I carried around a passel of three-by-five index cards in my shirt pocket, and saw me continually making notes on them, they thought I had some secret system for mastering our assignments. (My friends all knew that my regular notes, like everyone else's, were on letter-size tablets.)

Though I did not want to publicize that I had undertaken a dictionary of usage for lawyers and was collecting specimens, I finally did disclose what it was all about. Otherwise, I thought, several friendships might be jeopardized.

By the end of that first year, several classmates were supplying me almost daily with sentences, drawn from judicial opinions, that they found puzzling, inelegant, or simply incorrect. Indeed, as lawyers who think much about the subject of legal style know, it is hard to find a judicial opinion that is free from usages that are puzzling, inelegant, or simply incorrect. In a sense, first-year law students are more adept at spotting these than seasoned lawyers, for they have not yet become inured to (much less enamored of) the many graceless and completely superfluous legalisms.

By 1985, when I clerked for the United States Court of Appeals for the Fifth Circuit, I had collected some 10,000 index cards containing material for inclusion in my dictionary. By that time, virtually every question posed to me by other legal writers found an answer in my "manuscript." What is the difference between *consist in* and *consist of?* What is the noun corresponding to *supersede?* Why do we more and more frequently see *undocumented worker* rather than *illegal alien?* Why do courts commonly say that they are *implying* terms into contracts, when surely they must be *inferring* those terms from the underlying circumstances? How does one pronounce *cestui* in *cestui que trust,* and is there any reason for preferring that phrase over *beneficiary?* And on and on.

These and hundreds of similar questions were not answered in any legal reference work. Even Fowler's *Modern English Usage* could provide guidance on only one of these questions — distinguishing between *consist in* and *consist of.* (Distressingly, the distinction is rarely observed by

American legal writers.) *Black's Law Dictionary*, of course, being a defining dictionary rather than a dictionary of usage, does not touch on such issues, though legal writers regularly confront them. That explains why I had the audacity to undertake *DMLU* in the face of queries that I might be competing with *Black's*.

Unlike a conventional dictionary, a dictionary of usage contains, in addition to word-entries, short essay-entries on myriad stylistic and grammatical subjects. Its purpose is fundamentally different from that of a conventional dictionary; the task is not to marshal and define all legal words and phrases, but rather to guide the legal writer who comes upon a word or phrase that for some reason proves troublesome.

During my judicial clerkship, I began writing publishers, 20 in all. (One question I was frequently asked was whether the dictionary was for myself, as an aid to learning, or whether I intended to have it published. Like George Bernard Shaw, I believe that if you do not write for publication, there is little point in writing at all.) I sent each publisher a letter explaining the work, together with a page of sample entries. In rather short order, I received 17 rejections. An 18th response all but amounted to a rejection: A minor legal publisher offered to take my typewritten pages, reproduce them, bind them, and sell the resulting bundle. I began to understand, over the course of several months, just what Saul Bellow meant when he said, "You write a book, you invest your imagination in it, and then you hand it over to a bunch of people who have no imagination and no understanding of their own enterprise."

The exception to that aspersion, naturally, was Oxford University Press, which I had considered from the outset to be the ideal but least likely publisher of *DMLU*. Some eight or nine months after my initial letter, I received offers from Oxford and from one other major publisher. (These were the only two left!) Given Oxford's fine list of publications, and the tradition embodied in works such as the *Oxford English Dictionary* and Fowler's seminal book, the choice was easy.

Before joining my law firm in Dallas, I took three months off to work day and night finishing the book. The work was daunting and exhausting, and not without moments of exasperation. I cannot say how many times I thought of Samuel Johnson's characterization of a lexicographer as a harmless drudge. In the midst of the drudgery, though, I tried to keep a sense of humor. Many of the witticisms that ►


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have been so widely quoted I wrote at three or four in the morning during these months. Thus, my entry on the noun *prophylactic:*

> To an educated layman, this word is synonymous with *condom.* Doctors use the term for anything that prevents disease. To lawyers, it means "anything that is designed to prevent (something undesirable)." E.g., "The Supreme Court recognized that the predeprivation notice and hearing were necessary *prophylactics* against a wrongful discharge." The example quoted does not demonstrate the keenest linguistic sensitivity: in view of the layman's understanding, it is perhaps unwise to use *prophylactic* in the same sentence with *discharge.*

Or my entry on *arguendo:*

> *Arguendo* is unnecessary in place of *for the sake of argument.* Although brevity would commend it, its obscurity to laymen is a distinct liability. . . . *Arguendo* is one of those LATINISMS that neophyte lawyers often adopt as pet words to advertise their lawyerliness.

Friends who read parts of the manuscript asked whether I was not going out on a limb by peppering the work with a wry sense of humor. The wryness came naturally; I certainly didn't set out to be funny. How can one refrain from commenting, though, on the writer who refers to a *prophylactic* against a wrongful *discharge*?

Actually, the smiles one finds in *DMLU* are in the Fowlerian tradition. Fowler, after all, was the one who divided the English-speaking world into five categories: (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; and (5) those who know and distinguish. Fowler showed that a work of scholarship need not be dry as dust, that a substantial reference work need not bore its users.

To the extent that I have gone out on a limb, it is by documenting the lapses in diction, grammar, and style of our judges. Far more than half the sentences that I quote to demonstrate some common error or pitfall derive from published judicial opinions. Many of these, in my judgment, required citation if for no other reason than to enhance the scholarly reliability of the book. Surely the appellate judges who wrote *irregardless* rather than the correct *regardless,* and *thusly* rather than *thus,* will not thank me for citing their opinions, when others have committed the same blunders. I could cite a thousand other examples of judges' writing errors documented in *DMLU,* including some from the United States Supreme Court.

The idea, of course, is not to mock these mistakes, but to learn from them; it is not to offer stylistic improvements as *ad hominem* attacks, but to guide legal writers safely through the bogs in which some of their unwary predecessors have sunk. And I include myself among the unwary predecessors; I quote (with citation) from an article in which I erred in using *bequest* as a verb in place of *bequeath.*

To the extent that I have gone out on a limb by supplying citations to particular opinions and law review articles, my sole object was the future betterment of legal writing. Nor is that aspect of *DMLU* without precedent: Fowler created quite a stir in England in the 1920's by pointing out a great many lapses in the pages of the London *Times,* considered by many to be a guardian of the language. That he did so has put us all in his debt. ■

*"Plain Language" is a regular feature of the* ***Michigan Bar Journal,*** *edited by Joseph Kimble for the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Prof. Kimble at Cooley Law School, P.O. Box 13038, Lansing, MI 48901.*