Mind Your Speech A Little. . .

By Robert G. Morris

Benjamin Disraeli once said that William E. Gladstone was "inebriated with the exuberance of his own verbosity." He might have simplified it to "Gladstone likes the sound of his own voice," or even "Gladstone is a windbag." But Disraeli was a wordsmith (he wrote novels, remember) and he lived in a time and political environment where genteel verbal skewering of an opponent was the bread-and-butter of his calling.

Not all lawyers have Winston Churchill's gift for phrase-making, or William F. Buckley's surgically-precise vocabulary. We try, though: God, how we try! And too often our verbal efforts end up sounding like Howard Cosell (himself a lawyer): Windy, pretentious and ultimately boring. The consequences are a spreading distrust, not to say dislike, of a noble and learned profession, coupled with an uncomfortable suspicion on the part of our clients that we are paid by the word.

The lawyer is a verbal communicator, often a teacher. We advise clients; we seek to persuade juries; we advocate interpretations of law before appellate courts. We do all this through speech. We are at risk every time we open our mouths to do more than order a sandwich and coffee. We — and our calling — are judged more by what we say than perhaps any other learned profession. Our hearers will neither plea-bargain nor grant early parole for our verbal transgressions. Judgment is passed on us and our profession, without right of appeal.

The Michigan Bar is ahead of its counterparts in establishing a Committee on Plain Language. Perhaps that is natural, coming from the state which gave us the Unicorn Hunters of Lake Superior State University, that splendid association which seeks to purge the English language of opaque and stilted words and phrases. At any rate, this Buckeye admires your attempt to encourage lawyers to become effective and understandable verbal communicators.

Perhaps Michigan lawyers have already attained this goal. Ohio lawyers haven't, and so I set out to compose a single sentence, drawn from personal experience, which would illustrate what we sound like at our worst. This was the result:

"Your Honor, we would suggest to the Court that the evidence will be showing that at some point in time the defendant verbalized words which led the cops to bust him, and so I feel that (indistinguishable) be acquitted."

This little jewel demonstrates ten examples of pretentious "lawyerese;" unfortunately, I have heard all of them used, although mercifully not in such a compact mass. Consider them singly:

1. "We." This is the Royal "We," much beloved by Queen Victoria, newspaper editorial-writers, politicians and mothers addressing small children. But it is not "we" who urge a proposition on a court, or seek to clarify evidence for a jury. Neither is it "I," the lawyer. It is the client.

It is the client who has the greatest stake in the outcome of the case. It is the client on whom the jury's attentions must be focused. It is the client who endured the pain and suffering, or stands wrongfully accused of committing a tort or a crime. The Royal "We" (or the egregious "I") is an impermissible blending of the lawyer's role as advocate with the client's role as the party in court seeking justice. It is presumptuous. As the Queen remarked to Alice, "Off with its head!"

2. *"Would."* The stilted subjunctive. Many of us recall the case in our Torts casebook in which an Englishman was charged with assault for saying, "If it were not Assize-time, I would run you through." It was Assize-time, though, and the Court held that since the offer to split the plaintiff on the defendant's sword was subject to a condition (the absence of Assize-time) which could not be fulfilled, the words did not constitute an assault.

The subjunctive is the most wishful of the grammatical moods, since it implies a longing for some set of circumstances which do not obtain at the moment, and which therefore prevent the speaker from carrying out his designs. The subjunctive is conditional; it is indefinite; it hints at inability to perform some duty which ought to be performed.

The lawyer who tells a court that he "would" say or do something invites the devastating response, "Well, Counselor, if you would say that, why don't you?" Away, then, with the subjunctive!

3. *"Suggest."* This is a diffident abdication of the lawyer's role as advocate. It lacks that ring of affirmation that one expects from a lawyer who believes in his or her client's cause. It is not a clean, confident assertion of a fact. It is not persuasive. It is as bland ►

"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.*

as a waffle and as definite as the future interest-rate on a variable-rate mortgage.

A lawyer does not "suggest." He asserts. And he does it within the framework of the courtesy he owes the court, the client and the witness, without appearing obsequious. "Your Honor, the facts in this case are. . ." is not a suggestion. It is an assertion, and an attention-getter at that. Therefore let us, in Lenin's words, consign "suggest" to the dust-bin of History.

4. *"To the Court."* Redundancy at its finest or worst, depending upon outlook. Having already addressed the court with the words "Your Honor," or even that more courtly salutation, "May it please the Court," why repeat the fact that it is that same Court's attention we wish to direct to whatever we plan to say?

Redundancy lessens the impact of what we say. It clutters the record, adds to the cost of transcripts and plants early in the Court's mind the notion that this will indeed be a very long day. Well then: Give redundancy the same shrift that some religious sects give their unrepentant sinners. Shun it!

5. *"Will be showing."* Erle Stanley Gardner would call this "The Case of the Stilted Participle." "I'll Be Seeing You" was the title of a popular song during the 1940's. So was "I'll See You Again." Both said the same thing. Both were perfectly respectable usages, given the need to match lyrics to the tempo of the music.

But lawyers are not composers. Neither are they general managers of sports teams, blandly trading away some journeyman athlete for a player "to be named later." We ought to tell clients that "the case will go to trial on the 14th," rather than "the case will be going to trial on the 14th." When we address a jury, "You will hear testimony that. . ." is simpler and more positive than "You will be hearing testimony that . . ." That's awkward. It testifies that the lawyer can't control his speech, let alone his case.

The verb "to be" is already overworked. In order to make ends (here, subjects and predicates) meet, it has to keep enough unsavory company — personal pronouns, predicate adjectives and the like — without also making the poor thing walk on stilts in front of a present participle.

Throw away the stilts! Make the participle behave as a working verb ought to behave. In short, make a noise like a lawyer, not a disc-jockey.

6. *"At some point in time."* The ultimate pontification. Judge Sirica sent John Dean to prison for the wrong reasons. Anyone can obstruct justice; it requires no special skill or training. But Dean was a lawyer and therefore a communicator. He should have fallen on his sword, rather than leave us that obnoxious pontifical verbal legacy "at that point in time." It was the most pretentious expression to come out of Watergate — and there were several. Regrettably, it has become a cliche, almost a part of folklore. It assumes pompously that the speaker's deed or state of mind on February 9 at 2:37 p.m. must somehow be measured against the vast backdrop of world history, from the age of dinosaurs to the present moment.

7. *"Verbalize."* The "ize-man" cometh . . . and (dare we hope?) goeth. Lawyers are not the only people who have succumbed to the temptation to invent verbs which end in "-ize." I once heard the following exchange in a courtroom:

Witness: "I verbalized the idea that . . . ."

The Court (interrupting): "You mean you said that?"

Witness: "Well, yes, I suppose you could say that." (The damnable subjunctive again!)

The Court: "Well, then, why don't you?"

Perhaps the witness should be forgiven. After all, he was part of the socio-bureaucratic subculture. But lawyers are supposed to be more articulate, more literate than the bureaucrats. Yet the incidence of "-izing" by lawyers is on the increase, and as matters stand we are nearing the time when lawyers will argue to juries that in order to "conceptualize" the case, they ought to either "fragmentize" or "totalize" the evidence, and "prioritize" the credibility of the witnesses.

There are some perfectly respectable "-ize" words. We might have to explain to a client how he can amortize a mortgage. We might call a jury's attention to the way a witness generalized his testimony when specifics were called for. But a lawyer who adopts trendy socio-jargon into his speech patterns risks identification with the mind-numbing bureaucratese of, say, the IRS Instructions for Schedule 1041(D), and the consequent indifference, not to say outright hostility, of the person he seeks to advise/enlighten/persuade. "-Ize" words? Vaporize them!

8. *"Led the cops to bust him."* This is the "patronizing colloquial." It creeps into lawyers' speech as a pathetic and

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usually insincere signal that we are just good-ole-boys at heart, plain as an old shoe when you really get to know us.

Well, the truth is that we are not. We are an elite segment of society, products of four years of college and three more of law school. Others rightly expect us to communicate with both dignity and clarity, without patronizing them by imitating their speech, by assuming that he won't understand us if we don't speak "his" slang.

Pop-culture vernacular may be well and good for professional athletes, adolescents and back-country politicians, but we are lawyers, and we have the special responsibility of pandering neither to highbrow nor lowbrow taste. Transparently synthetic use of slang expressions encourages someone to think, "Gee, he ain't no better than me!" when what we want him to believe is, "His case must be good, because what he says about it sounds so good!"

Every concession to the lowest-common-denominator of speech is a transparent attempt to patronize someone. To paraphrase Abraham Lincoln, "As I would not be patronized, so would I not patronize." Don't do it.

9. *"And so I feel that. . . ."* This is a vestige of the Age of Aquarius, of "feelings," of "letting it all hang out." We all learned in law school about the impotence of precatory words in a will. Yet lawyers stand up in court today and begin, "Your Honor, I hope. . ." or "I feel. . ." or "I believe. . ."

To be brutal, who cares what or whether we "feel?" The judge and jury are there to hear a robust exposition of the evidence, or a compelling reason why a convicted defendant should not be strung up by his thumbs. The lawyer is supposed to give it to them, in a straightforward, unambiguous, affirmative fashion. He doesn't "hope;" he knows. He doesn't "feel;" he overwhelms with reason, with legal precedent, with logic. He doesn't "believe;" he demonstrates the absurdity of any conclusion other than his own.

The lawyer who has to tell someone his "feelings" about the case doesn't need a jury; he ought to see a good psychiatrist. A lawsuit or an interview with a client is not a group encounter. Keep feelings out of it. Deal with facts and law. Your client is paying you to evaluate and present the merits of his case, not your own self-worth.

10. *"Indistinguishable."* The record that was never made. Ask a court stenographer to speak to your bar association luncheon, and be ready to wear a red face. You will hear a catalog of woes about lawyers' enunciation. You will hear how often the stenographer has to guess at what you said, rather than risk the embarrassing interruption of your case with a request for repetition.

If a case is worth preparing it is worth presenting audibly and articulately, so that the record will reflect what you actually said, rather than the stenographer's guess. It is worth cautioning your own witnesses, too, at the very beginning of their testimony, to speak loudly and distinctly so that their testimony can be recorded.

How we communicate is as important as what we say. Just for fun, talk conversationally into your tape-recorder sometime, then play it back. That is what your secretary, and your client, and the good and true members of the jury will hear. Remember Hamlet's admonition to the players: "Speak the speech, I pray you . . . trippingly on the tongue."

Now let's recast our horrible example sentence in light of our discussion.

"Your Honor, the defendant's evidence will show that on September 12th, at about three p.m., the defendant said something which provoked the officer and led to the defendant's arrest; that this violated the defendant's First Amendment rights; and that in consequence, the defendant must be aquitted."

To sum up: Law is a "learned profession." The cross that lawyers must bear is to express themselves orally in such a way that they sound "learned" without sounding stuffy, trite, or patronizing. To the extent that lawyers' speech sounds artificial, so must their cause appear to those who hear to be artificial as well.

A lawyer's mouth is still the best advertising. What a lawyer says, and how, are to the lawyer what a set of quick reflexes is to a fighter-pilot: His means of survival.

Polonius said it best to his son, Laertes: "Mind your speech a little, lest it may mar your fortune." ■