By Bryan A. Garner

Learning to Loathe Legalese

The jury is still out on Christopher Columbus Langdell (1826–1906), the Harvard law professor who invented the casebook method of instruction. He has been much lauded over the years, but he has also been seriously faulted for his method.

Grant Gilmore of Yale wrote that Langdell "was an essentially stupid man who, early in his life, hit on" the casebook method, an idea that was "absurd," "mischievous," and "deeply rooted in error." Others disagree.

But regardless of what anyone thinks about Langdell's casebook method, it has had one harmful if unintended consequence. It's undeniably responsible for helping perpetuate what judges everywhere detest—legalese.

By *legalese*, mind you, I don't mean terms of art, such as *allocution*, *habeas corpus*, *indemnity*, and *tortious interference with a contract*. No, I mean highfalutin legal jargon, such as *hereinbefore stated*, *instant case*, *pursuant to*, and *said claims* or *such claims* (meaning "these claims").

The costs of legalese are not entirely stylistic. Many studies have shown how it costs clients money, impairs persuasiveness, and generally detracts from a writer's reputation. Joseph Kimble, a Thomas M. Cooley Law School professor, discusses these costs and more in *Lifting the Fog of Legalese* (2006). His incisive essays are enough to make any legal writer swear off legalese forever.

Yet generation after generation, law students strive to learn it—partly because they don't entirely believe all the warnings about it, partly because they won't feel like lawyers until they've mastered it, and partly because Langdell set things up so law students would always be reading old cases with antiquated language. That's one of his most onerous legacies.

Having written a great deal about legalese, I decided recently to ask some respected lawyers and judges across the country what they think. Their responses are illuminating.

First, I asked Theodore Olson, former solicitor general of the United States and one of the finest writers you'll ever encounter. My question: "What do you think of legalese?" His answer: "Legalese is jargon. All professions have it. All professions use it as a substitute for thinking, and they all use it in a way that makes them appear to be superior. Actually, they appear to be buffoons for using it.

"I do a lot of television, and I do a lot of articulating of positions on behalf of clients. One of the reasons I'm asked to do that is that I understand that the people on the other side of that camera don't want you to speak like a lawyer. That's a pejorative term. 'Talking like a lawyer' is, to most people, talking in terms that sound boorish, condescending, and unintelligible. And lawyers need to be able to speak to people and forget the jargon and forget the legalese, because you can communicate the same thoughts without being swept up in the technicalities of a particular legal issue. They want to know what you're talking about. What do you mean? If you can't express that, you shouldn't waste people's time."

Then I interviewed a renowned Los Angeles litigator, James Clark, who is also an excellent writer. My question: "What does it tell you about a lawyer who uses a lot of legalese—*such* instead of *the*, *said* instead of *these*, and so on?" His answer: "A couple of things, both negative. One, I think that use of jargon is a crutch. I think it's a way of avoiding working harder—a way of avoiding putting yourself in the position of the reader. And I also think it shows an unfortunate lack of creativity. If you're not creative in your writing, I'm afraid you might not be creative

Win a Prize

By popular demand, another contest.

What about this beauty?

> ''Now comes Richard Penniman, hereinafter referred to as 'Penniman,' Third-Party Defendant in the above-styled and numbered action, and files this Motion to Dismiss pursuant to Rule 12(b)(6) of the Federal Rules of Civil Procedure, and in support thereof will respectfully show unto this Court as follows.''

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me an unadorned A version of that sentence. (I'll have to be the sole judge.) E-mail your version to kimblej@cooley.edu before November 22. I can't respond to each e-mail but will print the winner in next month's column. —JK

"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. 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, or at kimblej@cooley.edu. For more information about plain English, see our website—www.michbar.org/generalinfo/plainenglish/.

in your thinking. And the best lawyers are the most creative ones."

Applauding everything Olson and Clark said, I still wondered whether judges would agree. When I asked U.S. Court of Appeals Judge Stephen Williams of the D.C. Circuit about legalese such as *Comes now the plaintiff*, he scoffed at the idea that any lawyer would write something so absurd in his court.

I asked Chief Judge Deanell Tacha of the Tenth Circuit. Here's what she said: "I despise legalese, and I know I'm not alone. I dislike all the old-fashioned terms. In my chambers, for example, we use a process called 'cold reading' of opinions, where one of the law clerks is assigned to read the draft opinion to see whether it's expressed in plain English. Even if the litigant wouldn't understand what the legal principles involved were, would he or she understand what happened and why? That's where we get rid of the legalese."

I asked another federal appellate judge, Morris Arnold of the Eighth Circuit. He declared, "I hate legalese. It's to be avoided at all costs. There's much too much of it. There's too much jargon."

Finally, I went to my own Fifth Circuit and asked Judge Thomas Reavley about legalese. He called legalese "a substitute for good writing, for thinking, for editing, and for focus." When asked what it says about the writer who uses legalese, he answered: "Either they're pretending to be what they're not or maybe they think they can impress you with legalese. But they don't help their cause."

I wondered whether these views might be peculiar to federal appellate judges, so I visited some eminent federal trial judges.

First, I asked Judge William Wilson Jr. of Little Rock. He put it plainly: "There's a tremendous amount of legalese that hangs on, and it's always to the detriment of the writer."

Judge Barbara Lynn of Dallas answered: "Legalese consists of empty words that don't have any persuasive character. Speaking plain English is just so much more persuasive than loading your brief up with the *wherefores* and the *henceforths*. They're just archaic and don't really have any persuasive quality. It should all be about persuasion, and I think lawyers get lost in their jargon in brief-writing and in other aspects of advocacy."

With all these answers expressing a bias against legalese, it occurred to me that I'd been speaking mostly with federal litigators and federal judges. So I went to one of the most respected state judges in the country, Justice Nathan Hecht of the Supreme Court of Texas. Without hesitation, he said there are several things wrong with legalese:

"It's obscuring. But mostly it says about the people who use it unnecessarily that they don't know how to say what they're saying in a way that makes sense to anyone else. They're covering up their own lack of understanding about the issue by using words or phrases that distract, that don't convey a clear meaning. And these days—I suppose there may have been a time when legalese was more accepted—but these days, our society does not look well upon speakers and writers who resort to insider language, insider phrases, to explain themselves. So unless the Latin phrase has a particular meaning in a case, or some special historical significance, it's better to use plain English."

Eloquent denunciations, all. Take them to heart.

But now law students will go back to their casebooks, thanks to Langdell, and read something like this: "Pursuant to section so-and-so, the instant claim does not pass statutory muster. As hereinbefore stated, it is well-settled in this jurisdiction that . . . ." And subconsciously, they'll probably come to believe that expressing ideas that way is the essence of what it means to be a lawyer.

So the cycle repeats itself.

The novice legal writer yearns to acquire legalese, but the expert yearns to eliminate it Strive to make yourself an expert.

This article originally appeared in the May 2006 issue of the Student Lawyer*, published by the American Bar Association. It is reprinted with permission.* ◆

Bryan Garner (bglawprose@yahoo.com), president of Dallas-based LawProse Inc., teaches advanced-writing seminars for more than 5,000 lawyers and judges each year. His books include The Winning Brief *(2d ed. 2004),* The Elements of Legal Style *(2d ed. 2002), and* Legal Writing in Plain English *(2001). He is editor in chief of all current editions of* Black's Law Dictionary.