



## CURIOUSER AND CURIOUSER EXCUSES FOR LEGAL JARGON



BY CHADWICK C. BUSK AND MICHAEL BRAEM

“I don’t know the meaning of half those long words, and I don’t believe you do either.”

—Eaglet, *Alice in Wonderland* (1865), Chapter III

Some lawyers and academicians attempt to justify legal jargon and “traditional” legal writing—legal writing that’s “wordy, unclear, pompous, dull”<sup>1</sup> and even “wretched.”<sup>2</sup> But legal jargon in contracts burdens all those who must deal with it: the parties to the agreement who try to understand it, lawyers who mistakenly think they must use it, and judges who have to interpret it. Legal jargon often creates ambiguity, and ambiguity invites litigation. Many legalisms have been fodder for courts to puzzle over, including *herein*, *therein*, *hereby*, and *thereof*; *shall*; *and/or*; and *best efforts*.

However, some academicians, most recently Professor Lori Johnson of the UNLV William S. Boyd School of Law, have modernized old excuses for legal jargon and concocted new ones. Can these arguments withstand a reasoned analysis, or are they merely fanciful declarations from Wonderland?

Can legal jargon be justified because it contains “magical” terms of art?

The most common argument for using legal jargon is that it crystallizes legal concepts or meanings into “terms of art.” Lawyers should use terms of

art because courts have interpreted them consistently over the years, creating a well-established body of precedent that the legal community relies on for rotely and quickly accomplishing a desired legal result.<sup>3</sup> Thus, Johnson, a vocal proponent of this concept, advises that contract drafters shouldn't abandon traditional and tested terms of art, and it may be malpractice not to use them.<sup>4</sup>

This argument for legal jargon has been discredited by plain-language scholars in primarily three ways.

First, contrary to what Johnson claims, courts simply haven't approved the use of jargon-filled terms of art that work like magic to create a desired objective. As Vincent Wellman of Wayne State University Law School writes:

[N]o holding can truly validate the wisdom of a particular clause (or sentence or paragraph). In litigation, a court must choose between competing interpretations of the contested clause, and the legal winner is the better of the two alternatives. But that's only a comparison and *not* a validation. The fact that litigation is involved at all should raise questions about the wisdom of drafting another contract in the same way. Why should the rest of us want to be guided by a litigant's disputed interpretation of contract language that prompted a lawsuit? Shouldn't the fact of the lawsuit suggest there was something less than ideal about the contract clause?<sup>5</sup>

Wellman warns that "believing that there can be magic contract language can also lead a drafter to choose inappropriate sentences or phrases: if one is busy searching for the right spell, one's attention will often be distracted from choosing the best expressions of a party's intentions."<sup>6</sup>

Second, the premise that there is well-established, "tested" caselaw interpreting various legal clauses isn't grounded in reality. As contract-drafting guru Ken Adams observes, "[T]he notion of 'tested' contract language suggests that all courts ascribe the same set meaning to individual usages. That's not so. How courts interpret usages depends on the circumstances of each case," the semantic acuity of the judge, and jurisdiction.<sup>7</sup>

## FAST FACTS

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Third, courts haven't validated "approved" specific jargon-laced terms of art, such as *time is of the essence*,<sup>8</sup> *indemnification*,<sup>9</sup> *pari passu*,<sup>10</sup> and *in consideration of*.<sup>11</sup> Courts have even differed over the meaning of the innocuous-sounding phrase *including but not limited to*, some finding that its effect is restrictive rather than expansive.<sup>12</sup>

Finally, the idea that using plain-language alternatives to terms of art may rise to the level of professional malpractice is pure conjecture. In her article, "The Ethics of Non-Traditional Contract Drafting,"<sup>13</sup> Johnson cites only two court cases that supposedly show that the use of plain language in a contract backfired—hardly strong evidence in support of using legal terms of art.

In her first example, she uses the court's decision in *Lubbock County Water Control & Improvement District v Akin LLC*<sup>14</sup> to claim that the drafter's use of *will* instead of *shall* failed to create the desired language of obligation.

The court didn't discuss whether the use of *will* instead of *shall* in the provision at issue was at all significant. The court discussed the relationship between the landlord, the tenant, and the customers of the marina, finding that under the applicable Texas statute this provision wasn't enough to constitute the required "essential terms of [an] agreement for providing [catering-ticket] services to the [Water District]."<sup>15</sup>

The second case Johnson cites to support the use of legal jargon is *DBGS, LLC v Kormanik*.<sup>16</sup> The issue was whether an arbitration clause in a membership agreement was broad enough to compel arbitration of an issue indirectly connected to the agreement's subject matter: the alleged negligent representation concerning a contractor recommendation. Johnson claims that the omission of the "traditional and overbroad" term *relating to* resulted in a "far from predictable result based on the policies of the jurisdiction in which the language is interpreted."<sup>17</sup> The court held that under Georgia arbitration law "any doubts concerning the scope of arbitrable issues should be resolved in favor of arbitration."<sup>18</sup> But there is no evidence of whether the absent overbroad term *relating to* would have avoided the controversy, or that other state jurisdictions wouldn't also reference federal law that favors arbitration as did the court in this case, making the inclusion of *relating to* unnecessary.

The *Lubbock* and *Kormanik* cases don't support Johnson's conclusion that the use of "non-traditional" (her term for plain language) drafting resulted in injury to a client's position.<sup>19</sup> Thus, any argument that lawyers drafting contracts are somehow ethically bound to use terms of art instead of plain language is flimsy. The opposite is true: the unrestrained use of terms of art—especially without plain-language clarifications—is ethically questionable and may frustrate the legal efficacy of a

contract, inciting a lawsuit and providing fertile ground for a malpractice charge in that context.

### Can legal jargon be justified because it's a necessary, specialized language?

Some critics of the plain-language movement support making legal writing more *linguistically* clear but argue that the movement can't succeed in making legal writing more *legally* clear.<sup>20</sup> This is because certain complex aspects of the law, especially litigation, can't be eliminated by simplifying language, and specialized skills are required over and above the ability of laypeople to understand technical language. In other words, laypeople just aren't intellectually equipped to grasp legal concepts and complex legal subjects that attorneys easily understand.<sup>21</sup>

This criticism fails in several respects. First, it wrongly assumes that the goal of that movement is to reduce society's need for lawyers, when in fact the movement's goal is improving the legal profession. As Joseph Kimble, professor emeritus at Western Michigan University Thomas M. Cooley Law School, writes, "[N]o reform would more fundamentally improve our profession and the work we do than learning to express ourselves in plain language."<sup>22</sup> Plain-language advocate and *Black's Law Dictionary* editor Bryan Garner writes: "Just because you know what *malum prohibitum* means or what a *habendum* clause does is no reason to use such language at the dinner table. A lawyer should keep in mind that

the purpose of communication is to communicate, and this can't be done if the communication is nonsensical."<sup>23</sup>

Second, eliminating litigation isn't a primary goal of the plain-language movement. Rather, the movement advocates for communication that an audience can understand the first time around, whether the audience is made up of lawyers, judges, or clients. Consider the recent revision of the Federal Rules of Evidence. According to Kimble, the old rules were "riddled with inconsistencies, ambiguities, disorganization, poor formatting, clumps of unbroken text, uninformative headings, unwieldy sentences... multiple negatives, inflated diction, and legalese."<sup>24</sup> He concludes that "[e]veryone seems to agree that the new rules are much clearer and more consistent, and since they took effect, only a few corrections have been needed...."<sup>25</sup>

The final point to the argument that legal jargon is justified as a specialized language is that only lawyers and judges are qualified to interpret complicated laws and contracts for the "common folk." These educated legal professionals can and should communicate in their own lingo; ordinary people don't need to understand that esoteric subject matter. This raises the issue: is it ethical for only lawyers to understand the law but not the unwashed masses?

Several prominent nonlawyers have weighed in on the ethical merit of plain language versus legal jargon, and they don't mince words when it comes to legal jargon's pernicious impact. The late David Foster Wallace was a literary critic and author of the popular novel *Infinite Jest*, "one of the most influential and innovative writers of the last 20 years."<sup>26</sup> He warned that "Officialese [legalese] is meant to empty the communication of a certain level of humanity. On purpose."<sup>27</sup>

Likewise, Dr. Steven Pinker, an award-winning cognitive scientist, Harvard University professor, and author of the recent bestseller *The Sense of Style*, observed, "[T]here's so much waste and suffering that results from impenetrable legalese: People don't understand what their rights are because they don't understand a contract or they waste money hiring expensive lawyers to decipher contracts for them. I think that there's a high moral value in reducing legalese to a bare minimum."<sup>28</sup> And Dr. Russell Willerton, author of *Plain Language and Ethical Action: A Dialogic Approach to Technical Content in the Twenty-First Century*, advises that plain-language documents "save readers time and money; this reflects the ethical standard of utility, or seeking the greatest benefit."<sup>29</sup>

### Can legal jargon be justified because the privileged few use plain language to maintain their control over everyone else?

Another argument claims that plain language is elitist: because plain-language advocates make judgment calls on what words are objectionable legal jargon, the law remains in the hands of those privileged few who already possess most of



the economic, social, political, and cultural resources in the first place.<sup>30</sup> This argument is the opposite of justifying legal jargon as a beneficial specialized language. But there is no evidence that a “privileged few” determine what’s desirable plain language and what isn’t. As Pinker points out, “when it comes to correct English, there’s no one in charge; the lunatics are running the asylum.”<sup>31</sup> To determine what’s right or wrong, he suggests that “the key is to recognize that the rules of usage are tacit conventions. A convention is an agreement among the members of a community to abide by a single way of doing things. . . . Familiar examples include standardized weights and measures, electrical voltages and cables, computer file formats, and paper currency.”<sup>32</sup>

Guidelines for good legal and business writing exist that are based on evidence, and good writing withstands the test of time; think of Abraham Lincoln’s expertly crafted Gettysburg Address or Martin Luther King’s “I Have a Dream” speech. Impenetrable language serves to keep the public in the dark and protect a trade monopoly.<sup>33</sup>

### Can legal jargon be justified by modern rhetorical views?

The final fanciful argument against plain language is that principles of modern rhetoric, especially the Burkean Pentad, justify the use of legal jargon. The Burkean Pentad is the invention of American literary theorist and language philosopher Kenneth Burke (1897–1993).<sup>34</sup> He devised a “pentad” consisting of five questions to ask of any discourse to begin teasing out the motive:

- (1) Act: What happened? What is the action? What is going on? What action; what thoughts?
- (2) Scene: Where is the act happening? What is the background situation?
- (3) Agent: Who is involved in the action? What are their roles?
- (4) Agency: How do the agents act? By what means do they act?
- (5) Purpose: Why do the agents act? What do they want?<sup>35</sup>

Burke believed his pentad was a good tool to discover the motives of people by looking for their particular type of motivation in action and discourse.<sup>36</sup>

That’s all well and good for students of rhetoric, but it’s debatable whether a contract even qualifies as rhetoric since it’s a tool to regulate conduct and state facts.<sup>37</sup> Yet Johnson argues that Burke’s pentad was the motive behind the drafter’s choice to include a time is of the essence (TOE) term of art rather than “standard English” in a loan agreement and three subsequent amendments that the court examined in *Gaia House Mezz LLC v State Street Bank & Trust Company*.<sup>38</sup>

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In that case, the appellate court reversed the lower court and ruled that the TOE clause was dispositive in finding that Gaia House as debtor failed to satisfy a condition of the loan—obtaining a temporary certificate of occupancy—by a specific date. As a result, State Street, the financing bank, was entitled to keep \$5 million in accrued interest and avoid payment of several hundred thousand dollars, all because State Street’s drafter was smart enough to include the TOE clause in the loan agreements.<sup>39</sup>

There are two main reasons why reliance on the Burkean Pentad in this context is flawed.

First, it’s likely that State Street Bank would have prevailed in the case regardless of the drafter’s inclusion of the TOE provision. Johnson deflates her own argument when she states that “the time is of the essence clause is so strictly enforced in the Second Circuit that lower courts in the jurisdiction have gone so far as to imply the existence of such a clause where none is even explicitly included in the document being litigated [citation omitted].”<sup>40</sup> In other words, per Johnson, the outcome of *Gaia House* might well have been the same even if the TOE clause wasn’t in the loan documents. As English Professor Dr. Peter Schakel of Hope College observes, “The Burkean Pentad can be used to analyze any style of writing to determine the motive. It doesn’t endorse legal terms of art compared to their expression in plain language. The Pentad is only a tool to determine motives in discourse; how the discourse is written is irrelevant.”<sup>41</sup>

Second, Johnson argues that State Street Bank’s drafter made the conscious decision of including the TOE term of art in the loan documents.<sup>42</sup> But she offers no proof of that.<sup>43</sup> In our experience, banks repeatedly reuse their antiquated,

jargon-filled loan documents in their deals without considering what plain language could do to improve the process.

The *Gaia House* decision is nothing more than a simple case where a lower court's failure to recognize a TOE clause was reversed. The decision can't be used to support the proposition either that a jargon-filled term of art saved the day or that a TOE drafted in plain language wouldn't have accomplished the same result.<sup>44</sup>

## Conclusion

Perhaps it's trendy for some to create arguments against plain language. But like the elaborate tales of Alice's imaginary adventures in Wonderland, these plain-language criticisms can't survive a careful analysis. ■



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## ENDNOTES

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- See *Ethics of Non-Traditional Contract Drafting*, p 485.
- Id.* (The authors refer to the State Street Bank loan agreement drafter using a feminine pronoun, but that's the result of giving "gendered pronouns an equal footing" and not because the authors know the drafter was a female. See note 25 on p 456 of that article.)
- For a proposed plain-language TOE provision, see *Time Is of the Essence (to Banish That Phrase from Your Contracts!)*, 92 Mich B J at 40-42.