

On Terra Firma with English

By Hon. Gerald Lebovits

Remember the first hour of your first-year legal-writing course in law school? You learned that *legalese* is a pejorative term and that good legal writers prefer English to romance languages. Then you spent the rest of law school reading cases that contradicted that good advice.

Those who distrust their writing teacher's advice not to use legalese should read Benson and Kessler's authoritative 1987 study.¹ It turns out that law clerks and judges believe that those who write in legalese are lousy lawyers—the more the legalese, the lousier the lawyer. Benson and Kessler also proved the reverse. Everyone believes that the less the lawyer uses legalese, the better the lawyer is.

Legalese—lawyers' jargon—is turgid and annoying, adds nothing of substance, gives a false sense of precision, and obscures gaps in analysis. From a judge: "There is still a lot of 'legalese' in current usage, but the best writers have come to regard it as pretentious or bad writing."² Legalese can be eliminated: "When legalese threatens to strangle your thought processes, pretend you're saying it to a friend. Then write it down. Then clean it up."³

Think of it this way, among other things. If you go on a date and your date asks you

what you do for a living, would you answer, "I am, *inter alia*, a JD"? If so, I suggest that you spend the next Saturday night in a law library—by yourself—studying texts on plain English for lawyers.⁴ If you somehow secure a second date, the only tokens of affection that your date will expect from you will be an English-Latin/Latin-English dictionary and plenty of caffeinated coffee to help your date stay awake during your effervescent conversation. Instead of an affectionate "hello," your date will expect you to say, "To All to Whom These Presents May Come, Greetings."

Justice George Rose Smith of the Arkansas Supreme Court said this in his classic primer on opinion-writing: "I absolutely and unconditionally guarantee that the use of legalisms in your opinions will destroy whatever freshness and spontaneity you might otherwise attain."⁵ That doesn't mean that writers write as they speak, unless memorializing such pretties as *umm, ab, I mean, and you know* appeals to you. But Justice Smith explained that legal writers should not write words that they "would not use in conversation."⁶ Here are a few examples.

About *said*, as in *aforsaid*, Justice Smith asked whether one would say, "I can do with another piece of that pie, dear. Said pie is the best you've ever made." About *same*, he asked whether one would say, "I've mislaid my car keys. Have you seen same?"

About the illiterate *such*, he asked whether one would say, "Sharon Kay stubbed her toe this afternoon, but such toe is all right now." About *inter alia*, he asked, "Why not say, 'Among other things?' But, more important, in most instances *inter alia* is wholly unnecessary because it supplies information needed only by fools.... So you not only insult your reader's intelligence but go out of your way to do it in Latin yet!"⁷

Many who enjoy legalisms also enjoy Latin. They might better enjoy being understood. As the line from high school goes, "Latin is a dead language, as dead as it can be. First it killed the Romans, and now it's killing me." Unless, *a fortiori*, you have an acute case of terminal pedantry, Latinize only when the word or expression is deeply ingrained in legal usage (*mens rea, supra*) and when you have no English equivalent.

Using Anglo-Saxon (English) words—not foreign, fancy, or Old English words—is not jingoistic. It is, *mirabile dictu*, common sense. Seldom is the foreign word *le mot juste*. A foreign word, rather, is usually an enfant terrible, a veritable *bête noire*. Foreign words and phrases are rarely apropos.

A *sine qua non* of good legal writing: do not use Latin and Norman French terms instead of (in lieu of?) well-known English equivalents. Example: "I met the Chief Judge in person," not "I met the Chief Judge *in personam*."

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The legal writer, when the audience is another lawyer, may, of course, use *stare decisis* for *precedent*; *sua sponte* for *on its own motion* or *of its own accord*; *amicus curiae* for *friend of the court*; *res gestae* for *things done*; or *pro bono* for *free legal work for the public good*. You and your alter ego will not be *personae non grata* if your *modus operandi* is to use *bona fide* foreign terms that have long been incorporated into the *lingua franca* of legal English and have no common and well-understood English equivalents.

If you must use Latin and French, do not make errata-like misspelling *de rigueur* or *de minimis*, thinking that *vis-à-vis* means “about” (it means “compared with”), or ordering *chile con carne* with meat while you cruise along the Rio Grande River.

To summarize, rarely use these old-English legalisms: *aforementioned*, *aforesaid*, *by these presents*, *foregoing*, *forthwith*, *henceforth*, *herein*, *hereinabove*, *hereinafter*, *herein-*

before, *hereunto*, *herewith*, *hitherto*, *inasmuch*, *one* (before a person’s name), *said* (instead of *the* or *this*), *same* (as a pronoun), *such* (instead of *the*, *this*, or *that*), *thenceforth*, *thereafter*, *thereat*, *thereby*, *therefor* (which is different from *therefore* and means “for that,” as in “I need a receipt therefor”), *therefrom*, *therein*, *thereof*, *thereto*, *to wit*, *whatsoever*, *whensoever*, *whereas*, *whereby*, *wherein*, *wherewith*, *whilst*, *whosoever*, and all verbs ending in *-eth*.

Deem and consider this: you may have wanted to eschew up and spit out your aforesaid first-year legal-writing course. But please acknowledge and confess that what you learned therein in your first hour will, *inter alia*, put you on *terra firma* to improve your practice, to wit, your career. More this writer sayeth naught. ■

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ENDNOTES

1. Benson & Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loy LA L Rev 301 (1987); see also Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* (Durham: Carolina Academic Press, 2014), pp 135–154 (summarizing 14 other studies of legal documents).
2. Rosenblatt, *Lawyers as Wordsmiths*, 69 NY St B J 12, 12 (November 1997).
3. Hurd, *Writing for Lawyers* (Pittsburgh: BookSurge Publishing, 1982), p 34.
4. See, e.g., Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (New York: HarperCollins, 1979); Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006); Wydick, *Plain English for Lawyers* (Durham: Carolina Academic Press, 5th ed, 2005).
5. Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark L Rev 197, 209 (1967).
6. *Id.*
7. *Id.* at 209–210.

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