

Law Students, Beware

In *One L*, that classic account of life during the first year at Harvard Law School, author Scott Turow describes his first assignment, a four-page case for his Legal Methods class. Only four pages? They must be going easy on us, he thought—until he began reading. “It was,” he wrote, “something like stirring concrete with my eyelashes.”

It may seem ironic that Turow, a writer and teacher of writing before law school, felt so frustrated upon confronting what were, after all, mere words. But that’s the irony of legalese: the more you know about words and how to arrange them, the more frustrated you are by a “language” that violates nearly every principle of good writing. For the most part, the substance of the law—the stuff you thought would be difficult—is easy compared to the words, phrases, clauses, sentences, and paragraphs under which it is buried.

Chances are that legalese is burying you, too, especially if you’re a first-year law student. Chances are you are spending precious hours each day digging out from under it, hours that you’d rather spend struggling with some challenging legal concept, or pondering the public-policy implications of some legal doctrine, or playing with your kids or your lover.

I empathize. Rest assured that you will learn the language of the law after a fashion, and I hope you learn it quickly. But I also hope you never learn it so well that it ceases to frustrate and anger you. God forbid that it should someday sound elegant to you, as it did to the charming southern gentleman who taught me contracts. (He was an undergraduate English major, speaking of ironies.) I hope that you stay angry and that you channel your anger into a willingness to undertake in your professional lives the hard and thankless—but valuable—labor of translating legalese into standard English.

Let me address some fundamental questions. First, what exactly *is* legalese? If it’s an “ese”—a language as I’ve suggested—it must

have identifiable, recurring characteristics that set it apart. Some distinctive features of legalese include the following:

- Arcane and archaic vocabulary: Lawyers use outmoded words and phrases (*know ye by these presents*) and Latin and French words and phrases (*habeas corpus*), and they give unfamiliar meanings to familiar words and phrases (*complaint, consideration, assault*). Not surprisingly, unfamiliar vocabulary is a barrier to comprehension.
- Overspecificity and redundancy: Legal writing is full of such doublets and triplets as *will and testament, cease and desist, and remise, release, and forever discharge* that waste time and space.
- Abstraction and indirectness: Legal language shares these weaknesses with scholarly and bureaucratic prose. Legal writers overuse the passive voice, producing sentences that are longer and less straightforward than they should be—for example, “It can be argued that the property was not owned but was leased by our client,” instead of “We argue that our client did not own the property, but leased it.” Lawyers also transform direct, vital verbs—the workhorse words of the English language—into long, languid nominal (noun-based) constructions glued together with helping verbs, articles, and prepositions. Thus “Bob determined that” becomes “Bob made the determination that” (or, more likely, “the de-

termination was made by Bob that”). Multiply these transgressions several hundred-fold, and you’ll see how they can sap your prose’s—and your reader’s—vitality.

- Grammatical complexity: This heading describes a multitude of sins that together constitute the most serious barrier to comprehension in legal writing. Indeed, other characteristics of legalese are mere annoyances in comparison. Many examples come to mind, but I’ll point to the complex construction I find most frustrating: the long sentence made up of a series of subordinate clauses that appear before the main clause they modify, thus putting the grammatical cart before the horse and suspending the core meaning of the sentence until the end. Here’s an example from a set of jury instructions:

It will be your duty, when the case is submitted to you, to determine from the evidence admitted for your consideration, applying thereto the rules of law contained in the instructions given by the court, whether or not the defendant is guilty of the offense as charged.

Here’s a simplified version, and notice how quickly it gets to the point:

Your duty is to determine whether the defendant is guilty of the offense charged. You must do this by applying the law contained in these instructions to the evidence admitted for your consideration.

- Long sentences: Complex, convoluted constructions go hand in hand with long sentences. When your high-school English teacher told you that each sentence should contain a single thought, he or she was giving sound, if simplistic, advice. You know from mind-numbing experience that 200-word sentences are endemic in legal writing. All are harder to read than need be.

By now you should be getting a fix on the enemy; on the other hand, you may be wondering whether legalese really is the enemy. I mean, isn’t legalese a necessary evil? Aren’t

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herein contained, the parties hereto agree”
instead of “we agree.”*

legal terms of art a shorthand that actually makes it easier for lawyers to communicate with each other? Surely, our good professors wouldn't make us work these verbal Chinese puzzles if it weren't necessary.

Legalese may indeed be a necessary evil, depending on what you mean by “necessary.” If you mean that legalese is necessary because your boss will berate you or your law professor will lower your grade if you refuse to use it, you may be right. In the same sense, bosses and law professors are necessary evils.

But is legalese necessary for purposes other than reinforcing the prejudices, and quieting the fears, of your “superiors”? The answer is yes (rarely) and no (usually). Yes, terms of art are useful under some circumstances. *Res ipsa loquitur* is a time-saving shorthand for the concept it represents, as is *proximate cause*. But terms of art are harmful, not useful, in consumer contracts and other documents designed for public consumption. The lawyer's shorthand is the public's gobbledygook.

More important, terms of art, which are sometimes useful, do less to impede comprehension than the long strings of archaic phrases or tortuous sentences for which there is *no* excuse. Tangled sentences are not a shorthand for anything. They waste time and cause confusion, which in turn causes needless litigation. Antiquated formalisms are similarly useless. To use Professor David Mellinkoff's example, there is no rational justification for writing “in consideration of the agreements herein contained, the parties hereto agree” instead of “we agree.”

There are reasons for these affronts to good English, of course. For example, archaic formalisms are frozen into legal prose by the inherent conservatism of the legal process. When a judge upholds the words of a contract, those words become winners. Cautious lawyers will choose them time and again over untested words, even though the “winning” words fell from common usage centuries ago.

As legal drafters, you will have to live with these reasons, just as you must live with bosses and law professors and judges. More than most writers, lawyers must be sensitive to the needs of their varied readers and must learn to write for their audience. I'm simply asking that you put up with as little legalese as you can. If your boss won't let you draft contracts in standard English, at least don't write client letters in legalese. At least don't permit yourself to write some 300-word boa constrictor of a sentence—and if your boss makes you do *that*, get a new boss. Finally, when *you* become the boss, create an environment in which standard English flourishes. You will be rewarded many times over.

How so? you ask. Why, now that you've gone through or are going through such agony to learn legalese, should you join the crusade to revise it into something that approximates standard English? (Incredibly, legalese does have its defenders.)

There are many reasons for casting arms against bad legal writing, including the hardship that legalese works on laypeople who must interpret it and the damage it does to our profession's already tarnished image. But if you're persuaded by no other reason, consider this: legalese will continue to waste your time and energy even after law school, and your time will be more valuable then, at least in monetary terms. Translating legalese may get easier, but “easier” is a comparative adjective—easier than what? Easier than stirring concrete with your eyelashes, maybe. Maybe. Stay angry. Stay tuned. ♦

This article originally appeared in the Student Lawyer.

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