Excerpts from a Dictionary of Modern Legal Usage

By Bryan A. Garner

As we have said in this column before, Garner's Dictionary *is indispensable to legal writers.*

It is not merely a dictionary in the traditional sense of a book that defines words. (After all, when was the last time you used Black's*?) Rather, it shows how words are most effectively used, providing guidance on myriad questions of style and grammar.*

Let me give an example. At a jury instructions meeting, the word "perjurious" came up. Is that a good word? And what about ending that sentence with "up"? On these and all such questions, our advice is to check Garner.

To illustrate the approach of this superb book, we offer just a few excerpts.
—J. K.

and. A. Beginning Sentences. It is rank superstition that this coordinating conjunction cannot properly begin a sentence. And for that matter, the same superstition has plagued *but*, q.v. But this transitional artifice, though quite acceptable, should be sparingly used; otherwise the prose acquires an undesirable staccato effect.

arguendo is unnecessary in place of *for the sake of argument.* Although brevity would commend it, its obscurity to laymen is a distinct liability. E.g., "Assuming *arguendo* that her answers establish that she actually attempted to warn appellant, the court of appeals erred in inferring that her having done so established that she was acting as a state agent." *Arguendo* is one of those LATINISMS that neophyte lawyers often adopt as pet words to advertise their lawyerliness.

enclosed please find is archaic deadwood in lawyers' correspondence for *enclosed is* or *I have enclosed.* Whether the phrase was originally commercialese or LEGALESE, it has been cant since its creation.

GOBBLEDYGOOK is the obscurantist language characteristic of jargon-mongering bureaucrats. Thus *iterative naturalistic inquiry methodology* = a series of interviews. Much legal writing is open to the criticism of being gobbledygook. One of the goals of this book is to wage a battle against it. See LEGALESE, LATINISMS, JARGON & OBSCURITY.

"The besetting sin of jurists," writes a well-known English authority, "is to conceal threadbare thoughts in elaborate and difficult language. In spite of the difficulties inherent in the subject, the problems of jurisprudence can be expressed in fairly simple language." G. W. Paton, *A Textbook of Jurisprudence* 1-2 (4th ed. 1972).

HERE- AND THERE- WORDS abound in legal writing (unfortunately they do *not* occur just here and there), usually thrown in gratuitously to give legal documents that musty legal smell. Following are typical examples: "The exclusive right to enter upon the land, drill wells *thereon,* and remove *therefrom* the oil to exhaustion, paying *therefor* a portion of the oil extracted or the equivalent of such portion, is a property right that the law protects." / "Humble Oil & Refining Co. entered upon this 50 acres of land and began drilling an oil well *thereon,* claiming the exclusive right to the leasehold interest *therein.*" These words are generally to be used only as a last resort to avoid awkward phrasing; certainly using one after another is stylistically abhorrent.

hereby is often a FLOTSAM PHRASE that can be excised with no loss of meaning; *I hereby declare* has no advantage over *I declare.*

MYTH OF PRECISION, THE. "Delusive exactness is a source of fallacy throughout the law." *Lochner v New York,* 198 U.S. 45, 75-76 (1905) (Holmes, J., dissenting). When attacked for their inscrutable use of language, lawyers have traditionally sought refuge in precision, and often silenced their critics by the invocation of precision. Not everyone has been satisfied, however, by the explanation or excuse that legal language, despite its WOOLLINESS and frequent ugliness, is more precise than the general language. "For this redundancy," wrote Jeremy Bentham early in the nineteenth century in words that still ring true,

> *for the accumulation of excrementitious matter [i.e. legalese] in all its various shapes . . . [and] for all the pestilential effects that cannot be produced by this so enourmous a load of literary garbage,—the plea commonly pleaded . . . is, that it is necessary to* **precision***—or,*

"Plain Language" is a regular feature of the **Michigan Bar Journal,** *edited by Joseph Kimble for the State Bar Plain English Committee. Assistant editor is George H. Hathaway. 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.*

to use the word which on similar occasions they themselves are in the habit of using, certainty.

But a more absolutely sham plea never was countenanced, or so much as pleaded, in either the King's Bench or Common Pleas.

3 J. Bentham, Works *260 (Bowring ed. 1843) (quoted in D. Mellinkoff,* The Language of the Law *292 (1963)).*

A late nineteenth-century legist wrote, with somewhat less vitriol:

There is an abundance of affected accuracy in the addition of descriptions to distinguish persons and things needing no distinction, and in the expression of immaterial matters; but real accuracy and precision are attained quite as much by the omission of superfluous phrases, by the avoidance of tautology, by correct references and by a strict adherence to the rules of grammar, as by the use of apt words.

1 Davidson, Precedents and Forms of Conveyancing *23 (4th ed. 1874).*

David Mellinkoff has done much in recent years to expose the fallacy of the argument that LEGALESE is precise. He writes:

Lawyers spend more time talking about being precise than others similarly addicted to words—politicians and the clergy, for example. Listening to these discussions about precision, and contrasting their own concern with the indifference of the street, law students and lawyers come to the effortless conclusion that with so much interest in precision, there must be a lot of it around.

D. Mellinkoff, The Language of the Law *293 (1963).*

In fact, there is all too little around, as Mellinkoff has so well illustrated, and as a number of entries in this work should demonstrate.

NEOLOGISMS, or invented words, are to be used carefully and self-consciously. Usually they demand an explanation or justification, for the English language is quite well-stocked as it is. The most obvious neologisms in -IZE, for example, are to be eschewed. New words must fill demonstrable voids, as *conclusory,* a relatively new word, does. If a word is invented merely for the sake of novelty, then it is vexatious.

perjury; false swearing; forswearing. The popular meaning of the first two terms is the same, namely, "swearing to what the witness knows to be untrue." *Forswearing* is a little-used equivalent of *false swearing; forswearing* also means, of course, "repudiating, renouncing." The technical DIFFERENTIATION at common law between *perjury* and *false swearing,* apart from their being separate indictable offenses, is that *perjury* connotes corruption and recalcitrance, whereas *false swearing* connotes mere falsehood without these additional moral judgments.

pleaded; pled; plead. The best course is to treat *plead* as a weak verb, so that the correct past tense, as well as past participle, is *pleaded. Pled* and *plead* are alternative past-tense forms to be avoided; they were once chiefly dialectal, but now have some standing in AmE.

Pled, dating from the sixteenth century, is obsolete in BrE, except as a dialectal word. Nor is it considered quite standard in the AmE, although it is a common variant in legal usage throughout the U.S. E.g., "Defendant *pled* [read *pleaded*] guilty to the lesser offense." *State v Carlberg,* 375 N.W.2d 275, 277 (Iowa App. 1985).

prior to is a terribly overworked lawyerism. Only in rare contexts is it not much inferior to *before.* Even the U.S. Supreme Court has suggested that the phrase is "clumsy," noting that "[l]egislative drafting books are filled with suggestions that *prior to* be replaced with the word *before.*" *United States v Locke,* 471 U.S. 84, 96 n.11 (1985). Nevertheless, examples abound in virtually any piece of legal writing: "*Prior to* [read *Before*] hearing in the Appellate Division, we certified the cause on our own motion." / "*Up to December 24, 1936, and for many years prior thereto* [read *For many years up to December 24, 1936*], petitioner and his wife were domiciled in the State of Oklahoma."

As Bernstein has pointed out, one should feel free to use *prior to* instead of *before* if one is accustomed to using *posterior to* for *after.* T. M. Bernstein, *The Careful Writer* 347 (1979). Cf. **previous to & subsequent to.**

same. A. As a Pronoun. This usage, well exemplified in the common phrase *acknowledging same,* is symptomatic of LEGALESE; Fowler termed the usage an illiteracy. One should substitute *it, them,* or the noun for which *same* is intended to stand. "The informer told the officer that a white male would usually load the buyer's car with marijuana at a residence and then deliver *same* [read *it*] to buyer." Similar examples abound in legal writing: "Even though such a witness discloses a new lead, one is best advised to make note of *same* [read *it*], but not to depart from the original objective until its possibilities have been extended."

WOOLLINESS is the quality in expression of being confused and hazy, indefinite and indistinct. Excessive use of cross-references in writing, as in the Internal Revenue Code, is perhaps the apotheosis of woolliness. E.g., "For purposes of paragraph (3), an organization described in paragraph (2) shall be deemed to include an organization described in section 501(c)(4), (5), or (6) which would be described in paragraph (2) if it were an organization described in section 501(c)(3)." I.R.C. § 509(a) (1984). See OBSCURITY. ■

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