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 allocation, habeas corpus, indemnity, and tortious interference with a contract. No, I mean highfalutin legal jargon, such as hereinafter 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 don’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 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 writing, I’m afraid you might not be creative of creativity. If you’re not creative in your putting yourself in the position of the reader. And I also think it shows an unfortunate lack of jargon is a crutch. I think it’s a way of avoiding working harder—a way of avoiding expressing yourself. 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 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
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. 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.

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.”

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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.

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