Plain Language

Excerpts from a Dictionary of Modern Legal Usage

By Bryan A. Garner

A s 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.

arguendo is unnecessary in place of for the sake of argument. Although brevity would commend it, its obscenity 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.


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 enormous a load of literary garbage,—the plea commonly pleaded...is, that it is necessary to precision—or,

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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.


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.

pledged; pled; plead. The best course is to treat pled 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 Carberg, 375 N.W.2d 273, 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 "[I]nstitutional 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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