

An Excerpt From *The Elements of Legal Style*: Rooting Out Sexism

By Bryan A. Garner

Editor's Note: Bryan Garner has done it again. First he wrote *A Dictionary of Modern Legal Usage*—the lawyer's version of Fowler's classic *Dictionary of Modern English Usage*. We devoted two columns to Garner's *Dictionary*, in August 1988 and October 1990. We called it "a landmark reference."

Now he has written *The Elements of Legal Style*—the lawyer's version of another classic, Strunk & White's *Elements of Style*. Garner's *Elements* covers the world of legal writing from usage (punctuation, word choice, syntax) and matters of form, to the structure of sentences and paragraphs, to rhetorical figures, and finally to general principles of style. It is expansive, instructive, witty, and wise. If you care about legal writing, you need this book.

Garner is a good friend of plain language, as even a few of his guidelines will confirm:

- Avoid jargon and beware terms of art.
- Write in English, not in Latin or Norman French.
- Instead of using doublets or triplets, use a single word.
- Use kernel words, not long derivatives.

"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 Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901.

He defines plain language as the "idiomatic and grammatical use of language that most effectively presents ideas to the reader." And he reminds us that "[m]ost of us, when writing, are not framing Kantian thoughts. We should stick to a plain approach. Our age prefers it."

At the same time, Garner shows unmistakably that writing can be plain and polished, both, and that clarity and precision are not normally at odds with simplicity. Until we put aside all the myths and excuses, legal writing will never change.

It takes work, and guidance from experts like Bryan Garner. As a way of introducing this book, we offer an excerpt on a subject that we have not covered before. You will notice that he does not recommend contrivances such as "he/she." If no other method works, then "he or she" is fine. But the last thing we need is a cousin of "and/or."

—JK

Much can be, and has been, done to lessen the effect of sexist language. Legal writers are at the forefront of the movement to eradicate the linguistic unfairness of the English language. Today even some of the stodgiest scholars show in their writing a sensitivity to the existence of women.

Only a boorish writer today would begin a sentence, "For the lawyer more than for most men . . .," or would write: "There is a brand of lawyer for whom law is the making of a livelihood, a competence, a fortune. Law offers means to live, to get ahead. It is so viewed. Such men give their whole selves to it . . ."¹ The second example was written many years ago, but the first appeared in 1980 (right before and

after warnings in the same text to avoid sexist language).

Nowadays, legal writers have become so sensitized to the problem that a tacit rule has emerged: In all hypotheticals posed, doctors, judges, professors, and other leaders of society are women; drug addicts and criminals remain men. When, we must wonder, will it be safe to have a better balance?

Not just in hypotheticals has the cause progressed. Many writers use *she* and *her* as generic pronouns. Indeed, at least two law reviews have enshrined this practice as their policy.² A writer must be sure to get her pronouns right before submitting an article to those journals.

Despite our considerable progress, writers must grapple with particular problems in wording. There are a number of ways to avoid sex-specific references that readers increasingly find objectionable. Consider any of these choices, but avoid clumsy artifices that are sure to prove ephemeral, such as *s/he* and *(wo)man*. Some of these devices may not work in a particular context; we may not succeed in completely uprooting *he* as a generic pronoun, but we can shrivel its roots by using these methods.

First, cut the pronoun. Instead of,

The judge should try to read trial briefs as they are submitted to him by the parties.

Write

The judge should try to read trial briefs as they are submitted by the parties.

Second, repeat the noun. Instead of,

The judge in whose court the case is first filed has priority in hearing the case. If venue appears to be improper, he should grant a motion to transfer venue.

Write

The judge in whose court the case is first filed has priority in hearing the case. If venue appears to be improper, the judge should grant a motion to transfer venue.

When overused, this method of repeating nouns (*the judge... the judge... the judge*) gives prose an un-English appearance and tires the reader.

Third, make the antecedent plural. This tactic makes the singular *he* unnecessary. Instead of,

A judge should conscientiously meet his responsibility to avoid even the appearance of impropriety.

Write

Judges should conscientiously meet their responsibility to avoid even the appearance of impropriety.

Note the slight change in connotation that this method causes: The responsibility appears to be less an individual than a collective one.

Fourth, use an article instead of a pronoun. For example, instead of,

Every judgment-creditor may use legal means to enforce his judgment.

Write

Every judgment-creditor may use legal means to enforce a judgment.

Fifth, use *one*. Instead of,

A prevailing plaintiff in this circuit is more likely to be awarded attorneys' fees than he is in that circuit.



Bryan Garner is the president of LawProse, Inc., a Dallas firm that teaches lawyers how to improve their writing. He teaches advanced seminars in legal editing and language of the law at Southern Meth-

odist University School of Law. He is editor-in-chief of The Scribes Journal of Legal Writing and chairs the Plain Language Committee of the State Bar of Texas. The Elements of Legal Style is available from Oxford University Press, 200 Madison Avenue, New York, NY 10016 (1-800-334-4249).

Write

A prevailing plaintiff in this circuit is more likely to be awarded attorneys' fees than one in that circuit.

This method is not calculated to encourage writers to say, "One may begin an appeal from an adverse judgment by filing one's notice of appeal and then timely submitting one's brief." Repeating *one* in that manner seems unnatural to most Americans.

Sixth, use *who*. Instead of,

The assumption of law professors is that if a writer cannot write standard English, he cannot be expected to understand and analyze complex legal problems.

Write

The assumption of law professors is that a writer *who* cannot write standard English cannot be expected to understand and analyze complex legal problems.

Seventh, use the imperative. This method has limited use in legal writing. But teachers and commentators may profitably avoid the needless verbiage here:

The litigator must always take the greatest care when he is choosing a jury.

Write (if your audience is one of litigators)

Take the greatest care in choosing a jury.

Finally, reword the sentence. Instead of,

A trial judge who decides not to recuse himself may continue hearing the case unless an appellate court reverses his decision and orders recusal.

Write

A trial judge who denies a motion to recuse may continue hearing the case unless an appellate court reverses the decision and orders recusal.

The generic *he* is not our only problem. We also have suffixes that many perceive to be sexist, as in *chairman*,

foreman, *workman*, *venireman*, *testatrix*, and *executrix*. These difficulties can usually be avoided (preferably not by making *-person* a suffix): *chair*, *presiding juror* instead of *foreman*, *worker*, *veniremember*, and *testator* and *executor* (used of both sexes). We may never be able to dust out the sexism from every corner of the language (*manhole* may last), but with a little sensitivity and effort we can obviate most sexist references without becoming manic. ■

Footnotes

1. K. Llewellyn, *The Bramble Bush* 119 (1930; repr. 1951).
2. They are the *University of Pennsylvania Law Review* and the *New York University Review of Law and Social Change*. A prefatory statement in the latter reads: "In order to further the Review's commitment to sex equality, contributors are expected to use female pronouns for the third person singular when the pronoun is used generically."

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