The "Best of" Series

Symptoms of Bad Writing

Irving Younger

So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

But who can correct or condemn without first recognizing? It's not hard. The disease of bad writing has many symptoms, five of which a child could spot. The first shows up chiefly in statutes; the second in contracts and similar documents; the third, fourth, and fifth in briefs and judicial opinions.

First, the dread *provided that*. Use a proviso and you show that you hadn't thought through what you wanted to say before starting to write. You came to the end with matter left unexpressed. Rather than begin again and weave the unexpressed matter into your text where it belongs, you tack a *provided that* into your last sentence, vexing the reader and convicting yourself of slovenly intellectual habits. For example:

> No person who has not attained the age of twelve years shall be competent to testify, provided that, if the court finds that any such person understands the nature and obligation of the oath, such person shall be competent to testify.

This statute should have been rewritten as follows:

> Every person above the age of twelve years is competent to testify, but a person beneath that age is also competent if the court finds that the person understands the nature and obligation of an oath.

Second, the unnecessary *herein*, *hereinabove*, and *hereinafter*. These are show-off words. Anyone who uses them wants the world to see that it's a lawyer talking, for only lawyers use such words. There's no need to remind the world that you're a lawyer, and there's no need for *herein*. When asked where's the library, you don't reply, "Two streets down in this city." "Two streets down" suffices, because no one will mistake your meaning. So strike the *hereinabove* from *as defined in paragraph 2 hereinabove*. "Paragraph 2" can't refer to some other document unless you say that it does, in which case you'll write, for example, "as defined in paragraph 2 of the master lease of December 20, 1985."

Third, the screaming adverb or adjective. Here, you wish to convey to the court the intensity of your feelings. You do so by adverbs and adjectives that neither communicate nor convince. They merely register your dudgeon, which an experienced advocate knows serves only to mark the offending brief as beginner's work. For example, in "This ruling was outrageously unfair and is a blatant violation of due process," the adverb *outrageously* and the adjective *blatant* are screamers. Delete them.

Fourth, humorless exaggeration. When Mark Twain says of *Huckleberry Finn* that "persons attempting to find a plot in [this narrative] will be shot," we laugh. No judge so much as smiles at the solemn overstatement that many lawyers seem to think is the way to argue a case. It isn't. Humorless exaggeration merely leaves the judge suspicious of the trustworthiness of a brief replete with the likes of this:

> The evidence demonstrates that [the university] has consistently appointed to tenured professorships so few [members of an identifiable group] as to constitute only about half of their representation in the population at large. This is naked racism, amounting to genocide.

Naked is a screamer, and in the circumstances, it's absurd for counsel to be speaking of "racism" and "genocide." Avoid humorless exaggeration.

Fifth, egregious legalisms. Legalisms, the jargon of the law, have a limited utility. Employ them within those limits. Beyond those limits, use plain English. This memorandum by an appellate court is an example of how not to do it:

> The order of the trial court denying appellant-appellant-respondent's motion for summary judgment and granting respondent-respondent-respondent's cross motion for, *inter alia*, leave to amend the complaint and for leave to serve a late notice of claim, *nunc pro tunc*, against respondent-respondent-appellant is reversed, respondent-respondent-respondent's motion denied, and appellant-appellant-respondent's motion for summary judgment granted.

Substitute *plaintiff* or *defendant*, *Jones* or *Smith*, for those whirling *appellants* and *respondents*, and you've mitigated the memorandum's opacity.

Skimming the Fat Off Your Writing

Irving Younger

When Rudyard Kipling finished a story, he would put the manuscript away in a drawer. After a month or so, he took it out, read it over, and struck out every word he then saw to be unnecessary. Kipling called this "letting it drain," and Kipling's "letting it drain" is among the chief assurances of persuasive writing.

So "let it drain," not necessarily in Kipling's way by revising your pleading, contract, or opinion after a 30-day cooling-off period, but certainly by rewriting your first draft in accordance with two related principles inspired by Kipling's example.

First, eliminate. Examine each word sitting there on your page and ask it, "What do you do for me?" If the answer is that it merely loiters, doing nothing, make the superfluous word get up and move along. Let lazy language take its ease elsewhere, but never in your writing.

Second, boil down. A briefer version is always better than a longer. Remember, verbosity endangers. Language is as precious as any coinage and as easily debased. The spendthrift of words risks a fate even worse than that awaiting the spendthrift of money. All the latter need fear is an empty pocket; the former hazards an empty head.

"Draining" lends precision to your ideas. You can't eliminate unnecessary words without first determining which are the necessary words. You can't boil down unless you have first thought hard about what you propose to say.

Further, eliminating unnecessary words gives your prose clarity of focus. Boiling down leads to economy of effort, the parsimonious adaptation of linguistic means to intellectual ends. These two qualities — clarity and economy — bespeak a mind at work, and

when your reader perceives a mind at work, persuasion is only a step away.

To illustrate, take the opening paragraph of the Supreme Court's opinion in the celebrated case of *Roe v. Wade*, 410 U.S. 113 (1973):

> This Texas federal appeal and its Georgia companion . . . present constitutional challenges to state criminal abortion legislation. The Texas statutes under attack here are typical of those that have been in effect in many States for approximately a century. The Georgia statutes, in contrast, have a modern cast and are a legislative product that, to an extent at least, obviously reflects the influences of recent attitudinal change, of advancing medical knowledge and techniques, and of new thinking about an old issue.

This wants revision. One respectfully wishes the author had proceeded as follows:

First sentence. (1) Because the United States Supreme Court is a federal court, to describe the appeal as "federal" is redundant. Eliminate. (2) What do Supreme Court appellants do but challenge state legislation under the Constitution? Boil down *present constitutional challenges*. (3) *State criminal abortion legislation*, a string of four nouns with the first three serving as adjectives, is barbarous English. A verb would handle the job better.

Second sentence. (1) Given the first sentence's reference to the statutes under attack, the phrase *under attack here* adds nothing. Eliminate. (2) The clause *that have been in effect* can be boiled down.

Third sentence. (1) By describing the Georgia statutes as modern and, in the preceding sentence, the Texas statutes as old, the author has already drawn the contrast. Eliminate the unnecessary phrase *in contrast*. (2) *Modern cast* means "modern." Why two words instead of one? And why expend a word to label the Georgia statutes modern when the rest of the sentence elucidates their modernity? (3) To say that "statutes . . . are a legislative product" is to say that statutes are statutes. Boil down. (4) The phrase *to an extent at least* is inconsistent with the adverb *obviously*. Neither is necessary. Eliminate. (5) *Reflects* means "shows the influence of" something. Hence, *reflects the*

influence of is redundant. Boil down. (6) *Recent attitudinal change.* People always have attitudes. A recent attitude must, therefore, be a change from old attitudes. Boil down. (7) "Medical knowledge" includes "techniques." Boil down.

Rewritten, the paragraph reads as follows:

> This Texas appeal and its Georgia companion . . . challenge state legislation making abortion a crime. The Texas statutes are typical of those in effect in many states for approximately a century, while the Georgia statutes reflect recent attitudes, advancing medical knowledge, and new thinking about an old issue.

Consider this general method for writing persuasively. (1) Since clear ideas make clear writing, think about your meaning before trying to express it. (2) Use verbs liberally, especially verbs other than *to be*, and preferably verbs in the active voice. (3) "Let it drain" by eliminating the superfluous and boiling down the verbose.

A Good Example and a Bad

Irving Younger

Go to 112 *Federal Reporter Second*, and at page 538 you will find *Meaney v. United States*, in which the Court of Appeals for the Second Circuit held that a patient's statements to his physician describing past physical symptoms are admissible despite the bar of the rule against hearsay.

No one but a zealot of the law of evidence would be concerned with the opinion were its author not Learned Hand. That it is a Learned Hand opinion commends it to all who love the English language.

Observe how the great judge begins:

> This is an appeal from a judgment entered upon the verdict of a jury, dismissing a petition in an action to recover upon a policy of war risk life insurance. The insured was mustered out on December 31, 1918, and the policy lapsed on January 30, 1919; he died of pulmonary tuberculosis on July 6, 1922, and the question was whether he was permanently and totally disabled when the policy lapsed.

No throat-clearing, no fanfares, and no preliminary juggling act to warm up the audience. Hand gets right to it, demonstrating that a principal virtue of persuasive legal writing, as of all good expository prose, is directness.

Your eye and mind move effortlessly from the two sentences just quoted, on through the next eight sentences, to the end of the opinion's first paragraph. Having read it, and one reading will suffice, you possess all the complicated facts necessary to understand the rest of the opinion. No effort is required. You come to the second paragraph with resources undiminished, fresh and ready for the difficult legal analysis there presented. This doesn't happen by accident. Clarity being another principal virtue of persuasive writing, Judge Hand has made sure that his first paragraph is clear.

Not counting dates or citations, the first paragraph contains 319 words. Of that total, 7 are words of five syllables (*tuberculosis* twice, *sanatorium* twice, *examination* twice, and *determinative*), 5 are words of four syllables, 35 are words of three syllables, 44 are words of two syllables, and 228 — 71% of the whole — are words of one syllable. A third principal virtue of persuasive writing, as Judge Hand's opinion shows us, is simplicity of vocabulary, the use of those short and exact words that are the glory of English and the joy of every skillful writer.

For a contrasting example, turn back in 112 F.2d to page 163, where a judge of the Court of Appeals for the Third Circuit starts an opinion as follows:

> We think it fair to say that the resolvement of the case at bar depends upon the judicial stigmatism of the court deciding it. The learned district judge and ourselves are required to appraise facts in relation to, first, causation and, second, a standard of care. Our appraisal happens to differ with his and we find the same difference in the 'books'. It is an application of facts to a point of view. We should begin, therefore, with a statement of those facts.

Since faithful readers of this column know by now how to spot bad legal writing, I do not need to put a label on the quoted paragraph.

It is not direct. Why impose on our patience with introductory curlicues serving no purpose? Had the judge omitted his first paragraph, he would have produced a better opinion.

The quoted paragraph is not clear. Read it; read it a second time. Do you know what its author is trying to say? You can guess, perhaps, but legal writing that leaves the reader guessing at its meaning is invariably unpersuasive.

The quoted paragraph is not simple. Its first sentence alone contains an unnecessary clause, *We think it fair to say* (if the court thought it unfair, the court wouldn't say it); an awkward and unusual word, *resolvement* (perhaps a slip of the pen for *resolution*); and an out-of-control metaphor, *judicial stigmatism*. Look up

stigmatism in the dictionary and try to figure out what in heaven's name the judge wants to convey. I think it's something like, "It all depends on how you look at things." If so, *stigmatism* is the wrong word, and the thought is excessively trite, even (with all respect) by the inexigent standards of judicial philosophizing.

A fourth principal virtue of persuasive legal writing is wonderfully illustrated by comparing another aspect of our two examples. Judge Hand's paragraph, for all its excellence, never clamors for attention. It is modest and quiet, confident that its merit lies partly in the art by which the author has concealed his art. The other judge's paragraph is different. It promises handstands and backflips, shouting, "Look! See how clever I am! Admire me!" When the attempted acrobatics become a pratfall, the embarrassed bystander can only look the other way. One might say that persuasive legal writing should be like a triple-dry martini — colorless but powerful.

Lessons from a Bar Journal

Irving Younger

Lawyers must sometimes turn their hand to homelier stuff than the formal documents of legal practice. Not long ago, for example, a member of the board of editors (M.B.E.) of the journal of a state bar association was asked to put aside his weightier engagements and write the prefatory "editors' note to our readers" for the journal's next issue. This is what he produced, anatomized here not out of lack of charity, but to show that elevated status within the organized bar, lamentably, does not presuppose command of the mother tongue.

Our M.B.E. starts off with the following paragraph:

> This year marks the bicentennial celebration of the writing of the Constitution of the United States of America. This historic document was signed by representatives of twelve of the thirteen colonies. It is an incredible masterplan of representative government that has withstood the erosive forces of time and of events.

Concerned only with the mental quality of what is being said, an experienced reader of bar journals would probably overlook the triteness of these three sentences and remark merely that the first of them has its subject and object reversed (the year does not mark the bicentennial; the bicentennial marks the year), that the second is unrelated to the sentence before or after or to anything else in the editors' note (and the information it conveys — that the Constitution is historic and was adopted — is presumably familiar to members of a bar association), and that the third is overblown. How can the Constitution be "incredible," impossible to believe, when any doubt about its existence will be allayed by reference to the nearest almanac or encyclopedia? If that were all, one might chalk up the third sentence to bicentennial enthusiasm and forgo comment. But that isn't all. In addition to being overblown, the sentence can be replaced by a sentence of exactly opposite meaning without noticeable effect on the paragraph: "It is an incredible masterplan of representative

government that has overcome the inertial forces of time and of events." This is fatuousness of a kind that lawyers are much given to.

Our M.B.E. now quotes a passage from the foreword to Catherine Drinker Bowen's *Miracle at Philadelphia*. He describes the passage "as part of the forward to her book" and uses it to introduce a paragraph of his own that summarizes the issue's lead article:

> He [the author] presents to the readers a comprehensive study of this freedom shrine of American history. His article includes three aspects of the subject, namely the background material surrounding the composing of the document; the subsequent significant changes (amendments) to the text; the challenges facing the American people in the preservation of its effectiveness. More than any other professional group, lawyers are in the position to appreciate this great collective accomplishment of our Founding Fathers and the bearing the Constitution has on our legal system.

Before these few sentences, the critical faculties stand amazed. How can anyone born to the language perpetrate such a phrase as *freedom shrine of American history*, or call "background material" an aspect of the subject? How can he make so mindless an assertion as the one contained in his last sentence? How can he permit to be published over his name a piece of prose so ugly, so awkward, so false to the melody of decent English?

The rest of the editors' note is about twice again as long as the introductory paragraphs I have quoted and of equal quality with them. The lessons to be learned from this example of how not to do it are no fewer than six:

(1) Write as carefully for your local bar journal as you would for the United States Supreme Court.

(2) If you do write, be sure that you are acquainted with the vocabulary of English and that your words are used correctly.

(3) Make each of your sentences say something that an intelligent person might regard as sensible or worth saying.

(4) Arrange your sentences so that they express a connected line of thought.

(5) By reading the writing of good writers, teach yourself what good writing sounds like and try to make your writing sound like that.

(6) Failing these things, consider the virtues of silence.

Culture's the Thing

Irving Younger

Breathes there the lawyer who doesn't recall *Mutual Life Insurance Co. v. Hillmon*, 145 U.S. 285 (1892)? Its facts were stated by John Maguire in his classic article, *The Hillmon Case — Thirty-Three Years After*, 38 Harv. L. Rev. 709 (1925):

> More than forty-six years ago Frederick Adolph Walters, then at Wichita, Kansas, wrote letters to his sister and his sweetheart in Fort Madison, Iowa, declaring his intention to leave on an early date "with a certain Mr. Hillmon, a sheep-trader, for Colorado or parts unknown to me." The rest is silence. None of the persons who would naturally have heard from Walters if alive ever had any later communication of his existence or whereabouts. "Parts unknown" evidently included eternity.
>
> Eternity, but not oblivion. About two weeks after Walters wrote his last letters a man was shot and killed at Crooked Creek, Kansas. Around the body raged a dispute as famous in its time as the fight over the body of Patroclus. For Hillmon had recently and heavily insured his life, and the dead man was said to be Hillmon.

Earlier this semester, I put two questions to my evidence class, 150 students who had read *Hillmon* and Maguire's commentary on it. First, I asked, who recognizes "The rest is silence," in Maguire's first paragraph? Second, who understands the reference to "the fight over the body of Patroclus," in the second paragraph?

One student recognized "The rest is silence" as Hamlet's last words, and ten understood the reference to Patroclus' body, recovered by Achilles in one of the central episodes of the *Iliad*.

Considering that each of those 150 young people had been declared by a good college to be an educated man or woman and that all of them were then just weeks short of completing their studies for entrance into a learned profession, these results are appalling. They

also explain the inability of so many lawyers and judges to write well, an inability that for some seems incurable, no matter how often the patients are doused with grammar, syntax, and vocabulary. The most they ever manage is the bare transmission of data.

The bare transmission of data is a mechanical function requiring only a command of grammar, syntax, and vocabulary. Though grammar, syntax, and vocabulary can be programmed into a computer, no computer will ever write well. The reason is that there are demesnes of language closed to computers and to those who aspire to no more than a computer's function.

In ways transcending its elements, language permits the writer's mind to enter the reader's mind and become part of the reader's very sense and experience of the world. Writing and reading are separate processes, of course; but when a skillful reader reads the writing of a competent writer, the two come together, much like two gametes forming a zygote, to create something new, different, and better than either of the components that went into its making. That is writing well.

If this miracle is to occur, reader and writer must stand on common ground, united by shared presuppositions.

These shared presuppositions go by the name "culture," a familiarity with mankind's story and with the poetry and myth, art and music, by which mankind has tried to make sense of that story.

It is culture that marks the skillful reader and the competent writer, turning language into a medium by which the mind of one meets and is enriched by the mind of the other. No computer will ever possess culture, and it is through culture manifested in language that language acquires the depth, richness, and resonance by which a piece of writing becomes part of one's experience of life, rather than a mere printout.

There was a time when the writer of a law-review article, like Maguire, could take for granted the culture that bound his readers to him. Anyone with an interest in reading the article would surely know Shakespeare and Homer (and much else). No footnote was

necessary to inform the reader of Hamlet's doom or of the wrath of Achilles. These were matters in common between writer and reader.

Unlike grammar, syntax, and vocabulary — which, as many lawyers and judges have demonstrated, anyone can learn — the acquisition of culture is the enterprise of a lifetime. Lawyers and judges who've never embarked on it will never write well. They'll transmit data, but that is computers' work. For anyone who aims at something higher than word processing, culture's the thing.

Law Students, Beware

Mark Mathewson

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 determination was made by Bob that"). Multiply these transgressions several hundredfold, 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 character-

istics 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 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.

A Critic of Plain Language Misses the Mark

Mark Mathewson

Open-minded soul that I am, I'm ever on the lookout for articles and essays that purport to defend legal writing, eager to learn the good news about *hereby*, *wheretofore*, doublets, embedded clauses, and the like. But even though articles occasionally appear under titles like "In Defense of Legalese," they are rarely what they claim to be. Most are not so much defenses of legal writing as attacks on the aspirations and expectations of plain-language advocates — critiques of the critique of legal writing.

One such contribution to the genre, titled *A Defense of Legal Writing*, was written by Richard Hyland and appeared in the *University of Pennsylvania Law Review*, 134 U. Pa. L. Rev. 599 (1986). It's a lengthy and subtle essay and deserves a more ambitious response than the one I'll offer here, but I do feel impelled to answer this broadside against plain-language advocates.

First, let me offer a crude summary of the attack. According to Hyland, critics of legal writing say that lawyers should write like novelists, particularly novelists with a no-frills prose style (Hemingway being the obvious example), and should write so that laypeople can understand them. But, these critics charge, lawyers will not and cannot write in an engaging, "novelistic" prose style for two reasons. First, lawyers have an economic interest in confounding clients with convoluted prose. (It makes the law appear mysterious, remote, indecipherable, and hence makes lawyers appear to be worth $150 an hour.) Second, lawyers deal in abstractions rather than flesh and blood, grist and grit, and so cannot employ clear, compelling, down-to-earth language.

The problem, Hyland writes, is that the critics of legal writing miss the point. At one level, they are right: lawyers *do* deal chiefly in abstractions, not flesh and blood. Indeed, the law is all about

applying abstractions — rules — to facts. But the critics are wrong in implying that there's something sinister in the fact that lawyers don't use plain language. It isn't sinister. Legal writing cannot be plain, down-to-earth, and compelling, because plain, down-to-earth, compelling language cannot convey abstract thought. "Because legal concepts are elements of legal theory," Hyland writes, "lawyers do not — and may not — use language as it is used in literature." What's more, that's why ordinary people cannot understand legal writing; they are not trained in abstract, conceptual thought.

The *real* problem with legal writing, Hyland suggests, is that most lawyers don't know how to think conceptually and thus cannot write well. Sloppy writing results from sloppy thinking. If lawyers could only think clearly, if they were masters of conceptual thought, they would write effectively (though not plainly, of course). So instead of teaching "tips," which "are either wholly arbitrary — such as the suggestion that sentences should average no more than a certain number of words in length — or meaningless platitudes, like the reminder that sentences should be no longer than necessary," those who would improve legal writing should strive to teach conceptual thought, say by requiring law students to read good books or to learn a classical language.

That's Mr. Hyland's argument in a nutshell. So where has he gone wrong? How has he unfairly assailed the assailers of legalese?

For one thing, he has misrepresented the collective wisdom of the critics of legal writing and thus has set up a pair of false premises. First, few, if any, critics of legalese insist that laypeople be able to understand all legal writing. Second, few, if any, still think that lawyers should write like novelists.

Lawyers should write like novelists? If that were truly what plain-language advocates thought, Hyland could rightly dismiss them, but that's not what they think, at least none I've read. I do think I know where Hyland got this curious notion. Several prominent critics of the current state of legal prose have cited Hemingway's work approvingly, and because Hemingway was a novelist, Hyland

apparently inferred that critics think lawyers should write like novelists, or at least like novelists who write like Hemingway.

In fact, I think most critics of legalese would have lawyers write like good technical writers, or perhaps good newswriters. Indeed, Hemingway's prose style is a popular model for plain-language advocates precisely because it is spare, plain, simple, transparent, designed to transmit information with a minimum of noise. The fact that he made his name as a novelist is not the point. After all, some novelists write ornately, densely, in a style that is anything but lean and transparent. Plain language, not literary language, is the goal of plain-language advocates.

Beyond that, novelists must entertain as they inform and enlighten, and no plain-language advocate that I know of demands that lawyers write entertainingly — *clearly*, yes, but not entertainingly. No one could reasonably insist that contracts be gripping narratives, that legal memos fire the imagination. Lawyers should be able to write persuasively when the occasion demands, but it's usually enough that their prose not be a source of confusion, that it not draw attention to itself, that it not get in the way of content.

As for Hyland's other false premise, no one could seriously demand that Joe Ordinary Citizen, completely untutored in the law, be able to read and understand every piece of legal writing. Even with my populist leanings, I wouldn't hold legal writers to such a standard. Most plain-language enthusiasts would insist that consumer contracts, jury instructions, and other legal writing designed for public consumption be comprehensible to readers of ordinary intelligence. But when lawyers are writing for other lawyers, it stands to reason that legal writing, like any technical writing, will contain information (including some professional jargon) that lay readers can't understand. The point is that the substance, not the syntax, should present the challenge. Even other lawyers deserve relatively simple, clear, plain prose.

But the crux of Hyland's argument is that legal prose *cannot* be clear and plain, because plain language cannot convey conceptual thought. Hyland asserts (without offering supporting evidence) that

plain or "concrete" language is fine for relating everyday occurrences but that a simple prose style is incapable of conveying abstract thought. Well, I just don't buy it. I'm no linguist, but I can write a legal brief in simple declarative sentences if I choose to. It won't read like a novel. You won't want to curl up beside the fireplace with it. It probably won't be fully comprehensible to people without legal training; that is to say, it may refer to legal principles unfamiliar to lay readers. But it will take "abstract, conceptual thought" — rules of law — and apply them to the facts. What's more, even lay readers will be able to navigate my sentence structure if I've done my job properly; the content might defeat them, but the form will not.

In short, I don't believe that the prose style that expresses concepts must be more difficult than the prose style that expresses facts. Moreover, I don't think the common failings of legal writing — *hereby*, *wheretofore*, doublets, lengthy embedded sentences, and the rest — have anything to do with conveying abstract thought. If you don't believe me, consider that the fact summaries in judicial opinions are often as obtuse as the rules of law, and there's nothing abstract about a fact summary. If you still don't believe me, dip into a set of plain-language jury instructions sometime, and compare the simplified version to the original. I'll bet you'll agree that the plain-language version conveys the same meaning as the original, but does it more clearly.

As for Hyland's suggestion that good legal thinking will lead to good legal writing — that all one must do to become a better legal writer is to become a better legal analyst — it just won't wash. While sloppy writing is usually a by-product of sloppy thinking, good legal analysts are not necessarily good writers; some are, some aren't. Open any law review and you'll find some excellent legal analysis expressed in impossibly convoluted prose.

Bad writing is not simply the result of sloppy thinking. There's nothing "sloppy," really, about an embedded sentence, in which intervening clause after intervening clause piles up between the main subject and verb. Such a sentence can be grammatically correct and is comprehensible after you break it down and chart it out. But why

write such a sentence? Why force your reader to parse and chart your prose? The writer should be doing that work, not the reader. Think of it in economic terms: there will almost always be fewer writers of a document than readers, and the interests of efficiency will surely dictate that the writers, not the readers, translate the prose into simple form.

The point is, critics of legalese aren't asking for what Hyland says they are. They aren't asking that legal prose sing or entertain, and they aren't demanding that the public be able to understand every legal document. They're only asking that legal writing be clear, or at least more clear than most of it is now. How can anyone feel impelled to defend against so modest a proposal?

Remembering Fred Rodell

Mark Mathewson

This article will pay homage to a twisted classic of legal literature — a savage, outrageous (and outrageously funny) attack on law, lawyers, law schools, and legal language that has inspired several generations of *pro se* litigants, lawyer-bashers, and disaffected law students.

Perhaps it will appeal to the rebel in you. The book is *Woe Unto You, Lawyers!* It was first published in 1939. Its author, Yale law professor Fred Rodell, died in 1990. Rodell may be better known to law students for his broadside against legal scholarship, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38 (1936). In fact, his literary corpus consists mostly of journalism. When he said goodbye to law reviews, he meant it.

But *Woe Unto You, Lawyers!* is his most ambitious scribal attack — and it's one of the most creative, if bombastic, ever launched — against law in general and legal writing in particular.

Rodell's analysis holds up just as well (or fails just as miserably, depending on your point of view) more than 60 years later, but that wouldn't surprise him. "If a British barrister of two hundred years ago were suddenly to come alive in an American courtroom, he would feel intellectually at home," Rodell wrote. "The clothes would astonish him, the electric lights would astonish him, the architecture would astonish him. But as soon as the lawyers started talking legal talk, he would know that he was among friends. And given a couple of days with the law books, he could take the place of any lawyer present — or of the judge — and perform the whole legal mumbo-jumbo as well as they."

That passage gives you a feel for the tone of *Woe*, and if you're sensitive about lawyer-bashing, you'll find the book hard to stomach. He was blessed — or afflicted — with a gift for sarcastic epigrams, and to the extent he is heard at all today it is mostly through them. "There are two things wrong with almost all legal writing," he

famously wrote (in *Goodbye to Law Reviews*). "One is its style. The other is its content." Then there's his observation (in *Woe*) that most legal documents read "as though they had been translated from the German by someone with a rather meager knowledge of English." But don't be thin-skinned; however offended you may be by the rest of the book, his observations on legal language are worth thinking about.

Rodell does a remarkable job of pointing out the interrelationship of form and substance, style and content, in legal prose. Whether you agree with him or not, he squarely faces the fact that law is language and that the sorry state of legal writing often reflects equally murky legal reasoning.

His most interesting line of analysis goes something like this: Sure, legal prose is hideous. Take the sentences: "Invariably they are long. Invariably they are awkward." Or look at the "abstract, fuzzy, clumsy words." And legal writing is hideous even though the "best kind of language, the best use of language, is that which conveys ideas most clearly and most completely . . . ."

Why is legal prose so abominable? Not, Rodell insists, because law is inherently beyond the ken of ordinary language. "The Law, regardless of any intellectual pretensions about it, does not at bottom deal with some esoteric or highly specialized field of activity like the artistic valuation of symphonic music or higher calculus or biochemical experimentation. . . . [T]he fact is that Law deals with the ordinary affairs of ordinary human beings carrying on their ordinary daily lives. Why then should the Law use a language . . . which those ordinary human beings cannot understand?"

If it sounds like Rodell is about to make a pitch for plain-language laws, he isn't. Indeed, he thinks it impossible to translate legal terms into plain English, but not for the reasons you're used to hearing.

The reason legal terms can't be translated has nothing to do with the weightiness, abstractness, or complexity of the ideas that the words represent, Rodell argues. The problem is that legal terms of art don't represent ideas at all. Instead, they represent aggregations of

fact, of detail, held together by nothing more than the term of art itself.

Rodell uses an example that should strike a resonant chord for any law student: the hocus-pocus associated with the term *consideration*. In most cases, Rodell points out, whether a promise is enforceable boils down to whether there was or wasn't good "consideration."

But what is consideration? There's the rub, Rodell insists, and he goes on to list some of the exceptions to and variations on the concept of bargained-for exchange. For example, a blob of sealing wax amounts to consideration in some states or, if the other person reasonably relies on it, a promise to flat-out give money away.

What you are left with is an abstract principle, but an empty one. Or, more accurately, an overstuffed one. "[T]he so-called concept of Consideration is both meaningless and useless until you know every one of the countless fact situations about which courts have said: Here, there is Consideration, or Here there is no Consideration. But once you know all those fact situations, what has Consideration become? It has become an enormous and shapeless grab-bag, so full of unrelated particulars that it is just as meaningless and just as useless as it was before."

By using the term *consideration* to describe this bag full of exceptions, the legal profession gives this mundane, rather sloppy mass of facts a pretentious mystique, Rodell says. This empty language persists in no small part because lawyers "are blissfully unaware that the sounds they make are essentially empty of meaning. And this is not so strange. For self-deception, especially if it is self-serving, is one of the easiest of arts." After all, lawyers "have been rigorously trained for years in the hocus-pocus of legal language and legal principles. . . . They discover, too, that all non-lawyers seem terribly impressed by this language which sounds so unfamiliar and so important. So why ask questions . . . if it is to your own personal advantage to accept and believe it?"

Rodell carries this theme throughout the book. His real tour-de-force performance is an exegesis of *Senior v. Braden*, a due-process

case from 1935. Rodell goes through the opinion line by line, "translating" the classic legalese with a pen dipped in acid. An example (quoting *Senior v. Braden*):

> Appellant owned transferable certificates showing that he was beneficiary under seven separate declarations of trust, and entitled to stated portions of rents derived from specified parcels of land — some within Ohio, some without. On account of these beneficial interests he received $2,231.29 during 1931.

Rodell's translation:

> The man who brought this case up to the Supreme Court — and by way of introduction, through no courtesy of the Court, meet Max Senior — had some pieces of paper showing he had a stake in seven plots of land, in Ohio and elsewhere. His stake was worth over two thousand dollars to him in one year.

Rodell's breezy tone somehow softens the hard edge of his message, but still you can hear how deeply cynical he is, and it's that cynicism about law and lawyers that has kept him from being taken seriously by all but a handful of would-be legal reformers. He goes on to argue that the only way to get rid of legalese and the tyranny of the lawyers is to throw them out and replace them with nonlawyer experts (mining engineers could arbitrate disputes about the value of coal mines, retail merchants could handle squabbles about retail business, and so on).

If you find his proposed solution simpleminded, you're not alone. Unfortunately, Rodell's cynicism about lawyers seems to be matched by a naive faith in the inherent wisdom and goodness of everyone else. As is so often the case, the revolutionary's prescription for change is far less interesting than his critique of the status quo.

But what about his critique, particularly his indictment of legal language? Is he right that legalese can't be translated, can't be eliminated because the problem is not style but content?

I don't think so. But having said that, there is a sense in which he *is* right. Consider the lack of progress we seem to be making in this country in producing understandable pattern jury instructions. We ask juries to follow the law, and all indications are that jurors are almost pathetically eager to do so, but we give them instructions that no one could possibly understand. Some of the confusion is syntactic and thus obviously remediable — you really don't need to have 12 subordinate clauses between the subject and main verb. But then there are those definitions, those terms of art. What is "reasonable doubt"? What is "proximate cause"? What is "consideration"? Well, it's — they're — well, you sort of have to read the cases.

On the other hand, I've seen some remarkable feats of translation from impenetrable legalese into standard English, particularly in plain-language insurance contracts. You don't appreciate the "after" — the simple, conversational plain-language version — until you've grappled with the textbook legalese of the "before."

In other words, even if you grant that *consideration* is a term that can't be meaningfully defined, you don't have to pack it into a convoluted 150-word sentence that leaves you reeling. Even the best sentence might leave you wondering what consideration is, precisely. But it shouldn't leave you wondering whether it's important to the matter at hand, or whether it's good or bad for your side. Certainly, it shouldn't leave you scratching your head in utter befuddlement, as far too many sentences do in the statute books and case reporters.

Woe Unto You, Lawyers! won't befuddle you, whatever else it may do. Rodell was a fine stylist, and his prose is as clean and pure as glacial melt. Read it sometime when you're in a rebellious mood. Any good law library should have a copy. (For more about Rodell, I recommend G. Beth Packert's excellent student note, *The Relentless Realist: Fred Rodell's Life and Writings*, 1984 U. Ill. L. Rev. 823.)

Good Writing as a Professional Responsibility

Thomas Haggard

Under Rule 1.1 of the ABA Model Rules of Professional Conduct, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This applies to everything a lawyer does, including writing.

At a minimum, writing-related *competent representation* requires a lawyer to follow court rules concerning the format, content, and page length of a brief. Failing to do so can have disastrous consequences for the client. In *Henning v. Kaye*,[1] the supreme court suggested that it would be completely justified in dismissing the appeal because of appellant's numerous violations of the South Carolina Appellate Court Rules.

Procedural rules often go beyond content and format, and address the required style of some pleadings. Both the federal and South Carolina rules require that a complaint contain "a short and plain statement" of the claim or the facts,[2] and both require that "each averment of a pleading shall be simple, concise, and direct."[3] A New York federal district court recognized that inadequately pleaded factual allegations could take two forms:

> First, a complaint may be so poorly composed as to be functionally illegible. This is not to say that a complaint need resemble a winning entry in an essay contest. "[A] short and plain statement of the claim," rather than clarity and precision for their own sake, is the benchmark of proper pleading. . . . However, the court's responsibilities do not

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[1] 415 S.E.2d 794 (S.C. 1992).

[2] FED. R. CIV. P. 8(a); S.C. R. CIV. P. 8(a)(2).

[3] FED. R. CIV. P. 8(e)(1); S.C. R. CIV. P. 8(e)(1).

> include cryptography, especially when the plaintiff is represented by counsel.[4]

Another court described a complaint as "gobbledygook" and "gibberish" and noted in particular a one-sentence paragraph that filled the length of a legal-sized, single-spaced page.[5] Still another court noted that the plaintiff's third amended complaint was still too "wordy [and] repetitive," and that it went on for "sixty-four pages before reaching the first claim for relief."[6]

Other forms of bad writing can also get the lawyer into difficulty. Take wordiness, for example. Merely because the rules allow a brief of a certain length does not mean that the writer must fill all those pages with words. As one judge noted, "An attorney should not prejudice his case by being prolix. . . . Conciseness creates a favorable context and mood for the appellate judges."[7] Oliver Wendell Holmes condemned wordiness in these terms: "I abhor, loathe and despise these long discourses, and agree with Carducci the Italian poet . . . that a man who takes half a page to say what can be said in a sentence will be damned."[8] Some lawyers, however, stubbornly refuse to accept the instruction or heed the warning. In one case, the defendant sought Rule 11 sanctions because the plaintiff's counsel submitted "voluminous briefs" and "large, tedious affidavits" in support of baseless claims. Apparently not getting the point, the plaintiff responded with a 158-page brief justifying the original prolixity! The Seventh Circuit faulted this "windy, excessive

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[4] Duncan v. AT & T Communications, Inc., 668 F. Supp. 232, 234 (S.D.N.Y. 1987).

[5] Gordon v. Green, 602 F.2d 743, 744, 745 & n.7 (5th Cir. 1979) (requiring dismissal of the complaint, albeit without prejudice).

[6] Arena Land & Investment Co. v. Petty, No. 94-4196, 1995 WL 645678, at *1 (10th Cir. Nov. 3, 1995) (dismissing the complaint with prejudice).

[7] Commonwealth v. Angiulo, 615 N.E.2d 155, 168 n.17 (Mass. 1993) (quoting J.R. NOLAN, APPELLATE PROCEDURE 11, § 24 (1991)).

[8] Letter from Oliver Wendell Holmes to Frederick Pollock (June 1, 1917), *in* 1 HOLMES-POLLOCK LETTERS 245 (Mark DeWolfe Howe ed., 1941).

and voluminous style of practice" and imposed sanctions.[9] Another court noted that "[t]he briefs of both sides are prolix, verbose, and full of inaccuracies, misstatements and contradictions. The lawyering on behalf of both parties falls woefully short of the standards to which attorneys practicing before this court have been traditionally held . . . ."[10]

On the other hand, some lawyers do not write enough. As the First Circuit has noted, "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."[11]

Clarity is one of the benchmarks of good brief-writing. Lawyers who fail to achieve it have been subjected to a variety of sanctions. A Vermont lawyer filed briefs that the court said were "generally incomprehensible."[12] To avoid sanctions, he agreed to a stipulation with the Vermont Professional Conduct Board that he would obtain instruction to cure his writing problems. Otherwise, he would be suspended until he could demonstrate his fitness to practice law.[13] A Minnesota lawyer who wrote "unintelligible" documents that showed a "lack of writing skill" was publicly reprimanded and ordered to take a course in legal writing.[14] Another court noted that the writing of several lawyers was "far below the quality of work that this Court is accustomed to seeing," with the court thus suggesting that they "give serious consideration to not practicing in

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[9] Brandt v. Schal Assocs., 960 F.2d 640, 646 (7th Cir. 1992).

[10] Allen v. G.H. Bass & Co., 176 B.R. 91, 95 (D. Me. 1994).

[11] United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (dismissing appellant's claim of trial-court error).

[12] *In re* Shepperson, 674 A.2d 1273, 1274 (Vt. 1996).

[13] *Id.* at 1275.

[14] *In re* Hawkins, 502 N.W.2d 770 (Minn. 1993).

the United States District Court until such time as they have demonstrably enhanced their practice skills."[15]

Obscure writing can also cost lawyers and their clients money. One court assessed costs against an appellant because his lawyer filed a "poorly written" brief in which the "argument wander[ed] aimlessly through myriad irrelevant matters," creating an "unwarranted burden" on the court.[16] Likewise, the husband-lawyer in a divorce case was ordered to pay his wife's attorney fees because the "slap-dash quality" of his briefs made them "almost impenetrable."[17]

Although some lawyers still maintain that terms like *hereinafter*, *said*, and *aforementioned* are precise, traditional, and thus appropriate in legal writing, few courts agree. One court spoke disapprovingly of a litigant's habitual use of "legalese instead of English."[18] That court also said that the indictment was "grammatically atrocious" and, paraphrasing Shakespeare, added, "It cannot be gainsaid that all the perfumes of Arabia would not eviscerate the grammatical stench emanating from this indictment."[19]

In a similar vein, some lawyers still maintain that *and/or* is a precise term of art. Apart from being potentially ambiguous in some contexts, the term has also been the object of so much judicial invective as to cause the prudent lawyer to eschew its use totally. For example, consider the biting words of the Wisconsin Supreme Court on this subject:

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal

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[15] Vandeventer v. Wabash Nat'l Corp., 893 F. Supp. 827, 859 n.43 (N.D. Ind. 1995).

[16] Slater v. Gallman, 339 N.E.2d 863, 864-65 (N.Y. 1975).

[17] Green v. Green, 261 Cal. Rptr. 294, 302 (Ct. App. 1989).

[18] Henderson v. State, 445 So. 2d 1364, 1367 (Miss. 1984).

[19] *Id.* at 1367 n.1.

> documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with [a] view to furthering the interest of their clients.[20]

A government lawyer's writing was found to be so bad as to violate the Due Process Clause in *David v. Heckler*.[21] Referring to the medicare notices that had been sent to the plaintiffs, the court said: "The language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English."[22]

Sloppy writing, in the form of a misplaced comma, created an ambiguity that led one court to deny a motion to convert a criminal complaint into an information.[23] Similarly, a missing serial comma in a statute created an ambiguity that led to expensive and unnecessary litigation in *Rowe v. Hyatt*.[24]

Missing apostrophes incurred the wrath of the court in *P.M.F. Services, Inc. v. Grady*: "[C]ounsel uses possessives without apostrophes, leaving the reader to guess whether he intends a singular or plural possessive . . . . Such sloppy pleading and briefing are inexcusable as a matter of courtesy as well as because of their impact on defendants' ability to respond."[25]

Another court lectured one of its former clerks for his writing derelictions, noting that the offending brief was "replete with over fifty examples of mistakes in punctuation, citation and spelling." The court encouraged him "to do credit to his former position by

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[20] Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935).

[21] 591 F. Supp. 1033 (E.D.N.Y. 1984).

[22] *Id.* at 1043.

[23] People v. Vasquez, 520 N.Y.S.2d 99, 102 (Crim. Ct. 1987).

[24] 452 S.E.2d 356, 358 (S.C. Ct. App. 1994).

[25] 681 F. Supp. 549, 550 n.1 (N.D. Ill. 1988).

applying greater attention to detail in his brief writing and proofreading efforts before the Bench."[26]

Judges are not immune from bad writing either. Consider this unpublished monstrosity from a Florida court:

> This cause coming on for hearing, on the Motion to Set Aside Default, the Court hearing arguments, finds that this is a very unique case involving issues of first impression concerning the validity of the Will, the nine charities who are asking the default to be set aside, assumed the Personal Representative would be protecting their interest under the Will, this is not the case and in order to protect any interest the nine charities may have under the Will, the default entered against these nine charities only will be set aside, it is therefore
>
> Ordered and Adjudged that the Motion to Set Aside Default is hereby Granted.

But judicial writing is another story — and another article.

[26] State v. Bridget, No. 70053, 1997 WL 25518, at *3 n.3 (Ohio Ct. App. Jan. 23, 1997).

Definitions

Thomas Haggard

Below are the accepted conventions for creating definitions.

Means

Use *means* to stipulate the complete and exclusive meaning of the term. This type of definition, sometimes called a restricting definition, is necessary when you are creating a new term without any existing referents, when a conventional term is excessively vague, and when you want to give a conventional term a particular meaning. Restricting definitions are custom-tailored to the unique needs of the document in which they appear.

> "Oceanside condominium property" means . . . [whatever the referents are going to be].
>
> "Indigent" means a person whose gross annual income is less than $5,000 [clarifying a vague term].
>
> "Building" means the structure located at 950 Taylor Street, Columbia, SC 29201 [giving the term a particular meaning].

Since a definition using *means* is both complete and exclusive, it must be drafted with all the possibilities in mind. Nothing can be added or deleted by interpretation.

> "Vehicle" means an automobile, bus, trolley, tram, or electrically driven cart.

Under this definition, a horse-drawn carriage would not be included. This might be a significant omission if one were attempting to draft an ordinance dealing with traffic congestion in Charleston, South Carolina.

Do not create a restricting definition if the term already has a commonly understood dictionary meaning. Consider, for example, the silly and totally unnecessary definition found in a certain federal regulation:

> ["Form" means] a piece of paper containing blank spaces, boxes, or lines for the entry of dates, names, descriptive details or other items.[1]

The reverse of defining the obvious is defining a term in a way that is totally at odds with its commonly accepted or dictionary definition. This kind of definition is sometimes labeled as a Humpty Dumpty definition, after the Lewis Carroll character who claimed that he was the absolute master of all the words he used. Consider the following definition taken from a federal statute:

> "September 16, 1940" means June 27, 1950.[2]

Many drafters erroneously use the term *shall mean* in definitions. The term *shall* is a term of command. Its use in a definition creates a false imperative. You are creating a definition, not commanding that it be created.

Includes

Use *includes* either to ensure that a particular referent is included within the meaning of a term with a conventional dictionary definition or to add to that definition something the term would not otherwise encompass. In both instances, this type of definition takes the core dictionary definition as its base point.

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[1] An Atomic Energy Commission regulation of years ago, *quoted in* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 149 (2d ed. 1986).

[2] H.R. 353, 474, 1624, 1882, 2335, 4171, 6391, 6757, 82d Cong. (1952), *quoted in* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 141 (2d ed. 1986).

> "Employee" includes persons working on a part-time or temporary basis [ensuring inclusion].
>
> "Apartment" includes the hallway, stairways, and other common areas [adding something].

The drafter of enlarging definitions must also take care not to be guilty of Humpty Dumptyism. Consider the definition contained in an old English statute:

> "Cows" includes horses, mules, asses, sheep, and goats.[3]

The following South Carolina statute is not much better:

> "Tangible personal property" means . . . [and] includes services and intangibles . . . .[4]

Some drafters use the phrase *includes but is not limited to*. This is probably unnecessary but may be wise as a precautionary measure.

Does Not Include

This phrase is used in what are called confining definitions. They take the core dictionary or commonly understood meaning of a term as a base point and ensure that certain things are excluded.

> "Automobile" does not include taxicabs.

By giving careful thought to the type and the wording of definitions — and to which ones are really necessary — the drafter can greatly improve the substantive quality and usefulness of the document being drafted.

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[3] *Quoted in* FRANK COOPER, WRITING IN LAW PRACTICE 7 (1963).

[4] S.C. CODE ANN. § 12-36-60 (Law. Co-op. 2000).

The Ambiguous *And* and *Or*

Thomas Haggard

These simple and commonly used words are capable of enormous ambiguity. The legal writer must use them with caution, especially in drafted documents.

And

The word *and* may be construed as meaning either "jointly" or "severally." For example, if a will provides that *Bill and Mary receive $1,000*, does this mean that Bill and Mary share $1,000 jointly? Or does it mean that Bill and Mary each get $1,000? The will should either say, *Bill and Mary receive $1,000, to be shared jointly*, or say, *Bill and Mary each receive $1,000.*

Ambiguity may also arise when the reader cannot determine from context whether *and* is intended to identify several different entities or to identify the traits of a single entity. This is especially true when modifiers are used in an *and* phrase. A document, for example, might refer to *charitable and educational institutions.* Does this refer to institutions that are both charitable and educational? Or does it refer to two entities, charitable institutions and educational institutions? If the drafter intends to refer to a single entity, this intent can usually be expressed by drafting in the singular. *A charitable and educational institution* clearly refers to an institution that has both those traits. If two types of institutions are contemplated, this could be expressed as *charitable institutions and educational institutions.*

Similarly, an ordinance might provide that *every owner and operator of a taxicab must report annually.* Does the ordinance apply to a single entity, someone possessing the traits of being both an owner and an operator? Or does it apply to two entities, persons

who are owners and persons who are operators? Or does it possibly apply to all three entities?

Once aware of the ambiguity, the drafter can use a number of devices to avoid it. For example, identifying the entity or entities with a word that is different from the words used to describe the traits will often make the intent clear. This sentence identifies a single entity possessing multiple traits:

> A person who [entity] is both the owner and the operator of a taxicab [traits] must report annually.

In contrast, the following sentence identifies multiple entities, each possessing one or more traits:

> The following persons must report annually: a person who [entity #1] is the owner of a taxicab [trait], who [entity #2] is the operator of a taxicab [trait], or who [entity #3] is both the owner and operator of a taxicab [traits].

These two examples also illustrate the rule that *and* is used to enumerate the traits of a single entity, while *or* is used to enumerate multiple entities. Many times, the same concept can be expressed either way. *The list includes entities A, B, and C* enumerates three classes of included entities. And *the list includes each entity that is A, B, or C* enumerates a single class of entities possessing alternative qualifications.

Or

The word *or* may be used in the inclusive sense, meaning *A or B, and possibly both*. Or it may be used in the exclusive sense, meaning *A or B, but not both*. *Or* is usually construed in its inclusive sense. In drafted documents, however, use *A or B, or both* to express inclusiveness, and use *either A or B, but not both* to express exclusiveness — if there is any real risk of ambiguity.

A related ambiguity exists when *or* is used to connect classes of entities from which a selection is to be made. For example, a contract might provide, *Seller must ship 1,000 red or blue widgets.* If it is important to the buyer that all the widgets come from the same color class, then the contract should make that express by requiring the seller to ship *either 1,000 red or 1,000 blue widgets.* Otherwise, the seller might feel free to ship 500 of each color.

In Defense of the Lowly Footnote*

Thomas Haggard

The most common type of intrusion that one finds in legal writing involves in-text citations. Consider the following (from the South Carolina Court of Appeals):

> The primary focus of punitive damages is on the defendant's wrongdoing. F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 S.C. L. Rev. 273, 314 (1992). By contrast, compensatory damages depend on the plaintiff's injury, not the defendant's behavior, and involve a different standard of proof. *Id.* at 314.
>
> Comparative negligence is the law in South Carolina. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244-45, 399 S.E.2d 783, 784 (1991). While this Court has recently re-examined several traditional tort doctrines in light of *Nelson*, not every tort concept is affected by the adoption of comparative negligence. *Compare Fernanders v. Marks Constr. of S.C., Inc.*, 330 S.C. 470, 499 S.E.2d 509 (Ct. App. 1998) (joint and several liability survives adoption of comparative negligence) *with Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 325 S.C. 507, 516, 482 S.E.2d 569, 574 (Ct. App. 1997) (7-2 decision), *cert. granted in part* (Aug. 8, 1997), *and Spahn v. Town of Port Royal*, 326 S.C. 632, 638-41, 486 S.E.2d 507, 510-12 (Ct. App. 1997), *aff'd as modified*, 330 S.C. 168, 499 S.E.2d 205, 208 (1998) (holding assumption of risk and last clear chance are merely factors for the jury to consider in apportioning negligence). We decline to impose a comparative negligence calculus on punitive damages because of the conflicting functions these legal concepts serve.

Consider now how that text could be enormously improved through the use of citation footnotes (the footnotes themselves are omitted):

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* *Editors' note:* For the same argument made in this article, see Bryan A. Garner, *The Citational Footnote*, 7 SCRIBES J. LEGAL WRITING 97 (1998–2000).

> The primary focus of punitive damages is on the defendant's wrongdoing.[1] By contrast, compensatory damages depend on the plaintiff's injury, not the defendant's behavior, and involve a different standard of proof.[2]
>
> Since the Supreme Court's 1991 decision in *Nelson v. Concrete Supply Co.*,[3] comparative negligence has been the law in South Carolina. While this Court has recently reexamined several traditional tort doctrines in light of *Nelson*, these cases show that not every tort concept is affected by the adoption of comparative negligence.[4] [Perhaps some brief discussion of these cases would be appropriate here.] Similarly, this Court declines to impose a comparative-negligence calculus on punitive damages because of the conflicting functions these legal concepts serve.

The content and reasoning of the footnoted version is vastly easier to follow than that of the unfootnoted version. And as the footnoted version demonstrates, if the court, date, or name of the case is important, it can easily be incorporated into the text — leaving the jumble of abbreviations, numbers, and parentheticals to the footnote.

Admittedly, footnotes have a bad name among brief and memorandum writers. Footnotes are said to be "too academic" and "disliked by judges." There is some truth in both claims. One does not have to look far to find law-review pages containing four or five lines of text, with the rest of the page filled with densely packed footnotes — tracing, perhaps, the history of the referenced legal doctrine back to the Norman Conquest or giving a full etymological treatment of a simple and commonly understood word like *is*. Busy judges and lawyers have no need for or patience with such pretensions. The conventional wisdom about the prevailing judicial attitude is reflected in a line from a famous judge who is purported to have said that if something is worth saying, say it in the text; otherwise, omit it.

On closer reflection, however, the objection is not to footnotes as such. The objection is to lengthy *textual* footnotes. And the objection is well founded. Upon encountering a footnote, the reader will do one of two things — neither of them good from an advocacy perspective. First, the reader might not read the footnote at all. If the

footnote contains important or even merely relevant information, it is lost on this reader. Second, if the reader does peruse the contents of the footnote and finds it to be irrelevant to the flow of the argument, then the reader will be both distracted and annoyed at being led down this blind alley. And even if the content is relevant, the constant necessity of jumping from text to footnote and back to text to get the full gist of the argument will quickly exhaust the reader's patience.

What footnotes should be used for are citations. If the reader knows this is all they contain, the reader is not even apt to glance at them unless a specific need for verification arises. Think of the discussion section of a brief or memorandum as a river, down which your argument will float like a barge containing goods. It should flow smoothly and efficiently from loading-port premises to the destination-port conclusion, going up major argument-tributaries only as absolutely necessary to off-load or on-load additional goods. Think of legal citations as rapids or dams, around which the barge must be portaged. Expensive and slow, these obstacles obstruct the flow of the goods, the ideas, that the barge is carrying. In less prosaic terms, legal citations only create annoying gaps that the reader must jump over while trying to follow the gist of your argument. This is not what you want to do as an advocate.