Point:

In Defense of Legalese

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Lawyers are frequently criticized by nonlawyers for logorrhea, the excessive use of words. But there are at least two valid reasons why lawyers communicate as they do. First, to avoid any possible misunderstanding or subsequent attack on their work, lawyers tend to use more words than nonlawyers believe necessary. Second, when communicating with each other, lawyers use a jargon called "legalese," which most nonlawyers find incomprehensible.

Every document that a lawyer drafts is prepared with the knowledge that it may one day be attacked by other lawyers or construed by courts. Thus, the lawyer must foresee every possible ground for such an attack, even the most remote, and plug every loophole in advance.[1] Plugging all the loopholes frequently requires the use of language that nonlawyers think superfluous. But when extra words are used for this purpose, they are fully justifiable. As Sir Ernest Gowers remarked:

> The legal draftsman . . . has to ensure to the best of his ability that what he says will be found to mean precisely what he intended, even after it has been subjected to detailed and possibly hostile scrutiny by acute legal minds. For this purpose he has to be constantly aware, not only of the natural meaning which his words convey to the ordinary reader, but also of the special meaning which they have acquired by legal convention and by previous decisions of the Courts.[2]

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1. THEODORE M. BERNSTEIN, DOS, DON'TS & MAYBES OF ENGLISH USAGE 127 (1977) (explaining that "[p]art of the trouble comes from the desire to sniff out and plug all possible loopholes that other lawyers might discover and part comes from fear of deviating from language that has become traditional and what lawyers consider safe").

2. ERNEST GOWERS, THE COMPLETE PLAIN WORDS 8 (Bruce Fraser ed., rev. ed. 1973).

To avoid multiplying words, lawyers have devised a jargon that they use to communicate with each other. *Webster's Dictionary* defines *legalese* as "the specialized language of the legal profession."[3] Every profession has such jargon, which tends to serve its members well but frustrates outsiders. For example, what patient can understand a doctor's prescription? Yet no one criticizes doctors for writing prescriptions. Lawyers, however, are accused of using "stilted phrases that the legal profession delights in" and having as their motto, "Never say anything in one or two words if it can be said in six."[4]

Nonlawyers seldom recognize, however, and frequently refuse to admit, that the purpose of legalese when properly used is to express the drafter's meaning with perfect precision. Yet they demand such precision whenever their own legal documents are being prepared. If such expertise were not necessary, why employ lawyers to draw legal documents at all? The fact that most lawyer-drafted documents never need to be interpreted by a court is evidence of the profession's success. The fact that nonlawyers fail to understand legal documents without interpretation and explanation is immaterial so long as their meaning is perfectly clear to other lawyers. Legal documents are, after all, drafted primarily for the benefit and use of other lawyers.

It is this attitude — the exclusion of others — that gives legalese a bad name. For example, some lawyers like to appear more erudite than they really are; they rely on archaic words, Latin and French tags, and stilted phrases to help perpetuate this illusion. While not unique to the legal profession, this failing is perhaps more prevalent among lawyers than in other fields.

Lawyers' use of archaic and obscure language may not, however, be attributable to arrogance, but may be due to the reverence that lawyers seem to hold for tradition. Such reverence

3. WEBSTER'S NINTH NEW COLLEGIATE DICTIONARY 682 (1983).

4. BERNSTEIN, *supra* note 1, at 126.

may itself be an outgrowth of lawyers' reliance on precedent. As one author recently noted:

> Lawyers know, if some laymen do not, that our profession's seeming devotion to archaic language is rooted in a sensible desire for well-settled meaning, and our penchant for seemingly redundant terms stems from a prudent effort to "cover all the bases." Yet here, as in other things, it is possible to go overboard in pursuit of a good thing.
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> There *are* synonyms which are truly redundant and hence unnecessary to protect the parties' interests. There *are* words and phrases less than 500 years old whose meanings are thoroughly settled. Plain and accurate style *does* become the profession.
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> I do not suggest abandonment of all legal words and phrases. Some are technical words of art that identify legal doctrines, such as res judicata, laches, proximate cause. But most are pure old fashioned legalese.[5]

This observation is true, especially since the definitions of *res judicata*, *laches*, and *proximate cause* are all over 15 words long.[6] Yet each word is perfectly clear to any lawyer. The use of legalese in these situations, therefore, does not obfuscate, but instead shortens and clarifies.

This difficulty of balancing between legalese and superfluous words sometimes creates a dilemma that can best be illustrated by a personal anecdote. Several years ago, a will I prepared for a client provided that her property should descend per stirpes, which was strictly in accordance with her instructions. When I presented the will to her, she refused to execute it, despite my explanation of the term *per stirpes*, because she would not sign any document that contained words she didn't understand. So I redrew the will to

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5. IRWIN ALTERMAN, PLAIN AND ACCURATE STYLE IN LAWSUIT PAPERS [n.p., preface] (1984).

6. BOUVIER'S LAW DICTIONARY 1058, 645, 1000 (William E. Baldwin ed., student ed. 1934).

read that her property should descend to her children living at her death and to the living descendants of any of her children who predeceased her and left living descendants, each group of such descendants sharing equally that portion which their parent would have taken if living at the time of her death. With this alteration, she signed the will unhesitatingly; but 44 words had been added.

What conclusion can be drawn from the long and unenviable linguistic history of our profession? Primarily that the fault is not in the tools of language, which have been developed over the centuries, but in ourselves for misusing them. There is nothing inherently wrong in the proper use of legalese; only its abuse has drawn criticism. Therefore, lawyers should continue to use legalese when it adds to the simplicity and clarity of the document, but should avoid it when used only to impress, confuse, or purposely exclude nonlawyers.