

Fordham University School of Law

From the Selected Works of Hon. Gerald Lebovits

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On Terra Firma with English

Gerald Lebovits



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THE
SCRIBES JOURNAL
OF LEGAL WRITING

Tribute to Beverly Ray Burlingame by
Bryan A. Garner

Articles by
Joseph Kimble
Kenneth A. Adams
Ross Guberman
Matthew R. Salzwedel
Kenneth Bresler

The "Best of"
Gerald Lebovits

SJLW

From the Editor

We've got an agenda. Just one. And it's right there in our back-cover manifesto: promoting better legal writing. Yet our manifesto also acknowledges the subject's breadth. The field of legal writing is expansive, and some of its not-so-far reaches touch the blurry edges of jurisprudential and political perspective. This volume reflects that; it contains some spirited entries with frank points of view. As you'll see, it all comes back to writing. And the frequent subtext is that inattentive (or untrained) drafting sometimes forces courts to make educated guesses.

A number of our authors examine judicial writing and decision-making, and their commentary ranges from the laudatory to the instructional to the critical. For our editorial staff, the sharper points posed a dilemma. The judiciary has long been a welcome and active partner in our mission. (Just check volumes 13 and 15.) But if there was occasional editorial discomfort over authorial candidness, we were even less comfortable censoring authors who've more than earned their lines in the legal-writing dialogue. We strove for a fair, even tone, but we did not mute our authors' voices.

Again, in the end, it all comes back to writing, and we welcome — encourage — submissions offering a different perspective on any point raised in this volume.

We lead with Joe Kimble's latest work, which takes on the canons of construction and textualism. Joe was the drafting consultant on the projects to restyle the Federal Rules of Civil Procedure and Evidence — projects meant to help judges and lawyers more easily extract meaning from the rules' text. So some may find it ironic that this plain-language lion now sinks his teeth into textualism, which was historically known as a "plain language" theory of jurisprudence and which still,

in its modern form, puts a premium on the words in the text.¹ Whatever your views, you'll find the article thought-provoking.

Drafting expert Ken Adams, a recent recipient of the Legal Writing Institute's prestigious Golden Pen Award, also advocates against a strict adherence to canons of construction. His petri dish is a federal case in which, he believes, a long-recognized canon produced mischief instead of genuine insight.

Stepping beyond the canons, our remaining authors offer a unique mix of style and content, including a bit of memoir, prophecy, Oscar Wilde wit, and praise for "impure" court opinions.

Ross Guberman, whose book *Point Made: How to Write Like the Nation's Top Advocates* has been something of a sensation, shares an excerpt from his forthcoming book, *Point Taken: How to Write Like the World's Greatest Judges*. The book advises judges on effective opinion-writing, and his article shows how and why some judges infuse breezy prose into their opinions.

Matthew Salzwedel, founder of the *Legal Writing Editor* and *Lawyerist* blogs, recounts his formative years while exploring the challenges faced by new legal writers. And he wonders whether the best educational innovation for today's students might be to restore some old-fashioned traditions.

Kenneth Bresler, who penned Massachusetts' first legislative-drafting manual (among other things), gives us a potpourri of sorts. He gazes into his crystal ball for a peek at legal language's future, advocates for a new entry in *Black's Law Dictionary*, and teaches us how to avoid those common, everyday redundancies that so frequently sneak into our prose.

We finish with the next installment of our "Best of" series, this time featuring short pieces by Gerald Lebovits. Judge

¹ See Ronald Turner, *Title VII, the Third-Party Retaliation Issue, and the "Plain Language" Mirage*, 5 Ala. C.R. & C.L. L. Rev. 77, 82 (2013); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, passim (2006).

Lebovits is a frequent contributor to the *New York State Bar Association Journal*, in which he offers practical advice shaped by his years as a legal reader and writer. He has written many pieces worthy of inclusion here, but we've picked our favorite favorites.

Besides these articles, you'll find a few items of special note. First, we take a moment to remember Beverly Ray Burlingame, whose passing touched so many Scribes members. Her name and work will always be associated with this publication, and it's an association that we wear with pride.

You'll also notice a page (the back inside cover, actually) thanking the law firms whose generous financial contributions helped make this volume possible.

Let me thank our new assistant editor, Laurel Romanella, for her hard work. And my thanks to Joe Kimble and Ray Ward for their usual editorial excellence. As always, we thank Karen Magnuson, the world's finest copyeditor. And thank you, Cindy Hurst, for your eagle eyes.

Finally, I offer special thanks to our dedicated (and remarkably tolerant) typesetter, Patricia Schuelke. Thank you, Trish. After all, you make the *Journal*.

— Mark Cooney

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On Terra Firma with English

Gerald Lebovits

Remember the first hour of your first-year legal-writing course in law school? You learned that *legalese* is a pejorative term and that good legal writers prefer English to romance languages. Then you spent the rest of law school reading cases that contradicted that good advice.

Those who distrust their writing teacher's advice not to use legalese should read Benson and Kessler's authoritative 1987 study.¹ It turns out that law clerks and judges believe that those who write in legalese are lousy lawyers — the more the legalese, the lousier the lawyer. Benson and Kessler also proved the reverse. Everyone believes that the less the lawyer uses legalese, the better the lawyer is.

Legalese — lawyers' jargon — is turgid and annoying, adds nothing of substance, gives a false sense of precision, and obscures gaps in analysis. From a judge: "There is still a lot of 'legalese' in current usage, but the best writers have come to regard it as pretentious or bad writing."² Legalese can be eliminated: "When legalese threatens to strangle your thought processes, pretend you're saying it to a friend. Then write it down. Then clean it up."³

Think of it this way, among other things. If you go on a date and your date asks you what you do for a living, would you an-

¹ Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loy. L.A. L. Rev. 301 (1987); see also Joseph Kimble, *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* 135–54 (summarizing 14 other studies of legal documents).

² Albert M. Rosenblatt, *Lawyers as Wordsmiths*, 69 N.Y. St. B.J. 12, 12 (Nov. 1997).

³ Hollis T. Hurd, *Writing for Lawyers* 34 (1982).

swer, “I am, *inter alia*, a J.D.”? If so, I suggest that you spend the next Saturday night in a law library — by yourself — studying texts on plain English for lawyers.⁴ If you somehow secure a second date, the only tokens of affection that your date will expect from you will be an English–Latin/Latin–English dictionary and plenty of caffeinated coffee to help your date stay awake during your effervescent conversation. Instead of an affectionate “hello,” your date will expect you to say, “To All to Whom These Presents May Come, Greetings.”

Justice George Rose Smith of the Arkansas Supreme Court said this in his classic primer on opinion-writing: “I absolutely and unconditionally guarantee that the use of legalisms in your opinions will destroy whatever freshness and spontaneity you might otherwise attain.”⁵ That doesn’t mean that writers write as they speak, unless memorializing such pretties as *umm*, *ah*, *I mean*, and *you know* appeals to you. But Justice Smith explained that legal writers should not write words that they “would not use in conversation.”⁶ Here are a few examples.

About *said*, as in *aforesaid*, Justice Smith asked whether one would say, “I can do with another piece of that pie, dear. Said pie is the best you’ve ever made.” About *same*, he asked whether one would say, “I’ve mislaid my car keys. Have you seen same?” About the illiterate *such*, he asked whether one would say, “Sharon Kay stubbed her toe this afternoon, but such toe is all right now.” About *hereinafter called*, he asked whether one would say, “You’ll get a kick out of what happened today to my secretary, hereinafter called Cuddles.” About *inter alia*, he asked, “Why not say, ‘Among other things?’ But, more important, in most instances *inter alia* is wholly unnecessary because it supplies information needed only by fools So

⁴ See, e.g., Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* (1979); Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005).

⁵ George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 209 (1967).

⁶ *Id.*

you not only insult your reader's intelligence but go out of your way to do it in Latin yet!"⁷

Many who enjoy legalisms also enjoy Latin. They might better enjoy being understood. As the line from high school goes, "Latin is a dead language, as dead as it can be. First it killed the Romans, and now it's killing me." Unless, *a fortiori*, you have an acute case of terminal pedantry, Latinize only when the word or expression is deeply ingrained in legal usage (*mens rea*, *supra*) and when you have no English equivalent.

Using Anglo-Saxon (English) words — not foreign, fancy, or Old English words — is not jingoistic. It is, *mirabile dictu*, common sense. Seldom is the foreign word *le mot juste*. A foreign word, rather, is usually an enfant terrible, a veritable bête noire. Foreign words and phrases are rarely apopos.

A *sine qua non* of good legal writing: do not use Latin and Norman French terms instead of (in lieu of?) well-known English equivalents. Example: "I met the Chief Judge in person," not "I met the Chief Judge *in personam*."

The legal writer, when the audience is another lawyer, may, of course, use *stare decisis* for *precedent*; *sua sponte* for *on its own motion* or *of its own accord*; *amicus curiae* for *friend of the court*; *res gestae* for *things done*; or *pro bono* for *free legal work for the public good*. You and your alter ego will not be personae non grata if your *modus operandi* is to use bona fide foreign terms that have long been incorporated into the lingua franca of legal English and have no common and well-understood English equivalent.

If you must use Latin and French, do not make errata — like misspelling *de rigueur* or *de minimis*, thinking that *vis-à-vis* means "about" (it means "compared with"), or ordering chile con carne with meat while you cruise along the Rio Grande River.

To summarize, rarely use these old-English legalisms: *aforementioned*, *aforesaid*, *by these presents*, *foregoing*, *forthwith*,

⁷ *Id.* at 209–10.

henceforth, herein, hereinabove, hereinafter, hereinbefore, hereunto, herewith, hitherto, inasmuch, one (before a person's name), *said* (instead of *the* or *this*), *same* (as a pronoun), *such* (instead of *the, this, or that*), *thenceforth, thereafter, thereat, thereby, therefor* (which is different from *therefore* and means "for that," as in "I need a receipt therefor"), *therefrom, therein, thereof, thereto, to wit, whatsoever, whensoever, whereas, whereby, wherein, wherewith, whilst, whosoever*, and all verbs ending in *-eth*.

Deem and consider this: you may have wanted to eschew up and spit out your aforesaid first-year legal-writing course. But please acknowledge and confess that what you learned therein in your first hour will, *inter alia*, put you on terra firma to improve your practice, to wit, your career. More this writer sayeth naught.

Notes on Contributors

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The Scribes Journal of Legal Writing seeks to promote better writing within the legal community. Because the field is so broad, the *Journal's* contents are purposely eclectic. We hope to appeal to all with an interest in improving legal writing, whether in the courthouse, the law office, the publishing house, or the law school.

The writing in the *Journal* should exemplify the qualities we advocate: lucidity, concision, and felicitous expression. Meanwhile, we hope to spread the growing scorn for whatever is turgid, obscure, and needlessly dull.