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On Terra Firma With English

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On *Terra Firma* With English

BY 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 nonlawyers, practicing lawyers, law professors, and judges believe that those who compose legalese are lousy lawyers – the more the legalese, the lousier the lawyer. Benson & Kessler also proved the reverse. Everyone believes that the less the lawyer uses legalese, the better the lawyer is.

Legalese – lawyers' jargon – is turgid, annoying, adds nothing of substance, gives a false sense of precision, and obscures gaps in analysis. From Judge Rosenblatt: "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 process, 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 answer, "I am, *inter alia*, a J.D."? If you would, plan to 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 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 Smith of the Arkansas Supreme Court said this in his classic lecture 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 Legal writing should be planned and formal, not conversational. Writing cannot emulate conversation. When people speak they use inflection, modulation, and body language. Nor should writers write as they speak, unless memorializing such pretties as *umm, ah, I mean, and you know* appeal to you. But Justice Smith explained that legal writers should not write words they "would not use in conversation."⁶

About *said*, as in *aforsaid*, 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."⁷ About *same*, he asked whether one would say, "I've mislaid my car keys. Have you seen same?"⁸ About the illiterate *such*, he asked whether one would say, "Sharon Kay stubbed her toe this afternoon, but such toe is all right now."⁹ 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."¹⁰ About *inter alia*, he asked, "Why not say, 'Among other things?' But, more important, in most instances *inter alia* is wholly unnecessary in that it supplies information needed only by fools . . . So you not only insult your reader's intelligence but go out of your way to do it in Latin yet!"¹¹

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, Latinate only when the word or expression is deeply ingrained in legal usage (*mens rea, supra*) and when you have no English quid pro quo.

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 *apropos*.

Many who enjoy legalisms also enjoy Latin. They might better enjoy being understood.

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 may 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*. The lay reader will not fully understand the English terms anyway. You and your alter ego will not be *personae non grata* if your *modus operandi* is to use bona fide foreign terms of art that have long been incorporated into the lingua franca of legal English and have no commonly known and well-understood English equivalent.

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If you must use Latin and French, do not make errata. It is *de rigor* (really *de rigueur*) that you use foreign words correctly. *Exempli gratia*, misspelling Latin words is not *de minimus* (really *de minimis*). *Inter alia*, using foreign words may lead to redundancies, such as ordering chile con carne with meat while you cruise along the Rio Grande River. *Quod vide* “*vis-à-vis*,” which means *compared with*, not *about*.

Legal writers are also entreated to forgo archaic words and expressions. It behooves you to eschew them. Store them in a file cabinet marked “Nice to Know” and forget them. A nonlawyer will never use archaic words. Methinks lawyers should quash them too.

Never use these old-English legalisms: *aforementioned*, *aforesaid*, *by these presents*, *foregoing*, *forthwith*, *hereinafter*, *henceforth*, *herein*, *hereinabove*, *hereinbefore*, *hitherto*, *herewith*, *inasmuch*, *one* (before a person’s name), *per* (or, worse, *as per*), *said* (instead of *the* or

this), *same* (as a pronoun), *such* (instead of *the*, *this*, or *that*), *therein*, *thereto*, *thereat*, *thenceforth*, *thereof*, *thereby*, *hereunto*, *thereafter*, *therefor* (which is different from *therefore* and means *for that*, as in “I need a receipt *therefor*”), *therefrom*, *to wit*, *whatsoever*, *whensoever*, *whosoever*, *whilst*, *whereas*, *wherein*, *whereby*, *wherewith*, 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 not.

1. Robert W. Benson & Joan B. Kessler, *Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing*, 20 Loyola L.A. L. Rev. 301 (1987).
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).
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* (2d ed. 1985).
5. George Rose Smith, *A Primer of Opinion Writing, for Four New Judges*, 21 Ark. L. Rev. 197, 209 (1967).
6. *Id.*
7. *Id.*
8. *Id.*
9. *Id.* at 210.
10. *Id.*
11. *Id.*

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