

The Scrivener: Modern Legal Writing



Be Plain



by K.K. DuVivier

"Be plain, good son, and homely in thy drift."
William Shakespeare,
Romeo and Juliet, Act I, Scene 2

You are pondering which word to use in a brief. Which should you use—"supra," "aforementioned" or "above"? Be cautious of Latin and archaic English words. If you use them, your argument, as well as your reputation, may be placed at risk.

Historically, lawyers strived to intimidate and impress clients with multisyllabic words. If the writing was esoteric enough, clients would feel that the lawyers had earned their fees. In some instances, the lawyers' prestige rose in direct proportion to the number of Latin words per inch of prose.

Today, however, studies show just the opposite is true. Although some lawyers believe that judges prefer and expect to see traditional legalese, recent empirical evidence demonstrates that judges prefer to read writing that is simple and clear.

One of the first studies polled California appellate judges and research attorneys in 1985.¹ Four subsequent studies—in Michigan, Florida, Louisiana and Texas—surveyed judges by sending them excerpts from legal documents.² Each passage was presented in two forms: one from actual documents filed in court that contained archaic words, obscure formalisms, wordy phrases, the passive voice and long sentences; and the other in simplified, plain English.

Over 80 percent of the judges who responded favored the simpler versions, while a minority favored the legalese. Some judges even scoffed at the need for the survey. One stated, "I really can't believe any judge or lawyer would admit to suggesting they prefer these [legalese] alternatives."³

DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through *The Scrivener* column. Send your questions to: K.K. DuVivier, University of Colorado School of Law, Campus Box 401, Boulder, CO 80309-0401.

Nevertheless, judges and lawyers who say they prefer plain English may write or even talk in legalese. From the days of law school, legalese becomes part of a lawyer's everyday vocabulary. Until challenged by a non-lawyer, many lawyers will not even notice that the term used is not commonly recognized.

Lawyers who continue to write in traditional legalese place their cases at risk. Not only have studies shown that a statistically significant majority of judges prefer plain English, but they also show that the legalese versions are considered substantively weaker and less persuasive.⁴

Finally, lawyers who use legalese also may find their personal credentials questioned. Responses to the studies showed that judges considered writers who wrote in legalese to be less qualified, less credible and from less prestigious firms than those who wrote in plain English.⁵

Thus, the moral is this: "When your pen is poised to write a lawyerism, stop to see if your meaning can be expressed as well or better in a word or two of ordinary English."⁶

NOTES

1. Benson and 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. Harrington and Kimble, "Survey: Plain English Wins Every Which Way," 66 *Mich. B.J.* 1024 (1987); Child, "Language Preferences to Lawyers and Judges: A Florida Survey," 64 *Fla. B.J.* 32 (1990); Kimble and Prokop, "Strike Three for Legalese," 69 *Mich. B.J.* 418 (1990); Dubose, *The Court Has Ruled*, The Second Draft, Bulletin, Legal Writing Institute (October 1991).

3. Dubose, *supra*, note 2 at 8.

4. Benson and Kessler, *supra*, note 1 at 314.

5. *Id.*

6. Wydick, *Plain English for Lawyers* (Durham, N.C.: Carolina Academy Press, 1985) at 55.

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