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.)