COMMENTARY

IS THIS REALLY NECESSARY?

Beyond Regulation: The Indigenous Problem of Attorney Self-Importance and Abuse of the English Language

Every profession has divergent public *personae*: one that is its self-image, and one which others have of it. Physicians, for example, may view themselves as a coterie of Marcus Welbys, but may not perform quite as beneficently. They may require regulation presuming a less charitable professional *weltanschauung*. A *tabula rasa* objectivity is inhibited where those examining, analyzing, indeed, judging, the verities lying behind abstruse representations, are precluded from direct experiential impact through the distorting myopia of linguistic hyperbole.[1]

Lawyers certainly have a dichotomous image: to themselves, they are professionals with superior intelligence and an expertise which they feel cannot be appreciated easily outside the profession. They have been through the same boot camp: law school's Socratic method. There, most of them were mercilessly cross-examined by professors, who had little difficulty in making their every utterance seem to be illogical and thoughtless blathering. They have now developed a limited ability to use this same technique.

Many of them are now convinced that they "think like a lawyer." This means not to think emotionally, but logically, carefully, and in a superior fashion. The attorney self-image is one of the "upper class" of our society—those who solve problems, carry the banner for the oppressed, fashion the rules of law we all live by, and who are society's true philosophers—able to think through false arguments to arrive at what is genuine and what is true.

To many outside the profession, the image is very different. It is one of overweening greed and amorality. It is a profession which, rather than eliminating the need for its services (the Greek definition of "profession"), seeks to create complex systems—such as probate, immigration, tax and bankruptcy—which unnecessarily require their services. Generally, it is a profession of self-indulgent arrogance, and whose basic contribution to disputes is to exacerbate them.

Certainly both images are exaggerated. However, this negative public perception is validated to a large extent by two things: lawyers' manners, and their abuse of the English language.

Self-Importance as an Art Form

Walking into the office of many attorneys can be intimidating for the average wage earner. Plush carpeting, walnut paneling, and behind an impressive desk, a wall of plaques designating degrees and mysterious certificates of admission to important courts. Offices typically have ostentatious libraries, carefully coifed and formal receptionists, and the *de rigueur* high floor view of The City. And it is not only those who work for a living who are to be impressed; more desirably, the attorneys practicing together seek to project success to each other and to the powerful and wealthy clientele many covet.

Attorneys follow a number of unwritten rules to project the proper self-importance beyond the words they actually utter. For example, no counsel worth his salt would ever place a phone call himself. Better to have the secretary ask for whomever is to be the lucky recipient: "Mr. Attorney is calling for Ms. Smith, is this Ms. Smith?" Once Ms. Smith is interrupted, Attorney's secretary will then say, "Ms. Smith, Mr. Attorney is calling, one moment please." Then Attorney will take a few seconds while Ms. Smith, who was interrupted because counsel was calling her, waits.

The second step in the procedure is to put the call on the speaker phone. Attorneys are convinced that hearing their voice echo dimly from a speaker phone exudes a sure sign of power.

Psychologically, this occurs quite apart from the extra cost. Speaker phones indicate that the attorney is too important to actually pick up the phone (which is being "touched" by the other party). Hence the other party is seeking to be intimate or personal with the attorney, who rejects the advance and maintains a haughty distance. Also, because it is a speaker phone the attorney has to speak more loudly than would be the case in conversation which normal people have. This volume communicates authority and decisiveness even if the volume itself does not reach the listener.

On occasion, the speaker phone also gives the caller the chance to introduce a third or fourth party to the conversation, often identified well after the conversation has begun. This can create the impression of "holding court," or of at least being a part of a dynamic group of experts all interrelating very impressively—impressing you and impressing each other. A typical reference to a third party would go like this: "John, I am sitting here with Mary Jones from our firm. Mary is the firm expert on the tax implications of off-shore shelters and I thought she should hear this." Actually, the client may not be aware that Mary knows very little about off-shore tax shelters or that they are irrelevant to his problem, but at some point he may become aware that he is being billed for the preliminary discussion counsel and his firm associate have had on the subject, and that both counsel and the associate are separately billing him.

On the first day at Harvard Law School in 1967, famous Dean Erwin Griswold instructed the incoming class of 1970 on the proper demeanor for the attorney. Never admit that you do not know an answer. When asked a question that you do not know the answer to, stall and look it up. The stall has been elevated to an art form by many lawyers. Usually it is accompanied by a patronizing tone and references to the "complexity" or the "interesting issues" raised by the question. Or the attorney will imply she could answer the question, but it is too difficult to explain such a sophisticated concept to the questioner in a way likely to be comprehended.

After the early contacts, it is necessary for counsel to refuse to actually talk directly with his client. Counsel is simply too busy and important to actually deign to call his client or to return calls. Hence, most contact will be through secretaries or associates. The client may not understand that the attorney, as with most professionals, makes maximum money by hiring a great

1. *See* discussion *infra*; *see also* the terribly impressive format of these first three sentences.

number of assistants and billing at a high rate for their services. These auxiliary persons are themselves paid a relatively low wage and the profit from their work gives the attorney an extraordinary income. As a side benefit, such personal avoidance further reinforces the power and self-importance of the attorney.

The Language of the Profession

The most obvious symptom of overweening self-importance is pretentious use of language. Attorneys could not get away with pompous behavior simply through telephone tricks or furniture. They must convince us they are doing something only they can do. To some extent, what they do *cannot* be accomplished easily by others, but attorneys employ linguistic techniques to make sure—and to add to the mystique of the law. Some of this is justifiable, even necessary. But the law is too basic to all of our lives to be left to an elite sublanguage understood only by one group—except to the extent necessary. Attorneys go far beyond necessity.

Terms of Art. The first common attorney language abuse is the overuse of jargon or "terms of art." Unlike many scientific terms, most legal "terms of art" are gratuitous; that is, they do not describe something which cannot be described in simpler form by a commonly-understood word. They are sheer pretension.

What does a lawyer mean when she says "extrinsic fraud," "in the instant case," "prerogative writ," "discretion vested in the court by the statutes," "subserves the interests," "after the accrual of the cause of action," "condition precedent," "equitable servitude," or "collateral estoppel?" Are these words representing thoughts easily expressed by commonly-understood English? Yes.

Some terms of art may be necessary to convey a special package of meaning not conveyed efficiently by a longer phrase of commonly-understood words. But most legal terminology is *not* much more efficient. Nor, by the way, is there an enormous number of difficult words for an attorney to know which might convey special meaning. A typical attorney will know approximately 300 words with a special "legal sounding flavor"—of these, about half will be totally unnecessary as opposed to a normal English word carrying the same message. And of the 150 words used by the attorney involving some genuine complex meaning, he will be able to define accurately about one-third of them.

Adding Suffixes. Lawyers sprinkle their documents with words carrying unnecessary suffixes. Instead of saying "analysis," one might say "analyzation;" "substantiality" instead of "substantial." If you want a spontaneous demonstration, listen to Howard Cosell—who routinely uses suffix-laden non-words for pompous effect. Cosell is one of the few more commonly heard voices trained in the law.

Gratuitous Latin. Lawyers also choose to augment their English with Latin. Some attorneys will use the Latin expression "*vel non.*" "*Vel non*" simply means "or not." Black's Law Dictionary cites these examples: "So the sufficiency *vel non* of the order of publication is important;" "the negligence *vel non* of the owner was for the jury."

Another favorite Latin term is "*a fortiori.*" This simply means "with stronger reason." For example, "Dr. Jones testified that the defendant could read the line of one-inch letters on the eye chart. *A fortiori* the defendant could also read the two-inch letters immediately above." This certainly sounds more profound than "if he could read the one-inch letters, he must have been able to read the two-inch letters."

"*Jus tertii*" and "*ab initio*" flow easily off the tongues of many attorneys, but their translations—"the right of a third party" and "from the beginning"—would be preferable, even if they add a word or two.

Lawyers know virtually nothing about Latin, and the Latin phrases they do use are readily translatable. "*Sua sponte,*" "*ipso facto,*" "*pro per,*" "*sui generis,*" and other dignity-projecting words are conveyed by the same number of English words and with equal clarity.

Making Nouns From Verbs. Grammarians call making nouns from verbs "nominalizing." Lawyers love to nominalize. For example, an attorney will write: "Failure of proper citation may result in the rejection of an argument." "Failure" from "to fail," "citation" from "to cite," and "rejection" from "to reject" are all examples. The attorney avoids the verb for the noun, which has a remote but pretentious ring. Avoiding a verb means the sentence does not have to specify which actor is doing the verb, or what happens to it. Whose failure of proper citation? Rejection by whom? A normal person wanting to be understood would write the above sentence as follows: "If an attorney does not cite properly in his appellate brief, the court may reject his arguments."

Using the Passive Voice. The voice of a sentence defines how the subject and verb relate. When the subject does the action described by the verb, the sentence is in the "active" voice. When the verb acts upon the subject, the sentence is in the "passive" voice. An attorney will almost always use the passive voice, or to repeat the last phrase in legalese, the passive voice will almost always be used by attorneys. The passive voice allows the attorney to eliminate the names of the actors, as do nominalizations: "if the motion is denied due to the failure to timely file, the filing fee may be refunded." Rejected by whom? Refunded by whom?

The attorney will also avoid personal pronouns. It is just not dignified enough to say "We shall bill you on an hourly rate. If you will enclose your check in the envelope we send to you, we will be better able to credit your account accurately," when one can say "Billing will be conducted on an hourly basis as accrued. The enclosure of your check in the envelope supplied with the bill will assist in the accurate crediting of the users' account."

False Verbal Limbs. An attorney will stud her simple verbs, where she uses them, with extra syllables to give her sentences the appearance of symmetry: "be subjected to," "give rise to," "take effect," "exhibit a tendency to." These words can be combined with a noun and a general-purpose verb, such as "prove," "serve," or "render," to project profundity. "The document will exhibit a tendency to render the mutual obligations voidable *ipso facto.*"

In addition, simple prepositions, "of," "to," and "by," are replaced by "with respect to," "the fact that," and "in the interests of."

Footnotes and Citing. Attorneys also like to overcite and overfootnote. It is interesting to read a controversial point in something an attorney has written and see it footnoted. The proposition seems to be substantiated and the reader nods acceptance silently and reads on. Usually these cites do not provide substantiation,[2] even if substantiation may be available.[3] Attorneys love to write *See...*" or "*See also...*" in these footnotes, and then cite cases having something vaguely to do with the subject discussed.[4] Or the note will refer forward to some discussion on the same subject by the attorney in the same document. Sometimes the same dubious point will be made in the latter part of the document where this cite refers, with a citation back to the earlier discussion.[5]

If one wishes to spot the most sus-

picious contentions of an attorney, one merely needs to look at the density of cites—often, the more citations the weaker the argument. There is also one other sign: the use of words such as "clearly" or "obviously." If an attorney precedes a point with "clearly," that usually means she has no proof or citation upon which to rely.

The citations of attorneys are often used in such a distorted way that they may support the very opposite position intended by the court writing the opinion. As damning as such a description of the intellectual honesty of attorneys may appear, it is verifiable simply by reviewing "memoranda of points and authorities" submitted by attorneys to courts and then reading the full opinions of the cases cited to support various propositions. Some attorneys will admit readily in private that the impressive pattern of citations in briefs and memoranda supporting motions is based on cases they have never read (especially citations submitted in motions at the trial court level). Where the cases are read, the distortions may be even more egregious, since counsel will commonly take isolated phrases in an opinion out of context. Often, an attorney will quote a judge who is pondering an argument he later rejects.

Attorneys will, on occasion, actually read the cases cited by another attorney; the result of this is a hearing with interminable haggling over what the writer of the decision meant. It takes a great deal of time to go through a long decision to point out to a court at a hearing that a citation is being incorrectly used. Where an attorney has miscited cases ten or twelve times in a document, a hearing for which only ten minutes has been allotted (which is typical) becomes a morass of confusing allegations about what one court did or did not hold.

Attorneys are not held accountable by anyone for their misuse of citations. The judge receiving the citations, and even opposing counsel, implicitly understand that the citations are, to large degree, window-dressing to make the language of the document appear more professional and significant to impress the client.

Repeating Words. Attorneys love to repeat words, phrases, clauses, and terms. Just like that. Especially when writing what they call a "legal" document, they will try to make it sound "ironclad" by repeating nouns and verbs. A contract will not simply say that one party will "sell" an item; rather, he will "sell, assign, transfer, and deliver." A person receiving an item will not merely receive it for herself, but for her "heirs, assignees, transferees, executors, and administrators." Most of this repetition is unnecessary. Where needed, it may be accomplished by drafting a short definition section in the document, and there including a thesaurus of synonyms relating to chosen single words to be used in the document itself. Of course, then the document would be easy to understand. Someone might get the idea that the work of the attorney is not quite as momentous as he or she wishes it to be perceived.

The Attorney Drafts a Contract. The following is a form for a "Building Loan Bond." It is a standard form of the New York Board of Title Underwriters and appears in "Model Legal Forms."

> Know All Men by These Presents, that I, ___ of ___, am held and firmly bound unto ___, of ___, in the sum of ___ dollars, lawful money of the United States, to be paid to the said ___, or his executors, administrators, or assigns, for which payment to be made I bind myself, and my heirs, executors, and administrators, firmly by these presents.
>
> The condition of the above obligation is such that if the above-bounden ___, his heirs, executors, or administrators, shall pay or cause to be paid unto the above-named ___, the sum of ___ dollars on the ___ day of ___, 19 ___, with interest thereon at the rate of ___ percent per annum, payable semiannually (etc.), then the above obligation to be void; otherwise to remain in full force and virtue.
>
> And it is hereby expressly agreed that the whole of said principal sum shall become due at the option of the said obligee after default....

The next *sentence* of the "model" contract is *two pages long*; here are a few excerpts:

> ...and the said obligee, and his legal representatives or assigns shall be at liberty and have the right immediately after any such default, upon a complaint filed or any other legal proceedings commended for the foreclosure of said mortgage, to apply for, and shall be entitled as a matter of right and without regard to the value of the premises, or the solvency or insolvency of said obligor or any owner of the mortgaged premises, and on ___ days' notice to said obligor, his legal representatives or assigns, in any court of competent jurisdiction, to have granted a receiver of the rents, issues, and profits of the said mortgaged premises, with power to lease said premises for a term to be approved by the court, with power to pay and to keep the same insured, and with power to....

The ultimate in this sort of verbal overkill is the standard maritime "charter party" which is a commercial contract to lease a ship. This 300-year-old document is still being used by American maritime lawyers and contains 25,000 words.

Lawyers typically defend the use of arcane and confusing terminology with the excuse that it has been tested in the courts; thus, documents using such words are not subject to suit for interpretation. This justification locks in incomprehensible language for all time, since—unless reversed—these "inflexible" court decisions forever rule.

Writing Our Laws. Unfortunately, persons trained in the systematic abuse of the English language are also writing our laws. Even if a legislator is not an attorney, and many are, she will give a proposed bill to one to redraft in the appropriate "legal language." Let's take a fairly typical California statute, SB 315 (Holmdahl). This purpose of the bill is simply to allow husband and wife to split their assets when they divorce (or separate) without paying any tax, since the property split is not a sale but a division between two people. Simple enough? Sure. A legislation class at Loyola University, not trained in "the law," apparently wrote it as follows:

> There is no tax under this Act when husband and wife divide property between themselves because they are ending their marriage, or nullifying it, or legally separating.
>
> On the document which would otherwise be taxed, husband or wife shall sign a statement saying that this exemption applies.

The California bill as drafted by lawyers and as introduced reads as follows:

> 11927.(a) Any tax imposed pursuant to this part shall not apply with respect to any deed, instrument, or other writing which purports to transfer, divide, or allocate community, quasi-community, or quasi-marital property

assets between spouses for the purpose of effecting a division of community, quasi-community, or quasi-marital property which is required by a judgment decreeing a dissolution of the marriage or legal separation, by a judgment of nullity, or by any other judgment or order rendered pursuant to Part 5 (commencing with Section 4000) of Division 4 of the Civil Code, or by a written contemplation of any such judgment or order, whether or not the written agreement is incorporated as part of any of those judgments or orders.

(b) In order to qualify for the exemption provided in subdivision (a), the deed, instrument, or other writing shall include a written recital, signed by either spouse, stating that the deed, instrument, or other writing is entitled to the exemption.

George Spanos, the attorney who drafted the statute for Holmdahl, explained the need for his more elaborate version as follows: "Although it is desirable to simplify the language of the law, it's also important that you do not ignore some of the verbal conventions and subtleties that, for better or worse, have crept into legal language. When a new law is enacted that modifies existing law and makes reference to established concepts, it is sometimes necessary to continue to use the same designations or categories so no new ambiguities are created." I suppose this means we are all trapped forever. What we are being told is that legislatures, courts, and attorneys understand legalese, and they may be unable to translate what they have done previously in legalese into understandable English. They are apparently now unable to relate meaningfully to the English language.

The Fount. To understand what has happened to this species of person called "attorney," one must examine the fount: the law school. For here is where the attorney learns the new language, and apparently forgets the old one. Do professors develop this new language consciously? Indeed they do.

The grand fount has always been Harvard Law School—where we suffered three years of self-importance training. The faculty of that institution includes some of the worst teachers in the nation, but they are legal scholars. Translated, this means they can take a very simple idea and make it into one that sounds very complicated and obscure. Anything complicated and obscure must be deep and profound.

A current illustration of the example set by this leading institution is a document floating around most of the law schools of the United States; a document which is the product of many Harvard professors. They will debate the subject interminably and do very little, but the nature of the debate tells us a great deal about the pretension visited upon the students by this faculty.

In its final draft version, this work borne of several years of debate is now seriously being discussed by law faculties throughout the land. It is commonly viewed as a "brilliant" exposition of current curriculum problems. So what does the language of the masters tell us about the way in which the lawyers of the future are being trained? Here is one of the more eloquent passages:

> Doctrinal mastery cannot by itself provide an intellectual base for life-long critical reflectiveness about legal institutions, the profession, and one's own work, in the actual and changing conditions of social life and legal practice. For those purposes, students need to become conversant with learning and argument about the nature and functions of law and legal institutions; about their historical and cultural contingencies, and the varieties and modes of social ordering; and about the moral and political outlooks immanent in bodies of legal doctrine, institutional systems, conceptions of professional role, theories of law, and approaches to their study.

The Layperson Imitators. The layperson imitators of legalese illustrate both its artificiality and the success of attorneys in making it the *sine qua non* to entry into the legal system. (Are you impressed?) Attorneys love to sneer at attempts by laypeople to imitate their legalese. Following is an excerpt from a fairly typical document filed by someone who learned English as a second language and is attempting legalese as a third. It was filed in a format thought by the filer to be appropriate, following his arrest.

> Attentively, I, ___, a Mexican National, 57 years old with domicile at Tijuana, B.C. Mexico being cited to appear in Court on the 9th. of January 1979 for investigation charges, I hereby with all my respects appear before you in order to expose the motive, same one which obliges me to refuse for the services of the defense, concerning this charge, defense ordered by Your Honor and by the Court.
>
> MY REASONS: 1/st., Due to the Spanish in which I am interrogated, this Spanish is limited reason why I don't quite understand at all.
>
> 2/nd., That I understand that the defense of my case, entrusted to Atty. ___, it is an Official one or else a routine requirement.
>
> 3/rd., Due to the seriousness and gravity of this charge against me, it urgently drives me to prove my innocence (not guilty).
>
> Reason why I solicit from that Honorable Court it may be granted the right which the Law of this Country grants me, in order to ask formally the quick annulation of the defense in my case directed by Attorney ___ Also to present within a brief time, after searching the real truth to the facts occurred at the time of my detention by the Police in Chula Vista, California.

This particular document captures the basic personality of current legalese, exposed in its reality by the exaggerated misuse of vague terms and by its syntax.

Another illustration is a statement made to the probation department by a nonlawyer defendant who was urged to write a description of the events leading to his arrest which would impress the court—something that sounds "lawyer-like." Here is the product:

> On the (7) seventh of January a suitcase was brought to Ocean Beach by a person unknown to me. The deliverers name was Tim and he drove a Datsun pickup. At approximately (10:30) ten thirty the described vehicle, a premonition solicited to me, approached and stopped at the predesignated location. After introduction and speculation of various intricacies a stipulation, not omnious on my behalf was endeavored to transport the suitcase and myself to Lindbergh Field. Upon arrival at American Airlines terminal the driver, Tim, entrusted me with a pecuniary subsidation, ticket to Cincinnati Ohio and a yellow suitcase. Farewells were expounded and we parted. I entered the terminal check my baggage and went into a lounge at approximately (11:10) eleven ten. While receiving boarding pass at approximately (11:45) eleven forty five I was

arrested. My most veracious and inherent sanction for this elicit paradox was for transportation to my home state.

I am not an incessant violator of the jurisprudence of this country nor is it contended that I shall be. I ecstatically adhere to the tenet that victumus crimes encompass me and circumstance effuse this idiosyncrasy that is me, beguiling my true virtues. I have foibles just as others but incentively endeavor to attain a substantial degree of knowledge. Vast difficulties have impeded this meander of subjugation but in contrast an implicit entreaty with an educational institution is imminent. Therefore I ask only for a propriety that is befitting.

Attorneys love to make fun of these efforts to emulate them. They are very much relieved that it is difficult to copy the pretentious style with the grace needed to preserve some semblance of meaning—at least enough meaning so that some small scintilla of message is imparted. It is unfortunate that attorneys do not understand how closely related their use of the language is to the attempts of those who imitate them.

The Reason. The heart of the law may be the impenetrable language that lawyers use, sometimes at great length. Commentators have speculated that it is a direct outgrowth of the English practice of paying lawyers by the word for their briefs—which are, as a result, rarely brief.

Other professions, most notably journalists, are making serious efforts to use simpler language. These professions recognize that the goal of writing or speaking is—after all—communication. The lawyer's goal, however, may be obfuscation. Fred Dutton (White House aide in the Kennedy Administration and now a successful Washington, D.C. attorney), has been quoted remarking candidly:

> Lawyers are paid to complicate, to keep a dispute alive, to make everything technical. The Washington, D.C. firm of Covington and Burling, for example, once delayed for twelve years a Food and Drug Administration ruling on the labeling of peanut butter jars. Said one Covington lawyer: "Certainly, there's something suspicious about a 24,000-page hearing transcript and close to 75,000 pages of documents on a case involving peanut butter!"

As we have seen, 75,000 pages does not mean much was said. George Orwell was not writing about lawyers in his famous essay *Politics and the English Language*, but he could have been: "The great enemy of clear language is insincerity. When there is a gap between one's real and one's declared aims, one turns as it were instinctively to long words and exhausted idioms, like a cuttlefish squirting out ink."