Plain-English style transcends ideology

By Matthew R. Salzwedel

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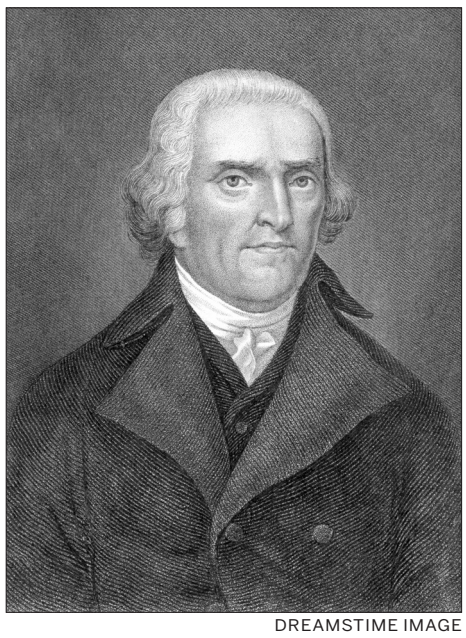
At the end of his career, Thomas Jefferson reflected on the style of early American statutes:

"[I]t would be useful . . . to reform the style of [statutes] which, from their verbosity, their endless tautologies, . . . and their multiplied efforts at certainty, by *saids* and *aforesaids*, by *ors* and by *ands*, to make them more plain, do really render them more perplexed and incomprehensible, not only to common readers, but to the lawyers themselves."

We might excuse the early American drafters' poor legal writing; after all, they'd inherited a legal language that was hardly a model of clarity. But what excuse remains for the modern defenders of the traditional style of legal writing? Despite decades of studies showing otherwise, the old guard still claims that it's not possible to make legal writing comprehensible to ordinary people without sacrificing precision.

As I explain below, the traditional style of legal writing is an accident of history, which the legal profession has perpetuated through inertia and self-interest for 1,000 years. If the bar is serious about empowering citizens by making the law more accessible, it must demand *without exception* plain English as its legal language. Our time, perhaps more than any other, demands it.



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Thomas Jefferson

Early Latin, French influences

Before 1066, English legal language was rudimentary Old English. But that changed in 1066 when William the Conqueror invaded England from northern France. William brought his clergy, nobles, and royal courts with him, and this upper-crust of Norman society wrote and spoke in either Latin or a northern-France dialect called Norman French.

David Mellinkoff explains in "The Language of the Law" that Norman French didn't initially become the language of English law. William had promised no major changes to the local (secular) courts, and he kept his word. English statutes were, at first, written in either English or Latin, and, later, only in Latin. The English peasantry and lower classes (about 90 percent of the population), however, continued to speak Old English.

Over time, the spoken language of the local courts probably became trilingual: English, Latin and French. But the courts primarily used law French (a French variant used by only lawyers) and law Latin (a mixture of Latin, French, and English). According to Mellinkoff, though, after 1250 French began to replace Latin in the statutes, and "at least through the Middle English period [roughly 1150–1500], French predominate[d] as the language of [English] law."

Elitist-lawyer protection

By the mid-13th century, English had become the population's primary spoken language, partly because of Norman-English intermarriage. But as Peter Tiersma explains in "Legal Language," mid-13th century efforts to make English the official legal language failed because: (a) law French was thought to be more precise than English; (b) the bar and courts feared that ordinary people would attempt to read legal documents without lawyers' guidance; and (c) lawyers wanted to maintain their monopoly over providing legal services.

Mellinkoff contends that self-interest and inertia caused the local courts to perpetuate law French. As English became more generally popular, "French became the mark of the noble and the wealthy. . . . Like other medieval arts organized into guilds, the law was a mystery. And there is no reason to believe that the ruling cliques of England were eager to share the legal mysteries with plebeians. What better way of preserving a professional monopoly than by locking up your trade secrets in the safe of an unknown tongue?"

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Genesis of legalese

English ultimately became the primary language of the local English courts. But there were problems with it as a legal language, too. Besides preserving some long-familiar law-French and law-Latin words, Mellinkoff says that in the 15th and 16th centuries legal "[d]ocuments were peppered with the trivia of language, the *where* and *whereas* and *wherefore*, *forseid* and *above-seid*. The French of an earlier day gave way to an English stockpile of formalized piety and lament that has distinguished the language of the law ever since."

Because French and Latin still influenced the local courts' legal language, scribes (who were paid by the word) and lawyers could choose from English, French or Latin words that meant the same thing. But in the name of precision, they often didn't choose. That's partly why traditional legal writing is riddled with doublets and triplets such as "For my last *will* (English) and *testament* (French), I hereby *give* (English), *devise* (French), and *bequeath* (English) my *property* (French), *goods* (English) and *chattels* (French) to my wife."

Old elitism dies hard

Some lawyers today doubtless would be comfortable practicing law in Norman England.

Consider the example of *give*, *devise*, and *bequeath*. Are all three words required to convey property? Not according to "Garner's Dictionary of Modern Legal Usage," which cites two authorities on the law of wills and trusts, one of which says that *give* alone "will effectively transfer any kind of property, and no fly-specking lawyer can ever fault you for using the wrong verb."

Or how about *shall*? Ordinary people rarely use *shall*, yet it's still a favorite word of authority for contract drafters and legislatures (more than 17,000 sections of the Minnesota statutes, for example, use it). *Shall* technically means "has a duty to." But it's not precise; "Garner's Dictionary of Modern Legal Usage" lists eight possible senses for *shall*, and the treatise "Words and Phrases" dedicates more than 90 pages and 1,200 cases to explaining its multiple interpretations.

Finally, consider this super-precise sentence, which is an example of the precision school run amok: "[Party] exclusively owns all right, title and interest in and to [X] in perpetuity throughout the Universe." Arguably only the French word *interest* is necessary to reserve ownership of X, because *interest* encompasses the Old English words *title* and *right*. And did the drafter really need to account for future space colonies by including the modifier *in perpetuity throughout the Universe*?

A time for choosing

Lawyers have made some progress in rejecting the arcane, verbose style of traditional legal writing. But in many respects the legal profession remains, as Jonathan Swift once described it, a society of lawyers with "a peculiar Cant and Jargon of [its] own, that no other Mortal can understand." Perhaps more than any other needed law reform, the plain-English movement offers the profession a cause that can transcend our often-divisive ideology and politics.

One-thousand years after the Normans, the legal profession still faces a stark choice. Will it continue under the guise of faux precision to perpetuate an arcane legal language that's more an accident of history, inertia, and self-interest than of intentional, well-thought-out design? Or will it demand full adoption of plain English, which, although not infallible, offers both necessary precision and accessibility to the greatest number of citizens?

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