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THE ELEMENTS OF LEGAL STYLE

Mark P. Painter*

In December 1994, right after I was elected to the appellate court in Ohio, Bryan Garner came to Cincinnati to give his legal writing seminar. Garner was not quite yet the guru of all American writing, which he surely is now, but was already preeminent in legal writing. His seminar ran from 9:00 to 5:00 in a hotel meeting room, complete with the mandatory hard chairs. I'm not a good sitter for that long. But at 5:00 I was sorry it was over. As a trial-court judge I had by then written a legal treatise and fifty-two nationally published decisions. They were not bad. But that day I learned how they could have been so much better.

Garner taught me more in a day than I had learned in years. And I wanted to know more. Then, Garner hadn't published the seemingly dozens of books he has out now. So I bought what I could find—*The Elements of Legal Style*.¹ This was the first edition from 1991; an updated and expanded one came out in 2002.² And I studied it. But more about that later. I want first to talk about the state of judicial writing.

LAWYERESE—THE STATUS QUO

Having gone to law school before attending Garner's seminar, I had been ruined in so many ways—but my writing had suffered most.

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1. Bryan A. Garner, *The Elements of Legal Style* (Oxford U. Press 1991).

2. Bryan A. Garner, *The Elements of Legal Style* (2d ed., Oxford U. Press 2002).

I don't remember any professor saying on the first day of law school that we needed to learn to "write like a lawyer." Think like a lawyer, perhaps, but not write like a lawyer. No professor said to remove most verbs from your sentences, make the sentences long and complex—200 words minimum—and the paragraphs even longer. But we got that idea from someone.

I don't remember anyone telling us to use "said" for "the" or "that"; "such" for no reason at all; and weaselly terms such as "provided that" in any old place, but somehow we learned to do that. And along the way we learned the unnecessary couplets or triplets like "devise and bequeath"; "free and clear"; "rest, residue, and remainder" too.

Of course, we also started to learn in law school how to turn perfectly good verbs like "examine," "agree," and "prefer" into nouns like "examination," "agreement," and "preference." And because a sentence must still have a verb, we learned to add weak, usually passive, verbs.

One problem with law schools is that they teach students to write like lawyers by asking them to read old cases by dead judges who learned to write by copying older, deader judges. (Of course, Cardozo, Holmes, and Jackson were great writers, but most judges are not.) And it is not just that many judges write badly. Cases are selected for casebooks not because they are examples of good writing, or even of clarity, but because they illustrate the precepts of law in that course. Even when edited, many of these cases are wordy, redundant, and confusing. Perhaps there is value for the law student in this situation: training her to pick out the needle of law from the haystack of verbiage. But the inadvertent consequence of reading all this lawspeak and bad writing is that we internalize it. We think that if judges write this way, then it is the language of the profession, something to be emulated.

So we come out of law school writing like lawyers and judges always have. Badly.

ELEMENTS—THE REVOLUTION

Garner's *Elements of Legal Style* is a treatise on writing—a how-to book for treating what ails legal writing. But it's not dry. It's fascinating. When I sat down to look the first edition over

for the first time, I ended up reading it through. From his very first advice—always use the serial comma—to the end, which I'll quote later.

For this article, I re-read the book's second edition. When I read the original version fifteen years ago, much was a revelation. Now it seems familiar, because in the interim I've not only taken all the advice to heart, but also given more than 100 plain-language seminars and done my own (much shorter) book. But none of this would have happened without the original inspiration provided by Garner's seminar. I would have muddled on as most of us do.

Because reading *Elements* made me a more effective writer, I hope that most of my appellate opinions have been much better than they would have been had I never encountered Garner and his books. And here, I'll just highlight what I have found in those years of writing to be the most important advice in *Elements*, which is the same as most all advocates of plain language give. But it never hurts to refresh that advice.

It seems obvious, but writing shorter, plainer sentences is the first step to plainer writing. Sentences should be shorter. And phrasal adjectives—two or more adjectives modifying one noun—must be hyphenated. Legalese, fancy words, euphemisms should be shunned. Get rid of the useless couplets and triplets—"null and void," "rest, residue, and remainder." These spring from Norman times, and are nonsense. Never use parenthetical numerals: "two (2)". You may, and should, begin sentences with "and" and "but." In America, commas and periods go inside quotes, always. Other good advice abounds.

And after you have read the book through, next you must get Garner's *Dictionary of Modern Legal Usage*.³ This will answer all your questions about grammar, usage, and style. It's a dictionary, but it's also enjoyable to read sections at random. Be sure to start with the section on "Superstitions."

FINAL ADVICE

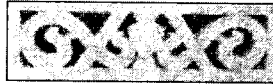
In *Elements* is a passage that I quote at the end of my seminars. Because the seminars concentrate on form—which of course can't be divorced from content but sometimes seems to

3. Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed., Oxford U. Press 1995).

be—I urge the lawyers and judges in my audiences to remember that

[l]aw is not just a bunch of dusty old precepts to be applied with humdrum objectivity. It is alive; blood courses through its veins. As often as not, to apply legal rules you must weigh, judge, and argue about human folkways and human foibles. And to do that well, you must have a heart.⁴

And thanks to Bryan Garner, I now try to remember this myself.



4. Garner, *supra* n. 2, at 178. (This passage appeared in the first edition of *Elements* on page 174.)