BRYAN GARNER ON WORDS

Ax these terms from your legal writing

Posted Apr 1, 2014 3:30 AM CDT
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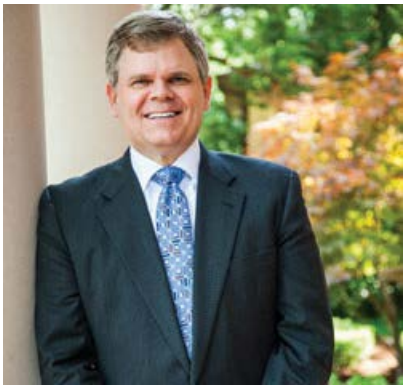

Photo of Bryan Garner by Terri Glanger

William Cullen Bryant, editor of the *New York Evening Post* from 1829 until 1878, created an "Index Expurgatorius" for his newspaper. Certain words simply weren't allowed in its pages.

Likewise, James Gordon Bennett Jr., owner of the *New York Herald* from 1867 to 1918, had his "Don't List." For example, he wouldn't allow his journalists to write *executive session* when they meant *secret session*.

Keeping a banned-word list is hardly unique to newspapers. The novelist Ambrose Bierce kept a "Little Blacklist of Literary Faults," published nearly a century ago. He despised *committed suicide*, preferring instead *killed himself* (or herself). He likewise disapproved of *decease* for *die*, *executed* for *hanged* (or *put to death*), *expectorate* for *spit*, *inaugurate* for *begin*, *prior to* for *before* and so on. He wasn't fond of genteelisms. No real stylists are.

Legal drafters could benefit from a similar verbal blacklist—a simple list of words that do nothing but blemish the documents that contain them. Learn them and ax them.

and/or Is it a word? Is it a phrase? American and British courts have held that *and/or* is not part of the English language. The Illinois Appellate Court called it a "freakish fad" and an "accuracy-destroying symbol." The New Mexico Supreme Court declared it a "meaningless symbol." The Wisconsin Supreme Court denounced it as "that befuddling, nameless thing, that Janus-faced verbal monstrosity." More recently, the Supreme Court of Kentucky called it a "much-condemned conjunctive-disjunctive crutch of sloppy thinkers."

If a sign says "No food or drink allowed," nobody would argue that it's OK to have both. (*Or* includes *and*.) And if a sign says "No admission for lawyers and law students," would you argue that either could go in alone? You'd be thrown out of court.

The real problem with *and/or* is that it plays into the hands of a bad-faith reader. Which one is favorable? *And* or *or*? The bad-faith reader can pick whatever reading seems favorable.

I've done lots of drafting since 1987, the year when I learned how unnecessary *and/or* really is. I've drafted court rules, jury instructions, model contracts, car warranties and many other documents. Never once have I needed *and/or*. You won't either. Kill it.

herein Old-style drafters say they stick to their ways for reasons of precision. They like the *here* and *there* words—apparently unaware of the ambiguities they're creating. The problem with *herein* is that courts can't agree on what it means. In this agreement? In this section? In this subsection? In this paragraph? In this subparagraph? Courts have reached all those conclusions and more. Use ordinary English words: *in this agreement* may be two extra words, but it's more precise.

deem The Seattle Seahawks are deemed to be the XLVIII Super Bowl champions. That's silly. They are the champs. The word deem should create a legal fiction, not state the truth. For example, if you said: *For*

purposes of this agreement, the Denver Broncos are deemed to be the XLVIII Super Bowl champions, that would make sense. They aren't really, but we're treating them that way. You'll almost never need to create a legal fiction. So banish *deem*.

know all men by these presents It's asinine, sexist deadwood. It's a legalistic way of saying "Heads up!" Just cut it.

provided that Experts in drafting have long agreed that this phrase is the bane of legal drafting. It has three serious problems: (1) its meaning is unclear—it can mean *if, except* or *also*; (2) its reach is uncertain—that is, it may modify the preceding 12 words or the preceding 200; and (3) it causes sentences to sprawl. A variant form is the phrase *provided, however, that*. If you see it, try inserting a period and begin a new sentence with a capitalized *But*. That's how the drafters of the U.S. Constitution did it—eight times—and they were grammatically unimpeachable on that score.

pursuant to This is pure legalese. It makes beginners feel as if they belong to a club. That's about it. The rule-making body for federal courts has been stamping it out for more than a decade. Instead of saying that something is required *pursuant* to the contract, say it's required *under* the contract. Or say that the contract requires whatever it is.

said As the past tense of *say*, this word is fine. As a fancy-pants substitute for *the* (such as *said agreement*), it isn't fine at all. It's foolish. It doesn't add one iota of precision. It makes you sound like a parody of law-talk.

same Many lawyers use *same* as a pronoun because they think they're being precise: *I've received your notice and acknowledge same*. In that sentence, is *same* really more precise than *it*? No.

In fact, *same* is the source of an ambiguity in the U.S. Constitution so severe that a constitutional amendment had to cure it. In April 1841, President William Henry Harrison died after little more than a month in office. Vice President John Tyler then became our 10th president. But did he really? Article III of the Constitution reads: *In case of the removal of the president from office—or of his death, resignation, or inability to discharge the powers and duties of the said office—the same shall devolve on the vice president.*

So what devolved? The office? The powers and duties of the office? Contemporaries couldn't agree, and neither can modern historians.

The passage of the 25th Amendment in 1967 finally resolved the ambiguity. Now if the president dies or resigns, the vice president becomes president. If the president is merely unable to serve but remains alive, the vice president becomes acting president. So a constitutional amendment had to cure one sloppy word choice: *same* for *it*.

shall Judge Frank Easterbrook, one of the most celebrated jurists in the country, once wrote in an opinion: "*Shall* is a notoriously slippery word that careful drafters avoid." He's exactly right. Courts have held that *shall* can mean *has a duty to, should, is, will*, and even *may*. The word is like a chameleon: It changes its hue sentence to sentence. Abjure it. Forswear it. You shan't regret it.

such What does *such* mean? To the educated nonlawyer, it means *of that kind*. To the lawyer it means *the very one just mentioned*. I might tell you about a certain piece of property: 100 Main St. Then I tell you my client bought such property last week. (You think my client is well-heeled.) Then I say that my client is constantly buying such property. (You now think my client is a fool to pay money again and again for the same piece of property.) Like so much other legalese, *such* is inherently ambiguous. Use it only as educated nonlawyers do. It's only the lawyers' use that causes trouble.

whereas This archetypal legalism used to be every lawyer's idea of how to begin a contract. No longer. One easy way to avoid it—and to avoid the never-ending sentence it spawns—is to use the subtitle "Background" or "Recitals," followed by short declarative sentences explaining what's about to be done and why.

witnesseth It's usually in all-caps text and spaced out across the line. Modern readers—even lawyers—take *witnesseth* to be a sort of command. They think it's the imperative mood of the verb. But no: It's indicative. It's a variant form in Elizabethan usage. Elizabethan—as in Shakespeare's day. Lawyers are slow to update their forms.

In the old days the opener read: *This agreement witnesseth that* ... . Drafters almost never use it correctly these days. They write: *This is an agreement between [one part and another]. Witnesseth* ... . That's risible. Just cut the *witnesseth*. Doing so will contribute to your mental health.

This article originally appeared in the April 2014 issue of the ABA Journal with this headline: "Learn Them and Ax Them: Here are a few suggestions to build your own 'Index Expurgatorius'."

Bryan A. Garner, the president of LawProse Inc., is the author of many best-selling books, including Making Your Case: The Art of Persuading Judges (with Justice Antonin Scalia) and Garner's Modern American Usage. Since 1994, he has been editor-in-chief of all editions of Black's Law Dictionary. A version of this column previously appeared in the ABA's Student Lawyer magazine in September 2006.

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