Albany County Bar Association
Newsletter
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JUDGES ARE FROM MARS, EVERYONE ELSE IS FROM VENUS: WHEN JUDGES TALK, WHY NO ONE LISTENS

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"As formerly we suffered from crimes, so now we suffer from laws."
Tacitus (56-120 A.D.)

I interrupted a court proceeding a few weeks ago when the father's attorney remarked that the mother was *pro se.* I asked the mother if she knew what that term meant. She said that she didn't and the lawyer quickly explained that the mother was representing herself. However, I wondered what her first reaction was. Did she think that she was being accused of having a communicable disease? Was her integrity being impugned?

For the last several months, I have been trying to get lawyers in my court to refer to people as "parents" and not "parties." I have discovered that lawyers are imprinted in law school to call parents "parties." However, to the unaccustomed ear of a nervous, scared, angry parent sitting in Family Court, how does it register when he or she is called a "party"? The point here is that judges, lawyers—indeed the entire court system—talks like this to our customers and we do it hundreds of times each day.

So, what's the problem? First, we exclude people by the use of legalese. Second, people do not trust a process that they do not understand. Third, talking to parents in ways they do not understand is disrespectful. In all our courts we truly have a failure to communicate but Family Court (primarily because we have the most face-to-face contact with the litigants) is the worst offender.

Below is a list of words that I collected from various papers submitted or used by attorneys in my court over a recent three week period. The list grows by the day. Most of the parents who come to my court do not know the meaning of these words and certainly not in the way that they are used. We toss around these terms so casually that we are oblivious to the fact that most parents have no idea what we are talking about. By the way, what exactly does “having had herein” mean? If people “mutually agree” is that a higher level of agreement than if they just agree? Does the phrase “such other and further” mean something other than “additional”?

Acknowledgment
Adjudication
Admission
Admonition
Affinity
Agnst
Appearance
Apprised
Approach the Bench
Articulate
Ascertain
At first blush
Augment
Bifurcated
Case At Bar
Catch 22
Caveat
Collateral Estoppel
Commitment
Condition Precedent
Consanguinity
Continuance
Continuance
Corollary
Couched
Decretal
Deems
Deminimus
Disposition
Dispositional
Equitable estoppel
Exculpate
Execute
Expunge
Extant
Filiation
Full satisfaction
Good Cause
Having Had Herein
In full satisfaction
In lieu of
In Camera
Inchoate
Incorporated
Inculpate
Indenture
Infant Issue
Instant Case
Instrument
Inter Alia
Juncture
Just cause
These Presents
Laches
Material
Mens Rea
Merged
Moot
Motion Pendente Lite
Moved
Nunc Pro Tunc
On the lam
Order of Filiation
Parties
Per se
Pleading
Preponderance
Presumption
Prima Facie
Pro Bono
Pro Se
Pro Per
Process
Proffer
Proximate Cause
Pursuant To
Putative
Quantum of Proof
Reform
Relief
Remanded
Res Ipsa Loquitor

Rigors
Salient
Sequestered
Sequestration
Service
Sole Custody
Standing
Status Quo
Stipulation
Sua sponte
Subject Child
Subsequent
Sui Generis
Supplant
Surrender
Survive
Tolled
To Wit
Vacate
Venue
Verbatim
Verification
Vis-a-vis
Whereas
Without Prejudice
Witnesseth

Did I mention abbreviations? When we aren't confusing people with arcane legalese, we talk in abbreviations—just to make sure that the parents are thoroughly confused. Here is a sample: T.O.P.; UCCJEA; F.O.P.; UIFSA; S.C.U.; ISC; VAWA; ICWA; V.O.P.; T.O.C.; C.P.S.; F.O.C.; CASA; M.P.R.; A.S.F.A.; F.O.S.; P.K.P.A.; D.C.Y.F.; I.C.P.C.

It gets worse. Take for example, New York State's "Notice of Rights" that is given by the police at a crime scene to victims of domestic violence. If you use the analysis function of your word processing program you will discover this: The Notice contains 418 words in one paragraph. The sentences average 35 words. On the Flesch-Kincaid readability scale, it rates at a college degree understandability level. It has a sentence complexity of 94 out of 100. By contrast, an Ernest Hemingway short story comes in at a 4th grade level and a sentence complexity of 14 out of 100. How anyone would expect someone who was just battered by a spouse to comprehend this Notice is anyone's guess—except the New York State Legislature, which mandated it by law. However, we're just getting warmed up in the obfuscation department.

The admonitions that are read to a mother or father who is charged in a New York Family Court with child abuse or neglect set the standard for unintelligibility. But first let me set the scene. The parents have been summoned to Family Court. They may have graduated from high school but probably not. If they are lucky, they have received the petition in advance. If they are really lucky, they may even have had the chance to speak with their public defender for two minutes before they go before a judge who is about to tell them that their parental rights could be terminated and their children put up for adoption.

These admonitions, prescribed by the New York State Legislature, rate at a college degree level for comprehensibility. They have a sentence complexity of 81 out of 100. The sentences average 60 words (16 is the recommended number of words per sentence for understandability). After I read this warning to the parents (and just as my clerk hands the mother a box of tissues so she can dry her tears), I ask the parents if they understand what I just said. They always say that they do. Although I know they have no idea of what I just said, we all pretend that they do.

There is actually a worse example than this. When parents execute a judicial surrender, voluntarily terminating their parental rights, they sign a document

that would be incomprehensible to Oliver Wendell Holmes, Benjamin Cardozo, and Antonin Scalia sitting as a three-judge panel. This "Judicial Surrender Instrument" has a college degree level for comprehensibility and a sentence complexity of 96 out of 100.

So, why do we keep up the pretense that we are communicating with people when we know that they do not understand half of what we are saying? Part of it is how the Legislature talks to the Courts. For example, New York Family Court Act §440—just the first third of that section—contains one paragraph of 716 words with 11 sentences averaging 65 words per sentence. It is virtually incomprehensible without five readings under intense concentration. Even the section designations are little better than hieroglyphs. Here is one typical example: "FCA § 413(1)(b)(5)(iii)(F)." FCA § 413, which involves child support, covers nine pages and has more than 4,000 words in 87 sub-sections. In 1962, when the New York Family Court Act was first passed, it contained about 55,000 words. It now contains more than 200,000 words.

Part of our pretense is the result of inertia. We have always spoken the language of the abstruse, the obtuse, and the obscure and we are resistive to change. Here is what English Chief Justice Fortescue said about the language of the law in 1458: "Sir, the law is as I say it is, and so it has been laid down ever since the law began; and we have several set forms which are held as law, and so held and used for good reason, **though we cannot at present remember that reason."**

Part of our pretense is due to obliviousness. We get so used to the way we talk that we don't hear ourselves anymore—just as no one thinks that they have an accent.

Part of our pretense is laziness. It takes a lot of work to write clearly and succinctly. Marcel Proust once apologized to a friend because the letter he sent was so long. Had he more time, he said, it would have been shorter. A good rule of thumb to increase comprehensibility of any writing is to count the number of periods—and then double them.

The worst part of how we as judges (and collectively as a court) talk to our customers is the lack of caring and sensitivity we show to the people whom we are supposed to serve. But they aren't like us, are they? We have more money, more education, more things. We live uptown and they live downtown. We have no idea what it is like to buy groceries with food stamps or negotiate the business of our daily lives using public transportation. A 12-year-old child summed all this up when she told the great observer of schools in America, Jonathan Kozol, this: "You have and we don't have." They are the other America that we hear so much about but care so little for. And we talk in front of them like they were not even there—like cellophane people.

What is most tragic about the way Family Court communicates to parents (and children) is that it doesn't have to be this way. This is one of those aspects of a judge's job where, with a bit of determination, big changes can be made. We don't need grants from OJJDP or the Annie E. Casey Foundation. We don't need new legislation or court rules. We don't need new staff, new programs, or technical assistance. Just a little thought about the way we do our jobs, a new attitude and some persistence is all that it

takes.[1]

1. In case you were wondering. This article contains just under 1400 words. The sentences average 16 words. It rates at a 9th grade comprehension level with a sentence complexity of 25 out of 100.