Judge Bruce Selya, Resipiscent Recidivist

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This column is intended as a thoroughly lighthearted and recreational exploration of the backwaters and byways of legal language. Its subject will be the high points and low points, the sudden blossomings and slow extinctions, of the English language as used by lawyers, whether in briefs or oral arguments, judicial opinions or statutory and regulatory promulgations.

The most obvious place to start is with judicial opinions, where such luminaries as Kent, Shaw, Holmes, Jackson, Hand, Cardozo and the late Justice Brennan forged their unique styles. Sadly, though, the ever-expanding shelfloads of the Federal Reporter supply little nourishment for the linguistic gourmet. As Judge Posner and others have lamented, most of the output of the appellate bench nowadays is uninspiring stuff, needlessly lengthy and overladen with citations and footnotes. It tends to be the work of clerks rather than the judges themselves, which means that few judges can be said to have an ascertainable style.

A refreshing exception to this trend is First Circuit Judge Bruce Selya. Noted (and occasionally criticized) for his flights of verbal fancy and literary allusions, Selya has almost singlehandedly kept certain deliciously arcane words in judicial currency. Indeed, it is difficult to come up with a juicily recondite word that Selya hasn't trotted out at least once – and sometimes he is the only one to have used it. For instance, a computer search of the entire database of federal opinions reveals only one appearance of the adjective "Laodicean" (roughly, "lukewarm"). Selya resorted to it in a 1989 opinion: "Hence, even if defendant proved that its buying agent was Laodicean when it came to the principal's bottom line … no actionable breach of fiduciary duty would inhere in the circumstances at

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bar . . . ."

Similarly, by my count Selya is responsible for one of only three appearances, in the annals of the federal judiciary, of the word "flummox" (and its only use as a noun). He has also accounted for 30 of 56 jeremiads, 6 of 9 myrmidons, 26 of 69 quondams, and 2 of 5 pelfs (pelves?).

If Selya has a signature word, it is "eschatocol." This fifty-cent wonder is not found in the most comprehensive of American dictionaries; one must repair to the OED to discover that it means "The concluding section of a charter, containing the attestation, date, etc.; a concluding clause or formula." "Eschatocol" has been used twenty-two times in the published oeuvre of the federal bench – all twenty-two courtesy of Judge Selya. In fact, in thirteen of those instances, the word is used in the same stock phrase: "We add an eschatocol of sorts." (Thank goodness for the saving clause "of sorts," lest we readers mistake what follows for a traditional eschatocol.)

The Selya approach can come off as presumptuous. An example is a 1983 opinion in which Selya (then a district court judge in Rhode Island) emphasized the "grave and important constitutional issues" at stake, then promptly launched into a "Dramatis Personae" that purported to encapsulate in a sentence each of 37 key characters in the lawsuit. ("Lester Young: Brutally frank and plainspoken, his abecedarian educational philosophy spurred plaintiff to run for political office.") Judges can engender resentment when they mine the real disputes of real people for their own novelistic experiments.

But to the weary hunter of exotic words, Selya's opinions are like a tropical aviary where a rare quetzal or ptarmigan seems to lurk around every corner. Of course, some of his more obscurantist creations feel like the result of a rather willful deployment of the thesaurus (to my mind, the "Laodicean" example quoted above bears the imprint of Monsieur Roget). But the better ones have a kind of sesquipedalian fluidity.

In a 1996 Texas Law review article, Selya bemoans the judicial trend toward "overwriting and overciting." He immediately admits to being a "recidivist" in this regard, but adds: "I am at least a resipiscent recidivist." Indeed. Well, resipiscent or not, Judge Selya is an entertaining repeat offender.

As an eschatocol of sorts, the reader is invited to guess which of the following four sentences is NOT the work of *Selya, J.*:

1 Finding the penalty hard to swallow, the Commonwealth serves up a gallimaufry of issues for appellate mastication.

2 His appellate brief purported to raise momentous questions, but the very extravagance of the claims caused our level of dubiety to rise as inexorably as a moon-drawn tide.

3 Her original salmagundi of claims was gradually winnowed as time went by and rulings intervened.

4 Appellants' initial complaint seems to have rested on a congeries of legal grounds, ranging from the merely otiose to the frankly outlandish.

Please send your own favorite observations, foibles or quibbles anent legal language to "Terms of Art" via GreenBag@ibm.net. *The answer, incidentally, is number 4.*