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Book Excerpt

'Translating the Terrain' over Cultural Myths and Mistaken Assumptions

BY MARJORIE CORMAN AARON

"To know another's language and not his culture is a very good way to make a fluent fool of yourself."

—Winston Brembeck

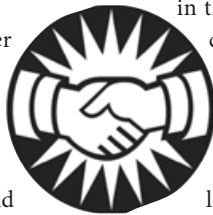
How is it that a lawyer may scrupulously avoid technical terms or stylized usage when describing legal concepts, and still leave his client wandering between entirely lost and somewhat uncertain as to the intended message?

Why might a lawyer's pretty-darned-clear explanation of a twist in litigation or legal impediment to a transaction still yield client puzzlement or incredulity?

Stepping back from words and phrases, lawyers must recognize that, outside of the legal practice, people lack shared knowledge about its workings. Thus, the "lawyer-translator" must supply basic, missing knowledge of legal process, practice, and culture for her words to make sense. Without some of that knowledge, the lawyer's words lack meaning.

In "Meaning-Based Translation: A Guide to Cross-Language Equivalence," translation theorist Prof. Mildred Larson writes that translation "consists of studying the lexicon, grammatical structure, communication

situation and cultural context of the source language text, analyzing it in order to determine its meaning, and then reconstructing this same meaning using the lexicon and grammatical structure which are appropriate in the RECEPTOR LANGUAGE and its cultural context."



To explain this academic jargon (irony noted): when a translator listens to French and translates into English, French is the source language, and English is the receptor language.

The most adept translators are equally comfortable in the "source" language as in the "receptor" language. Some theorists argue that the best translators are those whose mother tongue was the receptor language. If so, assuming lawyer and client are both fluent in English (or any other shared language), translating from "legalese" as source language to the lay person's "receptor" language would seem simple enough. After all, no lawyer's native language was legalese: we picked that up in law school.

Still, at least three types of problems arise for the lawyer-as-translator:

- (1) Words or phrases with "no meaning or uncertain meaning" to his client, absent definition.
- (2) Words or phrases with "non-synonymous" meanings—the client understands them to mean something different than their meaning in a legal context.
- (3) Words or phrases containing embedded, unrecognized concepts.

Most lawyers acknowledge the need to avoid legalese with clients or, at least, to define unavoidable legal language or terms of art. Unfortunately, the law school experience that so famously transforms thinking also seems to erase memories of what nonlawyers don't know and won't understand: "We will face a summary judgment motion. ... We'll have to

prove scienter. ... The motion in limine is a threat. ... Dictum isn't dispositive but it is worrisome. ... Discovery is burdensome. ... Jury nullification isn't likely."

It is quite astonishing to hear second-year law students' efforts to describe legal concepts to a client. Phrases such as "material facts" and "dispositive motions" fill the air. Just one year after matriculation, they have lost awareness of the gaps in knowledge now separating them from lay clients. Paradoxically then, law school may graduate lawyers newly competent in law and newly incompetent at insuring their clients are fully informed.

Perhaps because legalese and "native" non-lawyer speech both occur within English, boundaries between the two are more difficult to remember and recognize. If I am translating between French and English, or English and German, I just don't confuse what are English words and what are German or French words. (Even though I am not fluent in either German or French, and may fail to retrieve the necessary words for translation, I do remember which is which.)

In contrast, when lawyers or any professionals "translate" into lay language, they are apt to forget which words, phrases, and concepts were learned within their profession. So, computer programmers speak of java code, and busses, and RAM; doctors speak of histamine reactions, pathologies, and REM; and lawyers speak of motion practice, SEC 10b-5, standing, and jurisdiction.

They all seem perplexed by the others' confusion.

To translate effectively, the lawyer must remember or "refresh his recollection" of pre-law school language and thought. Be mindful of words you wouldn't have known. If you must use them—the client must be told "a summary judgment motion has been filed"—make sure you define and explain carefully.

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Book Excerpt

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Consider this “parable” of two cooking translation challenges involving an accomplished caterer, with a well-equipped kitchen and capable staff. He must prepare only authentic French menu items for two different dinner parties. (He cannot serve the same French meal twice.) Internet research yielded a plethora of recipes for signature dishes of famous French chefs. The recipes are cryptic—listing ingredients and sparse instructions—and entirely in French.

For the first dinner, the caterer forwards the recipes to a French professor friend, who translates them into English and emails them back, with the message “Good luck.” Does the entertainer caterer need luck? Not really. He will select wisely from among the many recipes, capably oversee cooking, baking, and timing challenges, and pull off a wonderful French meal. He knows the process.

For the second dinner, the caterer asks his French-speaking niece, who knows nothing about cooking, to first select a recipe for each course and then translate them into English. How can the niece make wise selections? She can’t tell which finished flavors work well together. She doesn’t know the process of cooking or baking or time requirements for different preparations. Language alone is not enough. The caterer will need a lot of luck.

Moving from French cooking to the moral for lawyers and clients: To be informed enough to make wise choices, a client may need to understand the workings of law, the legal system, and legal process. Yet many clients are unaware of basic legal impediments, such as motions to dismiss and for summary judgment, statutes of limitation, privileges, or evidentiary privileges and preclusions. They have little experience with the uncertainty of procedural twists or unanticipated legal tactics. They are shocked by the power of civil procedure’s discovery phase to intrude on their lives and businesses, gaining access to files, financial records, medical records, and ancient email. They are dismayed at their inability to control the cost of reciprocal discovery obligations, the cost of counsel’s time to respond to motions or prepare for depositions, or the cost of retaining an expert. They may be surprised to learn

that one’s own damaging information must be sought and then provided to the other side.

They don’t know how the system works.

MISSING LINKS AND LEGAL CONCEPTS

In less time than it takes to type the words, here is an entirely incomplete list of things lawyers know about litigation that most clients do not:

- To file suit, you need to establish jurisdiction.
- Jurisdiction is. ...

Explain Yourself

The discussion: Communicating with clients.

The problem: Legalese. Jargon. And, yes, potentially, your law school education.

The assignment: Unraveling the uncertainty conveyed by some of the precise language you use as a matter of habit, practice and convenience.

- Requirements of notice pleading are different than pleading with particularity.
- If you don’t answer a complaint filed against you, a [default] judgment eventually will be entered.
- Cases can be dismissed by judges, without any jury involvement.
- A “motion to the court” can be made by either side. It is initiated by filing a written document and is a vehicle for parties—through lawyers—to ask the judge to take certain actions. When one side files a motion, the other side always has an opportunity to respond in opposition.
- Judges hear lawyers’ arguments but clients cannot testify in most hearings on motions.
- A preliminary injunction can tie up your business for quite a while even though you haven’t had a trial yet.
- Pre-trial discovery is expensive, long, and unavoidable.

- In discovery, the other side has a right to obtain your documents.
- In our system, the judges determine the law, and juries decide facts when the parties disagree about the facts. Unless you disagree about facts that are necessary to make a legal determination, there is no need for a jury.
- Law derives not only from what is “on the books” as passed by a legislature, it also is found in judicial decisions case law.
- When deciding the law in a case, judges are bound to follow appropriate precedent—to be consistent with what other courts have done in similar circumstances. Doctrine is a definitive rule derived from consistent reasoning and often named and articulated in judicial opinions.
- In most cases, in the United States, the winner bears his own legal costs.
- Not every case can eventually go to the Supreme Court.
- Scienter means. ... Fraud means. ... Both can be challenging to prove—and must be proven.
- Anticipated lost profits from a deal may not be the measure of damages.
- Conflicts of law is a course unto itself.
- The same case can involve state and federal law; their application is not always obvious.
- An oral contract can be enforceable (absent Statute of Frauds protection).
- The Statute of Frauds makes it impossible to enforce many oral contracts.
- The judge can dismiss a case (on a j.n.o.v.) even if the jury found liability.
- Judges have discretionary power to reduce a jury’s damages award.
- Litigation is slow. Depending upon the jurisdiction, the initial pleading and motion stage can take six months, with completion of discovery and dispositive or pre-trial motions another year to 18 months (or more or less), and a first trial date a year (or more or less) after that. Courts often postpone calendared cases. When you sue a company, no matter how much you “win,” you can only recover up to the value of its assets—after mortgages, etc.—even if the owner is rich. (Once explained, “piercing the corporate veil” is not automatic.)
- Appellate courts uphold lower courts’ rulings in an overwhelming majority of cases.

- After winning a verdict, collecting the award takes time, and it may require additional expense to acquire the assets.

Assume a lawyer trying to explain summary judgment risk to a client who knows none of the bullet point information listed above. He begins with the words: “The defense will file a motion for summary judgment with the court, arguing that there are no disputed issues of material fact and that we cannot prevail at trial.” What meaning will that explanation have, and what questions will it raise?

First, the client doesn’t know what a motion is, and she doesn’t know what a “material fact” is. Assume she asks for definitions, and the lawyer translates those words within the sentence by saying: “The defense will file a document, a piece of paper with the court, called a motion for summary judgment, arguing that there are no disputed issues on any facts that are important, and saying that we cannot prevail—win—at trial, and so the court should prevent the case from going forward.”

Now, the client may understand that the defense will do something involving “arguing” to “the court” and that the other side wants to stop him from winning, of course. But when you take this sentence and overlay it on her incomplete knowledge, she still would not understand that:

- “To the court” means to a judge and not to a jury;
- You will of course be arguing against it;
- “Arguing” will also likely involve writing a lengthy document, and that will be expensive (unless this is a contingency fee case);
- She will not have the chance to “get on a witness stand and tell her story” unless her case “survives” the motion;
- If she loses on that motion there will be no trial and she will collect nothing (on the plaintiff’s side), or she will be obligated to pay (on the defense side), and
- Even though her physical or financial harms are undeniably real, a judge could indeed conclude her case is not winnable at trial.

Even a client who understands the words may not glean from them any sense of the steps that will have to be taken, the reasons why, or the potential impact. For the words to have

meaning, the lawyer must supply information about the underlying layer of process, rules, legal reasoning, and convention, piece by piece.

NO SCRIPTED ANSWERS

We accept that the lawyer’s task is to translate language describing legal circumstances sufficiently to achieve the elusive “fully informed client.” But must all explanations of legal process include every possible twist, turn, and consequence, no matter how remote? How much information is too much?

Completely eliminating the knowledge imbalance could take quite a while. Law school was three long years. Must a lawyer anticipate, recite, and dispel every myth? Is there a prescribed way for a lawyer to make these judgments?

But how could there be? Each client comes to the table with different capacities, engagement, and levels of curiosity.

Find the Foundation and Build There: It would be foolish for an architect to design living space without knowing whether the project is a renovation or new construction, or without having seen the foundation or the site. So, before explaining legal circumstances to a client, a lawyer is wise to learn something about that client’s familiarity with law and the legal process terrain.

As early as the initial client meeting or interview, ask your client about any past experience with lawyers and the legal system. Both what that experience was and the way she speaks about it will provide insight into her facility with legal concepts and processes. If you didn’t ask in earlier meetings, consider raising the question in a general, friendly way before focusing on explanation of legal circumstances in the client counseling session.

A word of caution: do not assume that college education, age, or general business experience give rise to a sophisticated client. Highly accomplished and intelligent people sometimes know astonishingly little about the legal system—astonishing to lawyers, at least.

Too often, when meeting with a professional client dressed in a suit and possessing an impressive title or resume, the lawyer assumes too much knowledge. It’s natural. After all, the client looks and speaks much like the lawyer’s colleagues: They appear to be from the same “speech community,” which can be defined as

noting that common language is not necessarily sufficient for clear communications in a social group with shared understanding of grammar and rules for its use.

The opposite is also true: clients who do not appear highly educated or worldly may be quite aware of the way the legal system works. Some cab drivers study philosophy; a waitress may be an astronomy geek. Your grocery produce manager client may have helped his sister study for the bar. He may be an ardent environmentalist who follows Environmental Defense Fund litigation. You just never know.

Credit and Climb onto the Client’s Understanding: Knowing a client’s general experience with the legal terrain helps a lawyer make initial judgments about when translation is necessary, and what types of words to choose. To ensure a fully informed client on legal circumstances and choices faced in *this* matter, there’s no harm in the lawyer asking what the client has already gleaned. Imagine that depositions and other discovery are done. The lawyer sets up a meeting to discuss the status of the litigation and possible settlement.

The lawyer might ask: “Could you tell me what you understand about where we are in the process? I don’t want to take your time explaining what you already know.”

One client might respond:

I think discovery is done because there’s no one else to depose and everyone has everyone else’s documents. Based upon the last time, I assume we’ll file something to try to get rid of this case. If that doesn’t work, trial is still a long time away. I also know there’s a tactical question about whether we should look at settling now, or after we file that thing. And from the company’s perspective, settling or not may have other repercussions.

A different client might say:

I hope we’re done with talking in conference rooms with stenographers, because I’m hoping you’re going to tell me the trial will be soon and we have to get ready.

Whichever client is yours that day, you will have gained valuable clues on where and how to communicate effectively.

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Book Excerpt

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THE 'UNDER-ARMOR OF FALSE BELIEF'

Clients who inhabit our civic culture of high school government courses, television legal dramas, movies, and literary epics may share myths and false beliefs about the legal system. This complicates lawyers' communication with clients.

The lawyer must anticipate and address those culturally-created myths and false beliefs. Otherwise, whenever the lawyer's explanation and analysis contradict them, the client may have great difficulty understanding, accepting, or integrating what the lawyer has said. Here are some common myths, and often false beliefs:

- The legal system is always fair. Results are just.
- A trial reveals the REAL truth.
- In this country, we all have a right to our day in court and to be heard by a jury.
- Juries always vote for the honorable party. A jury decision is always fair and right.
- Because I have been sued, my name and honor have been damaged. My record is tarnished. The world will know. When I win, my name and honor will be restored.
- If I sue and win at trial, the other side's name and reputation will be ruined. The world will know. I have the power to injure!
- People can win millions of dollars in punitive damages whenever the other side deserves to be punished.
- No jury would award punitive damages against my company if we didn't intentionally do anything wrong.
- I can always appeal—all the way to the Supreme Court.

Unmindful of the client's "under-armor of false belief," the frustrated lawyer moans: "I've explained the realities to my client until I'm blue in the face. He just doesn't get the picture, or he doesn't want to get it. It's as if he doesn't care, or he's just oblivious!"

The lawyer has indeed painstakingly, clearly, and carefully explained his analysis of the legal issues and the evidence. The cli-

ent seems finally to understand the analysis, but it is without impact. The armor of myth and belief was neither addressed nor penetrated. "It's as if he's intent on walking off a cliff," laments the lawyer or mediator, shaking his head.

In fact, myths often shape the way people understand the world and their own story within it. Heroic myths are particularly strong and cross-cultural, including the notion of hero as warrior. See Joseph Campbell, "The Hero With a Thousand Faces," 334-341 (2nd ed.) (Princeton, N.J.: Princeton University Press, 1968).

BELIEFS PLAY OUT IN PRACTICE

Imagine a 50-year-old business owner whose company is accused of gender discrimination in its initial demotion and then termination of a mid-level female manager named Sally.

The owner was involved in the termination decision, based on a regional vice president's recommendation. The VP was a loyal member of the senior management team and the owner's long-time golf buddy.

The business owner's lawyer has explained that the patterns of hiring, firing, and promoting women in the region over the past 10 years, revealed in discovery, may appear not to favor women, and that his VP acknowledged having made remarks such as "These gals just don't put out hard work like the guys do. They play too much with their kids."

And: "Sally doesn't fit in with the team; she bitches and moans about nitpicky details, and she reminds me of my mother."

The regional vice president has steadfastly denied any biases and maintains that Sally really was a problem—all of the other (mostly male) department members will testify to that.

The business owner strongly believes that his VP is a decent, honorable man who had only the business's best interests in mind. When his lawyer explains that on this evidence, plus the testimony of the plaintiff and her witnesses, a jury might well find gender discrimination, the business owner may hear the words but flatly reject the idea of risk that any jury will doubt his VP's credibility.

He has an abiding faith that the jury will find the real truth and vote for the good guys

and he knows in his heart of hearts that he and his VP are the good guys. The jury will (magically?) be able to separate fact from fiction and therefore will see that Sally really was incompetent and uncooperative and deserved to be terminated.

The idea of punitive damages will not cause concern for a nanosecond because, even if the statistics are awkward, the owner's testimony will explain them. He would never have been intentionally unfair to any employee.

Myth or fantasy, plaintiffs who feel wronged by more powerful actors believe their lawsuit has the power to ruin the other side, or power to make them take notice and regret what they have done. Theoretically, if a large dollar verdict would bankrupt the other side, it might be true.

But in a single plaintiff and corporate defendant context, the plaintiff sometimes envisions public damage—vindication of his public "record" and ruinous public image damage to the other.

Indeed, that vision—mostly mirage—may be an important motivation for taking legal action. It is an attempt to equalize power imbalance, to become a threat, to let the world know of the wrongs committed. Some lawyers are faithful to these myths and see themselves as crusading warriors, and thus help to build the illusion that a public trial will topple the powerful and achieve heroic vindication. Yet this is the stuff of grand movies, and rarely of reality.

Grounded in experience and evidence, most lawyers become astonished or frustrated when their clients turn deaf ears to concerns about practical financial interests. As a mediator, I often witness a lawyer's incredulity and concern at her client's "irrational" rejection of a significant settlement in favor of waiting for trial and risking a low or zero-dollar verdict. That lawyer may have learned that the client deeply desires to resurrect his good name and ruin the other's.

All too often, however, the lawyer fails to recognize the strength of the client's underlying belief that his legal action has the power to do so. Unless that belief is addressed and discussed, the client will cling to negotiating positions that cause his lawyer to shake her head in disbelief. ■

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