



More Effective Writing Makes More Effective Lawyers

June 11-12, 2020

9:00 a.m. – 12:15 p.m.

CT Bar Association

Webinar

CT Bar Institute, Inc.

CT: 6.0 CLE Credits (General)

NY: 7.0 CLE Credits (Skills)

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Lawyers' Principles of Professionalism

As a lawyer I must strive to make our system of justice work fairly and efficiently. In order to carry out that responsibility, not only will I comply with the letter and spirit of the disciplinary standards applicable to all lawyers, but I will also conduct myself in accordance with the following Principles of Professionalism when dealing with my client, opposing parties, their counsel, the courts and the general public.

Civility and courtesy are the hallmarks of professionalism and should not be equated with weakness;

I will endeavor to be courteous and civil, both in oral and in written communications;

I will not knowingly make statements of fact or of law that are untrue;

I will agree to reasonable requests for extensions of time or for waiver of procedural formalities when the legitimate interests of my client will not be adversely affected;

I will refrain from causing unreasonable delays;

I will endeavor to consult with opposing counsel before scheduling depositions and meetings and before rescheduling hearings, and I will cooperate with opposing counsel when scheduling changes are requested;

When scheduled hearings or depositions have to be canceled, I will notify opposing counsel, and if appropriate, the court (or other tribunal) as early as possible;

Before dates for hearings or trials are set, or if that is not feasible, immediately after such dates have been set, I will attempt to verify the availability of key participants and witnesses so that I can promptly notify the court (or other tribunal) and opposing counsel of any likely problem in that regard;

I will refrain from utilizing litigation or any other course of conduct to harass the opposing party;

I will refrain from engaging in excessive and abusive discovery, and I will comply with all reasonable discovery requests;

In depositions and other proceedings, and in negotiations, I will conduct myself with dignity, avoid making groundless objections and refrain from engaging in acts of rudeness or disrespect;

I will not serve motions and pleadings on the other party or counsel at such time or in such manner as will unfairly limit the other party's opportunity to respond;

In business transactions I will not quarrel over matters of form or style, but will concentrate on matters of substance and content;

I will be a vigorous and zealous advocate on behalf of my client, while recognizing, as an officer of the court, that excessive zeal may be detrimental to my client's interests as well as to the proper functioning of our system of justice;

While I must consider my client's decision concerning the objectives of the representation, I nevertheless will counsel my client that a willingness to initiate or engage in settlement discussions is consistent with zealous and effective representation;

Where consistent with my client's interests, I will communicate with opposing counsel in an effort to avoid litigation and to resolve litigation that has actually commenced;

I will withdraw voluntarily claims or defense when it becomes apparent that they do not have merit or are superfluous;

I will not file frivolous motions;

I will make every effort to agree with other counsel, as early as possible, on a voluntary exchange of information and on a plan for discovery;

I will attempt to resolve, by agreement, my objections to matters contained in my opponent's pleadings and discovery requests;

In civil matters, I will stipulate to facts as to which there is no genuine dispute;

I will endeavor to be punctual in attending court hearings, conferences, meetings and depositions;

I will at all times be candid with the court and its personnel;

I will remember that, in addition to commitment to my client's cause, my responsibilities as a lawyer include a devotion to the public good;

I will endeavor to keep myself current in the areas in which I practice and when necessary, will associate with, or refer my client to, counsel knowledgeable in another field of practice;

I will be mindful of the fact that, as a member of a self-regulating profession, it is incumbent on me to report violations by fellow lawyers as required by the Rules of Professional Conduct;

I will be mindful of the need to protect the image of the legal profession in the eyes of the public and will be so guided when considering methods and content of advertising;

I will be mindful that the law is a learned profession and that among its desirable goals are devotion to public service, improvement of administration of justice, and the contribution of uncompensated time and civic influence on behalf of those persons who cannot afford adequate legal assistance;

I will endeavor to ensure that all persons, regardless of race, age, gender, disability, national origin, religion, sexual orientation, color, or creed receive fair and equal treatment under the law, and will always conduct myself in such a way as to promote equality and justice for all.

It is understood that nothing in these Principles shall be deemed to supersede, supplement or in any way amend the Rules of Professional Conduct, alter existing standards of conduct against which lawyer conduct might be judged or become a basis for the imposition of civil liability of any kind.

--Adopted by the Connecticut Bar Association House of Delegates on June 6, 1994

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Rick Horowitz Bio

Rick Horowitz is the founder and Wordsmith in Chief of **Prime Prose, LLC**, offering writing, editing, and messaging services to institutions and organizations across the country. A graduate of Brandeis University and N.Y.U. School of Law, Horowitz worked for a Washington law firm, specializing in communications law, and as a legislative assistant to a member of the congressional leadership. He went on to become a nationally syndicated columnist, winning two National Headliner Awards; and a commentator for Milwaukee Public Television, where he received eight Regional Emmy Award nominations and two actual statuettes. His latest project: trying to get lawyers to write more like...actual humans, at least some of the time.

Rick's full-day workshop, "**More Effective Writing Makes More Effective Lawyers,**" has been a popular monthly offering on the DC Bar's CLE calendar since 2017; he's also led workshops for other state and local bar associations coast to coast. Prior to that, he taught business writing at the University of Wisconsin – Milwaukee, and led dozens of workshops for journalism organizations and state and national press associations.

“More Effective Writing Makes More Effective Lawyers”

Rick Horowitz, Discussion Leader

Schedule for Connecticut Bar Association

June 11 & 12, 2020

June 11

9:00 a.m. – 10:30 a.m.: **Session A**

- When Lawyers Write: What Can Go Wrong?
- “We Have a Situation...”: The Writing You Do *Before* You Start Writing
- Demystifying the Process: Four Essential Questions, and Two Key Factors.

10:30 a.m. – 10:45 a.m.: **Break**

10:45 a.m. – 12:15 p.m.: **Session B**

- “What’s In? What’s Out?” Complete v. Concise
- A Few More Words About Getting Started: Different Strokes for Different Folks

June 12

9:00 a.m. – 10:30 a.m.: **Session C**

- “Where Do I Put It?” Help Them Early – and Often!
- “How Do I Say It?” Going for Clarity

10:30 a.m. – 10:45 a.m.: **Break**

10:45 a.m. – 12:15 p.m.: **Session D**

“How Do I Say It?” The (Occasional) Value of Vagueness

- “How Do I Say It?” Going for Brevity
- “How Does It Come Across?” Tone and Voice

More Effective Writing Makes More Effective Lawyers

**Useful Strategies,
Crucial Details,
and Lots of Practical Tips**

**Rick Horowitz
Prime Prose, LLC
Discussion Leader**

**Connecticut Bar Association
June 11 & 12, 2020**

“More Effective Writing Makes More Effective Lawyers”

Rick Horowitz, Discussion Leader

Today's Likely Agenda

- **When Lawyers Write: What Can Go Wrong?**
- **So Here's the Situation: The Writing You Do
*Before You Start Writing***
- **Demystifying the Process: Four Essential
Questions, and Two Key Factors**

- **"What's In? What's Out?" Complete v. Concise**
- **A Few More Words About Getting Started:
Different Strokes for Different Folks**

- **"Where Do I Put It?" Help Them Early – and
Often**
- **"How Do I Say It?" Going for Clarity**

- **"How Do I Say It?" The (Occasional) Value
of Vagueness**
- **"How Do I Say It?" Going for Brevity**
- **"How Does It Come Across?" Tone & Voice**

Session A

The Problem

- **When Lawyers Write: What Can Go Wrong?**
- **"So Here's the Situation..." The Writing You Do *Before* You Start Writing**
- **Demystifying the Process: Four Essential Questions, and Two Key Factors**

- *When Lawyers Write: What Can Go Wrong?*

One Person's List...

"We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is '(1) wordy, (2) unclear, (3) pompous, and (4) dull.'"

Source: Wydick, **Plain English for Lawyers**

Really?

Any person who, by means of any machine, instrument, or contrivance, or in any manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument of any internal telephonic communications systems, or who willfully and without consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any such wire, line or cable, or is being sent from or received at any place within this state, or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars (\$2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison.

California Penal Code § 631(a)

Cited by Wydick, **Plain English for Lawyers**

The Questions:

1. What's the most difficult part of the writing and editing process for you? (Note: "All of it" is not an acceptable answer – I need details!)

2. What part do you most enjoy?

3. How – if at all – have your writing and editing changed since you became an attorney?

4. What's the most valuable writing/editing tip you've either received from someone else or discovered for yourself?

- *"So Here's the Situation..."*

Think About It: What "Writing Situations" Have *You* Faced?

1.

2.

3.

Your Documents

Your Targets

Your Verbs

- *Demystifying the Process...*

Write It to Remember It! **"Four Essential Questions..."**

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Write It to Remember It!

"Identifying Your Goal"

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Adjusting to Your Audience

Consider in advance how you will explain legal concepts and terminology. Use plain words that accurately describe the concept without implying that you're talking down to the client. Compare two examples. The first flunks this standard:

1. A lawyer, speaking to a client who owns a gas station and who has just been served with a temporary restraining order:

A TRO can be granted while a motion for a preliminary injunction is pending for the purpose of preserving the status quo until the motion can be decided. You've been restrained from selling gasoline from the pumps alleged by the Department of Environmental Protection to be an environmental hazard, and violation of the order is punishable as a contempt. The order is effective until it's vacated, which probably won't be before the court decides the pending motion for a preliminary injunction, which has a return date of next Friday.

2. Another lawyer, conveying the same information to the same client:

A judge can order you not to do something for a short period, which is what has happened here through this document, which lawyers call a temporary restraining order or a TRO. This TRO orders you not to sell gas from the pumps that the Department of Environmental Protection complained to you about last week. If you sell gas from those pumps anyway, the judge can make you pay a fine or even lock you up in jail. The DEP has also asked for another kind of court order called a preliminary injunction, which would do the same thing but for a longer period of time. The judge hasn't given DEP a preliminary injunction, although she might do so later. The TRO—the order that was delivered to you yesterday—will last until the judge decides on Friday whether to issue the other order, the preliminary injunction.

Source: Neumann, *Transactional Lawyering Skills*

Write It to Remember It!

"Understanding Your Readers"

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Write It to Remember It!
"Meanwhile, Those Readers Are
Asking Themselves..."

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-
-

Which One of These Works?

We can violate our readers' organizational expectations on the small scale as well as the large—as the three examples below show. This usually happens because we fail to think about the perspective from which a passage should be written.

In the two versions of the passage below, taken from a letter to a client, the first adopts a legal perspective, the second the client's. The first may be appropriate for a judge, an administrative agency, or, on occasion, another lawyer. The second is usually best for the client itself.

Version 1

Both the Unruh Act and the Health & Safety Code contain antideficiency provisions. If either of these statutes applies, it will bar the Bank from obtaining a deficiency judgment, regardless of who purchases at the repossession sale. The Unruh Act applies to . . .

Version 2

**The Bank will be able to obtain a deficiency judgment against the obligor if the Bank has made a direct loan to the purchaser of the boat or mobile home. However, the Bank will be barred from obtaining a deficiency judgment, regardless of who purchases at the repossession sale, if the Bank has purchased a retail installment contract from a dealer. The relevant antideficiency provisions are contained in the Unruh Act
....**

Source: Armstrong & Terrell, **Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing**

Session B

- **"What's In? What's Out?" Complete v. Concise**
- **A Few More Words About Getting Started: Different Strokes for Different Folks...**

- *"What's In? What's Out?" Complete v. Concise*

The Eternal Struggle

The Most Difficult Part of the Writing/Editing Process Is...

- "Including the appropriate amount of detail for my analysis."
- "Being concise, while providing enough details."
- "Being concise but complete."
- "Trying to be concise while at the same time including all of the relevant facts/details/argument – especially when up against a word limit."
- "The most difficult part for me is streamlining my work. It's hard to give up details or elements of reasoning that add context or depth."
- "I often write draft briefs, complaints, etc. to be reviewed by senior attorneys. In drafting, I try to be over-inclusive. In that way, I allow the senior attorneys to simply delete/simplify rather than add. (I will often include comments indicating that certain arguments may not be necessary, etc.) While I think this makes the senior attorney's job easier, sometimes it seems to backfire, e.g., giving the appearance that I can't prioritize issues. I find this line hard to draw."
- "Knowing when to stop researching and start writing. Not getting pulled down research rabbit holes when I'm unhappy with my writing product."
- "I often buried myself with tons of information and did not know when to start writing; I did not feel confident enough to start writing."

“Nothing is less real than realism. Details are confusing. It is only by selection, by elimination, by emphasis that we get at the real meaning of things.”

Georgia O’Keeffe

Write It to Remember It!

"Situational Selection"

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- *A Few More Words About Getting Started:
Different Strokes for Different Folks*

Making It Better: The First Draft, and Beyond

***Technique 1.1:
Anticipate likely problems.***

Your effectiveness as an editor depends on your skill as a diagnostician. Like a doctor about to give a physical, you should approach a draft with an educated sense of the problems most common to drafts of legal writing—and, if you are editing your own writing, of the specific problems to which you are particularly prone. With this perspective, you should be able to predict many of the problems you will encounter, and therefore to spot them more quickly.

Among professional writers, most problems can be traced back to the inherent difficulties of writing about complex issues. In the first draft and perhaps the second, our job is to do justice to the content. Most of our energy is expended simply trying to get the material down in a roughly logical sequence; we do not have much left for working on clarity and persuasiveness. In later drafts, we should do justice to the reader, a job that requires the stylistic and organizational tactics described in the book's earlier chapters. Almost inevitably, for example, a draft will need major surgery to its introduction, to the introductions to its sections, and to the "mini-introductions" before new chunks of information within sections. Its structure will probably be too difficult to grasp. If it relies on much case law, you will probably have to tie each case more clearly to your analysis before discussing it. Transitions will be inadequate. And you will have written many clumsily constructed sentences because you were using them simply as rough-and-ready containers for their content.

Source: Armstrong & Terrell: **Thinking Like a Writer:
A Lawyer's Guide to Effective Writing and Editing**

The Outline (or at least *An* Outline...)

- I. Introduction
 - A. Overview of the issue you are examining
 - B. Overview of what your paper will cover, and how this will be accomplished
 - C. Thesis statement

 - II. The Issue
 - A. History behind the issue
 - B. Challenge posed by the issue
 - C. How the issue impacts society in general
 - D. Possible solutions to resolve the issue that occurred to you before conducting your research

 - III. Literature Review
 - A. Theoretical/Exploratory literature (journal articles, textbooks)
 - 1. Overview/summary of each theory and/or explanation
 - 2. Relevance of each theory/explanation to the issue
 - 3. Application and utility of theoretical/exploratory findings to the issue
 - B. Empirical literature (journal articles) – For each study:
 - 1. Overview of the empirical study
 - 2. Summary of methodology
 - 3. Summary of the relevant/key findings related to the issue
 - 4. Critique of the study
 - a. Was it well thought out and designed?
 - b. Were seemingly appropriate methods utilized?
 - c. Were the findings applicable to your thesis?
 - 1) If so, how?
 - 2) If not, why?
 - C. Summary
 - 1. Cohesive summary of all relevant findings, theoretical, exploratory, and empirical
-

Getting You Over the Hump: A First-Draft Font?

↻ Ashley Feters Retweeted



Ashley Feters  @AshleyFeters · 5h 

A writing strategy I cannot recommend highly enough is having one font to use for assembling words and sentences into a draft and another font for polishing it up to file



28



51



492



Ashley Feters  @AshleyFeters · 16m 

Having a “first write-thru” font (and always using it) helps train my brain to get into just-write-it-out mode rather than fussing over every word choice; changing the font throws off some of the familiarity of the words and I can read it like it’s the first time I’ve seen it

Cathleen Rittreiser @TheUncorrelated

Replying to @AshleyFeters

How does this approach help you?

Source: **Twitter, Not That Long Ago**

And the Twittersphere Responds...



Ross Andersen  @andersen · 5h

Replying to @AshleyFetters


YES, and no polished/pretty fonts until absolutely done, or else you fool yourself into thinking the prose is better than it is

 1  1  17 



Alia Wong  @aliaemily · 3h

my mind is blown! i've long been doing the opposite—when struggling w writers' block, i resort to the pretty/exquisite fonts as a motivation tool assuming they trick me into thinking my words are pretty/exquisite. now i know why that doesn't really work ... 🤔

 1   8 



McKay Coppins  @mckaycoppins · 1h

I've tried this too. Never really works for me either.

 1   3 



Alia Wong  @aliaemily · 1h

from now on i will start writing all my drafts in comic sans

   10 



Ilana @ilanawithaney · 3h

Replying to @AshleyFetters

I work in one font and then once I consider it “complete” I change it to submission font for a victory lap

Session C

- **"Where Do I Put It?" Help Them Early – and Often**
- **"How Do I Say It?" Going for Clarity**

- *"Where Do I Put It?" Help Them Early – and Often*

First Things First.

Before:

Dear Jane:

As you requested, we have prepared your deed. It is now ready for signature. After it is signed, stamped and sealed, it should be returned to our office.

Your signature must be given in the presence of a notary public and a witness. Neither the witness nor the notary can be your kin and both must be over 18 years of age.

Please sign the enclosed deed exactly as your name is printed.

After:

Dear Jane:

As you requested, I have prepared your deed in the form we discussed last month. It is now ready for your signature.

Please sign the deed exactly as your name is printed. You must sign it in the presence of a notary public and a witness. Both must be over 18 and unrelated to you.

After the deed is signed and the notary has stamped and sealed it, please return it to our office by hand or by certified mail, return receipt requested.

Source: Armstrong & Terrell, **Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing**

Organize *This*

Plum

Orange

Carrot

Grapefruit

Lime

Broccoli

Tomato

Celery

Peach

Lettuce

Potato

Grape

String Bean

Pea

Squash

Lemon

Cantaloupe

Apple

Bacon

Spinach

Turnip

Pear

Mango

Onion



The Whistle-Blower Knows How to Write

His complaint offers lessons on how to make a point.

By Jane Rosenzweig

Ms. Rosenzweig is the director of the Writing Center at Harvard.

Sept. 27, 2019

I can't tell you what's going to happen to his blockbuster complaint about the president's behavior, but I can tell you that the whistle-blower's college writing instructor would be very proud of him.

As a writing instructor myself for 20 years, I look at the complaint and see a model of clear writing that offers important lessons for aspiring writers. Here are a few:

The whistle-blower gets right to the point.

We know right away what his purpose is and why we should care. He wastes no time on background or pleasantries before stating that he is writing to report "an 'urgent' concern." And then he immediately states it:

"In the course of my official duties, I have received information from multiple U.S. Government officials that the President of the United States is using the power of his office to solicit interference from a foreign country in the 2020 U.S. election."

The whistle-blower uses subheadings to make sure we can connect the dots.

Most subheadings don't do much to enhance a document. The whistle-blower's subheadings do what the best subheadings do: They structure the complaint and provide a clear outline of what the document contains:

- I. The 25 July Presidential phone call
- II. Efforts to restrict access to records related to the call
- III. Ongoing concerns
- IV. Circumstances leading up to the 25 July Presidential phone call

The bonus of good subheadings is that they serve as a guide for writing the rest of the document. Even if you're writing something less formal, you can use subheadings to organize your document and then remove them before you share it.

The whistle-blower gets an A for his topic sentences.

Strong persuasive or expository writing features topic sentences that tell the reader what to focus on. You can see the benefit of a good topic sentence in this paragraph from the complaint:

“Multiple White House officials with direct knowledge of the call informed me that, after an initial exchange of pleasantries, the president used the remainder of the call to advance his personal interests.....”

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With that first sentence, we know that this is going to be a paragraph about how the president used the phone call. And indeed, the sentences that follow flesh out that picture.

The whistle-blower uses active verbs.

Among other revelations in the complaint, we learn that “the president also praised Ukraine’s prosecutor general, Mr. Yuriy Lutsenko” and that “senior White House officials had intervened to ‘lock down’ all records of the phone call.”

Contrast that with versions of those sentences that he could have written, which might read like this: “Ukraine’s Prosecutor General was praised” or “all records of the phone call were locked down.”

Passive constructions leave us hanging about who did what, which can be useful if you’re trying to deflect responsibility for something. But if you want to keep your reader focused on who is accountable for what, tell them by making sure your sentences feature real people performing actions.

Every semester, I encounter students who tell me variously that they hate writing, that they’d rather not write, that for the careers they aspire to they won’t need to write. I explain that no matter what careers they choose, they will have to write — reports, strategic plans, proposals and, if nothing else, many, many emails.

But I also tell them that learning to write matters because some day they may have something to say that really matters to them and possibly to the world — and they will want to convey it when the moment arrives in writing that’s clear and concise.

May they never have to blow the whistle. But in case they do, by studying the whistle-blower’s complaint, they’ll be a bit more prepared to write their own.

Jane Rosenzweig is the director of the Harvard College Writing Center.

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Which Facts Will Matter?

Motion to Suppress and Exclude Evidence Unlawful Search and Seizure

At approximately 4:00 p.m. on December 7, 2000, West Carolina State Troopers Charles Jones, Ronald Brown, and David Green, accompanied by Assistant State's Attorney Frank Smith, went to John Torrance's home located at 1819 Fawn Way, Centerville, West Carolina. A search of the premises was conducted resulting in the seizure of a brown calendar book and a red notebook from Torrance's bedroom. Torrance attempts to suppress these items.

Torrance had developed as a prime suspect in a homicide that occurred during the afternoon of December 7. That fact led the troopers to his residence. At trial, Troopers Jones and Brown and Torrance's father testified about what happened in the Torrance residence.

Jones stated that Brown was in charge and that, upon arriving at the front door, they were greeted by Torrance's mother. Brown asked permission to search the house for Torrance. She allowed them to enter the house, but asked that they wait for the arrival of her husband. Brown's version of the initial contact is similar. There is no question that the purpose of the troopers was to determine if Torrance was in the house. Brown also told her that Torrance was a suspect in the homicide case and that the police wanted to search the home for Torrance. The troopers and Mrs. Torrance waited in the kitchen for the arrival of Mr. Torrance, a wait of some fifteen to twenty minutes. During the wait two events took place. First, Brown testified that while they waited they observed and listened for the signs of any movement in the house. Second, as a result of a conversation between Brown and Mrs. Torrance about a gun missing from the ...

**Source: Armstrong & Terrell, *Thinking Like a Writer:
A Lawyer's Guide to Effective Writing and Editing***

Which Facts Will Matter? (This might help.)

Assume, for example, that the passage about the search had been preceded by this introductory paragraph:

John Torrance attempts to suppress evidence seized from a drawer in his bedroom by the state troopers who searched his parents' home, where he lived. He argues that the troopers did not receive his parents' informed consent for the warrantless search. Although the troopers conducted the search only after Torrance's father had signed a form permitting them to search his home and seize any material relevant to their investigation, they did not clearly explain the form to the father, and stated explicitly that they were searching only for Torrance himself. The evidence they seized is therefore inadmissible.

This introduction does several good things that most introductions should do, and to which this and later chapters will return. For the moment, one thing matters most. It gives us a focus—in fact, three intertwined foci. In legal terms, there was no informed consent; in factual terms, the father did not clearly understand the purpose of the search; in decisional terms, the seized evidence is inadmissible. The foci could have been differently shaped, as questions (was there informed consent?) or simply as topics (the issue is informed consent). But the results would have been much the same:

- We can now throw our minds into gear and think as we read, not just try to memorize.
- We can distinguish between important details, secondary ones, and those we can afford to ignore.
- Because we can grasp the significance of each detail as we see it, we can read more efficiently and with far less distraction and frustration.

Note the power of this change. The passage has more wrong with it than the lack of an introductory focus. It contains too many irrelevant facts, and the facts are badly organized. Ideally, if the writer had begun with a focus, he then would have recognized these other problems and fixed them. But even if that did not happen, if the rest of the passage remained badly written, the focus has transformed our ability to cope. It has the same result as putting a flashlight in the hands of someone about to walk down a dark, winding, treacherous path. The terrain remains the same, but his chances of navigating it successfully improve tenfold.¹

Source: Armstrong & Terrell, **Thinking Like a Writer:
A Lawyer's Guide to Effective Writing and Editing**

Let's Look at This One...

Before:

On August 4, 2001, Jessica Hall was involved in a motor vehicle accident at the intersection of routes 6 and 25 and the spur from exit 9 of 1-84 in Newtown. Jessica was a passenger in a pickup truck driven by her mother, Wendy Hall. Wendy Hall left exit 9 of 1-84 and proceeded eastbound on the exit spur to routes 6 and 25. At this point, routes 6 and 25 overlap into one road. When she approached the intersection of the spur and routes 6 and 25, she attempted to turn left to go north on routes 6 and 25. She testified that, because her vision was obstructed by brush, she could not see traffic traveling south on routes 6 and 25 so she inched her way onto the highway to obtain a view. At that point, a tractor trailer driven by John Jones was driving southbound on routes 6 and 25. Wendy Hall did not see the tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left but was unable to do so and struck Wendy Hall's truck, severely injuring Jessica Hall.

Source: Armstrong & Terrell, **Thinking like a Writer: A Lawyer's Guide to Effective Writing and Editing**

...and Try a Different Approach

The revision escapes this trap, without abandoning chronology entirely:

After:

[FIRST, THE CONTEXTUAL FACTS] On August 4, 2001, Jessica Hall was severely injured when a tractor trailer driven by John Jones collided with a pickup truck driven by her mother, in which she was a passenger.

[NEXT, THE GEOGRAPHY] The accident took place at an intersection where, for some drivers pulling onto the main road, vision is obscured until they are already in the road. At this intersection of exit 9 of I-84 with routes 6 and 25, routes 6 and 25 merge into one road as they are joined by the exit spur. According to the testimony of Wendy Hall, Jessica's mother, the view from the exit spur is obstructed by brush, so that drivers leaving the exit cannot see traffic traveling south on routes 6 and 25.

[FINALLY, THE NARRATIVE] Wendy Hall left I-84 and proceeded east on the exit spur to routes 6 and 25. When she approached the intersection, she attempted to turn left to go north on routes 6 and 25. She testified that because she could not see traffic traveling south, she inched her way onto the highway to obtain a view. She did not see Jones' tractor trailer until it was suddenly upon her vehicle. Jones attempted to avoid a collision by braking and swerving to the left, but was unable to do so and struck her truck.

Source: Armstrong & Terrell, **Thinking like a Writer:
A Lawyer's Guide to Effective Writing and Editing**

Early Help, Even in Contracts?

Although negotiated documents like contracts are not directly expository in nature—they are instead meant to be very precise, and will be construed many times very carefully before and after a transaction—there is no reason they must be excruciating to read and understand. In this section of a long and complex asset purchase agreement, we have done no more than bring the section’s logic to the “surface” of the document. As chapter 4 argues, this change alone will make the section more coherent from a reader’s perspective, without compromising its rigor.

Original:

2.06(a) **Inventories.** At the nearest practicable time prior to the Closing, the Company shall arrange for the Buyer’s independent auditors, _____, to inspect and appraise all inventories of products and materials owned, or estimated to be owned, by the Company on the Closing Date (the “Inventories”). The basis of valuation for such appraisal shall be as follows: (i) raw materials shall be valued at their replacement cost as of the Closing Date; (ii) work-in-process shall be valued at the selling price as of the Closing Date, less the sum of (A) cost to complete, (B) cost of disposal, and (C) a reasonable profit allowance for the completing and selling effort; (iii) finished goods shall be valued at the estimated selling price as of the Closing Date, less (A) cost of disposal and (B) a reasonable profit allowance for the selling effort. The aggregate appraised value thus determined shall be submitted for approval to the Buyer, and shall be the tentative purchase price of the Inventories. The Buyer’s approval of such tentative purchase price of Inventories shall be a condition precedent to the obligation of the Buyer to close. At the Closing, Buyer shall pay to the Company an amount equal to eighty percent (80%) of such tentative purchase price. Within forty-five (45) days subsequent to the Closing, the Buyer’s independent auditors shall establish a final purchase price for the Inventories in the same manner and with the same standards of valuation as was used for fixing the tentative purchase price of the Inventories. The final purchase price of the Inventories thus established shall be binding on the Buyer and the Company. From such final purchase price, the tentative purchase price of the Inventories paid to the Company at the Closing shall be deducted, and the balance then paid to the Company (or the credit refunded to the Buyer) within ten (10) business days after determination of such final purchase price. In connection with the transfer of the Inventories, the Company shall cease, at the close of the day prior to the Closing, all packaging and shipping, and cease, as at the close of said day, preparing, mixing or otherwise dealing with the Company’s raw materials transferred hereby until the Buyer shall have inspected the inventory of raw materials.

Even in Contracts!

Revision:

2.06(a) **Inventories.** The Company's inventories shall be inspected and appraised as provided in subsection (i) below, using the method of valuation described in subsection (ii). The buyer shall approve this value as outlined in subsection (iii) and, if it gives that approval, shall make payment for the inventories under the terms contained in subsection (iv).

- (i) *Inspection and Appraisal.* At the nearest practicable time prior to the Closing, the Company shall arrange for the Buyer's independent auditors, _____, to inspect and appraise all the Company's inventories of products and materials owned, or estimated to be owned, by the Company on the Closing Date (the "Inventories").
- (ii) *Method of Valuation.* The Buyer's independent auditors will value raw materials, work-in-process, and finished goods as follows:
 - a. *Raw Materials.* The replacement cost as of the Closing Date;
 - b. *Work-In-Process.* The selling price as of the Closing Date, less the sum of the
 - i. cost to complete,
 - ii. cost of disposal, and
 - iii. a reasonable profit allowance for the completing and selling effort;
 - c. *Finished Goods.* The estimated selling price as of the Closing Date, less the sum of the
 - i. cost of disposal, and
 - ii. a reasonable profit allowance for the selling effort.
- (iii) *Buyer's Approval of Valuation.* Upon the Buyer's approval of the aggregate appraised value, it will then be the Tentative Purchase Price of the Inventories. That approval shall be a condition precedent to the Buyer's obligation to close.
- (iv) *Disposition of and Terms of Payment for Inventory.* The Buyer shall take possession of and pay for the Inventories using the procedure outlined in the following four steps:
 - a. At the close of business on the day prior to the Closing, the Company shall cease all packaging and shipping of finished goods and shall also cease at that time all preparing, mixing, and other handling of raw materials transferred under this agreement until the Buyer has inspected that raw material inventory.
 - b. At the Closing, Buyer shall pay to the Company an amount equal to eighty percent of the Tentative Purchase Price.
 - c. Within 45 days after the Closing, the Buyer's independent auditors shall establish a final purchase price for the Inventories in the same manner and with the same methods of valuation outlined in sections 1.05(a)(i) and (ii) above. The final purchase price of the Inventories thus established shall bind both the Buyer and the Company.
 - d. Within 10 business days after the Buyer's independent auditors have determined the final purchase price, the Buyer shall pay to the Company the balance owed for the inventories, with deduction (or refund) for that portion of the Tentative Purchase Price already paid to the Company at the Closing.

What Goes Next? (Maybe Not What You Think.)

After the initial paragraph, lead with your strongest facts; don't feel compelled to tell your story chronologically

Like judges, almost all litigators relate their facts chronologically, beginning with the event that happened first in a historical sequence and proceeding forward to the present.

This is probably the worst mistake most litigators make in their writing. Modern novels, short stories, and movies rarely begin with what happened first. Instead, they start with an important event that leaves a strong impression. Then the narrative proceeds, with the author filling in the earlier facts as background as the plot moves along.

The only two groups left who tell stories chronologically—at least in American culture—are lawyers and six-year-olds.

Source: Stark, **Writing to Win: The Legal Writer**

More Than Chronology: A Story

Watch a good trial lawyer in a courtroom, and you see a master storyteller at work. Trial lawyers understand that their most powerful weapon is not the “evidence,” in and of itself. It is their ability to organize testimony and exhibits into a credible, compelling story. If they lack that skill, the evidence remains just a mass of data, sometimes persuasive, occasionally memorable, but never a compelling reason for the arbiter to come down on one side of the case rather than the other. If they master the skill, on the other hand, they can make the evidence cohere in a way that gives it larger meaning. Now, it leads us to infer motive, to judge the parties’ behavior, to understand the consequences of their acts, and to empathize with or distance ourselves from them.

But take lawyers out of the courtroom and put them in front of a word processor or dictaphone and, all too often, something goes terribly wrong. The storyteller disappears, and confusion and boredom ensue. The fact section of the brief or memorandum of law becomes an agglomeration of data that is not just unpersuasive, but downright painful to read. True, it is seldom pure chaos, because the writer usually seizes onto chronology as a drowning person onto a life preserver. But a chronology is not a story. Nor can you turn it into one by “spinning” or characterizing the facts, or by adding a few more heart-wrenching details. To write a persuasive story, you have to think carefully about the framework of plot and character around which the facts will cohere.

Source: Armstrong & Terrell: **Thinking Like a Writer:
A Lawyer's Guide to Effective Writing and Editing**

Which Facts? Presented How?

The prosecution version:

On September 25, 1998, G.L., a minor, was arrested by the Smithville police and charged with trespass and destruction of property under Sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

At approximately 9:00 p.m. on September 25, John and Julia Barr and their son, Roger, returned home from a PTA meeting. When they reached their front door, they found that it was ajar. Mr. Barr entered the house and noticed muddy footprints leading across the living room carpet towards the kitchen. In the kitchen, he found food strewn across the kitchen table, and a broken plate on the floor. He then looked through the other rooms on that floor and proceeded upstairs. In his son's bedroom, he found broken furniture and saw that clothes had been pulled from an open drawer and dropped on the floor. In the master bedroom, he found G.L. asleep on the bed. As he entered, she awoke, knocked him over as she pushed by him, and ran out of the house. She was later found and arrested by the police on the nearby golf course.

Source: Armstrong & Terrell, **Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing**

Which Facts? Presented How?

(2)

The defense version:

On September 24, 1998, G.L., a 15-year-old girl living in the Smithville Home for Orphans, had an argument with her dormitory supervisor and ran away from the Home. She had no money or food with her, and only the clothes she was wearing. She spent the night of September 24 and most of September 25 hiding on the Smithville Country Club golf course.

On the evening of September 25, it began to rain. Her clothing became drenched. At that point, she had not eaten since her lunch the day before. She left the golf course and began to wander through the adjoining neighborhood. In the fourth block, she walked up the drive to the largest house she had so far passed. She rang the doorbell, but no one responded. She then tried the door handle, and found the door unlocked.

Entering the house, she went directly to the kitchen, took some food from the refrigerator, and ate some of it. In the process, she dropped and broke a plate on which there had been a piece of chocolate cake. She then went upstairs, found some dry clothes in a bedroom, and put them on. She sat on the chair to rest, but one leg snapped beneath her. She then went into another bedroom and fell asleep on the bed.

When the Barrs returned, she awoke and ran out of the room. Mr. Barr tried to grab her as she went past, and was knocked over as she pulled away from him. He was not injured. She then ran out of the house and back to the country club grounds.

After being apprehended by the Smithville police, she was incarcerated in the Smithville City Jail and charged with trespass and destruction of property under Sections 250.17 and 137.55, respectively, of the West Carolina Criminal Code.

Building Your Story:

Seven Techniques for Presenting Facts...

- *Panoramic Shot*: Set the stage and sound your theme.
- *Show, Not Tell*: Let choice details speak for themselves.
- *Once Upon a Time*: Replace dates with phrases that convey a sense of time.
- *Headliners*: Use headings to break up your fact section and to add persuasive effect.
- *Back to Life*: Center technical matter on people or entities.
- *Poker Face*: Concede bad facts, but put them in context.
- *End with a Bang*: Leave the court with a final image or thought.

Source: Guberman, **Point Made**

- *"How Do I Say It?" Going for Clarity*

You Try It: Your Favorite Linguistic Outrages Here...

1.

2.

3.

4.

5.

You Try It: Dump the Jargon!

How Lawyers Often Say It

How Most Other English-Speaking Humans Say It

"...is able to..."

"...a sufficient number of..."

"...at this point in time..."

"...for the reason that..."

"...subsequent to..."

"...for the purpose of..."

"...notwithstanding the fact that..."

"...during the course of..."

"...in light of the foregoing considerations..."

"...prior to..."

"...until such time as..."

"...in the event that..."

The court's reaction:

There is nothing wrong with a specialized vocabulary — for use by specialists. Federal district and circuit judges, however, with the partial exception of the judges of the court of appeals for the Federal Circuit (which is semi-specialized), are generalists. . . .

Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English, as we hope this opinion has demonstrated. The able lawyers who briefed and argued this case could have saved us some work and presented their positions more effectively had they done the translations from reinsuranceese into everyday English themselves. xxx

Video Source: U. of Virginia School of Law

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

SILBERMAN, *Senior Circuit Judge*, concurring: I join Judge Edwards' opinion because of the emphasis he puts on the timing of these different projects, but I do think Judge Brown has a good point in suggesting that the "cumulative impact" issue is a stronger ground upon which to base the decision.

* * *

Petitioner's brief, unfortunately, was laden with obscure acronyms notwithstanding the admonitions in our handbook (and on our website) to avoid uncommon acronyms. Since the brief was signed by a faculty member at Columbia Law School, that was rather dismaying both because of ignorance of our standards and because the practice constitutes lousy brief writing.

The use of obscure acronyms, sometimes those made up for a particular case, is an aggravating development of the last twenty years. Even with a glossary, a judge finds himself or herself constantly looking back to recall what an acronym means. Perhaps not surprisingly, we never see that in a brief filed by well-skilled appellate specialists. It has been almost a marker, dividing the better lawyers from the rest.

We have recently been rejecting briefs that do not adhere to our instructions, and counsel should be warned that if a brief is rejected and has to be rewritten, they will not be able to alter the word limits.

Other Fields, Other Secret Handshakes

BOOKS OF THE TIMES

A Case for the New Jazz Sound That Will Inspire Playlists

By Dwight Garner

Aug. 13, 2018



Patricia Wall/The New York Times

... The best way to read “Playing Changes” is with YouTube and Spotify fired up on your laptop. Chinen has excellent taste in unruly new sounds and big, bent ears, and you’ll want to make a playlist. You’ll also want to hear and see what he’s talking about.

You may *need* to hear and see what he is talking about because, reading him, you sometimes have no idea. He has a fondness for academic jargon and can sound like Jacques Derrida in sophisticated sneakers.

He writes about “tracing a historicist agenda that actualized in the 1970s.” The composer Anthony Braxton’s music “utilized proprietary strategies.” Vijay Iyer’s dissertation “helped frame his personal interface with the piano.” The saxophonist Joshua Redman “prioritized an agenda of direct emotional clarity.” Sentences like these prioritize an agenda of not being able to stay entirely awake....

Source: **The New York Times**

He Calls it “Cognitive Ease.” (But You Can Call it “Common Sense.”)

How to Write a Persuasive Message

“Suppose you must write a message that you want the recipients to believe. Of course, your message will be true, but that is not necessarily enough for people to believe that it is true. It is entirely legitimate for you to enlist cognitive ease to work in your favor, and studies of *truth illusions* provide specific suggestions that may help you achieve this goal.

“The general principle is that anything you can do to reduce cognitive strain will help...

...

“If you care about being thought credible and intelligent, do not use complex language where simpler language will do. My Princeton colleague Danny Oppenheimer refuted a myth prevalent among undergraduates about the vocabulary that professors find most impressive. In an article titled ‘Consequences of Erudite Vernacular Utilized Irrespective of Necessity: Problems with Using Long Words Needlessly,’ he showed that couching familiar ideas in pretentious language is taken as a sign of poor intelligence and low credibility.”

Source: Kahneman, **Thinking, Fast and Slow**

WHY ARE YOU SHOUTING?

ARTICLE 6

BUYER'S REPRESENTATIONS

6.1 *Condition of Acquired Assets.*²² THEREFORE, BUYER IS TAKING THE ACQUIRED ASSETS IN AN "AS—IS, WHERE—IS, WITH—ALL—FAULTS—AND—ENCUMBRANCES" CONDITION EXISTING AS OF THE CLOSE OF ESCROW, BASED UPON BUYER'S OWN FAMILIARITY THEREWITH AND NOT UPON ANY STATEMENTS, ADVICE, OPINIONS OR REPRESENTATIONS WHICH MAY HAVE BEEN MADE BY SELLER OR SELLER'S AGENTS. THE SALE OF THE ACQUIRED ASSETS IS MADE WITHOUT COVENANT, WARRANTY OR REPRESENTATION, EXPRESS OR IMPLIED IN FACT OR LAW, AND BUYER WILL HAVE FULL RESPONSIBILITY FOR ASCERTAINING ALL MATTERS PERTAINING TO THE ACQUIRED ASSETS. WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, SELLER MAKES NO REPRESENTATIONS OR WARRANTIES REGARDING THE CONDITION OF TITLE OF THE ACQUIRED ASSETS. ALSO WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, WITH RESPECT TO ANY AND ALL REAL PROPERTY TRANSFERRED PURSUANT TO THIS AGREEMENT BUYER WILL HAVE FULL RESPONSIBILITY FOR ASCERTAINING ALL MATTERS PERTAINING TO SUCH REAL PROPERTY, INCLUDING BUT NOT LIMITED TO (I) FINANCIAL, ECONOMIC, MECHANICAL, ARCHITECTURAL, ENGINEERING, STRUCTURAL, HAZARDOUS MATERIALS WASTE CONDITIONS; (II) THE IMPACT OF WATER, SEWER AND UTILITY CHARGES, FEES, TAXES, PERMITS, REQUIREMENTS AND BUSINESS LICENSES; (III) ZONING AND SOILS CONDITIONS; (IV) THE USE TO WHICH THE REAL PROPERTY CAN BE PUT; (V) THE EXISTENCE OR PRIOR EXISTENCE OF ABOVE OR BELOW—GROUND STORAGE TANK(S); (VI) THE ENVIRONMENTAL CONDITION; (VII) THE EXISTENCE OR PRIOR EXISTENCE ON OR UNDER THE REAL PROPERTY OF ANY HAZARDOUS MATERIAL OR ANY SPILL, DISPOSAL, DISCHARGE, RELEASE, LEAK, ACCIDENT OR INCIDENT RELATING TO HAZARDOUS MATERIAL CONTAMINATION; (VIII) THE EXISTENCE OR PRIOR EXISTENCE ON OR UNDER THE REAL PROPERTY OF ANY ASBESTOS—CONTAINING MATERIALS OR ANY TRANSFORMER, FLUORESCENT LIGHT FIXTURES WITH BALLAST, OR OTHER EQUIPMENT CONTAINING PCB'S; (IX) THE CONFORMANCE OF THE REAL PROPERTY TO ANY LAWS, ORDINANCES OR REGULATIONS OF ANY GOVERNMENTAL AUTHORITY OR AGENCY; (X) DEED RESTRICTIONS; (XI) THE LEGALITY OF LOT SIZE; (XII) THE CONDITION OF THE REAL PROPERTY; AND (XIII) ANY AND ALL OTHER MATTERS PERTAINING TO SUCH REAL PROPERTY.

SELLER WILL HAVE NO LIABILITY OR RESPONSIBILITY FOR REMEDIATION OR REMOVAL OF ANY SUBSTANCE OR MATERIAL WHICH MAY BE POTENTIALLY INJURIOUS TO PUBLIC HEALTH OR WELFARE AND IS LOCATED ON THE REAL PROPERTY.

WITHOUT LIMITING THE GENERALITY OF THE FOREGOING, BUYER HEREBY

²²Does ALL CAPS really make this easier to read? "Some writers overuse capitalization for emphasis, but that is not good style. All-caps text is less legible than lowercase text, so the message ("read this!") conflicts with the medium ("don't read this!"). GARNER § 2.1, at 45. Garner also warns to use all-caps "sparingly." He reminds us to find a healthy balance—"A few instances heighten the effect but overuse dulls the impact." GARNER § 2.18(b), at 55.

Technically Speaking...

"When a writer does need to use a technical term, then he or she should consider whether to explain or define it, or provide examples. This decision on how much detail to include is probably the toughest call in drafting. It often depends on who the intended readers are and how difficult or unusual the term is. You would not define *indemnify* in a commercial contract between business parties. But you probably should in a consumer contract, such as a car rental."

Source: Kimble, **Writing for Dollars, Writing to Please**

Two Versions: Regulations

1. U.S.: Federal Communications Commission — Regulations⁵

When the FCC's regulations for citizens-band radios (remember those?) were written in legalese, the agency needed five full-time staff members to answer questions from the public. In 1977 or 1978, the FCC rewrote the regulations in plain language and was able to reassign the five staff members.

Incidentally, in the years that followed, there was not a single reported case implicating the plain language in those regulations. So much for the fear that plain language will create litigation. If anything, it probably decreases litigation.

Below is a before-and-after example that shows the difference just in headings, which are vitally important to readers who come to documents wanting to find answers to their questions. (The examples are from Title 47 of the *Code of Federal Regulations*.)

Before:

- § 95.455 Authorized frequencies.
- § 95.457 Policy governing the availability of frequencies.
- § 95.437 Limitations on antenna structures.
- § 95.511 Transmitter service and maintenance.
- § 95.613 Transmitter power.
- § 95.509 External radio frequency power amplifiers prohibited.

After:

- § 95.407 On what channels may I operate?
- § 95.408 How high may I put my antenna?
- § 95.409 What equipment may I use at my CB station?
- § 95.410 How much power may I use?
- § 95.411 May I use power amplifiers?

Source: Kimble, **Writing for Dollars, Writing to Please**

Two Versions: A Services Contract

Before:

3. The CONSULTANT agrees to fully complete the described assignment and furnish same to the DEPARTMENT by _____ calendar days after notification of Approval, it being fully understood and agreed by the parties hereto that in the event the CONSULTANT shall fail to do so as aforesaid, the DEPARTMENT shall, without the necessity of notice, terminate the services of said CONSULTANT without incurring any liability for payment for services submitted after said due date or shall deduct, as a liquidation of damages, a sum of money equal to one-third of one percent (1/3 of 1%) per calendar day of the total fee if the performance of the entire contract is delayed beyond the due date. Upon written request by the CONSULTANT an extension of time may be granted by the DEPARTMENT in writing, in the event the CONSULTANT has not received from the DEPARTMENT proper information needed to complete the assignment or, in the event other extenuating circumstances occur, the time may be similarly extended. It is further agreed that if a liquidation of damages is imposed pursuant to the aforesaid provisions, any money due and payable to the DEPARTMENT thereby may be retained out of any money earned by the CONSULTANT under the terms of this contract.

After:

5. Due Date for the Work.

The Consultant must complete and deliver the work by _____ calendar days after receiving notice that the Department has approved this contract. The Consultant may ask in writing for more time, and the Department may grant it in writing, if:

- (a) the Consultant does not receive from the Department the information needed to complete the work; or
- (b) there are other extenuating circumstances.

6. If the Consultant Misses the Due Date.

If the Consultant fails to deliver the work by the due date, the Department may—without having to give notice—choose either one of the following:

- (a) terminate the Consultant's services, and not pay for services that are submitted after the due date; or
- (b) claim liquidated damages of 1/3 of 1% of the total contract payment for each calendar day late, and subtract this amount from the total payment.

Source: Kimble, **Writing for Dollars, Writing to Please**

Is There a Clearer Way?

5.4 Termination Fees Payable by Pantheon. The Merger Agreement obligates Pantheon to pay to OJM an Initial Termination Fee if (a) (i) OJM terminates the Merger Agreement because of either a Withdrawal by Pantheon or Pantheon's failure to comply (and to cure such noncompliance within 30 days' notice of the same) with certain Merger Agreement covenants relating to the holding of a stockholders' meeting, the solicitation of proxies with respect to the Pantheon Proposal, and the filing of certain documents with the Secretary of State of the State of Delaware, (ii) Pantheon terminates the Merger Agreement prior to the approval of the Pantheon Proposal by the Pantheon stockholders, upon Pantheon having received an Acquisition Proposal and the Pantheon Board having concluded that its fiduciary obligations under applicable law require that such Acquisition Proposal be accepted, or (iii) either party terminates the Merger Agreement because of the failure of Pantheon to obtain stockholder approval for the Merger Agreement and the transactions contemplated thereby at a duly held stockholders' meeting, and (b) at the time of such termination or prior to the meeting of the Pantheon stockholders there has been an Acquisition Proposal involving Pantheon or certain of its significant subsidiaries (whether or not such offer has been rejected or withdrawn prior to the time of such termination or of the meeting).

Yup.

4. Termination Fees Payable by Pantheon. The Merger Agreement obligates Pantheon to pay to OJM an initial termination fee of \$250 million if both of the following conditions are met:

(A) any of the following occurs:

- (1) OJM terminates the merger agreement because Pantheon's board withdraws its support of the merger or because Pantheon fails to comply (and fails to properly cure its noncompliance within 30 days of receiving notice) with its merger-agreement covenants relating to the holding of a stockholders' meeting, the solicitation of proxies on the Pantheon proposal, and the filing of certain documents with the Delaware Secretary of State;
- (2) Pantheon terminates the merger agreement before the Pantheon stockholders approve the Pantheon proposal, upon Pantheon's having received a business-combination offer involving at least 15% of Pantheon's stock and the Pantheon board's having concluded that its fiduciary obligations under applicable law require acceptance of that proposal; or
- (3) either party terminates the merger agreement on grounds that Pantheon has failed to obtain stockholder approval for the merger agreement and the related transactions at a duly held stockholders' meeting; and

(B) at the time of the termination or before the meeting of the Pantheon stockholders, there has been a business-combination offer involving at least 15% of Pantheon's stock or of its significant subsidiaries (whether or not the offer has been rejected or withdrawn before the termination or of the meeting).

Source: Garner, **Legal Writing in Plain English**

Session D

- **"How Do I Say It?" The (Occasional) Value of Vagueness**
- **"How Do I Say It?" Going for Brevity**
- **"How Does It Come Across?" Tone & Voice**

- *"How Do I Say It?" The (Occasional) Value of Vagueness*

Five Reasons to Consider a Passive Construction...

1. When the action is more important than the actor.
2. When you don't *know* who the actor is.
3. When you *know*, but you'd rather not say.
4. When ending with the actor helps you stick the landing.
5. When you're hoping to pretend that no human beings were even remotely involved in this incredible screw-up.

Johnson | Passive Panic

In partial defence of an unloved grammatical tool

PITY the passive voice. No feature of the grammar of English has such a bad reputation. Style guides, including that of *The Economist*, as well as usage books like the celebrated American “Elements of Style”, warn writers off the passive, and automated grammar-checkers often suggest that passive clauses be redrafted. There are just two problems with this advice. One is that a diminishing proportion of the world’s pundits seem to know what the passive voice is. And the other is that the advice is an unwieldy hammer, when not every writing problem is a nail.

The proper brief against the passive is twofold. One is that it can obscure who did what in a sentence. Barack Obama said recently that “There is no doubt that civilians were killed that shouldn’t have been,” the passive voice hiding who did that killing: drones under the president’s command. Donald Trump, the presumptive Republican nominee to replace Mr Obama as president, tried to slip away from the controversy of his racist comments about a Mexican-American judge: “Questions were raised” about the judge’s impartiality, said Mr Trump. Who raised those questions? Why, Mr Trump.

The other criticism of the passive voice is that it recurs in the worst kind of prose: leaden academic and bureaucratic writing in particular. A scientific paper often describes how “Participants were selected for certain characteristics...it was noted that they behaved in a certain way... results were analysed...” Besides being dull, these relentless passives make the process seem oddly disembodied, as though the research somehow performed itself.

But critics of the passive often go wrong. Stephen King, a horror novelist, in an entertaining rant against the passive in his autobiography, refers to it several



times as the “passive tense”. It isn’t a tense. Tense has to do with when things happen in time. Voice structures who did what to whom in a sentence. In the typical active sentence, the subject is the doer of the action: he kicked the ball. In the typical passive sentence, the recipient of action becomes the subject: the ball was kicked.

Where critics have gone wrong is in diagnosing all kinds of vagueness as passive voice, even when there’s no grammatical passive to be found. Mark Carney, governor of the Bank of England, said recently that “there are no immediate plans for the £50 note...The feedback is that the notes need to be smaller; different sizes, but smaller.” A critic in America’s *National Review* carped: “Excellent use of the passive voice, Governor.” Except that there is no passive at all: “there are no immediate plans...the feedback is...” may be flabby, but passive they aren’t.

The problem is in confusing action and

vigorous writing with the active voice, and weak, vague sentences with the passive. Voice has little to do with content. “The journalist dozed on his desk” is active. “London was destroyed by aliens” is passive. Nor is clarity always an issue. The active voice can be vague: “Someone ate my cake.” The passive can be quite clear: “My cake was eaten by the neighbours’ kids.” (Only the “short passive” omits the miscreant: “The cake was eaten.”)

The passive can be useful. “I’ll never forget the day my pet hamster was run over” emphasises the speaker’s emotion, and the poor hamster. Only if the villain needs emphasising should this be “I’ll never forget the day Steve ran over my hamster.” And the passive can be good for connecting things: “Jim loved nothing more than his oboe. Then one day it was stolen.” The oboe is the last thing mentioned in the first sentence. While fresh in the readers mind, it should be the subject of the second.

The advice needed is stylistic, not grammatical. The problem with the “short passive” is that it can be incomplete: where full information is important, the real advice should be “include all needed information” rather than “never use the passive.” Where passive voices plod one after the other, the writer should vary sentence structure and where the passive results in awkward flow, use sentence structure to link information sensibly for the reader’s sake.

Inexperienced writers can certainly overdo the passive, which can feel “grown up”, serious. Telling them to prefer the active would be good advice. But to demonise a useful grammatical tool takes things too far. Many mistakes have been made in castigating the passive; not to name names, but it is time the language mavens improved their advice.

Source: **The Economist**

- *"How Do I Say It?" Going for Brevity*

Details: Necessary or Un-?

"On February 12, 2010, at or about 3:00 p.m., while showering, Plaintiff fell to the floor when her bathroom ceiling collapsed, striking her on the head. On February 12, 2010, at 4:06 p.m., paramedics took her, unconscious, to the hospital.

"On February 13, 2010, Plaintiff sued the apartment owner, alleging negligence and gross negligence in failing to maintain the premises. On March 6, 2010, Plaintiff visited Dr. Eugene Higginbotham, an orthopedic surgeon, who...[etc.]"

Or...

"In February 2010, while showering, Ms. Walker fell to the floor when the bathroom ceiling collapsed, striking her on the head. An hour later, paramedics took her, unconscious, to the hospital, where she was diagnosed with a herniated disk.

"The next day, Ms. Walker sued the apartment owner, alleging negligence and gross negligence in failing to maintain the premises. She then visited Dr. Eugene Higginbotham, an orthopedic surgeon, who...[etc.]"

You're Dating Yourself...

Before:

Plaintiff was injured when she slipped and fell on kiwifruit at the Shop Rite Supermarket on February 16, 2015. On July 25, 2015, her doctor diagnosed a herniated disk in her lower back. From July 5, 2015 until the present she has been receiving treatment for this condition. On January 5, 2016, Plaintiff sued Shop-Rite, alleging negligence and gross negligence in maintaining the premises. On September 14, 2016, a jury trial began. On September 15, 2016, the jury returned a verdict in favor of Shop-Rite. On September 16, 2016, the trial court entered a judgment on the verdict. On October 3, 2015, Plaintiff filed a motion for a new trial, which was denied on October 5, 2015. On October 26, 2015, Plaintiff filed a timely notice of appeal.

Not Any More.

After:

On February 16, 2015, Harrison allegedly slipped and fell on kiwifruit at the Shop-Rite Supermarket. **More than five months later**, her doctor diagnosed a herniated disk in her lower back. Harrison sued Shop-Rite, alleging negligence and gross negligence in maintaining the premises. A jury returned a verdict in favor of Shop-Rite, and the trial court entered judgment on the verdict. **After** the court denied Harrison's motion for a new trial, she timely appealed.

Better 1? Or 2?

1. If you don't respond, the court will issue a default judgment.
2. If you don't respond, the court will issue a default judgment. That means you'll lose, and the court will give the plaintiff what he is asking for.

Source: Trudeau, **The Public Speaks: An Empirical Study of Legal Communication** (2012)

You Try It:

Do You Need All 84 of These Words?

Before:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price for such security. However, no court has yet determined whether the current independent bid price would be the price at the time of the writing of the option or at the time of the exercise of the option. A Rule 10b-7 defense would succeed only if the court interpreted the current independent bid price to be the price at the time of the writing of the option.

After?

Do You *Really* Need All 84 of These Words? No.

Before:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price for such security. However, no court has yet determined whether the current independent bid price would be the price at the time of the writing of the option or at the time of the exercise of the option. A Rule 10b-7 defense would succeed only if the court interpreted the current independent bid price to be the price at the time of the writing of the option.

After:

Furthermore, 10b-7 prohibits anyone from stabilizing a security at a price higher than the current independent bid price. However, no court has yet determined whether this price would be the price at the time of the option's writing or at its exercise. A Rule 10b-7 defense would succeed only if the court chose the first interpretation.

[56 words]

Source: Armstrong & Terrell, **Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing**

“Not This, But This” – Trimming the Fat!

Some Before-and-After Examples

Example A

Not this: This theory is a drastic departure from that put forth by Plaintiff at the time when his experts were deposed by Defendants.

But this: This theory differs radically from Miles’s earlier one.

Example B (from the same brief as the passage in Example A)

Not this: Since December 2, 2012, certain of Plaintiff’s experts have promulgated a new theory regarding the case that had not been expressed by them at the time Defendants were determining which of Plaintiff’s experts would be deposed or at the time Defendants deposed Plaintiff’s experts.

But this: Some of Miles’s experts have recently expressed a new theory that was unknown to Pantor when it deposed them.

Example C

Not this: McDonnell might then rely on publication notice to convey the existence and general terms of the settlement to other potential class members.

But this: McDonnell might then rely on publication notice to inform other potential class members.

Example D

Not this: Mr. Sutherlin wholly fails to plead Alger Life Insurance’s knowledge of any alleged falsity nor does Mr. Sutherlin plead any intent on the part of Alger Life to defraud.

But this: Sutherlin does not allege that Alger Life knew about any falsity or intended to defraud.

Source: Garner, *The Winning Brief*

You Try It: Stop Clearing Your Throat

Their Version:

"Inferentially, the decision of the *Champlin* court can be read to stand for the proposition that mere ownership of property in a county does not establish venue where employees operate out of that property only on a sporadic basis."

Yours?

You Try It: "Working" Words v. "Connecting" Words

"A trial by jury was requested by the defendant."

[9 words: 4 working, 5 connecting]

[Your fix here...]

"The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues that were vital."

[24 words: 11 working, 13 connecting]

[Your fix here...]

"There are three reasons given in the majority opinion for its rejection of the approach taken by the Supreme Court in its earlier decisions with respect to the Confrontation Clause of the Sixth Amendment."

[34 words: __ working / __ connecting]

[Your fix here...]

Source: Wydick, Plain English for Lawyers

Beware...

Zombie Nouns

BY HELEN SWORD JULY 23, 2012 9:15 PM 280



Draft is a series about the art and craft of writing.

Take an adjective (*implacable*) or a verb (*calibrate*) or even another noun (*crony*) and add a suffix like *ity*, *tion* or *ism*. You've created a new noun: *implacability*, *calibration*, *cronyism*. Sounds impressive, right?

Nouns formed from other parts of speech are called nominalizations. Academics love them; so do lawyers, bureaucrats and business writers. I call them "zombie nouns" because they cannibalize active verbs, suck the lifeblood from adjectives and substitute abstract entities for human beings:

The proliferation of nominalizations in a discursive formation may be an indication of a tendency toward pomposity and abstraction.

The sentence above contains no fewer than seven nominalizations, each formed from a verb or an adjective. Yet it fails to tell us *who* is doing *what*. When we eliminate or reanimate most of the zombie nouns (*tendency* becomes *tend*, *abstraction* becomes *abstract*) and add a human subject and some active verbs, the sentence springs back to life:

Writers who overload their sentences with nominalizations tend to sound pompous and abstract.

Source: **The New York Times**

You Try It: Verbs Over Nouns

"When making application for a modification of local zoning standards, the inclusion of a summary statement regarding existing conditions is strongly advised."

"One factor making a contribution to a significant reduction in vehicle-pedestrian accidents is the installation of backup cameras in most current models."

- *"How Does it Come Across?" Tone & Voice*

Think About It: What Makes You Sound Like You?

-

-

-

-

-

New to You – Yet Strangely Familiar

“Eighty-seven years back, the people who lived more or less around these parts launched a kind of startup – a new country, actually. Now, one of their biggest motivations in launching this particular startup was ‘liberty’ – and another one was this idea of ‘equality.’”

Write It to Remember It!

"Some Tone Keys"

•

•

•

•

•



"Mitt Romney's Presidential Campaign Stuck in Lukewarm"

“...Republicans also fear that Romney’s scorched-earth strategy may drive down the voter enthusiasm he would need for a fall campaign.

“And that’s why the advice has rolled in, some of it contradictory: to hit Santorum harder; to stop hitting Santorum; to talk up his management experience; to stop running as a manager and start using the language of a movement;...even to stop saying ‘enterprise’ when he means ‘business.’ (‘Does anyone know what that means?’ one adviser asked. ‘The public thinks “enterprise” is either a car-rental place or Captain Kirk’s ship. It’s just a lot of annual-report talk as opposed to kitchen-table talk.’)”

Source: **The Washington Post**, February 9, 2012

"The difference between the almost right word and the right word is really a large matter. It's the difference between the lightning bug and lightning."

Mark Twain

Appendix

- **Additional Tips and Resources**
- **Your Credibility Matters: Catching Those Errors**
- **For Data Geeks and Skeptics: The Case for Better Legal Writing**

- *Additional Tips and Resources*

Helpful Resources for Effective Legal Writing

- Armstrong & Terrell, **Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing** (Third Edition)
- Asprey, **Plain Language for Lawyers** (4th Edition)
- Beazley and Smith, **Legal Writing for Legal Readers**
- Butterick, **Typography for Lawyers: Essential Tools for Polished & Persuasive Documents**
- Evans, **Do I Make Myself Clear? Why Writing Well Matters**
- Garner, **HBR Guide to Better Business Writing**
- Garner, **Legal Writing in Plain English: A Text with Exercises** (Second Edition)
- Garner, **The Redbook: A Manual on Legal Style** (Third Edition)
- Guberman, **Point Made** (Second Edition)
- Horowitz, **Rick's Tips** [Prime Prose Handouts]
- Kahneman, **Thinking, Fast and Slow**
- Kimble, **Lifting the Fog of Legalese: Essays on Plain Language E**
- Kimble, **Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law**
- Kolin, **Successful Writing at Work** (Eleventh Edition)
- Krumm, Cooney, Looper, **A Transactional Matter: A Guide to Business Lawyering**

(more)

- Kuney, **The Elements of Contract Drafting** (Fourth Edition)
- Markel, **Practical Strategies for Technical Communication** (Second Edition)
- Markel, **Technical Communication** (Eleventh Edition)
- McCulloch, **Because Internet: Understanding the New Rules of Language**
- McPhee, **Draft No. 4: On the Writing Process**
- Neumann, **Transactional Lawyering Skills**
- Painter, **The Legal Writer: 40 Rules for the Art of Legal Writing**
- Stark, **Writing to Win: The Legal Writer**
- Wydick, **Plain English for Lawyers** (Fifth Edition)
- [Video:] Univ. of Virginia School of Law, "**Strategies for Appellate Brief Writing**"
<https://www.yout1u17be.com/watch?v=2g0zkjcKOcA>

**Compiled by Rick Horowitz
Wordsmith in Chief
Prime Prose, LLC**

www.primeprose.com
414.963.9333
(cell) 414.899.7178

PRIME PROSE, LLC

RICK HOROWITZ
WORDSMITH IN CHIEF

www.primeprose.com
rick@primeprose.com

(o) 414.963.9333
(c) 414.899.7178

**COMMENCE IMMEDIATE
AVOIDANCE OF ALL
JARGONIZATION
PROCESSES**

**Rick's Rules of the Road
for Less-than-Effective Legal Writing
(Or, "A Few Common Lawyerly
Assumptions Worth a Second Look")**

- **"Include this. Include that, too."**
- **"Start writing immediately!"**
- **"Make sure you have the perfect opening sentence before you write another word."**
- **"Always write the first part first, and the last part last."**
- **"If you understand the flow of your argument, so will they."**
- **"For maximum impact, be sure to organize your facts chronologically. (And start at the very, very beginning.)"**
- **"Whenever possible, wow them with legal jargon and technical language."**
- **"The passive voice should never be used."**
- **"The longer the sentence, the more useful the information."**
- **"Above all, make sure you always 'sound like a lawyer.'"**

#

Different Names, Different Tasks

Revising, Editing and Proofreading

[Back to The Writing Process](#)

Many students don't differentiate between Revising, Editing, and Proofreading. What's the difference?

Revision involves analyzing the global level and paragraph level organization of the document, and making changes to your draft on a global, paragraph, and sentence level to ensure that:

- The document addresses its purpose
- The document supports any claims its makes (main claims and secondary claims)
- The structure of the document is logical and supports the purpose and main claims

Editing involves looking at each sentence carefully, and making sure that it's well designed and serves its purpose.

Proofreading involves checking for grammatical and punctuation errors, spelling mistakes, etc. Proofing is the final stage of the writing process.

Source: U. of Toronto, Engineering Communication Program

The Scourge

By Rick Horowitz

Hereinafter,”
“Hereinunder,”
Rip the brain cells quite asunder.
“*Silencio*” and “*Arguendo*”?
Fun – but not a chance to . . . mendo.

Claimants may be “on all fours,”
But who can judge above the snores?
As words pile high and jargon flows,
We rub our eyes,
We hold our nose.

No simple task to wrap one’s teeth
‘Round “Give, devise, and . . .” – yup – “bequeath,”
And what attorney wants to face
“Pursuant to the instant case?”

“Comes now aforesaid *inter alia*” –
Now fess up, when did English fail ya?
The forest lost behind the trees,
We hack our way through legalese.

“Wherein,” “Therein,” “Therefore,” “Thereby,”
The reader reels, and wonders “Why?”
When normal words can still convey
The very thing you want to say!

The law is thick with other pain,
So why not keep the language plain?
Have pity on the legal ear!
But first? Your favorite outrage *here*:

Judges Speaking Softly

What They Long for When They Read

ROSS GUBERMAN

The author is the president of Legal Writing Pro, the author of *Point Made: How to Write Like the Nation's Top Advocates*, and the creator of the legal-editing tool BriefCatch.

Do you ever stay up nights wondering what judges want? At least in briefs and motions?

I recently surveyed more than a thousand state and federal judges, both trial and appellate. Respondents ranged from state trial-court judges to U.S. Supreme Court justices.

The good news: Judges agree on much more than many litigators might think, and I found no major differences based on region or type of court. More good news: When judges are surveyed anonymously, they're blunt and sometimes even funny.

The bad news: Other than the briefs by the brightest lights of the appellate bar, almost every filing I see violates the wish lists of the judges I surveyed.

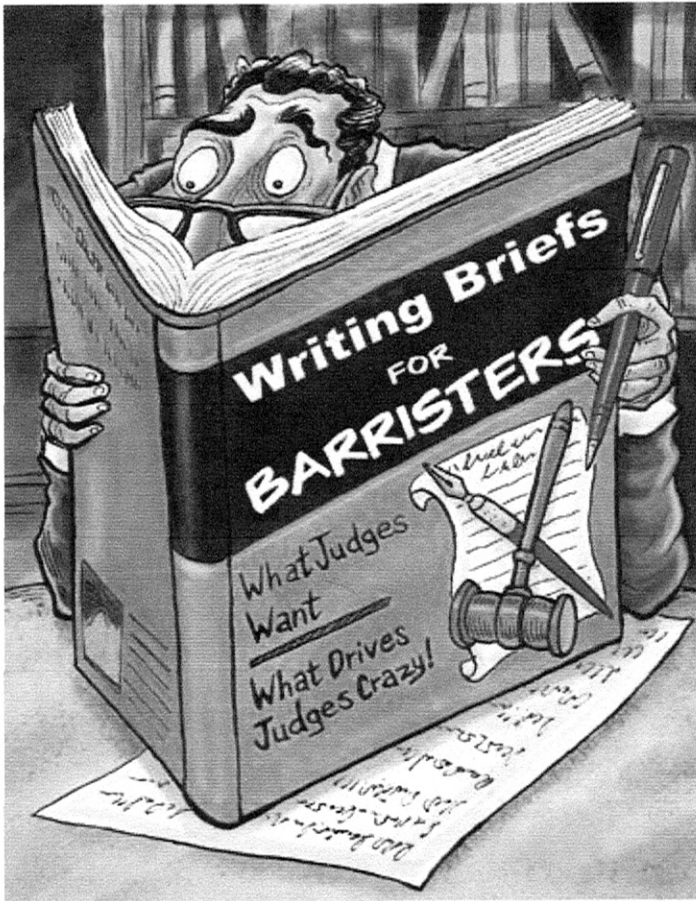
Here is some guidance, along with some choice anonymous quotations about what judges want but too often don't get.

For starters, watch how you name names. Use the parties' names rather than their procedural affiliation. Prefer words to unfamiliar acronyms, even if the word or phrase is longer. Avoid defining obvious terms like "FBI" and "Ford Motor Company." And for the terms you do define, put the defined term in quotation marks and then get out of Dodge.

All four of these techniques make "legal writing" feel more like "writing."

- "I absolutely detest party labels (plaintiff, debtor, creditor, etc.). Name names, for God's sake!"
- "Don't use 'plaintiff,' 'defendant,' 'appellant,' or 'appellee' in the brief because we may forget who's who. Instead, use names for individuals and business titles for companies."
- "Avoid defining obvious terms. If a party is Apple Computer Corp., why include the parenthetical ('Apple')? If the plaintiff's name is Henry Jackson and he's the only Jackson in the case, why the need to identify him as Henry Jackson ('Jackson')? If the case is about one and only one contract, when first identifying it, why the need for (the 'Contract')?"
- "I truly dislike acronyms. I would much rather have 'North River Insurance Cooperative' referred to as 'the insurer' or 'the cooperative' or 'North River' than as 'NRIC.'"
- "'Hereinafter defined as' (or anything like it) is pretty awful."
- "Avoid defined terms ("terms") altogether."

Keep your language choices classy. As if on cue, almost all litigators and appellate lawyers are happy to endorse a ban on emotional or hyperbolic rhetoric. The problem is that those same lawyers often grant themselves an exemption, as if their opponents are so singularly awful or imbecilic that even the snarkiest



tone is warranted. In fact, lawyers often tell me that they absolutely must point out how disingenuous their opponent is, because otherwise the court won't see it. Solution: Show, don't tell.

- “‘Disingenuous’ is a perfectly fine word that the legal profession has turned into the wild card disparagement of the other side’s argument.”
- “Don’t use ‘specious.’”
- “Avoid phrases and sentences that reflect a lack of civility. Don’t belittle the other side’s arguments but rather focus on your own strengths.”
- “I hate ‘speciously,’ ‘frivolously,’ ‘disingenuously,’ and other shots at counsel or the other party.”
- “Don’t write ‘ridiculous.’”
- “I hate ‘laughable.’”
- “Words such as ‘clearly,’ ‘plainly,’ ‘obviously,’ ‘absurd,’ ‘ridiculous,’ ‘ludicrous,’ ‘baseless,’ and ‘blatant’ are crutches intended to prop up arguments that lack logical force. They can never make a weak argument credible or a strong argument even stronger. So why bother with them?”

Oliver Wendell Holmes Jr. once said that you should strike at the jugular and let the rest go. If you write motions and briefs for a living, you can manifest Holmes’s maxim many times a

day. Start by cutting stuffy introductory formulas beset with such archaic language as “by and through undersigned counsel.” Reduce well-trodden standards and tests to their essence. Hack away at needless procedural detail. And then, at the sentence level, slash windups and throat-clearing.

- “Avoid long introductions such as ‘Plaintiff, by and through undersigned counsel, hereby submits its Reply Memorandum in response to _____. This Reply is accompanied by the following Memorandum of Points and Authorities.’ I know that counsel is filing the brief on behalf of his or her client. I can see in the caption that the filing is a reply, and I can also see that there is a memorandum of points and authorities.”
- “Avoid grammatical expletives (‘there is,’ ‘it is’).”
- “‘It should be noted that,’ ‘it is beyond doubt that,’ and the like waste space.”
- “Writing numbers out twice seems particularly useless.”
- “Is it really necessary to devote a page or more or even half a page to discussing the standard of review for summary judgment or a motion to dismiss for failure to state a claim?”
- “The procedural history does not need to go back to the Creation. Just summarize what is relevant to the issue specifically before the court.”
- “Most sentences are dramatically improved by omitting testimony references: ‘Smith [testified that he] went to the scene the following day.’ While some discussion of trial testimony is necessary when you are talking about hearsay or impeachment, those discussions are best left to highlight after you’ve told the story the reader needs to understand.”
- “There’s a real danger in stuffing factual sections with crud.”

With judges becoming ever more impatient readers, looks do matter. Out: long, uninterrupted blocks of text. In: timelines, maps, graphs, diagrams, tables, headings and subheadings, and generous margins.

- “Sometimes a timeline is clearer than an essay format.”
- “I ALWAYS appreciate a clear timeline of events and I am happy to have that in the text of the fact section or as an exhibit. I want one place where I can see when everything happened in the case if it’s not a singular event.”
- “Just as I don’t like scrolling down to find authority in a footnote, I don’t like flipping through clerks’ papers or exhibits to find a key piece of documentary evidence that is discussed in a brief. The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed).”

Illustration by Chad Crowe

- “When a case involves analysis of a map, graph, or picture, I would like to see attorneys include a copy of the picture within the analysis section of the brief.”
- “I like fact sections broken down with headings and even subheadings. Define chapters in the facts or the ‘next’ relevant event.”

I was surprised that the judges I surveyed were more open to bolding and italics than judges used to be. Perhaps this evolution stems from their desire not to wade through paragraphs that look and feel the same. Or maybe the internet has accustomed all of us to formatting bells and whistles. That said, even judges who don’t mind emphasis want it in small doses. And although the judiciary may be split on emphasis, every judge in the country appears to hate all caps, and few are fans of underlining.

- “Party names should not be in all caps.”
- “Headings in all caps are difficult to read.”
- “All caps are completely beyond the pale.”
- “If a lawyer feels that emphasis is needed, I always prefer italics to boldface type. Boldface signals to me ‘Just in case you’re too stupid to recognize what’s important.’”

Let’s move on to specific language choices. One question on my survey simply asked judges to list words and phrases they dislike. Few responses surprised me, but it was amusing to see how easily many judges could rattle off language choices that drive them crazy. They must have lots of exposure!

As the list below suggests, many lawyers are unaware of how often they use these words and phrases. Never confuse knowing that you should avoid a term with actually implementing that knowledge in your writing.

- “Death to modifiers!”
- “I don’t like any clunky legalese like ‘For the foregoing reasons,’ ‘heretofore,’ etc.”
- “‘Wherein,’ ‘heretofore,’ ‘aforesaid,’ ‘to wit’: they all should go the way of the dodo bird.”
- “Don’t use ‘at that time’ for ‘when.’”
- “Don’t use anything like ‘s/he.’”
- “I dislike formalistic terms that people don’t really use in ordinary life like ‘wherefore’ and ‘arguendo,’ unnecessary phrases like ‘[party] submits,’ and derogatory terms like ‘asinine’ used to describe the opposing party’s argument.”
- “Don’t use ‘prior to’ for ‘before’ or ‘subsequent to’ for ‘after.’”
- “I dislike ‘notwithstanding,’ ‘heretofore.’”
- “Don’t use words like ‘wherefore,’ ‘heretofore,’ ‘hereinafter’ that aren’t commonly used in everyday language.”
- “Don’t write ‘Pursuant to.’”

- “I believe ‘hereby,’ ‘hereinafter,’ ‘foregoing’ and other arcana have no place in modern legal writing.”
- “I do not care for ‘the instant’ anything.”
- “Tell them to stop writing ‘In the case at bar!’”
- “I don’t like unnecessary Latin phrases like ‘inter alia.’”
- “Get rid of the formalisms from the Middle Ages such as ‘Comes now Plaintiff, by and through his undersigned attorneys.’”
- “‘Aforesaid,’ ‘heretofore,’ etc. are all pretty much empty and add nothing. Same with ‘said,’ as in the ‘said contract was signed at the said meeting.’”
- “I loathe the word ‘utilize.’”
- “I do not like when lawyers tell me what I ‘must’ do. Just say that the court ‘should’ do something.”
- “‘Unfortunately for appellee’ (or for any party) should never appear in briefs.”

Another category of language irritation: Many lawyers are surprised when I tell them that judges really don’t find “respectfully submits” and “respectfully requests” to be, well, respectful. Cloying is more like it. And my survey results were right in line with my anecdotal experience.

- “Don’t write ‘Defendant respectfully requests.’ I prefer it if you just say what you want to say. I’ll know if it’s respectful or not!”
- “‘Respectfully submits’ or ‘it is our position that’ are wasted words: they communicate nothing, except potential insecurity about the argument that follows.”
- “Avoid ‘with all due respect.’”
- “Avoid phrases such as ‘respectfully submits that’ that can be stated in one word like ‘contends.’”

On the less-is-more theme, you’ll rarely if ever hear judges complain that sentences or briefs are too short. And yet, sometimes short is, in fact, too sweet. Two offenders: random “this” and “that” references such as “this proves” or “that explains.” Also, especially for traditionalist judges in the Justice Scalia mold, avoid contractions.

- “I do not like indefinite references and see the word ‘this’ used too often. It should be used in conjunction with another word such as ‘this argument’ or ‘this logic.’”
- “I REALLY dislike contractions. They make the argument sound like casual conversation and they give the writer an arch voice.”

When it comes to usage as opposed to word choice, American judges fall into three categories: (1) those who understand the finer points of usage and care (these are the judges who ask me in workshops about “pleaded” versus “pled,” predicate nominatives,

and the counterfactual subjunctive); (2) those who understand the finer points of usage but either don't notice or don't care, and (3) those who don't know enough about usage to notice mistakes.

- "I despise the use of 'impact' as a verb."
- "Learn to differentiate between 'that' and 'which.'"
- "I cannot stand 'As such' used as a synonym for 'Therefore.'"
- "Learn to use the subjunctive!"

Now let's talk about fact sections, and in particular dates. Whenever I relay judges' irritation with needless dates, someone in the audience retorts that some dates really matter. Well, that's why judges object to needless dates. And it's not as if you face a binary choice between a full date and nothing at all. Sometimes a word or phrase will do the trick.

- "It helps to vary how the passage of time is described. Instead of 'on May 26, 2016,' it's refreshing to read 'the next week' or 'two months later.'"
- "Dates are rarely essential and often overused. If I see a date, I assume it is important. If it's not, you have interrupted the flow of your argument for no good reason."
- "I HATE specific dates that have no relevance. I keep thinking the 24th day of September must really be important, for example, and then when it isn't, I'm unhappy I've spent brainpower waiting for writer to tell me why it was critical!"
- "Sometimes it's enough to refer to an event as 'mid-2015' rather than a specific date."
- "If two parties entered into a contract, and it makes no difference to the claim whether they did so on January 22, 2014, or March 6, 2015, leave the date out."

Now let's talk a bit about the beginning of motions and briefs. Don't short the introduction. Judges find strong introductions invaluable. They help lawyers hone their theory of the cases, and they help shape the fact section and legal argument to come.

- "Explain why you should win on the first page. 'The Court should deny Defendant's Motion for Summary Judgment for the following three reasons.'"
- "I've had briefs in fairly involved cases without executive summaries. I've likened reading them to putting together a jigsaw puzzle without having the cover of the box to know what the puzzle is supposed to look like when it's done."
- "I do appreciate a good 'statement of the case' section, particularly in complex civil appeals, in which, in a non-argumentative manner, the lawyer sets the stage for what issues the court is called upon to decide. That helps me focus on what facts and portions of the record will be most relevant to those issues."

How about cases and other authorities? Busy judges have become increasingly irritated with the way many litigators handle case law. Facile shorthand: "Too many and too much." But it's a bit more complicated than that. One common complaint is that many litigators appear to search case law databases for choice language even if a given case doesn't quite fit and even if the case doesn't come down procedurally the way the lawyer wants the current case to.

- "The main issue I run across is probably a function of Boolean searches: citations to 'blurbs' or quoted phrases within published decisions where the actual ruling, or the analysis, or the posture of the case is completely distinguishable (or even adverse) to the point the party is trying to make. I am much more persuaded by one or two authorities that are carefully analyzed and applied than by a sprinkling of quotations lifted from a dozen cases that are strung together."

It's also surprising how many cases some lawyers cite for a proposition that their opponents would never challenge, such as the summary judgment standard, the Daubert standard, or the standard of review.

- "For well-established law, such as the standard of review, I prefer only a single cite."
- "Cite just enough cases and not all cases. One controlling case is enough. For non-controlling cases, if there aren't any contrary or many contrary cases, cite two or three non-controlling cases, preferably the two or three most recent. If there are two contrary groups of cases and none is controlling, then it might be appropriate to cite one from each jurisdiction supporting the writer's side."

Once you know which cases to cite and how many, what should you do with them? On the one hand, most judges rail against including too many facts and too many quotations when it would be more effective to use a concise parenthetical or a pithy quoted phrase merged into a sentence about your own case. On the other hand, for complex or dispositive cases, some judges find that lawyers use a parenthetical when a fuller textual description would be more apt. Ask yourself this question: "If I were being asked to endorse proposition X, what would I need to know about case Y to be comfortable doing so?" And then don't write one more word.

- "Skip the long description. Just state the damn proposition, cite the damn case, and be done with it."
- "Long discussions of the facts of cited cases are often not helpful."
- "For the most important case, cover the important points in text, not in an explanatory parenthetical. But it's okay to use

explanatory parentheticals for the cases that support the main one.”

- “I prefer citation to one or two cases with a short, pertinent explanation in a parenthetical. I prefer a full paragraph for distinguishing an adverse authority. I don’t prefer distinguishing adverse authority in a footnote.”
- “I prefer that briefs directly address contrary authority organized by argument, not by case name.”

That brings me to the block-quote question. Most lawyers defend block quotes by insisting that they convey pivotal information that can’t be paraphrased. That may be true, but here’s the bad news about that “pivotal information”: If it’s presented in a block quote, judges are likely to skip it entirely. So meet judges halfway: Use block quotes only when the language of the text itself adds value. Use block quotes as little as possible. And introduce block quotes substantively and persuasively, focusing less on who said what and more on why the reader should care.

- “Do not block quote more than three lines. After that, I may stop reading.”
- “Don’t write ‘As follows:’ before quotes. Just use the colon; the ‘as follows’ is implied.”
- “Fold quotes into text if possible.”
- “Huge block quotes are terrible. It’s much more persuasive to paraphrase the reasoning and then quote only the crucial language.”
- “When quoting, do not overuse brackets—I call them punctuational potholes. If you’re quoting from a case, start the quote after the part of the sentence that makes you want to use a bracket. The same for quotes from the record. For example, instead of “The officer stated, “[i]f [we] catch [you] in [the area] again, if [you] don’t have something, [I]’ll make sure [you] have something,” put “The officer said that if Smith were ever caught in the neighborhood again and did not “have something,” the officer would make sure he did have something.”

One last issue. Even after Justice Scalia’s passing, the debate over where to put citations rages on. But with so many judges reading briefs on iPads or on other devices that require scrolling to see footnotes, 78 percent of the judges in my survey prefer to see citations in the text, the old-fashioned way. You should still try to avoid putting citations at the beginning or in the middle of your sentences. And, of course, some judges (12 percent in my survey, with the other 10 percent neutral) do love to see citations in footnotes, but those judges nearly always make their views known.

- “This is a show-your-work gig, and I need to see your work there—not go hunting for it. This is a bigger deal now, I think, since we all read electronically.”

- “We want to process the citation as we read. When a litigant makes a point, it matters if he or she is citing to a Supreme Court case, a circuit opinion, a treatise, etc. I don’t want to have to stop reading and look down and find the citation in the footnote or endnote. I understand the reasons some endorse it, but it is not practical for briefs and opinion writing, and everyone I work with hates that style of writing.”
- “I find citations in footnotes to be distracting. It also makes the case more difficult to read online such as in Westlaw.”

Shoot for strong, compelling, yet concise introductions; a restrained use of case law; and modern diction.

Here’s the bottom line: Just as many associates in law firms think that knowing individual partner preferences is all there is to writing, many seasoned litigators think the same about knowing the preferences of individual judges.

Sure, there’s something satisfying about finding out whether a given judge likes the Oxford comma. (Since I brought it up, 56 percent of the judges I surveyed said they do, 21 percent said they don’t, and 23 percent said they don’t care). And it’s all too tempting to make brief writing mostly about rules and formatting preferences. But I suggest that both litigators and appellate advocates spend most of their energies developing the core persuasive writing skills that would make almost all judges much happier.

So shoot for strong, compelling, yet concise introductions; a restrained use of case law, with quality over quantity; a readable treatment of party names and industry lingo; helpful lead-ins to block quotations; a confident and professional tone; modern diction; and more white space, headings, and visual aids.

In a word, show empathy for the reader. And for those of you thinking that judges should practice in their opinions what they preach to lawyers about their briefs, that topic will have to be for another article! q

What *Judges* Like – and Don't

Likes	Dislikes
Brevity	Verbosity
Clarity	Obscurity
Logical flow	Clutter
Clear issues	Failure to frame the question
Interesting writing	Long paragraphs
Fluidity	Repetition
Informative headings	Too many footnotes
Clean overall appearance	Run-on sentences
Structured paragraphs	Disorganized style
Directness	Unnecessary material
Issue and answer in first paragraph	Unclear intentions
Practical writing	Boring writing
Trustworthiness	Latin terms; technical language
Succinctness	String citations
Flowing prose; good transitions	Poor grammar
Clear divisions of thought	Overstatement; hyperbole
Explanations	Passive voice: who did what?
Accuracy	Long decisions
Honest, <i>sincere</i> writing	Boilerplate
Supporting rationale	Complicated writing
No footnotes	Long-winded philosophical discourses
Decisiveness	Stream-of-consciousness
Originality in presenting ideas	Quotations
Concise sentences	Incompleteness
Clear, concise statement of facts	Witness-by-witness statement of facts
Outline style	Cases cited for the wrong proposition
Short words	Footnotes, especially giant ones
Clear conclusions	Long words
Conveying a sense of justice	Circuitous sentences
Instant clarity	Lengthiness
Storytelling	Lack of closure
Short, to-the-point style	Convoluting writing
Simple sentences	Spelling mistakes
Clever phrases	Disjointed ideas
Well-put phrases	Cuteness; unprofessional manner
Inspiring confidence about precise questions presented	Unnecessary detail
Understandable language	Dancing around the issue
Common sense	Uninformative writing
Immediate identification of issues	Overuse of procedural labels
Logical organization	Writing you have to reread
Entertainment	Impossibly small type
Footnotes for string citations	Chattiness
Comprehensiveness	Distortions of fact or law
Complex ideas stated simply and directly	Overcontentiousness
Footnotes properly and sparingly used	Sentences broken up by citations
Civil tone	Lazy writing
	"Clearly"

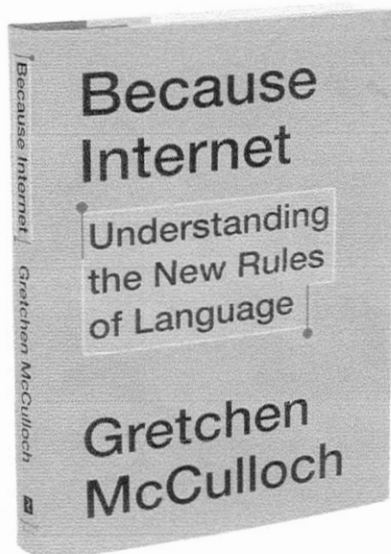
Source: Garner, **Legal Writing in Plain English**

Books of The Times

Why Has Language Changed So Much So Fast? ‘Because Internet’

By Jennifer Szalai

- July 22, 2019



Toward the end of “Because Internet: Understanding the New Rules of Language,” the linguist Gretchen McCulloch acknowledges a paradox at the heart of her book. On the one hand, books about usage tend to enshrine language in a set of rules, and woe to anyone who tries to break them. On the other, the “new rules” floating in the digital ether are constantly changing; anything tethered to the material world of dead trees can’t possibly keep up.

McCulloch doesn’t have a problem with this. “Rather than thinking of books as a way of embalming language, of rendering it fixed and dead for eternity,” she writes, “we can think of them as maps and guidebooks to help people navigate language’s living, moving splendor.”

With “Because Internet,” she has written an incisive and entertaining guidebook of her own. I was reflexively suspicious of her title — the “because noun” construction is quintessential internetese — but by reading this book I’ve gained a clearer sense why. To someone like me, who was introduced to email in college, the language of online chatter can look almost aggressively cute in the context of a book.

I’m one of what McCulloch calls, with her linguist’s affection for taxonomy, the Semi Internet People — those who “defined themselves by ambivalence towards technology and an orientation towards offline relationships over online ones.” Unlike Full Internet People, who grew up with the internet and never questioned its social potential, Semis tend to assume that conveying the entire social meaning of a message is better accomplished by a voice conversation, whether in person or (to the barely disguised panic of Full Internet People) in a phone call.

But the phone itself was once a profoundly disruptive technology for the English language (and presumably for other languages, too, though this book’s focus is English). As McCulloch explains in one of many illuminating historical anecdotes, simply settling on a standard greeting made for acute confusion. What initially started as a battle between “ahoy” and “hello” (another contender was “what is wanted?” — my new phone greeting) was eventually resolved in favor of “hello”; the word has the same origins as “holler,” and was used at the time as a call for attention.

“Hello” later became an acceptable greeting for all kinds of interactions, but it took a while for it to lose its whiff of impertinence. Now “hello” is not just polite but even a bit formal, compared with a nonchalant “hi!” or “hey!”

Or make that “hey!!!!” Exclamation points, unlike the period, have so far escaped obsolescence in customarily punctuation-free online interaction; if anything, they’ve been cheapened by overuse, with a single exclamation point being negligibly more eager than no exclamation point at all.



Gretchen McCulloch
Credit Yvon Huynh

But a string of them, in our age of hyperbole, can sound insincere. McCulloch doesn't parse the ascendancy of the double exclamation, but “!!” — taking care to keep one's exclamation points to exactly two — is apparently emerging as the marker of genuine enthusiasm.

For now, at least. One of the overarching themes of “Because Internet” is how fluid all of these norms are. McCulloch says that online exchanges like chats, texts and social media posts afford linguists like her an ideal opportunity for study. Internet language is “beautifully mundane” and, unlike speech, it leaves behind a convenient written record.

Formal language, she says, is mostly disembodied; informal language isn't. When we talk to a friend, we deploy gestures and facial expressions to give more context to what we're saying; on the phone, without visual cues, our vocal inflections, volume and laughter do the job. McCulloch is remarkably good at showing how internet speech has been evolving “to restore our bodies to our writing,” as certain online conventions have changed over time.

Take “LOL,” or what is now more typically written as “lol.” As early internet slang, “LOL” meant “laughing out loud,” but then its definition softened, acquiring additional layers of meaning. The lowercase “lol” is still a “word in transition,” McCulloch says, signifying “amusement, irony and even passive aggression.” It can temper a statement that might otherwise sound confrontational (“what are you doing out so late lol”) or gently poke fun at someone (“good morning lol” to a friend who woke up at noon).

McCulloch is such a disarming writer — lucid, friendly, unequivocally excited about her subject — that I began to marvel at the flexibility of the online language she describes, with its numerous shades of subtlety. Emotions can be quickly and efficiently conveyed by the “sarcasm tilde” (“isn't that ~special”) and “expressive lengthening” (“yesssss” and “bothhhh”). A lot of innuendo can be contained in the tiny emoji of an eggplant.

But being attuned to such fine gradations of meaning can make for extreme sensitivity, too. A Full Internet Person might read annoyance or anger into a sentence that ends with a period. I was surprised to learn that the dot-dot-dot of ellipsis in emails and texts, which I usually associated with a simple (and harmless) pause in thought, is “especially perilous.” Younger people indicate a simple pause with a line break or a new message; they “infer emotional meaning” from an ellipsis because they wonder what it's doing there, and what it might be insinuating.

Reflecting on these changes in “expressive typography,” McCulloch is fully celebratory: “I'd gladly accept the decline of standards that were arbitrary and elitist in the first place in favor of being able to better connect with my fellow humans.” She sees internet language as offering us a chance “to write not for power, but for love.” But it's hard to look at online discourse today and fail to notice that some people are writing for hate. The “in-group vocabulary” of internet language and memes isn't just inclusive; its ability to induce a “rush of fellow-feeling” often relies on excluding an out-group, too.

Formal language can be chilly and impersonal, but it abides by explicit rules and can therefore be taught, rather than relying on fuzzier paths of transmission. As McCulloch herself observes, the

formality is designed to appeal to a general audience — something that used to sound basic and boring but seems to be in awfully short supply these days.

“One type of writing hasn’t replaced the other,” McCulloch writes, taking care to emphasize that the situation between formal language and internet language isn’t zero-sum. She’s immersed in online life, where she sees the future looking emancipatory and bright. “There’s space, in this glorious linguistic web, for you,” she insists. I hope she’s right lol.

Follow Jennifer Szalai on Twitter: [@jenszalai](https://twitter.com/jenszalai).

Because Internet
Understanding the New Rules of Language
By Gretchen McCulloch
Illustrated. 326 pages. Riverhead Books. \$26.

A version of this article appears in print on July 22, 2019, Section C, Page 1 of the New York edition with the headline: Language Is Also Very Fluid Nowadays.

What Normal People Like – and Don't

U.S. General Public – Various Legal Passages

Now the other shoe drops on legalese. We have a new study - another first of its kind - confirming that the public, too, wants to read plain legal language. Hardly a surprise.

In 2011, the author sent a survey to hundreds of people he targeted by asking law firms to forward the survey to the firms' clients. Then the author asked those people who took the survey to forward it to other friends and contacts. Among other things, readers were asked to choose between 11 pairs of passages. One was written in plain language, and the other included at least one aspect of legalese - passive voice, an abstract noun where a verb should be, an inflated or antiquated word or phrase, or a technical term without an explanation of what it means. Two examples:

- (1) Discovery may proceed prior to the judge's consideration of the motion.
- (2) Discovery may begin before the judge considers the motion.

- (1) I have signed and enclosed the stipulation to dismiss your case.
- (2) I am herewith returning the stipulation to dismiss your case; the same being duly executed by me.

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Of the 376 responses, 202 were from people who had used an attorney within the previous five years, and the rest were from people who had not. Given the choices, just over 80% preferred the plain-language versions. And the client group preferred it by 5% more than the nonclient group. (Perhaps the clients were still reeling from the effects of traditional style.) On top of that, 41 % were "annoyed" by complicated language, and a measly 0.5% were impressed.

Christopher R. Trudeau, *The Public Speaks: An Empirical Study of Legal Communication*, 14 *Scribes J. Legal Writing* (forthcoming 2012).

Source: Kimble, *Writing for Dollars, Writing to Please*

- *Your Credibility Matters: Catching Those Errors*

Who Cares?

“On the face of it, my zero-tolerance approach to grammar errors might seem a little unfair. After all, grammar has nothing to do with job performance, or creativity, or intelligence, right?”

“Wrong. If it takes someone more than 20 years to notice how to properly use ‘it’s,’ then that’s not a learning curve I’m comfortable with.”

Kyle Wiens, CEO

*“I Won’t Hire People Who Use Bad Grammar.
Here’s Why.”*

Harvard Business Review

Preciser is Nicer...

E. Attention to Detail; Pride in Your Work; Neatness Counts.

Lawyers are word people. Words, phrases, sentences, paragraphs, sections, contracts, and briefs are their stock in trade. The contracts that you draft must be clear, practical, and precise so that they work by guiding the course of performance or providing the foundation for a successful lawsuit. All that is for your client's sake.

Beyond the client, however, aspiring lawyers must pay close attention to detail and take pride in *all* their written work product for their *own* sake. Each document you create—your work product—is your calling card. It is on this that you will be evaluated by your colleagues, clients, opponents, and others. Documents, including correspondence, that contain typos or substantive errors, that are badly formatted, or that do not convey an appearance of well-thought-out precision and accuracy will be held against you in the court of professional reputation.

All documents that go out over your name should be proofed, spellchecked, substantively correct, neat, and well-organized. This requires a level of attention to detail that few people other than lawyers, accountants, and editors and publishers give to writing. Each error that slips out can have a damaging effect upon the way others judge your professional competence, prudence, and attention to the matter at hand. The effect is cumulative. At some point—reached fairly quickly—mistakes add up to the reader, who assumes that the author is (a) not very smart, (b) not very careful, or (c) not paying attention. None of these impressions will advance your legal career. That means that you should *never* rely solely on your choice of word processor's spellchecking software alone. While spellchecking and grammar checking software can be a beneficial aid to drafters, there is no substitute for spending time with your own document, carefully combing through it for spelling, grammatical, and typographical errors. You may even uncover grammatical and word choice errors that have been introduced by your software while in an "autocorrect" mode.

Source: Kuney, **The Elements of Contract Drafting**

Is it it's or its? (Or its'?)

For instance...

"The dog stretched out on it's pillow for a nap."

What's wrong with that?

The "it's" you chose isn't the right one. What you want to say is: "The dog stretched out on its [no apostrophe] pillow for a nap."

The apostrophe version – "it's" – is only used as a contraction: most often for "it is" (e.g., "It's almost time for lunch ..."), and occasionally for "it has" (e.g., "It's been three months since we met...") By contrast, if you're using the word to indicate possession – the pillow that belongs to the dog, or "its pillow" – then you spell it without any apostrophe, anywhere.

In fact, you should handle possessive "its" the same way you'd handle "his" or "hers." ("We went to his house." "The book is hers.") You wouldn't say "We went to hi's house," would you? And you wouldn't – or at least you shouldn't — say "The book is her's" either.)

In fact, that whole category of possessive words – his, hers, its, ours, yours, theirs — doesn't need (and shouldn't have) apostrophes to show possessives. Think of the possessive as built in!

Here's how to remember it:

Anytime you're thinking of using it's-with-an-apostrophe, try saying the sentence out loud, substituting the words "it is" for "it's," and see if it makes any sense. So: "The dog stretched out on it is pillow"? "The door fell off it is hinges"? Ridiculous! So you know it isn't a contraction, which means it doesn't take an apostrophe. Go with plain and simple (and correct) "its."

Anything else you should know?

One more thing. Because right about now, you're thinking, "What about that third version of the word – you know, the one with the apostrophe after the "s"? When should I use that one?"

Never.

Let me repeat that: Never. That "third version" of the word – its' – does not exist. You say you've seen it somewhere? Or even lots of somewheres? Doesn't matter: It still doesn't exist. Wherever you saw it, and however frequently you saw it, it was wrong. Somebody made a mistake; at least it wasn't you. Be thankful – and step away.

Source: Rick Horowitz, **Prime Prose LLC**

Is it “affect” or “effect”?

Rick’s Tips to the Rescue!

It’s one of the English language’s great puzzlers, right? So let me give you the quickest way I know of to get your affect/effect decision right almost all the time:

VANE (like “weather vane”)

It’s an acronym for “**Verb? Affect. Noun? Effect.**” And I’d say it’ll steer you in the correct direction upwards of 95 percent of the time.

If the word you’re looking for is working as a Verb -- “The bad weather **x**ffected the turnout,” -- then go with the A word: “The bad weather **a**ffected the turnout.”

If the word you’re looking for is working as a Noun -- “The bad weather had a terrible **x**ffect on the turnout” -- then go with the E word: “The bad weather had a terrible **e**ffect on the turnout.”

“I can **a**ffect the outcome by flipping this switch.” (It’s a Verb -- go with the A.)

“If I turn this knob, I’ll have a significant **e**ffect on the process.” (It’s a Noun -- go with the E.)

Got it? Great! Now here’s the part where I have to tell you that sometimes, it’s exactly the opposite!

Turns out that both “affect” and “effect” have secondary, rarely used meanings. Turns out that “affect”’s secondary, rarely used meaning is as a Noun, not a Verb. Turns out that “effect”’s secondary, rarely used meaning is as a Verb, not a Noun. F’instance:

“He’s behaving very strangely today, don’t you think? He’s definitely showing a weird **a**ffect.” (Here it’s a Noun, but this time it’s the A word that you want.)

“The chairman got the recommendations, and **e**ffected the changes -- i.e., she put them into effect -- immediately.” (Here it’s a Verb, but this time it’s the E word that you want.)

It’s a cruel world, isn’t it? But here’s the saving grace, as I hinted at up top: These two secondary uses are so unusual that you’ll almost never have to deal with them without making a deliberate choice to deal with them. *In the vast, vast majority of cases, the mnemonic device VANE is all you need to get you to the proper decision.*

Verb? Affect. Noun? Effect.

Does that help? Should I trademark the thing? As far as I know, I invented it. Maybe I can put it on sweatshirts, like “Three-Peat.” (Worked for Phil Jackson, right?)

I always dreamed I’d be spending my Sunday evenings like this. :)

Source: Rick Horowitz, **Prime Prose, LLC**

Make sure your verb “agrees” with your subject.

For instance...

The result is encouraging.
The results are encouraging.
The color is blue.
The colors are blue and yellow.

So where’s the problem?

The problem occurs when the sentence gets a bit more complicated. You can easily be distracted, and take your eyes off the true subject of the sentence. And then before you know it, the subject and the verb are disagreeing. That doesn’t mean one of them roots for the Packers and the other one roots for the Seahawks; it means one of them is singular, but the other one is plural.

The result is encouraging. **Right!**
The result of their efforts are encouraging. **Wrong!**
The color is blue. **Right!**
The color of the jackets are blue. **Wrong!**

What’s wrong with the “Wrong!” ones?

Those extra words in the middle of the sentence don’t change the subject of the sentence, which stays singular in each case: “result” in the first pair of sentences, and “color” in the second pair. And if the subject stays singular, the verb has to stay singular, too: “The result...*is*..,” “The color...*is*...”

That’s true even when those extra words in the middle of the sentence contain another noun – even a plural noun, like “efforts” or “jackets.” The subject of the sentence stays the same! If it was singular before, it’s singular now, so it still takes a singular verb.

In fact, you can throw as many extra words in there as you’d like. And you can make every one of those extra nouns plural -- they don’t change a thing: The subject and the verb are the only pairing that matters, and they should see each other, and sync up, even across a crowded sentence:

The color of the jackets is blue.
The color of the jackets of the policemen *is* blue.
The color of the jackets of the policemen in the cars *is* blue.
The color of the jackets of the policemen in the cars on the highways is **still** blue!

But what if the jacket is blue *and* gray?

Well, that's a horse – or a jacket – of a different color. (Sorry.)

The exact same rules apply. It's just that, when you apply them, you'll get the opposite result.

For instance...

The colors are blue and gray.
The colors of the jacket are blue and gray.
The results are encouraging.
The results of their effort are encouraging.

And where's the problem this time?

It's the same problem as last time – extra words can create extra distraction – only this time, the mistake happens in the opposite direction: The subject is plural, but the extra words get the verb thinking it's supposed to be singular:

The colors are blue and gray. **Right!**
The colors of the jacket is blue and gray. **Wrong!**

And for that matter...

The results are encouraging. **Right!**
The results of their effort is encouraging. **Wrong!**

But I thought you said...

I didn't say the verb should always be singular; I said the verb should always *agree* with the subject it's paired with. I said you shouldn't let any extra words, no matter how attractive they might be, mess up that agreement. In these examples, the subjects – “colors,” “results” – are both plural, so the verb should be plural, too. And that's true even if the intervening noun – “jacket,” or “effort” – is singular.

Throw as many extra singular nouns in there as you like this time. Same result: They don't change a thing. Stay focused on the true subject, and the correct verb will be clear to you, despite all the distractions:

The colors of the jacket are blue and gray.
The colors of the jacket on the hanger are blue and gray.
The colors of the jacket on the hanger in the closet are blue and gray.
The colors of the jacket on the hanger in the closet in the basement are **still** blue and gray!

Source: **Rick Horowitz, Prime Prose, LLC**

Plurals, Possessives & Plural Possessives

There's the thing, and there's the owner of the thing.

You already know what the thing is – “a **shirt**,” “the **car**,” “our **supervisors**” – and whether there's more than one of it. That's the easy part – and that's not going to change just because there's a possessive – so let's set it aside for now.

Whatever the thing is (or things are), start with the other half:

Who owns the thing? (Whose thing(s) is it?)

How many owners are there?

Take care of the owner first. Owners need to show they're the owners – so first get the owner properly punctuated and properly spelled. That typically takes two steps:

1. Apply an apostrophe to the owner! And then...
2. Apply the possessive “s” – and that's it! *Except when...*

Except when the owner's final letter is *already* an “s”! Then the apostrophe works solo, and the extra (possessive) “s” isn't necessary; the sound is assumed.)

For instance, if the owner is “the boys,” the possessive is “the boys' game.” (No need for yet another “s” after the apostrophe.)

Got it? Good! You've done the hard part! You've punctuated the owner. Now you just turn back to the thing(s). Ask yourself:

What's the thing? Or: What are the things?

It doesn't care what you've done with the first half – **The thing stays the thing! The things stay the things!** If it's one thing, it stays one thing, and it's spelled as a singular. If they're multiple things, they stay multiple things, and they're spelled as a plural. ***This is a totally separate decision from how you spell and punctuate the owner!***

Any questions? I'm happy to answer a student's question, or a student's questions. In fact, I'm equally happy to answer many students' question (if they all have the same question), or many students' questions, if they have more than one.

A Tip Sheet: Plurals, Possessives, & Plural Possessives

Can you recognize the differences?

The boy

The boy's puzzle

The boy's puzzles

The boys

The boys' puzzle

The boys' puzzles

The company

The company's lease

The company's leases

The companies

The companies' lease

The companies' leases

Our customer

Our customer's favorite

Our customer's favorites

Our customers

Our customers' favorite

Our customers' favorites

Our child

Our child's scooter

Our child's scooters

Our children

Our children's scooter

Our children's scooters

Source: **Rick Horowitz, Prime Prose, LLC**

What's the Matter with These?

(Or Maybe *Nothing's* the Matter...)

Exercise

In the following sentences, correct the punctuation and spelling. When necessary, change the wording to make properly constructed sentences. Some of the sentences are correct as written.

1. From 1776 until the end of the War of 1812 the overriding question was whether the nation, besieged without by hostile governments and within by provincialism, having sufficient power to survive.
2. During those formative years, the weakest of the three branches of government being the judiciary.
3. Not particularly brightening the outlook, President Adam's appointment of John Marshall to the Court in 1801, supported unenthusiastically even by the Federalist's.
4. Yet, in its first 10 years under John Marshalls' guidance the Court consolidated far reaching judicial power and in another 15 it put Congress' authority on a broad and permanent constitutional footing.
5. The Jeffersonians' were certain of two things; that the Constitution was a limiting document and John Marshall was a malignant force.
6. They charged the Chief Justice with usurping power, and with converting his weak willed colleagues to his plans for aggrandizement.
7. The Federalists', on the other-hand expected the Court to consolidate national power, and contain the emerging forces of democracy.
8. There is precedent for non judicial action, by allies against a former enemy leader whose acts seem abhorrent, that of Napoleon.
9. When Napoleon escaped from Elba, broke the 1814 peace treaty and marched again on Europe he was declared "*hors la loi*" that is "beyond the law" by representatives of all the European states, except France which left the question what to do about him.
10. The Prussians said shoot him and the Russians said more delicately "summary execution."

11. Ultimately, however the Europeans agreed to exile him, to St. Helena where he would be out of the way and kept at British expense.
12. Exile spared the embarrassment of executing a sovereign, all European rulers had condemned the execution of Louis XVI, and did not want their subjects to suppose that killing rulers was an acceptable way of expressing their opinion of them.
13. No-one seriously considered a trial for Napoleon, it was unnecessary since his crimes were self-evident condemnation was universal and the European leaders had no qualms about punishing him for them.
14. However the idea of a trial for Nazi war-criminals was attractive to many even though the form the proponents favored was repugnant to others.
15. Stalin had punished his opponents and frightened others by "show trials" in the 1930's and Hitler himself mounted a show-trial for those who plotted to take his life in July, 1944.
16. In a show trial one can even allow a little defense; just enough to demonstrate how feeble it is.
17. The US Supreme Court has held that the processing, and disposal of solid-waste in landfills concerns an article-of-commerce for purposes of Commerce Clause analysis.
18. The legal issue in this case is whether the article-of-commerce test is satisfied when applied to sewage sludge the substance in question here.
19. Sewage-sludge is a by product of wastewater treatment. It is generally a solid or semi solid mud like substance, typically consisting of water and from 2–28% solids.
20. Some people limit the term 'sewage sludge' to mean stabilized disinfected sewage sludge that is suitable for beneficial agricultural uses.
21. Sewage sludge differs from solid-waste; in that economic ecological and agricultural benefits are realized by farmers using treated-sewage-sludge as fertilizer.
22. If solid waste constitutes an article-of-commerce, an even stronger more persuasive case can be made for regarding sewage sludge as an article of commerce for Commerce-Clause purposes.
23. Plaintiff Lutz sued defendant Reliance Nissan for wrongful termination and defendant successfully moved to compel arbitration pursuant to a two tiered arbitration procedure, that was specified by her employment contract.
24. Lutz won the initial arbitration but upon a second tier review the 'appellate' arbitrator reversed Lutz' award, and entered an award for defendant which award was confirmed by the trial court.
25. In a pre-mature appeal from the trial courts confirmation order Lutz raises various meritless arguments.

26. We hold that Lutz is responsible for the delay of which she complains, that she suffered no harm because defendant paid for all arbitration costs, that the two tiered procedure, which is uncommon but not unconscionable, was contractually binding, and, most important that the contract permissibly invested the “appellate” arbitrator with a broader standard of review than an appellate court would ordinarily have.
27. Our economic system depends in part on: legal recognition of property rights, and the ability of parties to enforce contract rights when necessary.
28. Defendant is charged with three antitrust offenses: horizontal price-fixing, horizontal division of territories, and resale price maintenance.
29. Patents protect novel and nonobvious inventions, such as machines, medicines, and processes; in contrast, copyrights protect original works of authorship, such as books, music, and paintings.
30. Attorney conflicts of interest can arise with: present clients, prospective clients, and former clients.
31. The most common causes of attorney discipline are: alcohol and greed.
32. Defense counsel sat in silence; the prosecutor’s evidence was admitted.
33. This is the way a pleading ends: not with a Bang but a Wherefore.
34. Our deadlines shorter now, because of the one-year statute of limitations.
35. The peoples’ right to be secure in their persons, houses, papers, and effects, against unreasonable search’s and seizure’s shall not be violated.
36. Its important to listen to our instincts when assessing a legal arguments’ validity.
37. Lay witnesses can be paid for their expenses and time lost from work, but a lay witness’s request for additional payments cannot be granted.
38. Justice O’Connors’ concurring opinion took issue with the majoritys reliance on cases from the 1920s, before the expansion of Congress’ power under the Commerce Clause. Her’s is the more persuasive of the two opinion’s.

-
39. A business' net worth is not always a good measure of it's fu-ture profitability.
 40. Microsofts Bill Gates's public image improved when his' con-tributions to various charitable and educational causes' in-creased.
 41. "Who's brown satchel is that beside the witnesses stand, and whats it doing there?" the judge asked in a quiet voice.

Source: Wydick, **Plain English for Lawyers**

Exercise 18

1. From 1776 until the end of the War of 1812, the overriding question was whether the nation – besieged without by hostile governments and within by provincialism – had sufficient power to survive.
2. During those formative years, the weakest of the three branches of government was the judiciary.
3. Not particularly brightening the outlook, President Adams's appointment of John Marshall to the Court in 1801 was unenthusiastically supported, even by the Federalists.
4. Yet, in its first 10 years under John Marshall's guidance, the Court consolidated far-reaching judicial power, and in another 15 it put Congress's authority on a broad and permanent constitutional footing.
5. The Jeffersonians were certain of two things: that the Constitution was a limiting document, and that John Marshall was a malignant force.
6. They charged the Chief Justice with usurping power and with converting his weak-willed colleagues to his plans for aggrandizement.
7. The Federalists, on the other hand, expected the Court to consolidate national power and contain the emerging forces of democracy.
8. There is precedent for non-judicial action by allies against a former enemy leader whose acts seem abhorrent: that of Napoleon.

9. When Napoleon escaped from Elba, broke the 1814 peace treaty, and marched again on Europe, he was declared "*hors la loi*," that is, "beyond the law," by representatives of all the European states, except France. That left the question what to do about him.
10. The Prussians said "shoot him," and the Russians said, more delicately, "summary execution."
11. Ultimately, however, the Europeans agreed to exile him to St. Helena, where he would be out of the way and kept at British expense.
12. Exile spared the embarrassment of executing a sovereign. All European rulers had condemned the execution of Louis XVI and did not want their subjects to suppose that killing rulers was an acceptable way of expressing their opinion of them.
13. No one seriously considered a trial for Napoleon; it was unnecessary since his crimes were self-evident, condemnation was universal, and the European leaders had no qualms about punishing him for them.
14. However, the idea of a trial for Nazi war criminals was attractive to many, even though the form the proponents favored was repugnant to others.
15. Stalin had punished his opponents and frightened others by "show trials" in the 1930s, and Hitler himself mounted a show trial for those who plotted to take his life in July 1944.
16. In a show trial, one can even allow a little defense – just enough to demonstrate how feeble it is.
17. The U.S. Supreme Court has held that the processing and disposal of solid waste in landfills concerns an article of commerce for purposes of Commerce Clause analysis.

18. The legal issue in this case is whether the article-of-commerce test is satisfied when applied to sewage sludge, the substance in question here.
19. Sewage sludge is a by-product of wastewater treatment. It is generally a solid or semi-solid, mud-like substance, typically consisting of water and from 2% to 28% solids.
20. Some people limit the term "sewage sludge" to mean stabilized, disinfected sewage sludge that is suitable for beneficial agricultural uses.
21. Sewage sludge differs from solid waste, in that economic, ecological, and agricultural benefits are realized by farmers using treated sewage sludge as fertilizer.
22. If solid waste constitutes an article of commerce, an even stronger, more persuasive case can be made for regarding sewage sludge as an article of commerce for Commerce Clause purposes.
23. Plaintiff Lutz sued defendant Reliance Nissan for wrongful termination, and defendant successfully moved to compel arbitration pursuant to a two-tiered arbitration procedure that was specified by her employment contract.
24. Lutz won the initial arbitration, but upon a second-tier review, the "appellate" arbitrator reversed Lutz's award and entered an award for defendant, which award was confirmed by the trial court.
25. In a premature appeal from the trial court's confirmation order, Lutz raises various meritless arguments.
26. We hold that Lutz is responsible for the delay of which she complains; that she suffered no harm, because defendant paid for all arbitration costs; that the two-tiered procedure (which is uncommon but not unconscionable) was contractually

- binding; and, most important, that the contract permissibly invested the "appellate" arbitrator with a broader standard of review than an appellate court would ordinarily have.
27. Our economic system depends, in part, on legal recognition of property rights and the ability of parties to enforce contract rights when necessary. (The commas are optional.)
28. (The original sentence is punctuated properly.)
29. (The original sentence is punctuated properly.)
30. Attorney conflicts of interest can arise with present clients, prospective clients, and former clients.
31. The most common causes of attorney discipline are alcohol and greed.
32. (The original sentence is punctuated properly.)
33. (The original sentence is punctuated properly.)
34. Our deadline is [or deadline's] shorter now, because of the one-year statute of limitations.
35. The people's right to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures shall not be violated.
36. It's important to listen to our instincts when assessing a legal argument's validity.
37. (The original sentence is punctuated properly.)
38. Justice O'Connor's concurring opinion took issue with the majority's reliance on cases from the 1920s, before the expansion of Congress's power under the Commerce Clause. Hers is the more persuasive of the two opinions.
39. A business's net worth is not always a good measure of its future profitability.

40. Microsoft's Bill Gates's public image improved when his contributions to various charitable and educational causes increased.
41. "Whose brown satchel is that beside the witness stand, and what is [or what's] it doing there?" asked the judge in a quiet voice.

Source: Wydick, **Plain English for Lawyers**

- *For Data Geeks and Skeptics: The Case for Better Legal Writing*

Lawyers, Take Note

"You might ask, Why should a lawyer or judge care about these studies?....

"First, lawyers and judges – who write for a living – surely care about the effect their writing has on readers. So even though some lawyers and judges might not be inspired by the studies on cost savings, the second group of studies – on pleasing and persuading readers – should be of particular interest.

"Second, corporate lawyers and government lawyers need to know what kinds of tangible and intangible harm their organizations may suffer by clinging to legalese. Armed with the evidence, enlightened lawyers can lead the way to plain-language reform."

Source: Kimble, **"Writing for Dollars,"** *The Scribes Journal of Legal Writing*, 1996-1997

"The Extraordinary Benefits"

"To most people, the benefits of plain language are intuitive. If readers understand plain language better, then no doubt they'll like it better than the dense, impersonal prose of most public and legal documents. And because they understand it better, they'll make fewer mistakes in dealing with it, have fewer questions, and ultimately save time and money – for themselves and for the writer's company or agency.

"There is, in fact, much informal evidence to this effect. ...

"But – and here is the irony – for the very reason that these benefits are so apparent, companies and agencies are not inclined to try to measure them. Why spend more money to study how much money the company was losing and is now saving? Rather, the company knows from experience that a document is causing trouble; somebody revises the document; and if the trouble seems to go away, the company calls it good....

"Behold, then, the 50 studies and reports that follow. Just browse through them, and know they're on hand as needed to make the case. Again, those in the first category show that plain language – in its full scope – can save organizations a ton of money. Those in the second category cement what we probably knew all along: readers strongly prefer plain language in public and legal documents, they understand it better than bureaucratic and legalistic style, they find it faster and easier to use, they are more likely to comply with it, and they are much more likely to read it in the first place."

Source: Kimble, **Writing for Dollars, Writing to Please:
The case for plain language in business, government, and law**

"Let Them Eat Legalese?"

(Well...)

5. Regardless of what readers may expect in legal and official documents, they certainly prefer plain language.

Some might argue that readers expect to see legalese and officialese in those kinds of documents. Increasingly, that's not true: «the era when clients will accept and pay for legal documents that they cannot understand - and are not expected to understand - is fading away."³⁴

But this argument, or excuse, is cold comfort to apologists in any case. To the extent that readers still expect to see legalese and officialese, then shame on the writers who have conditioned them to expect it - because readers don't want to see anything of the sort. And they say so in one survey after another. In 1992, I cited two surveys of the public with numbers like these:

- 64% said they are frustrated when they read legal documents.
- 57% said that legal documents are poorly written and hard to read.
- 33% said that lawyers don't even try to communicate with the average person - the lowest rating received by any profession in the survey.
- 48% said government and business forms are too complicated.

³⁴ Schiess, *supra* n. 1, at 53; see also Asprey, *supra* n. 1, at 45 ("It used to be thought that clients expect their lawyers to write in legalese and would be disappointed if they didn't. Those days are receding fast . . ."); Bryan A. Garner, *Securities Disclosure in Plain English* 4 (Commerce Clearing House 1999) ("Clients -- especially sophisticated clients -- are demanding more from their lawyers. They know now that they ought to be able to read and understand their wills, their leases, and their other contracts.").

Think Again.

Legalese

Legalese hinders clarity, and the judges who must wade through statutes, pleadings, briefs, and contracts are well aware of it. ¹ Lawyers who think that judges are conditioned to happily accept legalese should think again. Courts have used adjectives like "tortured,"² "painful," ³ "incomprehensible,"⁴ "abstruse,"⁵ "opaque,"⁶ and "mind-numbing" ⁷ to describe legalese. One United States Supreme Court Justice called legalese "Terrible!" and pointless.⁸ Another called it "pretentious."⁹ Still another "can't bear it."¹⁰

So if you're a lawyer who uses legalese, don't be surprised if you submit a proposed order and the judge edits out the legalese before signing it. ¹¹ Don't be surprised if a judge allows you to amend a pleading but instructs you to drop the legalese in the amended version. ¹² And don't be surprised if a judge sanctions you for frustrating discovery with legalese-infused objections ¹³ or denies your motion to compel discovery because instead of drafting simple and direct requests, you made "overzealous use of legalese."¹⁴

Some lawyers think they're playing it safe by rehashing stuffy old forms that are breeding grounds for legalese. If you are among those lawyers, beware: your safety net has a hole in it. Legalese actually makes your documents more vulnerable to attack, supplying ammunition to courts inclined to invalidate potentially harsh provisions. For example, legalese can doom exculpatory releases designed to avoid personal-injury suits.

¹⁵ On the flip side, courts have cited the absence of legalese as a reason to enforce a release. ¹⁶

Source: Cooney, "Style is Substance: Collected Cases Showing Why It Matters"

An Excerpt from *Writing for Dollars, Writing to Please*

By Joe Kimble

In May, your loyal editor published a new book, Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law. It sets out the elements of plain language, debunks the myths about it, describes 40 highlights in plain-language history, and summarizes 50 case studies, including the one that follows. (It happens to be #5 of the 50.) The case studies illustrate the untold millions and even billions that business and government could save by using plain language in their printed and online documents. Why? Because readers understand plain language better and faster, they make fewer mistakes and have fewer questions, they strongly prefer it to legalese and officialese, they are more likely to comply with it, and they are much more likely to read it in the first place. Almost 20 of the studies involve legal readers (judges, lawyers, or both) or legal documents. The book is published by Carolina Academic Press.

U.S.: State of Washington— Consumer Documents¹

In 2001, the Washington Department of Labor and Industries began a “Plain Talk” project to rewrite 100 of its form letters into plain language. Some other agencies fol-

lowed suit, and in 2003 the Department of Revenue rewrote a letter that tripled the number of businesses paying a commonly ignored use tax. In just one year, the letter produced \$800,000 more in revenue than the department had projected.

Results like this led the governor to sign a “Plain Talk” Executive Order in 2005. In the years that followed, 35 cabinet agencies adopted Plain Talk programs, at least 7,500 employees were trained in plain language, more than 2,000 letters and forms were rewritten, and six major websites were overhauled. Each agency had an assigned Plain Talk leader; the leaders formed committees to develop guidelines, measurements, and awards; and each agency submitted a yearly progress report to the governor. Unfortunately, the Plain Talk program began losing momentum in 2009 because of budget troubles. Never mind that the seminal use-tax letter cost 1 cent for every dollar collected.

Here are more success stories from that program’s brief run:

- The Department of Social and Health Services rewrote letters sent to citizens about their benefits. Before, the agency would send separate letters for each benefit (food stamps, medical, cash assistance), totaling 1.5 million pages per month. The new letter consolidated 12 letters into 1, thus reducing postage by \$25,000 annually and probably reducing confusion as well.
- The Department of Labor and Industries developed clearer instructions and explanations for citizens requesting public records. About 10% of people were calling with routine process questions, slowing staff response times. In one year, phone calls dropped by 95%, allowing the staff to reduce its response time from 12 to 8 days. Also, the department was able to withdraw an earlier budget request for two additional employees at \$110,000 a year. And the following year, when requests for public records suddenly tripled, the department managed with the same number of staff positions.
- The Department of Revenue wrote clearer instructions to businesses for returning unclaimed property (usually funds) because many were ignoring the old, unclear notice. The new notice increased the response rate from 41% to 76% in one year.
- The Health Care Authority, which administers benefits to state employees,

¹“Plain Language” is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. Want to contribute a plain-English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit www.michbar.org/generalinfo/plainenglish/.

In 2003 the Department of Revenue rewrote [into plain language] a letter that tripled the number of businesses paying a commonly ignored use tax. In just one year, the letter produced \$800,000 more in revenue than the department had projected.

The Department of Licensing changed a letter about failing to respond to a citation. After the change, the department's hotline busy signals dropped by 95%, allowing 850 more people to reach the hotline each day.

needed to cut costs and call-center wait times by getting more members online. The department wrote clearer instructions for how to start an online account, and those accounts jumped by 8,500, or 30%, in seven months. Even though more people, in general, are going online every day, the increase still exceeded expectations. For each phone inquiry avoided, the department saves \$3.50—or an extra \$30,000 annually if each new account goes online just once instead of phoning.

One last example. The Department of Licensing changed a letter about failing to respond to a citation.

Before:

ON 2-14-03 AT 12:01 AM YOUR DRIVING PRIVILEGE WILL BE SUSPENDED FOR FAILURE TO APPEAR/PAY/COMPLY ON CITATION #409584 RCW 46.20.289. THE SUSPENSION WILL REMAIN IN EFFECT UNTIL NOTIFIED OF REINSTATEMENT BY THIS DEPARTMENT.

TO AVOID SUSPENSION, YOU MUST RESOLVE ALL CHARGES ON THIS CITATION WITH THE COURT INDICATED BELOW AND THE DEPARTMENT MUST RECEIVE PROOF FROM THE COURT BEFORE 02-14-03 THAT THE CHARGE(S) HAVE BEEN RESOLVED. QUESTIONS REGARDING THE CITATION AND/OR FINE SHOULD BE DIRECTED TO THE COURT LISTED BELOW.

After:

On 2-14-2003 at 12:01 a.m. your driving privilege will be suspended.

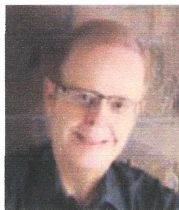
The Court has notified us that you failed to respond, pay, appear, or comply with the terms of the citation listed below.

Citation #	Violation Date	Reason for Citation
000000	10-6-2002	No valid license

What do I have to do to avoid suspension of my driving privileges?

1. Contact the court below to find out what you must do to take care of this citation....

After the change, the department's hotline busy signals dropped by 95%, allowing 850 more people to reach the hotline each day and freeing up three employees to help customers in other ways. ■



*Joseph Kimble has taught legal writing for 30 years at Thomas Cooley Law School. He is the author of *Lifting the Fog of Legalese: Essays on Plain Language*, the editor in chief of *The Scribes Journal of**

Legal Writing, the past president of the international organization *Clarity*, a founding director of the *Center for Plain Language*, and the drafting consultant on all federal court rules. He led the work of redrafting the *Federal Rules of Civil Procedure* and the *Federal Rules of Evidence*.

FOOTNOTE

1. Dana Howard Botka, Workshop Slides, *Washington State: Where We "Plain Talk"*, <http://www.plainlanguage.gov/news/PLAINPresentation4-1-08.ppt> (Apr. 1, 2008); Dana Howard Botka, Workshop Slides, in a "Self-Serve" Economy: *Using Plain Talk to Improve Processes—and Save Money* (Aug. 6, 2009); e-mails from Dana Howard Botka, Manager of Customer Communications, Wash. Dep't of Labor & Industries, to the author (Mar. 16 & July 7, 2010, Mar. 16, 2012).

The Proof Is in the Reading

Solid Evidence That Plain Language Works Best

By Joseph Kimble

To help round out this plain-English theme issue of the Bar Journal, I offer the evidence of four studies. These four are among 50 that I collect and summarize in my book Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law. Of the 50 studies, 18 involved different kinds of legal documents—lawsuit papers, judicial opinions, statutes, regulations, jury instructions, court forms and notices, and contracts. And they included readers of all sorts—judges, lawyers, administrators, and the general public. The evidence is overwhelming: readers strongly prefer plain language to legalese, understand it better and faster, are more likely to comply with it, and are more likely to read it to begin with. —JK

U.S.: Lawyers—Judicial Opinions

This survey¹ may have been the first to test judicial opinions. In the mid-1990s, I sent the original and a revised version of a short appellate opinion² to a random selection of 700 Michigan lawyers. One was marked O (my own clever code for “original”) and the other Y; half the readers saw the O opinion first, the other half the Y opinion.

“Plain Language” is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. To contribute an article, contact Prof. Kimble at Western Michigan University Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit <http://www.michbar.org/generalinfo/plainenglish/>.

The revised opinion had an opening summary containing the crucial facts, the deep, or dispositive, legal issue, and the answer; it divided the opinion into short sections with informative headings and began each section with its own summary; it used topic sentences that advanced the analysis; it shortened the average sentence length from 25 words to 19; and it omitted unnecessary cases, other unnecessary detail (beyond the 500 words’ worth I had already cut), and unnecessary words. Readers were asked which opinion they liked better, how they rated the two opinions on a 1-to-10 scale, and the top two reasons (from among several provided) why they liked one better than the other.

Out of the 251 lawyers who responded, 153, or 61%, preferred the revised opinion. They rated the (already shortened) original at an average of 6; they rated the revised version at 7. And the 61% that preferred the revised opinion gave as the top two reasons that it left out a lot of unnecessary detail and had a summary at the beginning. Those are two strong lessons for opinion-writers.

The article describing this study reproduces the package that readers received, compares a bunch of examples from the opinions, and even shows the original opinion with the unnecessary detail lined through.

Here’s the difference just in the all-important opening paragraph:

Opinion O:

Plaintiff Robert Wills filed a declaratory judgment action against defendant State Farm Insurance Company to determine whether defendant has a duty to pay benefits under the uninsured motorist provisions found in plaintiff’s policy with defendant. Pursuant to the parties’ stipulated statement of facts, the trial court granted summary disposition in plaintiff’s favor upon finding coverage where gunshots fired from an unidentified automobile passing plaintiff’s vehicle caused plaintiff to drive off the road and suffer injuries. Defendant appeals as of right. We reverse and remand.

Opinion Y:

Summary

Robert Wills was injured when someone drove by him and fired shots toward his car, causing him to swerve into a tree. He filed a declaratory-judgment action to determine whether State Farm had to pay him uninsured-motorist benefits. The issue is whether there was a “substantial physical nexus” between the unidentified car and Wills’s car. The trial court

The evidence is overwhelming: readers strongly prefer plain language to legalese, understand it better and faster, are more likely to comply with it, and are more likely to read it to begin with.

answered yes and granted summary disposition for Wills. We disagree and reverse. We do not find a substantial physical nexus between the two cars because the bullets were not projected by the unidentified car itself.

Note that the revised summary goes beyond the surface issue (was there a duty to pay?) to the deep issue (was there a “substantial physical nexus”—an unfortunate concept—between the cars?). And the revised summary gives an answer as well.

U.S.: Judges—Lawsuit Papers

This was the first study³ to test a complete lawsuit paper—a 3¼-page response to a motion. The author sent 800 surveys to judges across the United States, 200 surveys to each of four different “cohorts”: federal trial judges, federal appellate judges, state trial judges, and state appellate judges. Each judge received (1) the original motion and (2) either a plain-English version or what the author called an “informal” plain-English version. As in the other legal studies, the participants were chosen randomly; the cover letter merely said that the sender was conducting a study on legal writing; the versions were not identified as “legalese” or “plain English”; and half the recipients saw the versions in one order, while the other half saw them in the reverse order. A total of 292 judges responded.

The participants were simply asked which version they found more persuasive, along with a request for some demographic information. The published study includes all three versions, but they are too long to reproduce here. The differences between them, though, will sound familiar.

The plain-English version improves on the original version in these ways:

- It's shorter—2½ pages. So it obviously eliminates unnecessary sentences and words.
- It does away with underlining and all-caps in headings.
- It sets out the four reasons why the court should deny the motion—the critical points—in a vertical list.

- Its topic sentences provide a better organizational framework.
- Its sentences average 17.8 words, as opposed to 25.2 words.

The informal version of the plain-English sample makes the following additional changes:

- It does away entirely with the formulaic opening (“Plaintiffs, [names], through their attorneys, [names], state as follows in response to....”).
- It uses contractions.
- It uses the first person, although just once.
- It's more conversational in tone.
- It further reduces the average sentence length, to 16.3 words.

As in the previous studies, the results were decisive. The author broke them out in various ways, but overall the judges preferred the plain-English version to the original by 66% to 34%. And the demographics made no difference. Preferences were not correlated with state versus federal judge, trial versus appellate judge, rural versus urban area, gender, or years of experience as a judge. The informal plain-English version did not fare quite as well, but 58% still preferred it. The author suggests, based on judges' volunteered comments, that its use of contractions was the main reason for the 8% falloff.

U.S.: General Public—Court Forms

A California study conducted in 2005⁴ tested the use of plain language in two different court forms: a proof of service and a subpoena. Researchers, with the help of the local jury commissioner, selected 60 volunteers and divided them into two equal groups. Group 1 was tested first on the original proof of service and then on the plain-language version of the subpoena. Group 2 was tested on the plain-language proof of service followed by the original subpoena.⁵ For each form, 10 questions were read aloud, and participants were given 20

seconds to respond in writing on a blank answer form. The questions were designed to elicit participants' understanding of each form's purpose and the specific steps that each form required.

The scores showed a “marked and statistically significant improvement in reader comprehension” for the plain-language forms.⁶ The average score on the plain-language proof of service was 81% accuracy, compared with 61% on the original. The scores on the subpoena showed even greater average improvement: 95% accuracy on the plain-language version and only 65% on the original. Although the researchers did not try to quantify savings, they concluded that more comprehensible forms would have obvious benefits: less time spent explaining the forms and dealing with errors; more confident and self-reliant customers; and reduced printing costs, since plain-language documents are typically shorter (by 40%, in the researchers' estimation).

U.S.: General Public—Government Regulations

This study⁷ and the previous one are among nine in the book that tested the comprehensibility of law (a statute or regulation) or other legal documents or language on a nonlegal audience—the public or administrators.

In the early 1980s, the Federal Communications Commission reorganized and rewrote its regulations for marine radios on recreational boats. (Apparently, though, the new rules were never incorporated into the Code of Federal Regulations but were put only in a booklet for the public.) The FCC asked the Document Design Center to test the old and new versions. Readers of the old rules got an average of 10.66 questions right out of 20; readers of the new rules got an average of 16.85 right. The average response time improved from 2.97 minutes to 1.62 minutes. Finally, on a scale of 1 (very easy) to 5 (very hard), readers rated the old rules at 4.59 and the new rules at 1.88.

In revising these rules, the FCC adhered to what may be the hardest principle of all to follow because it involves judgment and

restraint—don't try to cover every remote possibility under the sun:

Probably the most important guideline used in revising the FCC's marine radio rules...was one that would say "select only the content that the audience needs." The rules for recreational boaters were originally mixed in with rules for ocean liners and merchant ships and were loaded down with exceptions and rules to handle unusual cases.⁸

The cardinal rule of clarity is to put yourself solidly in the minds of your readers: what would they like to know, and how would they like to get it? ■



Joseph Kimble taught legal writing for 30 years at Western Michigan University Cooley Law School. He is the author of Lifting the Fog of Legalese: Essays on Plain Language and Writing for

Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law. He is also senior editor of The Scribes Journal of Legal Writing, the past president of the international organization Clarity, and a drafting consultant on all federal court rules. He led the work of redrafting the Federal Rules of Civil Procedure and the Federal Rules of Evidence.

ENDNOTES

1. Kimble, *The Straight Skinny on Better Judicial Opinions*, in *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), pp. 15–35 and 89–104.
2. *Wills v. State Farm Ins. Co.*, 222 Mich App 110; 564 N.W.2d 488 (1997).
3. Fammart, *Persuading Judges: An Empirical Analysis of Writing Style, Persuasion, and the Use of Plain English*, 16 *Legal Writing: J. Legal Writing Inst.* 183 (2010).
4. Mindlin, *Is Plain Language Better? A Comparative Readability Study of Plain Language Court Forms*, 10 *Scribes J. Legal Writing* 55 (2005–2006).
5. See *id.* at 64–65 for the original and revised proof of service.
6. *Id.* at 55.
7. Redish, *How to Write Regulations and Other Legal Documents in Clear English* (Washington, DC: American Institutes for Research, 1991), pp. 42–43; Redish, Fekker & Rosa, *Evaluating the Effects of Document Design Principles*, 2 *Information Design J.* 236 (1981).
8. *Evaluating the Effects of Document Design Principles*, 2 *Information Design J.* at 240.



MONEY JUDGMENT INTEREST RATE

MCL 600.6013 governs how to calculate the interest on a money judgment in a Michigan state court. Interest is calculated at six-month intervals on January and July of each year, from when the complaint was filed, and is compounded annually.

For a complaint filed after December 31, 1986, the rate as of July 1, 2016 is 2.337 percent. This rate includes the statutory 1 percent.

But a different rule applies for a complaint filed after June 30, 2002 that is based on a written instrument with its own specified interest rate. The rate is the lesser of:

- (1) 13 percent a year, compounded annually; or
- (2) the specified rate, if it is fixed—or if it is variable, the variable rate when the complaint was filed if that rate was legal.

For past rates, see <http://courts.mi.gov/Administration/SCAO/Resources/Documents/other/interest.pdf>.

As the application of MCL 600.6013 varies depending on the circumstances, you should review the statute carefully.

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Style is Substance: Collected Cases Showing Why it Matters



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[Mark Cooney](#)

Western Michigan University Cooley Law School

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Abstract

This article, formatted as a miniature casebook, collects cases in which the outcome -- or some other significant aspect of the litigation -- hinged on how lawyers wrote. Readers will find discussion, case excerpts, notes, and questions about legalese, verbosity, run-on sentences, passive voice, ambiguous modifiers, word choice, personal attacks, and even punctuation. The writings at issue in the cases run the gamut: pleadings, insurance policies, appellate briefs, statutes, leases, employment contracts, and more. The cases show that the consequences of poor writing style are not abstract or hypothetical; they're real, affecting real parties in real cases.

Notes

