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## **PRACTICAL POINTERS FOR PRECISE & PERSUASIVE WRITING**

Included in this paper are some of my favorite DIY-editing suggestions as well as several style observations, all of which I've gleaned from reading various recognized writing authorities. Any good usage manual will have all these ideas—and many more. (I've listed some recommended resources at the end of this paper.)

We should first remember *why* we who are in the legal business write, whether it's a court filing, a legal memo, a transactional document, or a letter or email:

- to convey information
- to document an agreement
- to explain a position
- to persuade the reader

Each purpose calls for clarity, else we risk creating ambiguity or—in the worst scenario—committing malpractice. These tips are designed to enhance clarity, no matter the document type.

Especially when you're writing for a court, strive to convey your points in as few pages as possible. Judges are busy people who read massive amounts of material every day and will be slobberingly grateful for brevity. But because trimming word count without losing meaning takes time and effort, give yourself as much leeway as possible for that critical task.

Blaise Pascal, the 17<sup>th</sup>-century French philosopher, recognized how hard it is to write concisely, when he told a friend (roughly translated; tongue in cheek), “I have made this [letter] longer than usual, only because I have not had the time to make it shorter.”

## Style and tone

Hemingway or Faulkner? Conversational or formal? We all have a preferred style, but expressing things clearly—usually best achieved through plain English—is the paramount goal of all good legal writing.

Verbosity is an archenemy. As Bryan Garner has put it, “Everything you add that doesn’t help positively hurts. Think of this analogy: **a fifth leg wouldn’t help a gazelle move more swiftly and gracefully.**” *The Redbook: A Manual on Legal Style*, § 26.5(a). This observation applies to every kind of legal writing.

Often, the best tone is achieved if you write like you speak (but more polished). Would you ever call someone on the phone and say, “Thank you in advance for your courtesy and cooperation in this regard. Please do not hesitate to contact me should you have any additional questions concerning same”? I doubt it. You probably also wouldn’t say, “Pursuant to my conversation with Jennifer on today’s date, enclosed please find the following documents, to wit: . . .”

“[A] word about ‘plain English.’ The phrase certainly shouldn’t connote drab and dreary language. Actually, plain English is typically quite interesting to read. It’s robust and direct—the opposite of gaudy, pretentious language. You achieve plain English when you use the simplest, most straightforward way of expressing an idea. You can still choose interesting words. But you’ll avoid fancy ones that have everyday replacements meaning precisely the same thing.”—**B. Garner**, from the preface to “Legal Writing in Plain English” (Univ. of Chicago Press, 2001).

The important thing is to make the writing sound natural. Think about how it would sound as a book on tape—you can even try reading passages of a draft aloud, either to yourself or to the lawyer who wrote it (if you want to diplomatically reveal needed edits!). It’s a good way to sniff out stilted, awkward phrasing that detracts from clarity.

Whatever you do, leave personal attacks on the other side out of pleadings and briefs. Which of the two passages below sounds more reasonable, and thus more persuasive?

Smith is certainly not surprised that Jones has taken this position, because Jones’s outrageous behavior throughout the parties’ business relationship clearly shows that Jones set out to trick and cheat Smith. Jones is at it again, and Smith demands that Jones be sanctioned for his egregious factual misrepresentations to the court.

Although the parties' contentious business relationship has led them to this point, Smith is dismayed that Jones—surely inadvertently—has characterized that relationship in ways that Smith is compelled to correct with the following facts:

Also, sarcasm, snark, and even humor usually fall flat in legal writing and can be dangerously counterproductive.

### ***Prefer names or descriptive labels over party designations***

Try not to refer to the parties as “Plaintiff,” “Defendant,” “Appellant,” or “Appellee”—even in a simple case, it's easy to lose track of who's who. Do your readers a favor and use a person's last name, or a shortened form of a business entity. (*Amalgamated Pipe & Steel Fittings, Inc.* can become *Amalgamated Pipe* or simply *Amalgamated* if no one could be confused.)

On a related note, it's clunky and unnecessary to add the typical parenthetical “(hereinafter referred to as ‘Amalgamated’).” Instead, just write:

Edward Jones signed a contract with Amalgamated Pipe & Steel Fittings, Inc. The agreement required Amalgamated to supply Jones with ...

To clarify relationships to the case, after the initial reference to a party's name, consider using descriptors when appropriate: “Bank,” “Borrower,” “Senior Lienholder,” “Detective Humboldt,” “Officer Krupke.”

Use initialisms with care. Particularly in a case with multiple government agencies, avoid something like “The FDIC, in conjunction with the SBA, pursued interrelated claims against HHS and its OCR subdivision for violations of the FMLA.” And if a case involves, say, the old Atchison, Topeka and Santa Fe Railway, why would you force your reader to hold in mind who “ATSFR” is, rather than just calling it “the Railway”?

***Use short words that are jargon-free—and no legalese, please***

Why do people in the legal profession almost always write *subsequent to* instead of *after*? If you want to be frugal with your words—and thus increase your readability level—choose from Column B over Column A:

Column A	Column B
prior to	Before
subsequent to	After
due to the fact that for the reason that because of the fact that on the ground that	Because
at the present time at this point in time	Now
in the event that	If
despite the fact that notwithstanding the fact that	Although
in close proximity	Near
adequate number of sufficient number of	Enough
during such time as	while
in the near future	soon
is able to is capable of	can
is authorized to is empowered to	may
is desirous of	wants

This list barely scratches the surface, but you get the idea.

Legalese, a distinct form of jargon, is a self-perpetuating crime against good writing. Lawyers too often rely on forms and templates that include things like *comes now*, and *wherefore*, *premises considered*, and they assume that some rule mandates these phrases.

When I started practicing, no one dared file an answer to a lawsuit that didn't recite that "the defendant generally denies each and every, all and singular, the allegations in plaintiff's original petition, and demands strict proof thereof." With the advent of plain(er) language, we can now safely plead nothing more than "Defendant enters a general denial."

Still, legal jargon persists. Like hacking at kudzu, we must vigilantly guard against it, for legalese obscures analysis and effective communication. As you write or edit, then, I suggest eliminating the usual suspects, including—

Latin words and phrases that aren't necessary terms of art ("show-off" phrases like *vel non*, *ab initio*, *in praesenti*, *capacitas rationalis*, etc.)

whereas  
wherefore  
herewith  
heretofore  
hereinafter  
aforesaid  
aforementioned  
in the instant case (try *here*)  
said (when used as an adjective)  
same (when used as a noun)

"The rightful objects of our condemnation are the bombastic, vestigial *Latinisms* that serve no purpose but to give the writer a false sense of erudition." —  
*Latinisms*, **Garner's Dictionary of Legal Usage** (3d ed. 2011)

**Use *shall* with caution.** In contract drafting, and in lawsuits construing contracts or legislation, despite what many lawyers assume the word *shall* is very often not synonymous with the mandatory *must*. It can also mean *may* ("neither party shall assign this contract"), connote the future tense ("if any buyer shall fail to accept delivery"), etc., depending on the context. Better to use the clearest word than to risk creating ambiguity.

**Numbers.** It's now generally considered legalese to spell out a number and follow it with a parenthetical containing the corresponding numerals [two hundred and seventy-six dollars (\$276)]. And although exceptions exist, the general rule is to spell out the numbers ten and below and use numerals for those 11 and above.

### ***Recognize nominalizations and let the inner verbs do the work***

It's rare in the legal world that someone *argued* rather than *made the argument*. And we never seem to *move* for an extension when we can *file a motion* for one. In contracts, one might be obliged to *make payment* rather than *pay*.

A nominalization is just a noun that's formed from another part of speech, such as *implacability* from the adjective *implacable*, or *engagement* from the verb *engage*. Helen Sword, a professor at the University of Auckland, calls these "zombie nouns" because they "cannibalize active verbs, suck the lifeblood from adjectives and substitute abstract entities for human beings."

See which of Sword's versions of the same basic thought reads in a livelier fashion and with greater clarity:

"The *proliferation of nominalizations* in a discursive *formation* may be an *indication of a tendency* toward *pomposity* and *abstraction*." [Italics are hers]

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

And so they do. Legal writers can be among the worst offenders, burying their verbs and adjectives under the weight of such noun-making suffixes as *-ment*, *-tion*, *-ity*, *-ence*, *-ance*, and the like. If you're looking for a quick way to bring some sparkle to writing, do a "Find" search in Word for the typical offending suffixes and see if you can't resurrect the verb within to better effect.

After all, as legal writers, ~~it is our obligation to have knowledge about~~ *we must know* how to write well.

### ***Cut unnecessary detail***

If readers see that something happened on *July 13, 2016*, they assume that the specific date is important. If it's not, then you're asking them to hold information in their heads that's not needed. Unless the reader must know, say, that someone offered \$4,987.96 for something, you can write *roughly* [or *nearly*, etc.] *\$5,000* instead.

To give a general sense of the sequencing in something like the factual background, you can instead write “in late July 2015,” or “in the summer of 2015,” or “roughly two months after X,” etc.

Same for extraneous facts like “Jones was driving a 2009 green Toyota Camry,” unless there’s something significant about the car’s year, color, and make and model.

Legal readers already have a tough enough slog as it is, so be merciful when tempted to load them up with details.

### ***Recognize and eliminate throat-clearing phrasing***

Starting a sentence with *There is* or *It is* often represents a lost opportunity for more direct and active writing. Below, which sentence gets to the point more quickly and with actor and action placed front and center?

**There is** no argument in the record to support Smith’s current position.

*or*

The record does not show that Smith argued this position at trial.

**There were** many reasons for the trial court’s ruling.

*or*

The trial court had many reasons to rule as it did.

**It is** an unquestionable fact that Brooks drove the car that night.

*or*

Brooks unquestionably drove the car that night.

**It is** notable that she did not plead a claim for breach of contract.

*or*

She did not plead a breach-of-contract claim.

Keep an eye out for this kind of unnecessary lead-in.

Throat-clearing phrases “may have a place in speech, which is almost always wordier than good polished writing. They can warm up the speaker’s sentence.

“But in writing they just take up precious space. And they’re like a verbal tic. Happily, if you can recognize the tic, it’s easy enough to rid yourself of it.” — **Bryan A. Garner**, *The Winning Brief* (3d ed. 2014).

### ***Write in active rather than passive voice***

Unless the actor is unimportant, we should generally prefer the active to the passive voice. *The boy kicked the ball* is almost always better than *The ball was kicked by the boy*.

Writing in the passive voice uses more words and is rarely clearer. Active voice, in contrast, assigns responsibility for something:

It was held by this court that...

*versus*

This court held that . . .

But if you need to hide the actor's identity, or avoid sexist language, or for one of its other limited justifications, passive voice is acceptable.

### ***Reword "of" and other prepositional phrases***

Tiny prepositions can swarm all over your writing like gnats if you let them. *Of* is by far the biggest offender:

The argument **of** the plaintiff focused on the terms **of** his contract **of** employment.

Swat these pests away:

The plaintiff's argument focused on his employment contract's terms.

(Using possessives in legal writing is just fine, incidentally.)

Doing a Word search for *of* can uncover many opportunities to cut flabbiness.

You can trim length—and thus improve readers' understanding—by rewording other prepositional constructions as well. Consider this example from Bryan Garner's Tip #37 in *The Winning Brief*:

**Not this:** Also prohibited are payments **by** an agent **of** the seller **to** the other party **to** the sales transaction either **through** paying such other party all or a portion **of** its fee or **through** accepting a reduced fee which results **in** a



reduction **in** the price **by** the seller. [48 words: 10 prepositions]

**But this:** Nor may a seller's agent pay the other party **to** the sale all or part **of** its fee or accept a reduced fee **to** lower the price. [27 words: 3 prepositions]

### ***Vary sentence structure and length***

Just as you wouldn't enjoy eating even your favorite food day in and day out, so too do we get bored by digesting writing that has the same sentence structure and average length. If we want to keep readers engaged, don't stupefy them with the monotony of subject-verb, subject-verb, subject-verb, all in sentences of roughly the same length. Contrast the following two passages:

The defendant filed a motion for summary judgment. The defendant argued in its motion that limitations barred the plaintiff's claims. The plaintiff in response invoked the discovery rule because the defendant was plaintiff's fiduciary. The trial court granted the defendant's summary-judgment motion. The trial court found that the defendant was not a fiduciary. We reverse the judgment below because the parties were in a fiduciary relationship.

The defendant moved for summary judgment based on limitations. Although the plaintiff responded that the defendant owed it a fiduciary duty—and thus that the discovery rule applied—the trial court disagreed and entered judgment for the defendant. Concluding that the parties' relationship did place a fiduciary duty on the defendant, we reverse.

Your writing will be much more interesting to read if it has a syncopated rhythm rather than a steady drumbeat.

### ***Hyphenate phrasal adjectives***

Hyphens are clarity's pals. Consider the difference between *I saw a man eating shark* and *I saw a man-eating shark*. If you're writing about the fish rather than someone who's dining, omitting the hyphen makes your reader work harder to grasp your meaning.

If your noun is prefaced and modified by two or more words that make sense as an adjective unit—that is, a phrasal adjective—your readers will appreciate careful hyphen placement: it smooths their understanding.

For example:

summary-judgment motion  
speedy-trial violation  
abuse-of-discretion standard  
cessation-of-production clause  
due-process issues  
child-support order  
eleventh-hour temporary-injunction request

Garner (and others) note three exceptions:

- two-word phrasal adjectives containing an adverb ending in *-ly* followed by an adjective (*wholly owned subsidiary*, *newly discovered evidence*)
- a phrasal adjective consisting of a proper noun (*many United Nations members*)
- a phrase borrowed from a foreign language (*de novo review*, *habeas corpus writ*).<sup>1</sup>

***It's okay to start a sentence with “But” “And” and the other coordinating conjunctions: “Or” “Nor” “For” “So” “Yet.”***

Sixth-grade English teachers have inadvertently caused much mischief by insisting that one shouldn't begin a sentence this way—true only if what follows is a sentence fragment.

But the occasional punch of a short conjunction at a sentence's start is grammatically correct. (Just don't overuse it.) And reconsider opening a sentence with *However*. It's grammatical, but it's clunky.

“Avoid starting a sentence with *however* when the meaning is *nevertheless*.” —**William Strunk, Jr. & E.B. White, *The Elements of Style* (1950).**

**Note:** Don't put a comma after any of these openers.

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<sup>1</sup>*Phrasal Adjectives*, Dictionary of Legal Usage.

### ***Prefer strong words not needing adjectives and adverbs***

The right word, carefully chosen, can do wonders. Why would you *run quickly* when you can *dash*? Or why use a *large, heavy book* as a doorstop when you can use a *tome*? A thesaurus is a great tool.

This tip also lets you trim word count by getting rid of adjectives and adverbs.

### ***Keep subjects and verbs close together***

Sentences don't track well if the subject can't easily find its verb. "Spencer, having carefully reconsidered his intended course of action, and particularly in light of intervening events that cast doubt on the desired end result, slunk quietly away into the night." By the time you get to the verb (*slunk*), you've probably forgotten who the subject (*Spencer*) even is.

### ***Beyond the written word***

Technology makes it a breeze to include images where they're helpful in understanding something, such as a map or survey in an easement dispute. It's also now technologically easy—and easy on readers—to create a chart or other visual representation for a case or transaction with a complicated, multilevel entity structure.

**BUT:** don't try to evade word limits by screenshotting large chunks of text.

Always leave time to review for typos; they undermine credibility.

Consider document design: readers will thank you for including plenty of white space, using bullet points, and AVOIDING ALL-CAPS, WHICH STUDIES SHOW IS HARD TO READ AND DECREASES COMPREHENSION.

That's Also True of Speaking Headings Written in Initial Caps, Which Are Like Taking Your Eyeballs on a Miniature Roller-Coaster Ride. Distracting!

Due to modern word processing, insert only one space after a period, not two.

Break up huge passages of text with appropriate headings and subheadings.

Proofread carefully; don't rely exclusively on a spell-check (or even grammar-check) program.

A tip on footers in court filings: page numbers alone aren't helpful at all; at least include the document's title on every page (preferably below a separating line):

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BRIEF OF APPELLANT CISCO CORPORATION

Page [x]

Even more helpful:

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No. 02-22-00175-CV; *Cisco Corp. v. Maxwell Int'l & F. Robertson*

BRIEF OF APPELLANT CISCO CORPORATION

Page [x] of [y]

## ***Resources***

### ***Online***

[www.legalwritingpro.com](http://www.legalwritingpro.com) —Ross Guberman's site; check out his blog

[www.lawprose.org](http://www.lawprose.org) —Bryan A. Garner's site, with a blog full of lessons

<https://community.pepperdine.edu/law/writing-center/content/editing-exercises.pdf> —a series of exercises to reduce wordiness

### ***Books worth owning (all available at Amazon)***

Steven V. Armstrong & Timothy P. Terrell, *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* (3d ed.)

Bryan A. Garner, *The Redbook: A Manual on Legal Style* (4th ed. 2018)

Bryan A. Garner, *The Winning Brief* (3d ed. 2014)

Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed. 2011)

Bryan A. Garner, *Garner's Modern English Usage* (4th ed. 2016) (or 5<sup>th</sup> ed. 2022)

Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates*

Ross Guberman, *Point Taken: How to Write Like the World's Best Judges*

William Strunk Jr. & E.B. White, *The Elements of Style* (4th ed. 1999)

Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005)