Everything You Wanted to Know About Legal Writing But Were Afraid to Ask

By Chad Baruch*

I. INTRODUCTION**

"[T]he term 'legal writing' has become synonymous with poor writing: specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer."[1] Legal writing suffers from "convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs."[2] Despite recognition of this problem and concerted efforts by law schools to fight it, legal writing continues to deteriorate.[3]

No one who teaches at any level will be surprised by this deterioration in writing skills. Teachers bemoan it every day in high school, college, and law school faculty lounges. This paper presents a series of practical, easily implemented steps to improve legal writing.

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A. Legal Writing is Important!

Many lawyers roll their eyes at discussions of legal writing, and use legal writing presentations during seminars as coffee breaks. They regard legal writing as a topic for law professors, judges, and all-around eggheads, one that has little application to their practices. They are wrong. As Irving Younger explained:

> So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy's bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it. [4]

There are many reasons for a lawyer to write well. Good writing helps attorneys by:

- Enhancing their credibility with other lawyers. Many lawyers *are* good writers, and most of them recognize and respect quality legal writing when they see it. When opposing these lawyers, your ability to write well commands respect and affects their evaluation of the likelihood of success. At my former firm, we were writing snobs. When facing attorneys from small firms, we routinely made assumptions about them based upon their legal writing. Quality legal writing gains you respect that may prove useful in litigation.

- Preventing malpractice and grievances. Inferior legal research and writing skills can give rise to malpractice liability, client grievances, and court sanctions.

- Enhancing their credibility with clients. Some clients read what you produce in their cases with a Javert-like obsession for pointing out even the tiniest errors. A superior legal writing product works like a salve on these clients' tortured psyches.

- Enhancing their credibility with judges. Judges are the most frequent victims of bad legal writing. They cannot escape a daily barrage of poorly written motions and briefs. No surprise, then, that judges take special note of well-written pleadings. Once, during a sanctions hearing, a district court judge permitted me to argue on behalf of my client for less than one minute, telling me that his reading of my brief already made clear that I was "the only lawyer in the room who knows what he is talking about" (that was not true, but it kept my client from being sanctioned and pleased my mother very much).

- Helping them win cases. Legal writing is critical to appellate success. Even at the trial court level, better legal writing – particularly at the summary judgment stage – will produce better results for your clients. Like it or not, many cases are won or lost on the briefing.

The importance of legal writing increases as the odds of reaching trial diminish. In this era of ever-rarer trials and hearings, legal writing takes on added significance. As courts expand the types of matters they will decide based solely on briefing, legal writing becomes ever more critical. [5]

B. Know Your Audience – Judges Matter!

An important part of legal writing is to know your audience. Lawyers write most often for judges. With increasing frequency, judges are making public their frustration with much of the legal writing that comes before them and are asking attorneys to do better. As Supreme Court Justice Ruth Bader Ginsburg noted: "The cardinal rule: it should play to the audience . . . The best way to lose that audience is to write the brief long and cluttered . . . ." [6] Judges do not have unlimited time to read briefs:

> Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.[7]

The simple truth is that judges – and particularly state court judges – rarely have extended periods of time to focus on your legal writing. Judges want briefs that are interesting but also are organized and clear – in other words, briefs that are easy to read.

It is not uncommon for a state court judge to hear motions in twenty or thirty cases in a single morning. Most mornings, several of those are summary judgment motions involving lengthy briefs. Sometimes a hearing involves complex legal issues that necessitate lengthy briefs. Even in those cases, however, attorneys can take a number of steps to assist a busy judge reviewing their briefs. This paper describes some of those steps.

C. For Further Instruction

Attorneys interested in more detailed instruction on legal writing should take Bryan Garner's seminars. He is an outstanding teacher of legal writing and anyone attending his seminars will come away a better writer (I even recommend his seminars to my high school students in preparation for the AP examination). Mr. Garner's books on legal writing are helpful in any significant writing project. His most helpful for attorneys is *The Winning Brief*.

D. Maintain Credibility

Your brief only has as much value as your reputation and credibility. Be careful, then, to maintain your credibility with opposing counsel and the court. Don't misstate or overstate the facts or law. Cite-check your citations. Address all significant arguments raised or likely to be raised by your opponent. When the other side is right, don't be afraid to say so if it will not matter to the end result.

E. Use the Right Tone

Shrill briefs are not persuasive. Adopt a reasonable and respectful tone regardless of how opposing counsel behaves. An angry or defiant tone usually is unproductive. On very rare occasions, humor may be effective in conveying frustration. In helping defend an attorney from a specious sanctions motion several years ago, I wanted to point out to the court that the other party was blaming my client for a whole host of things that were not even arguably his fault. The opening line of our response read:

"Smith has accused Mr. X of everything but being the gunman on the grassy knoll." Upon receiving the response, opposing counsel called to tell me he enjoyed the line, so apparently it got our point across without offending anyone.

II. DRAFTING EFFECTIVE DOCUMENTS

A. Write in Something Resembling English

An important goal in drafting any document (presumably) is ensuring that the people who read it can understand it. Notwithstanding this rather obvious point, many contracts leave one with the unmistakable impression that the drafter's goal was to make certain that no one would ever comprehend the contract's terms.

Thought hardly difficult, drafting contracts in English requires a willingness to set aside entrenched writing habits and embrace the use of plain language. Here are some examples of traditional contract provision, and their plain English counterparts:

> *This Agreement constitutes the entire understanding between the parties with respect to the subject matter of this Agreement and supersedes any prior discussions, negotiations, agreements, and understandings between the Parties.*
>
> This Agreement contains the entire agreement between the parties.
>
> *The terms of this Agreement may not be varied or modified in any manner, except by a subsequent written agreement executed by all parties.*
>
> The parties can amend this Agreement only by signing a written document.

B. Prepare Documents in a Readable Typeface

To enhance readability, prepare documents in a serif typeface (serif refers to the lines or curves at the top and bottom of a letter) like Times New Roman or Garamond. Avoid using Courier and Arial. Whatever typeface you choose, use at least 12-point font.

> A contract prepared in Garamond is readable.
>
> `A contract prepared in Courier is not.`
>
> Neither is Arial.

C. Use Plenty of White Space

Magazine editors know that the intelligent use of white space pleases the human eye and enhances readability. Use enough white space in your contracts that the reader's eye gets a break from the text. Place this white space strategically throughout the contract to prevent the reader from being overwhelmed by text.

D. Give Your Contract a Title

A contract entitled *Contract* or *Agreement* does not help the reader very much. On the other hand, a contract entitled *Contract for Alarm Services* or *Agreement to Provide Computer Consulting Services* may help the reader understand the contract's purpose.

E. Include a Table of Contents

For contracts more than a few pages long, provide a table of contents.

F. Give Each Section a Clear and Specific Title

Regardless of the length of your contract, provide section titles that clearly and specifically state the subject matter of each section. Meaningful section titles are easy to draft and make the contract more understandable. In other types of legal writing, a well drafted topic sentence fulfills this function. Think of your contract's section headings as a series of topic sentences, or alternatively as a roadmap through the contract. Here are some examples of good section headings:

> *How to Provide Notice*
>
> *The Law Governing This Agreement*
>
> *How to Amend this Agreement*
>
> *What We Can Do If You Default*

G. Provide an Introduction That Explains the Contract

In addition to a good title and descriptive section headings, provide an introductory statement that helps the reader understand the purpose of the contract.

> *This contract specifies the terms on which CenterCorp will provide alarm monitoring services to Smith's Widgets.*

H. The Strategic Use of Bullet Points

Bullet points are a remarkable tool both to enhance clarity and for persuasion. They are an excellent way to present any type of list, so long as the listed items have no rank order. To avoid adding more numbers to a contract, use bullet points when listing items that do not have a rank order.

I. Avoid Underlining and All-Capital Letters

The use of all capital letters is distracting and makes type very difficult to read. While lower case letters have distinctive shapes, most fonts do not include those individual characteristics for capital letters, meaning the capital letters have a uniform shape and appearance that renders them inherently difficult to read. Similarly, underlining – a holdover from the days of typewriters – fails to provide sufficient emphasis for critical contract terms and often looks unnatural. ***To add emphasis, use italics or boldface type.***

J. The Top Ten Things *Not* to Say in Contracts

Here are some other common words and phrases that should be excised from contracts:

> **Prior to.** *Prior to* is a longwinded way of saying *before*. Just say *before*. *Prior to* leads to other clunky phrasing (as in *prior to commencement of the option period* – instead of *before the option period begins*).
>
> **Shall.** Once upon a time, lawyers were taught that *shall* was a legal term of art imposing a mandatory duty. Whether that ever was true, it certainly isn't now. Lawyers routinely use *shall* to mean all sorts of different things, including *is* (*There shall be no right of appeal from the county court at law*) and *may* (*No floor supervisor shall investigate or resolve any complaint of harassment by a subordinate employee*). Where a contract calls for required action, use *must* instead of *shall*. It sounds more natural and leaves no doubt as to its mandatory effect.
>
> **Now, therefore, in consideration of the foregoing and the mutual covenants and promises herein, the receipt and sufficiency of which are hereby acknowledged.** This commonly used phrase causes a ordinary reader's eyes to glaze over, and adds nothing to the contract. A good contract specifies each party's consideration, making

this clause redundant. If the contract fails to specify the consideration, this vague clause will not suffice to do so.

The parties agree. Isn't the whole point of a contract that the parties agree to all the terms?

The parties expressly agree. By specifying certain terms that the parties "expressly agree" about, this language implies the parties do not expressly agree about all the other terms.

Unless otherwise agreed. If this language refers to other potentially contradictory language in the contract, that other language should be specified. If it refers to contemplated amendments, it is unnecessary and probably confusing, so long as the contract specifies its amendment process.

Hereby. This word never serves any legitimate function, and clutters otherwise sound legal writing.

Wherefore. Let me introduce you to hereby's more annoying cousin.

Notwithstanding anything in this contract to the contrary. This provision serves only to confuse the reader. A well written contract should not have inconsistencies necessitating this language. If two provisions may be interpreted inconsistently and this cannot be avoided, the better practice is to explain the apparent inconsistency and how it should be resolved.

In witness hereof, the parties have caused this contract to be executed by their duly authorized representatives. This is another common phrase without any real meaning.

III. WRITING TO PERSUADE

A. Strong Introductions – Starting Well

Good writing includes a strong introduction. An introduction serves several purposes. First and foremost, it hooks the reader. An introduction piques the reader's interest and invites further reading. Mystery novelist Elmore Leonard is a master of the understated yet compelling introduction. Consider the opening paragraph from one of his recent novels:

> Late afternoon Chloe and Kelly were having cocktails at the Rattlesnake Club, the two seated on the far side of the dining room by themselves: Chloe talking, Kelly listening, Chloe trying to get Kelly to help her entertain Anthony Paradiso, an eighty-four-year-old guy who was paying her five thousand a week to be his girlfriend.[8]

This introduction hooks the reader, who wants to know more about Chloe's sordid arrangement with her sugar daddy. There is an important lesson here for lawyers. Most lawyers who use introductions focus on *issues*. The Leonard approach focuses on *people*; issues would be set forth only in the context of their impact on people. All of us – even judges – are more likely to be interested in people facing problems than in abstract legal issues. An introduction that presents the primary players in a compelling light is particularly effective:

> "Joseph Burke got it on Guadalcanal, at Bloody Ridge, five .25 slugs from a Jap light machine gun, stitched across him in a neatly punctuated line."[9]

Here is the introduction to a summary judgment brief filed on behalf of the American Civil Liberties Union in a First Amendment case involving the petition clause, in which we hoped to hook a rural Texas judge right away:

> On July 18, 1833, Stephen F. Austin arrived in Mexico City bearing a petition for reforms relating to grievances asserted by the residents of what is now Texas. For this audacity in petitioning his government, Austin spent more than a year in prison. Whoville City Council Member Cindy Simple apparently takes a similarly dim view of the petition right. While John Smith has not been imprisoned, he has - solely for exercising his constitutional right to petition his government - been haled into court and forced to defend this SLAPP (strategic lawsuit against public participation).
>
> Mr. Smith is entitled to summary judgment because the communications at issue sought redress of grievances from elected government officials and therefore are protected by the Petition Clauses of the United States and Texas Constitutions. Permitting this SLAPP to proceed would threaten fundamental constitutional liberties: "Short of a gun to the head, a greater threat to First Amendment expression can scarcely be imagined."[10]

Sometimes, an introduction begins with a single line so interesting or compelling that it commands the reader's attention. Quintin Jardine, Scottish author of the Inspector Skinner series so popular in the United Kingdom, often begins his novels with single sentences so interesting the reader cannot help but continue:

> Panic was etched on the face of the clown on the unicycle.[11]
>
> As a city, Edinburgh is a two-faced bitch.[12]
>
> It was only a small scream.[13]

Here is an example of the eye-catching opening sentence from another of Spenser's cases:

> The office of the university president looked like the front parlor of a successful Victorian whorehouse. Bradford W. Forbes, the president . . . was telling me about the sensitive nature of a college president's job, and there was apparently a lot to say about it. I'd been there twenty minutes and my eyes were beginning to cross. I wondered if I should tell him his office looked like a whorehouse. I decided not to.[14]

In a recent case involving an attorney who sold real property to our clients under a contract for deed but failed to follow the new property code provisions governing executory contracts, we began our clients' summary judgment motion with the following line:

> "Stanley Jones is an attorney who refuses to follow the law."

Perhaps my all-time favorite introduction to a legal brief, cited by Bryan Garner, is this opening paragraph of the shareholders' brief in a complex takeover case: "NL Industries is owned by its shareholders. The board of directors works for them. The shareholders want to sell their stock to Harold Simmons. The board won't let them." [15] This introduction is wonderful. It focuses on people, explains their problem, and points the reader toward a conclusion.

A strong introduction to a legal motion or brief provides a glimpse of the most important legal issues in the case. These should be woven into your client's story. Good introductions frame the issues so their resolution is clear to the reader. This is

done by framing the issues so the reader is compelled to reach the result you seek without being asked to do so.

Sometimes, an attorney must be creative in crafting an introduction. Several years ago, I represented a retired couple being sued on an account. The couple retired after selling a successful fabrication business to their son, who promptly ran it into bankruptcy. One of the son's unpaid creditors, who also did business with the company prior to the sale, sued the couple. This creditor sued the couple because the son was bankrupt and the parents had money. The parents were entitled to summary judgment and this would be fairly evident to any judge willing to read a five-page brief. The goals of our introduction were to persuade the judge to read the remainder of the brief – in other words, to get the judge's attention – and to make clear that the wrong people were being sued. In preparing the brief, I remembered a motion hearing during which the judge questioned me about a murder case in Dallas that I worked on for a brief time. The judge was fascinated by the case. The introduction to our brief joined the judge's interest in true crime with our desire to show the creditor's motive for suing our clients:

> The murder of Marilyn Reese Sheppard, found beaten to death in her home on July 4, 1954, was the most reported and sensational crime of the 1950's. During his closing argument en route to winning an acquittal at the retrial of Dr. Sam Sheppard, criminal defense attorney F. Lee Bailey described the myopic police investigation that resulted in the conviction and imprisonment of an innocent man:
>
> In my closing argument, I compared the State of Ohio to a woman who was poking around in the gutter beneath a street light. When a passerby asked what she was doing, she said she was looking for a dollar bill she had dropped fifty feet away. "Then why aren't you looking over there? asked the passerby. "Because," she replied, "the light is better over here."
>
> ABC Services filed this breach of contract case to collect a commercial account. The services at issue were ordered and received by TinMan Fabricating, which failed to pay for them. Rather than suing TinMan –which is insolvent and bereft of assets – ABC sued Nick and Nora Nelson, a married couple whose business assets were sold to, and later reacquired through foreclosure from, the founders of TinMan. Instead of suing the company that ordered the services and is obliged to pay for them, ABC chose to sue the Nelsons – presumably because "the light is better over here" (meaning the Nelsons can satisfy a judgment).
>
> In a different era, ABC might have pursued the Nelsons under the de facto merger doctrine, enmeshing the court in a protracted and arduous analysis of the Nelsons' business relationship with TinMan. In 1979, however, the Texas Legislature precluded the types of claims alleged by ABC in this lawsuit when it amended the Business Corporation Act to preclude successor liability in the absence of express assumption. Because the Nelsons did not:
> order or authorize anyone to order the services, receive the services, have any involvement in TinMan,
> give any indication they would pay for the services, or
> expressly assume any of TinMan's liabilities upon acquiring that company's assets,
>
> they are not liable for payment of the account. ABC must look for its money where it was lost, not where "the light is better." The Nelsons are entitled to summary judgment.

This introduction worked better than we possibly could have imagined. Not only was it clear at the hearing that the judge read our entire brief, the judge actually referred to the better light analogy during argument! Opposing counsel began his argument by telling the judge that summary judgment was not appropriate "despite the excellent brief" we filed. The judge granted our clients' summary judgment motion.

Drafting an introduction is a good way to focus your briefing in a case. When there are several complex issues in a case, drafting the introduction first necessarily forces you to decide what facts and arguments really are important. Having to compress four pages of facts and ten or twenty pages of argument into four or five sentences usually shows you what matters!

Introductions are also effective in shorter motions. The next time you file a motion for continuance, consider replacing:

Plaintiff John Smith files this Motion for Continuance, and would respectfully show as follows . . . .

with:

John Smith seeks a continuance due to non-elective surgery he is scheduled to undergo on the day of trial.

By reading the first sentence of your motion, the court will know what you seek, and why.

B. Strong Conclusions – Finishing Well

A particularly puzzling aspect of legal writing is the tendency of some lawyers to write an outstanding motion or brief – complete with strong introduction, well-crafted paragraphs, and persuasive arguments – and then end it with a conclusion that says something like "Wherefore, premises considered, plaintiff prays that this motion be granted in its entirety." Talk about ending with a whimper! A strong conclusion is nearly as important as a strong introduction. It is your opportunity to provide a compelling summary of your argument and leave the reader thinking about your principal points. Stuart Woods did a great job ending his early novels. In ending a book about a middle-aged man recounting his youthful adventures with a married couple, and the tragic death of the wife, Annie, he concludes:

> "The years have passed, and all this has remained fresh with me. I think of Mark often. I cannot bear to think of Annie."[16]

This ending is perfect – poetic, appropriate, abrupt, and emotional without being sentimental. What is its focus? It does not refer to any of the thrilling events of the novel. Instead, it focuses solely on *people*. Again, *people* are compelling.

A conclusion should describe the specific relief you seek, tie it to the people you represent, set forth the most compelling reason it should be granted, and leave the reader thinking. Here is the conclusion from our summary judgment motion involving the parents being sued for their son's obligation:

> The Business Corporation Act precludes successor liability in the absence of express assumption. Because the Nelsons did not expressly assume any of TinMan's liabilities, and because they neither purchased nor received the services at issue, they are not obliged to pay for them or spend any more money defending this lawsuit. The Nelsons are entitled to summary judgment.

This conclusion is brief, but it sets forth the central argument, focuses on the people involved, and tells the court what relief is being sought.

C. Summarize Arguments and Issues

How important are summaries? Well, the Fifth Circuit and the Texas appellate courts require them. Summaries are helpful to appellate judges, and their usefulness probably is even greater to overworked and distracted trial court judges. A summary of the argument or issue should identify the relief requested, the legal principles at issue, and the specific arguments addressed in the brief. A good summary achieves the delicate balance between being thorough and reprinting your entire argument. A summary that states your arguments but does not provide any support for them has limited utility. A summary that essentially copies your entire argument serves little purpose. Useful summaries are short, yet set forth the critical arguments in support of your key points.

E. Use Tables for Lengthy Briefs

Tables of contents and authorities are useful tools for judges and should be provided in any motion or brief longer than ten pages. There is a reason these tables are required for appellate briefs – judges and their clerks use them.

F. Use Headers

Headers, particularly in the argument section of a brief, are powerful summaries and a useful roadmap of your position. The ideal header is a one sentence statement in the form of a positive assertion of the argument that follows it, rather than merely a signpost. This header is not very powerful: "The accident photographs." This header is better: "The accident photographs should be excluded because they are hearsay." Using headers throughout your motion or brief will make it more readable, understandable, and persuasive.

G. Literary References

Literary references are a potent persuasive tool and may be useful in calling to the reader's mind the theme of a literary work. For example, a judge's quotation of Shakespeare's *King Lear* ("How sharper than a serpent's tooth it is to have a thankless child") reveals his disdain for adult children who attempted to defraud their mother.[17]

Literary references may be useful in setting an overall theme for a legal brief. In seeking summary judgment on behalf of a SLAPP defendant in a case where the plaintiff's claims violated my client's First Amendment rights as well as any sense of decency, I cited on the cover page a line delivered by Wilford Brimley in the movie *Absence of Malice*: "It ain't legal and worse than that, by God it ain't right." [18] It summed up my feelings about the case and, as it turned out, the judge's opinion as well. A terrific literary reference in any case involving an attempt to distort the meaning of a statute is Humpty Dumpty's classic statement about the meaning of words: "When I use a word, it means just what I choose it to mean . . . ."[19] Could there be a better way to underscore a litigant's distortion of meaning?

Caution is the watchword when using literary references. Sad though it may be, don't assume that judges and lawyers will recognize even major literary references unless you provide a citation. Also, don't overuse literary references. It is easy to pass over the line from being clever and insightful to full-on Niles Crane insufferability.

H. Presenting the Issues

A good brief or motion immediately sets forth the critical issues in the case. In appellate cases, briefing rules often require immediate identification of the issues. Where no rule compels immediate identification of the critical issue, the good legal drafter nevertheless presents that issue through a well-crafted introduction. This simple paragraph introduces the issue in a motion to compel:

Joe Nelson accuses the Smiths of carrying out a complex scheme to defraud him of more than $250,000.00. Mr. Nelson served interrogatories and document requests on the Smiths more than four months ago. The Smiths objected to every interrogatory and have yet to produce a single document. Mr. Nelson seeks to compel responses.

Good issues are hard to find. Generally, good issues:

- are presented at the outset of the motion or brief;
- are presented in short and readable sentences (rather than the old-style single sentence that begins with the word *whether* and continues until rigor mortis sets in);
- include facts sufficient for the reader to understand the issue and how it arose (in other words, focus on the people rather than an abstract legal principle); and
- permit only one possible answer.

Here are examples of issues from appellate briefs that follow this format:

> The underlying lawsuits allege losses to three financial institutions by Smith's legal malpractice in failing to discover conflicts, implement procedures to assure compliance with ethical standards, train and educate lawyers working on financial institution matters in their ethical and professional duties, and assure that those lawyers were adequately supervised. Are these activities "professional services for others" within the meaning of the insuring agreement so that the insurance company has a duty to defend the underlying lawsuits against Smith?[20]
>
> ********
>
> A jury convicted Abel Munoz of illegal entry after deportation. At sentencing, Mr. Munoz objected to the assessment of criminal history points for a prior conviction, claiming his guilty plea in that prior case was entered without benefit of counsel or a valid waiver of rights. The record of the prior case is silent as to representation or waiver. Despite the testimony by Mr. Munoz establishing lack of waiver or counsel, and the absence of any record or other evidence to contradict it, the district court assessed the points. Did the district court violate the sentencing guidelines?[21]
>
> ********
>
> Jane Doe sued ABC Corporation under Title VII. The district court granted ABC's summary judgment motion solely on the basis of after-acquired evidence. May a Title VII claim be adjudicated on the basis of after-acquired evidence?[22]

These introductions to Supreme Court decisions present issues in the context of facts:

Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sues respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not.[23]

After publicly burning an American flag as a means of

> political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not.[24]

IV. THE NUTS & BOLTS OF LEGAL WRITING

A. Relative Dating

Face it – dates are distracting, interrupting your prose with visual eyesores. Even worse, when someone goes to the trouble of inserting a date into a brief, most of us assume the date is relevant and slow down to try and absorb it. Judges are no different. As Fifth Circuit Judge Jacques Wiener Jr. observed:

"When we judges see a date or a series of dates, or time of day, or day of the week, . . . most of us assume that such information presages something of importance and we start looking for it. But if such detailed information is purely surplus fact and unnecessary minutiae, you do nothing by including it other than to divert our attention or anticipation from what we really should be looking for. In essence, you will have created your own red herring." [25]

Most of the time, the date is irrelevant to any issue in the case and serves only as a serious distraction to the reader. Take, for example, this paragraph in a DTPA case:

> On February 6, 2006, the Millers purchased a house from the Smiths. On February 13, 2006, the Millers discovered a water stain on the wall of their bedroom closet. On February 16, 2006, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. On March 12, 2006, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

All the dates are distracting; none of the dates is relevant. A better approach is:

> A week after purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Three days later, Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The following month, the Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.

An even better approach is:

> After purchasing a house from the Smiths, Robert and Ann Miller discovered a water stain on the wall of their bedroom closet. Foundation Repair Company inspected the home and informed the Millers that it required significant foundation repairs. The Millers paid Foundation Repair the sum of $8,500.00 to perform the necessary repairs.[26]

In most instances, chronology and relative dating are a better approach than actual dates. Of course, dates must be included when they are important, as in cases involving statutes of limitations or other legal issues dependent on actual dates. Even where actual dates are included, however, it is often best to frame them within the chronology. For example:

> The Texas Supreme Court rejected Ms. Smith's application for review on March 1, 2001, triggering the two-year statute of limitations. Ms. Smith filed this lawsuit two weeks prior to expiration of the limitations period, on February 16, 2003.

B. Spell Check (A Dangerous Tool!)

Spell check is a wonderful tool but is no substitute for thorough editing. The dangers of spell check are illustrated by a recent federal criminal pleading in which the government stated its intention to prosecute an alien for "Attempted Aggravated Sexual Assualt of a Chile."[27]

C. Don't Plagiarize

Legal writing culture is citation oriented, meaning it insists that sources of words and ideas be documented. In this environment, pagiarism is a very real issue. Plagiarism can have severe consequences, including a lawyer's loss of credibility and professional standing.

Most plagiarism in legal writing occurs when a lawyer uses the words, whether directly quoted or paraphrased, from a court decision or treatise. This is a tempting technique, since courts and legal scholars often set forth applicable principles clearly and concisely. The pride of a well written brief, however, will give way to humiliation if opposing counsel or the judge discovers that a source is quoted or paraphrased without attribution. In *Iowa Supreme Court Board of Professional Ethics v. Conduct & Lane*, Lane copied almost twenty pages of published work into a brief and then requested an award of $16,000.00 in legal fees for preparing it.[28] When a magistrate discovered that Lane had taken the pages verbatim from a treatise, the Iowa Supreme Court concluded that Lane plagiarized the brief and suspended him from the practice of law for six months.[29]

When borrowing from form books, other briefs, or court decisions, it is appropriate to borrow language so long as it is tailored and applied to the specific case. Treatises and articles, however, should not be used without attribution.

Like other writers, attorneys must take care for ethical and practical reasons not to plagiarize.

D. "A Few Too Many Words"

Salieri said it best in *Amadeus*: "A few too many notes."[30] Though probably an unfair criticism of Mozart, it remains an accurate assessment of most legal writing. Lawyers use too many words.

To improve your writing, review each draft with an eye toward cutting needless words. Be relentless in hacking unnecessary words from your writing. Shorten sentences. Simplify language. Cut, cut, cut. Spenser, Robert B. Parker's literate detective, speaks in simple yet descriptive sentences:

> It was a late May morning in Boston. I had coffee. I was sitting in my swivel chair, with my feet up, looking out my window at the Back Bay. The lights were on in my office. Outside, the temperature was 53. The sky was low and gray. There was no rain yet, but the air was swollen with it, and I know it would come.[31]

One source of clutter in legal writing is the overuse of certain customary phrases. If you find any of the following phrases in your writing, eliminate them:

- It is Smith's position that . . . .

- We respectfully suggest that . . . .
- It would be helpful to remember that . . . .
- It should be noted that . . . .
- It should not be forgotten that . . . .
- It is important to note that . . . .
- It is apparent that . . . .
- It would appear that . . . .
- It is interesting to note that . . . .
- It is beyond dispute . . . .
- It is clear that . . . .
- Be it remembered that . . . .
- Some additional phrases used by lawyers, and more efficient alternatives, are:
- during the time that/while
- for the period of /for
- as to/about
- the question as to whether/whether
- until such time as/until
- the particular individual/[Name]
- despite the fact that/although
- because of the fact that/because
- in some instances/sometimes
- by means of/by
- for the purpose of/to
- in accordance with/under
- in favor of/for
- in order to/to
- in relation to/about
- in the event that /if
- prior to/before
- subsequent to/after
- pursuant to/under[32]

Another way to pare your writing is to avoid using *provided that*. In addition to cluttering your writing, the phrase usually signals failure to think through what you want to say. Rather than weaving the additional matter into your original statement, you just added the words *provided that* to the end of the sentence. Consider the following sentence:

> "Any expert witness may testify, provided that the expert has been properly designated."

With better planning – or editing – it becomes:

> "Any properly designated expert witness may testify. "

E. Names, Not Party Designations

We know that people, rather than issues, are compelling. Why, then, would an attorney ever detract from the power of a brief by referring to the client as *plaintiff*, *defendant*, *petitioner*, or *respondent*? Novelists certainly don't do this. Consider the following passage from Spenser's case files:

> I drove the side of my right fist into his windpipe as hard as I could and brought my forearm around and hit Zachary along the jawline. He gasped. Then Hawk was behind Zachary and kicked him in the side of his back. He bent back, half turned, and Hawk hit him a rolling, lunging right hand on the jaw, and Zachary loosened his grip on me and his knees buckled and he fell forward on his face on the ground. I stepped out of the way as he fell.[33]

Now read the same passage written in the style of some lawyers:

> Petitioner drove the side of his right fist into respondent's windpipe as hard as petitioner could and brought his forearm around and hit respondent along the jawline. Respondent gasped. Then intervenor was behind respondent and kicked respondent in the side of respondent's back. Respondent bent back, half turned, and intervenor hit respondent a rolling, lunging right hand on the jaw, and respondent loosened his grip on petitioner and respondent's knees buckled and he fell forward on his face on the ground. Petitioner stepped out of the way as respondent fell.

Yuck. When the human element of the narrative is removed, it ceases to be compelling.

There are two significant exceptions to the rule against using party designations. First, use of party designations may be advisable where the opposing party is sympathetic in comparison to your client. For example, I used party designations in defending a recent child molestation case on behalf of a Dallas church. In that case, *plaintiff* seemed a lot better for my client than *Sally*. Second, party designations are helpful in cases involving multiple parties where confusion might otherwise result. Other than these situations, it is best to use names rather than designations.

F. To Cap or Not to Cap – Parties

Puzzling as it is, many attorneys engage in the maddening practice of capitalizing party designations like Plaintiff and Defendant. As noted in the preceding section, the better practice is to use the parties' names rather than their party designations. If you must use party designations, don't capitalize them. There is no compelling reason to do so, and it distracts those of us who know it. Among the authorities supporting this viewpoint are two of the leading guides to legal writing, and the Supreme Court:

> "Briefly, plaintiff seeks to recover for personal injuries . . . ."[34]
>
> "On January 15, 1979, appellant filed a charge with the Equal Employment Opportunity Commission . . . ."[35]
>
> "Louisiana infringed appellant's rights of free speech and free assembly by convicting him under this statute . . . ."[36]

During my first year as an associate, our partners assigned me the task of researching whether party designations should be capitalized and preparing a summary of my research. While they found my citation of legal writing authorities persuasive, the decisive factor in their decision was my discovery that Justice Cardozo did not capitalize those designations. For our partners, Justice Cardozo's word decided the matter.

G. Mr./Ms. or Last Names

This is one where Mr. Garner and I part ways. He advises legal writers to use last names alone:

> Legal writers seem to fear that, when referring to parties, they're being impolite if they don't consistently use *Mr.*, *Ms.*, or some other courtesy title. Actually, though, they're simply creating a brisker, more matter-of-fact style. Journalists aren't being rude when they do this, and neither are you.[37]

While recognizing Mr. Garner's superior expertise on writing, I disagree with his assessment of courtesy. Journalists face space limitations necessitating their use of only last names (in his excellent argument in favor of the serial comma, Mr. Garner points out that space limitations affect journalistic style). Lawyers do not have the same concern. Lawyers do, however, work in a profession losing even the pretense of civility. The use of *Mr.* or *Ms.* restores a small bit of this civility to the legal profession.

In debating the issue, I am reminded of George Washington. The most towering figure in American history, and a man known throughout the world as a great gentleman, Washington refused during the Revolutionary War to accept letters from General Howe addressed to "Mr. George Washington" or "George Washington, Esq." because they did not contain his rank of general. One can only imagine his reaction to a letter addressed simply to "Washington."

Perhaps the Texan in me causes me to feel this way. This much I know: my grandfather, who came to Texas during the 1890's, would never have approved of referring to any person – and certainly never a woman – solely by last name. I am not sure that a different approach constitutes progress.

On the subject of names, please avoid the peculiar practice of many attorneys who feel the need to tell us that Smith is shorthand for Smith:

> "Plaintiff John Smith ("Smith") petitions the court for relief . . . ."

If the reader cannot figure out that Smith means Smith, good luck with the rest of your argument.

H. Avoid Be-Verbs

Verbs move the action. Consequently, good writers try to avoid using forms of *to be*, the so-called be-verbs, including is, am, was, were, will be, and have been. These verbs undermine the power of your writing and put readers to sleep.

Be-verbs destroy impact and sap strength from sentences. Infusing writing with stronger verbs improves language and increases the reader's interest. It also creates a more compelling story or argument. Simply put, verbs matter more to our writing than any other category of words. Using strong verbs amounts to injecting your writing with performance-enhancing words. Here is a sentence with the dreaded be-verb: *The petitioner will be granted certiorari by the Supreme Court.* Now, here is the same sentence without the be-verb: *The Supreme Court will grant certiorari in the case.* The first sentence is sluggish compared to the second. The more effective sentence makes the subject (in this case, the Supreme Court) perform the action – *The Supreme Court will grant*.

Employing "be-verbs" is not entirely off limits. If a subject does not need to be identified, for example, it is not necessary to use action verbs. To increase your writing efficiency, however, limit "be-verbs" to about a quarter of your sentences.

I. State a Rule, Give an Example

Legal writing is the process of presenting rules and explaining their application. Stating a rule without providing an example of its application to facts leaves the job half-done. When presenting and applying a rule, most lawyers first present the rule and then apply it to the facts of their case. Many times, an intermediate step – presenting an example of the rule in action –improves the argument. Consider an argument concerning assumption of risk in athletics:

> Students who participate in sports assume risks inherent to the activity.[38] Tommy Jones did not assume the risk of tripping over debris in the end zone because that debris is not inherent to football.

This argument improves when an example is inserted between the general rule and its application:

> Students who participate in sports assume risks inherent to the activity.[39] A student who is injured in an awkward fall while learning a jump roll in karate class has assumed an inherent risk, while a student who trips over a torn tennis court divider has not. Falling is inherent to karate jump rolls, while torn nets are not inherent to tennis. Tommy Jones did not assume the risk of tripping over debris left in the end zone of the football field because that debris – like the torn tennis net – is not inherent to the game.[40]

In presenting a rule – particularly a complex rule – provide an example of the rule before applying it to your case.

J. Provide Determinative Facts

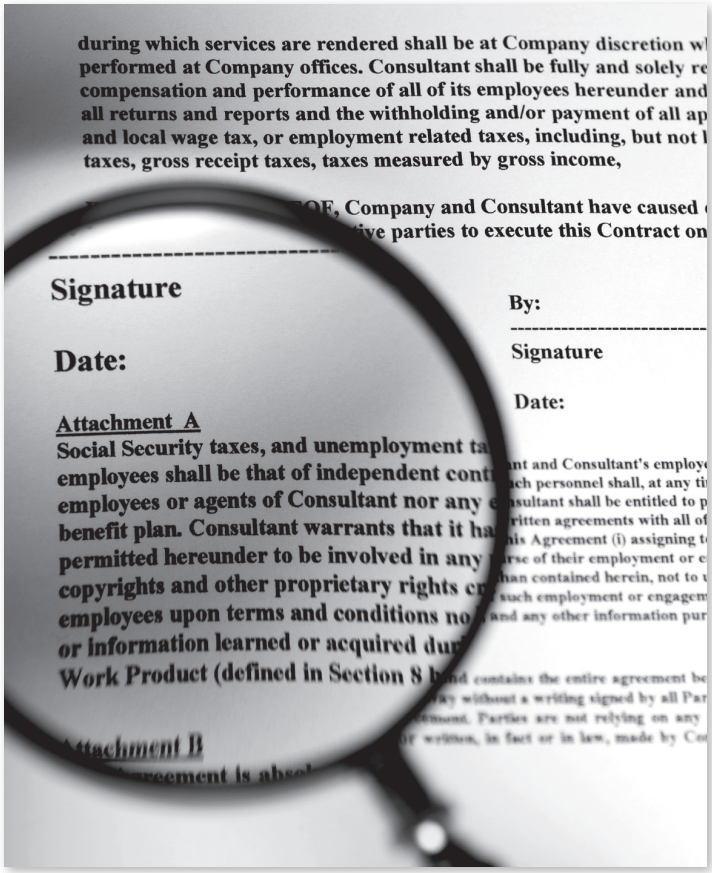
Provide the determinative facts when discussing important cases. Attorneys are so focused on the rules established by cases that they sometimes forget to describe the facts that led to those rules. Whether relying on a case or distinguishing it, providing the critical facts that led to the holding helps judges understand it. Provide those facts that related directly to the holding, with an eye toward providing only that level of detail necessary to secure a complete understanding of the holding.

K. Tell A Good Story, or Any Story

Much of the advice in this paper relates to storytelling. These techniques are designed to help the legal writer tell a better story. The statement of facts in a motion or brief should be a compelling story. The most compelling way to tell a story usually is in chronological order, by providing the facts in the order they happened.

There are rare exceptions when chronology is not the most persuasive way to tell a story. In a recent Supreme Court petition, my client argued that the Fifth Circuit resolved fact issues in affirming summary judgment for an employer in a discrimination case despite the Supreme Court's previous admonition in a similar case not to do so. To emphasize the critical fact issues in the case, we presented alternate versions of certain facts:

> D. Toycom "Eliminates" the RTV Lead Position
>
> Ms. Johnson's Version: Only two weeks after demoting Ms. Johnson, Toycom informed her it was eliminating the position of RTV Lead altogether and the company reduced the pay of both Ms. Johnson and Ms. Smith. The very next day, however, Ms. Smith received a pay raise from Toycom. Ms. Smith received another pay raise when she became the RTV Clerk/Trainer, a newly created position with the same duties as the previously "eliminated" RTV Lead position. Toycom managers could not agree about why the position was eliminated just weeks after the demotion of Ms. Johnson and promotion of Ms. Smith. Ms. Johnson remained a clerk until being terminated by Toycom on June 18, 2003. The demotion from RTV Lead to clerk substantially altered Ms. Johnson's job duties and authority, as well as her salary.
>
> Toycom's Version: Toycom made a business decision (based upon transfer of certain functions from the RTV Department to a different department) that it did not require any RTV Leads. Ms. Johnson and Ms. Smith were both demoted to clerk, with an attendant salary reduction. The day after her demotion, Ms. Smith was given a merit pay increase as a result of her regularly scheduled performance review. Between January of 2003 and mid-2004, Toycom did not have any RTV Leads.
>
> The Critical Fact Issue: The parties differ sharply over whether Toycom ever eliminated the RTV Lead position. Ms. Johnson believes that Toycom realized it could not demote her legally, hatched a plot to eliminate the



position only in name, created an equivalent position to award to Ms. Smith, and then lied about what its scheme.

This type of narrative is compelling when you want to highlight fact disputes. Most of the time, however, a chronological narrative is the best way to tell a story.

L. Creating Strong Paragraphs

Once upon a time, most of us had a high school teacher who instructed us to use topic sentences. Good advice. The first sentence of an effective paragraph expresses the focus of that paragraph. In legal writing, the topic sentence provides the reader with a summary of the argument contained in that paragraph. It also assists overworked judges trying to skim a brief before a hearing. Strong topic sentences permit judges to read only the beginning portion of each paragraph and still grasp the issues.

Backward though it may seem, many lawyers to do the exact opposite of what I am counseling – they fall into the habit of placing topic sentences at the end of paragraphs. This is most common in paragraphs discussing court decisions. Here is an example of this writing mistake:

> In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, evidence of Johnson's prior conviction is admissible to disprove his defense of mistake.

Aargh. The reader must complete the paragraph before discovering its principal point. Even worse, the case is cited without any immediate clue about its importance. A judge reading this paragraph could better analyze the import of the case if the topic sentence was at the beginning – rather than the end – of the paragraph (like Mr. Bonikowske taught me in the tenth grade!). Here is the same paragraph, rewritten to help the reader:

> Evidence of Johnson's prior conviction is admissible to disprove his defense of mistake. In *Smith v. Jones*, 000 S.W.0d 0 (Tex. 0000), the Texas Supreme Court held that "evidence of a prior sexual molestation conviction may not be admitted to show that molestation in the present case took place." *Id.* at 00. The court went on, however, to state that such evidence "may be admitted for the purpose of establishing other facts, such as absence of mistake, motive, plan, or preparation." *Id.* Thus, Johnson's prior conviction is admissible under *Smith*.

Now the reader understands the point of the paragraph and case citation upon reading the first sentence. Good topic sentences make your writing more readable and persuasive.

M. Creating Strong Sentences

Short sentences transform prose. Lengthy sentences are a common element of most poorly written motions and briefs. Your goal should be an average sentence length of fewer than twenty words. Remember to vary your sentence length. Some sentences should be longer, others shorter, but twenty words or less is a good average.

Uncomplicated sentences are particularly important to express complicated ideas. The more complex the idea, the shorter and simpler the sentences presenting it should be.

N. Eliminate Legalese

One sure way to undermine the power of your writing is to use legalese. All of us know this rule, and all of us break it (or stand mute while others do). We obligate our clients to *agree and covenant* not to do certain things, as though agreeing without covenanting somehow is not enough. We seek *any and all* documents, *bind and obligate* parties, demand that others *cease and desist*, help our clients *give, devise, and bequeath* their belongings, and declare contracts *null and void*. Sometimes these outdated terms of art are actually necessary, but only rarely. Most of the time, a single word will perform the work of these phrases. Similarly, is there really any reason to use words like *aforementioned*, *herein, hereinabove, inter alia, arguendo, hereinafter*, or *wherefore*? These are grand words on the Scrabble board and at the Renaissance Faire, but not in your motions and briefs.

O. Write in English

Latin is legalese's insufferable cousin. Avoid writing in any foreign language (except of course, when practicing law in the jurisdictions where they are spoken). The principal benefits of writing in English are (1) being understood and (2) avoiding sounding like a pretentious jackass. A side benefit is avoiding the "marvelous capacity of a Latin phrase to serve as a substitute for reasoning."[41] Impress your friends at cocktail parties with your command of Latin. Write in English.

P. Active, Not Passive

Many lawyers use the passive voice without realizing the damage it does to their writing. With the passive voice, the subject of the clause does not perform the action of the verb. A classic example of a passive sentence is: *The deadline was missed by Mr. Jones.* The same sentence in active voice would read: *Mr.*

Jones missed the deadline. The passive voice is weak and often ambiguous. Instead of saying that an actor acted, you say that an action was taken, meaning the reader might not realize who acted.

Lawyers who write strong, persuasive, and effective sentences avoid the passive voice. The passive voice adds unnecessary words, muddles writing, and undermines clarity.

Examples of passive phrases include:
Is dismissed
Are docketed
Was vacated
Were reversed
Been filed
Being affirmed
Be sanctioned
Am honored
Got paid

The passive voice is acceptable in certain situations, such as when the actor cannot be identified or is unimportant. Use the passive voice when the active might alter what you want to say. On the whole, however, avoiding the passive voice saves words, promotes clarity, and animates your style. You will snatch and hold the reader's attention with clear, assertive sentences.

Q. Using However

You should not begin a sentence with however. You may, however, move it inside the sentence.

R. The Important Case of That v. Which

Confusion regarding the use of these words abounds. Much of the time when *which* is used, it should be *that* instead. The result of this confusion is misuse of both words, causing ambiguity. The best way to remember when to use these words is to understand that *that* is restrictive, while *which* is nonrestrictive. Remembering this simple rule will, at least most of the time, permit you to use *that* and *which* properly. The real mistake most writers make is to use *which* restrictively. So long as you remain vigilant in avoiding the restrictive *which*, you should be fine.

S. Not Sexist, But Not Awkward Either

Avoid sexist language. It offends some judges and lawyers and can be removed painlessly most of the time. The most effective way to remove sexist language is to reword your sentences to avoid it. Consider the following sentence: *The fiduciary duty an attorney owes to his client is one of the highest recognized by Texas law.* Some lawyers would rewrite the sentence to read as follows: *The fiduciary duty an attorney owes to his or her client is one of the highest recognized by Texas law.* How awkward! Rewrite the sentence to refer specifically to the litigants: *As the Wrays' attorney, Mr. Smith owed to them one of the highest fiduciary duties recognized by Texas law.* Alternatively, use an article instead of the pronoun: *An attorney's fiduciary duty to the client is one of the highest recognized by Texas law.*

You can rewrite most sentences easily to avoid sexist language. The sentence, "Communications between a physician and his patient are protected from discovery," becomes, "Physician-patient communications are protected from discovery."

While it may take some effort, rooting out sexist language is worth it.

T. Using the Dash – For Emphasis

Dashes highlight important phrases within your sentences. They are superior in this regard to commas and parentheses. Once you start using the dash this way, your use of commas will diminish and your use of parentheses will almost disappear. Dashes can be used both for interruptive phrases and for emphasis near the end of a sentence.

Here are some examples of dashes from actual briefs used this way:

> The Smiths paid the note–in full.
> The memorandum–which contained false information about Mayor Smith–was an attempt to obtain government action.
> Judge Benavide–in attempting to find some basis for Smith's decisions during voir dire–was being kind.

> John Grisham, the best-selling legal writer of all time, uses the dash for interruptive phrases in his books: "Rabbits, squirrels, skunks, possums, raccoons, a million birds, a frightening assortment of green and black snakes–all nonpoisonous I was reassured–and dozens of cats. But no dogs."[42]

> Spenser also uses the dash both for emphasis and interruptive phrases:
> "It is a matter of the utmost delicacy, Mr. Spenser"–he was looking at himself in the glass again–" requiring restraint, sensitivity, circumspection, and a high degree of professionalism."[43]
> "Her hair was loose and long. She wore a short-sleeved blouse, a skirt, no socks, and a pair of loafers. I looked at her arm–no tracks. One point for our side; she wasn't shooting."[44]

The most famous use of the dash for an interruptive phrase in American history – and perhaps the most compelling – is Abraham Lincoln's use in the Gettysburg Address:

> "Now we are engaged in a great civil war, testing whether than nation – or any nation, so conceived and so dedicated – can long endure."[45]

U. Quotation Marks

The misused quotation mark is inescapable in American society. My son and I pass a church sign each morning on the way to school that states:

ACADEMY NOW "ENROLLING"

Despite an entire year of trying, we have yet to figure out what it means. Our local driver's education school engages in the curious but common practice of using quotation marks to emphasize key words, along these lines:

> It is imperative that "any" student who wishes to take the driving test bring "all" forms of requested identification, and each student "must" pay the testing fee. There are "no" exceptions.

An entire page of this actually made my eyes hurt. The misused quotation mark is so common that there is an episode of *Friends* devoted in part to Joey's inability to understand how quotation marks are used!

Quotation marks should be used when you are quoting someone, when you are referring to a word (as in, *the Legislature's use in the statute of the word "the" denotes an intent to signal a particular class*), and when you are pointing out that a word or phrase is being misused (as in, *Smith's classification of a giraffe as a "farm animal" flies in the face of a century of caselaw, not to mention common sense*). Other than that, avoid the use of quotation marks. "Really."

V. Persuasion with a Bullet

Bullets are a remarkable persuasive tool. They are an excellent

Many lawyers make the critical mistake of avoiding counterarguments or relegating them to the very end of a brief.

way to present any type of list, including the elements of a cause of action. The elements of a claim for breach of contract, for example, are:

- the existence of a valid and enforceable contract,
- breach, and
- proximate cause of
- actual damages.

W. Confront Counter Arguments

Many lawyers make the critical mistake of avoiding counterarguments or relegating them to the very end of a brief. Good legal writers confront counterarguments directly and without hesitation. Sound argumentation requires not only the construction of your argument but also the refutation of opposing arguments.

The best way to overcome opposing arguments is to weave them into your argument. Begin your argument by joining the law and facts necessary to support it, and then build to your principal conclusion. Then, enunciate the strongest possible counterargument and refute it. Repeat this process for each credible or likely counterargument. Finally, return to your principal argument and conclude it. In refuting counterarguments, devote as little time as possible to presenting the counterargument (you do not, after all, wish to highlight your opponent's arguments) and focus your efforts on refuting it. By this process, you will both support your argument and deal directly with the opposing arguments.

X. Serial Commas/Using Commas

Could there be a more important issue facing this nation than the ongoing dispute over the serial comma, known abroad as the Oxford comma (those British have a different word for everything!)? Some, Mr. Garner chief among them, are adamant about its use. Others, including Lynne Truss of *Eats Shoots and Leaves* fame, counsel flexibility.

Ms. Truss, incidentally, is the author of the greatest rule ever written about commas: *Don't use commas like a stupid person*.[46] Well said and worth saying again in big scary letters:
DON'T USE COMMAS LIKE A STUPID PERSON

The comma is the most overused, misunderstood mark in the English language. Please don't:

- Substitute a comma for the word *and* ("Agent, principal both responsible for defamation);
- Misplace a comma (the classic gun-toting panda who feels compelled to fire into the air because of a dictionary's misplaced comma – he believes a panda actually eats, shoots and leaves);
- Delete a necessary comma ("The captain crawled out of the boat's cabin before it sank and swam to shore");
- Use the gratuitous comma (The plaintiffs, were required to sign sworn statements waiving their DTPA rights);
- Overuse commas, placing them, at every turn, throughout your writing, leaving the reader to navigate, in frustration, what, otherwise, might be compelling prose;
- Use a comma to separate a party designation and name (Plaintiff, John Smith files this motion . . . .).

Of course, some people can get away with breaking all the comma rules. In his farewell address before leaving Springfield after being elected president, Abraham Lincoln relied heavily on commas yet produced compelling prose still praised more than a century later:

> My friends – No one, not in my situation, can appreciate my feeling of sadness at this parting. To this place, and the kindness of these people, I owe every thing. Here I have lived a quarter of a century, and have passed from a young to an old man. Here my children have been born, and one is buried. I now leave, not knowing when, or whether ever, I may return, with a task before me greater than that which rested upon Washington. Without the assistance of the Divine Being, who ever attended him, I cannot succeed. With that assistance I cannot fail. Trusting in Him, who can go with me, and remain with you and be every where for good, let us confidently hope that all will yet be well. To His care commending you, as I hope in your prayers you will commend me, I bid you an affectionate farewell.[47]

Y. To Split or Not to Split

As a first-year associate, I was summoned to our firm's conference room for a meeting with one of the partners. The partner laid before me a lengthy memorandum of my creation and turned to a portion he had highlighted in the middle of my glorious work. He asked me: "Are you aware of the firm's policy toward the split infinitive?" Concealing my astonishment that the firm had a policy on split infinitives, I confessed ignorance. The partner handed me a copy of Fowler's *Modern English Usage*, opened it to the section entitled *Split Infinitive*, and walked out of the room. This is what I learned (other than that our firm took legal writing a bit too seriously):

> "The English-speaking world may be divided into (1) those who neither know nor care what a split infinitive is; (2) those who do not know, but care very much; (3) those who know and condemn; (4) those who know and approve; & (5) those who know and distinguish."[48]

Upon completing the entry, I longed for the time only minutes earlier when I was among what Fowler termed those "happy folk, to be envied by most of the minority classes," who neither know nor care.[49] Alas, from that moment forward, I would be haunted by misgivings and confusion about the dreaded split infinitive.

The preferred class of people – at least according to Fowler – is those who know and distinguish. To summarize, split infinitives should be avoided unless the cure is worse than the disease. In other words, avoid the split infinitive unless doing so renders a sentence horrifically awkward, ambiguous, or patently artificial. Thus, we still avoid the classic *to mortally wound*, preferring instead *to wound mortally*. Captain Kirk and his crew do not undertake *to boldly go*, but instead *to go boldly*. On the other hand, we will probably prefer *our object is to further cement trade relations*, to *our object is further to cement trade relations* (making it unclear whether an additional object or additional cementing is the goal).

The problem is that many readers do not possess breeding sufficient to permit their appreciation of the nuance and beauty of the properly split infinitive, falling instead into the class of

those who know and condemn in all cases. Even worse, those who know and condemn are on the constant lookout for the split infinitive, to point it out and thereby establish their intellectual superiority. At least of a few of these condemners are judges. My constant state of infinitive-paranoia therefore causes me to rephrase sentences at almost any cost to avoid split infinites. You will have to find your own way on this one.

Z. Numbers

Numbers greater than ten should be written as numbers (100), but only words should be used for one through ten. The most important exceptions to this rule are (1) when a passage contains numbers in both categories, in which case only numbers should be used, (2) references to discovery requests or other numbered items, (3) when referring to percentages, where only numbers should be used, and (4) when the number begins a sentence. Finally, don't engage in the puzzling practice of using words and numbers, as in ten (10). Few judges and lawyers will assume that by ten you mean 26.

AA. Referencing Filings

Most lawyers list the entire title of pleadings and discovery instruments when referring to them:

> "After filing Plaintiff's Original Petition, plaintiff served Plaintiff's First Set of Interrogatories, Plaintiff's First Requests for Production, and Plaintiff's Requests for Disclosure. When defendant failed to respond, plaintiff filed Plaintiff's Motion to Compel Discovery and for Sanctions. "

This is distracting because it requires the use of capital letters, confusing because it disrupts the narrative flow, and deflating because it interrupts your prose. To avoid these problems, describe a pleading rather than giving its title:

> "After filing this lawsuit, Mr. Smith served requests for production and disclosure, as well as interrogatories, on Good Times. When Good Times did not respond, Mr. Smith sought to compel responses."

If the title must be used, it is best simplified:

> "After filing his petition, Mr. Smith served interrogatories, document requests and disclosure requests on Good Times. When Good Times did not respond, Mr. Smith filed a motion to compel responses."

BB. Modifiers

Misplaced and dangling modifiers are not located properly in relation to the words they modify, leading to ambiguous sentences that sometimes do not mean what the writer intended them to mean. An example of a misplaced modifier would be: *The magazine sat on the bed that Jonathan had read.* Jonathan read the magazine, not the bed. This modifier is misplaced because it is not placed nearest the word it modifies. Another example: *The clerk posted the docket of cases for the lawyers heard that morning.* It should, of course, be: *The clerk posted the docket of cases heard that morning for the lawyers.* Dangling modifiers usually are –ing modifiers not logically connected to the principal part of the sentence: *Walking through the courthouse, the briefcase rubbed against my leg.* The briefcase was, in all likelihood, not walking through the courthouse. Instead, write: *The briefcase rubbed against my leg as I walked through the courthouse.*

Careful editing should resolve misplaced or dangling modifiers, which is important because they are to many readers the written equivalent of nails on a chalk board.

CC. Citing Cases – Joining Law & Fact

Case citations are more persuasive when joined with the facts of a particular case. Many lawyers insist on separating law and fact even though it undermines the power of their argument. Here is an example of legal writing undermined by its separation of law and fact:

A party may protect from discovery the work of an expert witness employed purely for consultation. A party may not, however, continue to protect that consulting expert's work from discovery once it is reviewed by a testifying expert witness.[50]

In this case, Smith's report as a consulting expert witness was later reviewed by Jones, an expert witness who will testify on behalf of Buy-Low at trial. As a result, Buy-Low must produce Smith's report.

These two paragraphs are combined, strengthened, and shortened by joining law and fact:

> Smith's report was not discoverable when Buy-Low was using him purely for consultation. Once Buy-Low showed Smith's report to Jones, however, it became discoverable because Jones is a testifying expert.[51]

While not always possible, joining law and fact in this manner often strengthens the argument and makes it easier for the judge to understand how a legal rule applies in a particular case.

DD. Instant Cases

Coffee is instant. Teenage gratification in American culture is instant. Cases are not instant. Enough said.

EE. Use Consistent Terms

Don't change the way you refer to people and things. Once it is a collision, don't make it an accident then an incident. Once it is an automobile, don't make it a car then a motor vehicle. Once it is Mr. Smith, don't make it Smith then Robert Smith. Be consistent.

FF. Use Transitions

Good writing contains transitions between paragraphs. Refer back to concepts in the previous paragraph to provide a bridge between your thoughts.

GG. Avoid Screaming Adjectives

Rarely will an over-the-top adjective enhance your argument. Consider the following sentence: *The school district's actions are outrageously insensitive and in blatant violation of the First Amendment*. Are regular violations of constitutional rights and normally insensitive actions not enough? These types of adjectives accomplish little other than to undermine your professional standing and credibility.

HH. Eliminate And/Or

Its inherent ambiguity and ugliness aside, the hatred many judges have for this phrase should be enough to persuade you to avoid it. Here is what the Wisconsin Supreme Court had to say about it (and this should convince you!):

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean . . . .[52]

II. Avoid Repetition

Developing a consistent theme is one thing, but repeating the same sentence throughout a brief is quite another. Too many

lawyers use the same sentence in the introduction, statement of the case, and facts sections, or the summary of the argument, argument, and conclusion. If you feel the need to say the same thing repeatedly, at least vary the language.

V. ETHICAL CONSIDERATIONS

A. Competence – Research

Texas attorneys are required to provide their clients with competent representation.[53] In many – perhaps even most – cases, competent representation of the client requires adequate legal research.

An attorney is expected "to possess knowledge of those plain and elementary principles of law which are commonly known by well informed attorneys, and to discover those additional rules of law which, although not commonly known, may readily be found by standard research techniques."[54] As one court stated: "We recognize that it is unreasonable to expect every attorney . . . to construct arguments as if they were authored by Learned Hand, but a line must be drawn separating adequate from inadequate briefs . . . ."[55]

The reporters are rife with cases in which attorneys failed to perform adequate research.[56] Violation of this rule may constitute an ethical violation.[57] It may also violate federal or state civil procedure rules.[58]

An important part of performing adequate legal research is insuring the cases you cite remain valid law. Several years ago, I represented an employment discrimination plaintiff in federal court. The head of employment litigation for one of the mammoth downtown firms represented the employer. The employer sought summary judgment. A young associate drafted the motion, and the supervising partner signed it. Our summary judgment response pointed out that the principal cases the employer relied upon had been overturned. The federal magistrate began the summary judgment hearing by giving a senior partner of one of the largest law firms in Dallas a stern lecture about cite-checking and supervising associates. There are a lot ways to be humiliated in the practice of law, but having your opponent point out that you are relying on invalid law has to be near the top of the list.

B. Competence – Writing Skill

Competent representation usually requires adequate writing skills. With increasing frequency, courts are recognizing this fact and punishing lawyers who fail to heed it. The Kentucky Supreme Court suspended an attorney from the practice of law for sixty days when he filed a brief that was "little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message."[59] Similarly, the Minnesota Supreme Court publicly reprimanded an attorney and ordered him to attend ten hours of legal writing education programming based on pleadings that were "rendered unintelligible by numerous spelling, grammatical, and typographical errors . . . sufficiently serious that they amounted to incompetent representation."[60] The Vermont Supreme Court also ordered an attorney to obtain instruction to improve his writing as a condition of maintaining his license to practice law.[61]

Sometimes, the cruelest punishment for an attorney's bad writing is the judge's public wrath. Take, for example, Judge Samuel B. Kent of the United States District Court for the Southern District of Texas:

> [T]his case involves two extremely likable lawyers, who have together delivered some of the most amateurish pleadings ever to cross the hallowed causeway into Galveston . . . .
>
> [A]ttorneys have obviously entered into a secret pact – complete with hats, handshakes and cryptic words – to draft their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court will be so utterly charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed. [62]

In another case, a federal bankruptcy judge entered an "Order Denying Motion for Incomprehensibility," citing by footnote a statement from the movie "Billy Madison," in which a competition judge responds to Billy Madison's answer to a question:

> Mr. Madison, what you've just said is one of the most insanely idiotic things I've ever heard. At no point in your rambling, incoherent response was there anything that could even be considered a rational thought. Everyone in this room is now dumber for having listened to it. I award you no points, and may God have mercy on your soul.

The judge concluded that "[d]eciphering motions like the one presented here wastes valuable chamber staff time and invites this sort of footnote."[63] The Mississippi Supreme Court criticized an attorney for using "legalese instead of English" in an indictment that was "grammatically atrocious." The court used a literary reference when it paraphrased Shakespeare and stated: "It cannot be gainsaid that all the perfumes of Arabia would not eviscerate the grammatical stench emanating from this indictment."[64]

The tenor of legal writing also can give rise to sanctions. An attorney who referred in a pleading to the presiding judge as a "lying incompetent ass-hole," and then wrote that the special judge who replaced that judge would be superior if only he "graduated from the eighth grade" was suspended from the practice of law for sixth months (mercifully, it would seem, for his clients).[65] Similarly, an attorney who referred to opposing counsel as "Nazis" and a "redneck pecker-wood" was reprimanded and ordered to apologize.[66] The moral of these cases is that lawyers need to insure that their writing is competent and – if they believe it may not be – should get help to improve it.

C. Disclosure of Adverse Authority

Attorneys must disclose to the court any authority in the controlling jurisdiction known to the attorney to be directly adverse to the position of the client and not disclosed by opposing counsel. Tex. Disciplinary R. Prof. Conduct 3.03(a)(4) (2005). Legal authority is not limited to case law. It includes administrative rulings, codes, ordinances, regulations, rules, and statutes.[67]

D. Following Court Writing Rules

Following court rules becomes progressively more difficult with each passing year. In the federal system, local rules have proliferated to the point that one sometimes wonders why the federal rules even exist. I was admitted to practice in the Northern District of Texas just after a number of the new discovery rules were enacted. Judge Sanders told me, "Some of us follow all the rules, some of us follow some of the rules, and some of us follow none of the rules – so make sure you read each judge's rules!" Whew. Not to be outdone, many state court judges now have individual rules and standing orders concerning pretrial and trial practice in their courts.

Lawyers ignore court rules concerning writing at their peril. The Texas Supreme Court has dismissed appeals due

Judges' top pet peeve is the practice by lawyers of filing briefs just prior to hearings.

to failure to follow briefing rules.[68] Attorneys who violate briefing rules may also be ordered to pay sanctions.[69]

VI. THE LEGAL WRITING PROCESS

A. The Nike Rule: Just Write It!

As Eugene F. Ware noted: "All glory comes from daring to begin." The problem is how to begin. There is no shortage of advice, much of it contradictory, about the writing process. Some experts insist that the first step to any successful writing project is the old-fashioned outline. Some contend that you should write a rough draft before performing any research. Others counter that the more effective technique is to perform all the research, then prepare a rough draft. Still others advise lawyers to brainstorm and write down all their ideas before beginning the actual brief. There are probably as many effective ways to begin the writing process as there are writers. If a process works for you, use it. If it doesn't, find a new one. You can research, then outline, then write. You can brainstorm, then research, then write. Any combination of these tasks is acceptable so long as it works for you.

Writing ruts are a more persistent and universal problem. All writers get into ruts. There are things you can do to overcome these difficulties. Starting a brief in the middle is effective when you are having trouble beginning a project. Another useful tool is to change scenery. If you are having trouble writing in the office, try the neighborhood Starbucks or bookstore. A simple change of scenery may be enough to kick-start a project (and there is no better place for literary inspiration than the bookstore!).

B. Ruthless Editing

To call someone a great legal writer really is to say that person is a great legal editor. Great writing results from sustained and thorough editing.

The first and most important editor of your writing is you. Edit your work relentlessly and savagely, striking every unnecessary word. While editing your work, you should:

have the Blue Book close at hand and pay careful attention to citation forms;

proofread the final product – never assume that prior edits were made;

let the finished product sit for a day or two, then come back to it for a final read.

Once you are relatively satisfied with your work, seek editing input from others. These others may be lawyers, but need not be – my mother is my best editor (of course, it helps that she actually was an editor!).

Committed editing means numerous drafts. Good writers write, rewrite, and rewrite again almost the point of being unable to stand looking at the work. One of the very best ways to edit your writing is to read it aloud. If it sounds unnatural, it probably needs to be rewritten. An even better editing method is to read your work aloud to someone else. Whatever your method, careful editing is a requirement for quality legal writing.

VII. SURVEY SAYS . . . .!

In 2007, the State Bar College asked me to resurvey Texas judges about their writing preferences and pet peeves. /the first surprising result of the survey was that the judges took the time to complete and return it. Some of them even wrote notes expressing their gratitude that someone was at least trying to help improve the quality of briefs filed in their courts.

The surveys were sent to all civil and family district court judges, and all civil county court at law judges, in Dallas and Harris Counties. Virtually all of the judges completed and returned the surveys, which were anonymous.

A. What Judges Read

At least according to their own estimates, judges read almost all summary judgment briefs, almost no discover dispute briefs, and the majority of all other briefs filed in their courts. Well above 80 percent of the judges polled indicated that they read more than 75 percent of the summary judgment briefs filed in their courts. This compares with less than 50 percent of the judges who indicated they read at least 75 percent of the briefs pertaining to discovery disputes. In fact, about one-third of the judges admitted that they read fewer than 25 percent of the discovery dispute briefs filed in their courts. Finally, about 80 percent of the judges stated they read at least 75 percent of other briefs filed in their courts.

Of critical importance for lawyers is that almost 90 percent of the judges indicated that when they do "read" a brief, the usually skim it for what they believe to be important and read only the most important sections in their entirety.

B. What Judges Hate

In the survey, judges were asked to identify their #1 pet peeve in connection with briefs filed in their courts. ***Overwhelmingly*** (and, at least to me, surprisingly) judges' top pet peeve is the practice by lawyers of filing briefs just prior to hearings, rather than filing them well in advance of hearings to permit the judge to review them. In survey after survey, the judges pleaded "Please file the brief sufficiently prior to the hearing date that I can read it, and review the controlling cases if I choose to do so." The other pet peeve that garnered a substantial number of votes was wordiness. A great many judge cited their frustration with briefs that fail to get to the point. Among the other top pet peeves were the following:

Briefs that include numerous unnecessary case citations;

C. Pet Peeves

Here are things responding judges took the time to write when asked to list "things that bother me:"

- Not bringing an order to the hearing
- Detailing irrelevant facts
- Sloppiness
- Dishonest statements in briefs
- Verbosity; length
- Citing cases that are not directly relevant
- Filing briefs at the last minute
- Failing to put major arguments at the beginning
- Taking extreme positions not supported by cases or evidence
- Wasting time telling me black-letter law every first-year law student already knows
- Too many exhibits
- Not providing a copy directly to the court—the clerk may not recognize the time constraints involved
- Citing something called "The Law" without actually citing a single statute or case to support it
- Lack of organization

- Failure to clearly state issue and requested relief
- Case citations that do not actually support the proposition for which they are cited
- Misrepresenting the holding of a case
- Not clearly identifying the type and grounds for summary judgment
- Vituperative language
- Failure to let the court know what kind of case it is at the outset
- Lack of citation to legal authorities
- Failure to provide the cases they want me to review
- Hyperbole
- Long or unclear titles for motions and briefs— one judge actually included a photocopy of one for me, entitled (and the names have been changed to protect both the innocent and the guilty) "Defendant City of Smithtown's Motion for Reconsideration of October 27, 2008 Partial Summary Judgment Order and for Partial Summary Judgment Limiting the City's Cumulative Potential Liability on All Claims by John Smith, Stacy Jones, Ronald Lee, Michael Plunkett, and Lucy Lopez to $500,000"); to make matters worse, as the judge pointed out, the title was printed in all-capital letters and was underlined, so it actually looked like this: DEFENDANT CITY OF SMITHTOWN'S MOTION FOR RECONSIDERATION OF OCTOBER 27, 2008 PARTIAL SUMMARY JUDGMENT ORDER AND FOR PARTIAL SUMMARY JUDGMENT LIMITING THE CITY'S CUMULATIVE POTENTIAL LIABILITY ON ALL CLAIMS BY JOHN SMITH, STACY JONES, RONALD LEE, MICHAEL PLUNKETT, AND LUCY LOPEZ TO $500,000.

D. Most Common Mistakes

The most common writing mistakes the surveyed judges see are:

- Poorly-drafted affidavits
- Wordiness
- *Ad hominem* arguments
- Inaccurate case citations (misrepresenting the holding)
- Assuming court is as familiar with case as advocates
- Using case law that has been overturned or otherwise called into question
- Grammar mistakes
- Citation errors
- Filing briefs too late
- Long analysis of irrelevant issues
- Failure to address the other side's issues
- Failure to provide a proposed order
- Emotional arguments

E. Annoyances

The things that most annoy the surveyed judges, in descending order of annoyance (from "infuriating" to "mildly annoying") are:

1. Derogatory remarks about opposing counsel or parties.
2. Wordiness/length.
3. Spelling and grammar mistakes.
4. Repeated use of words like "clearly" and "obviously" as a substitute for reasoning and citations.
5. Legalese.
6. Obvious errors in citation form.
7. String cites.

F. Wish List

Judges listed a great many things helpful to them (my favorite response by far was "having a briefing attorney"). The judges are almost unanimous in five preferences. First, they appreciate briefs that have an introduction at the very beginning explaining the case, issues, and argument. Second, they ask that counsel provide courtesy copies—at least in connection with dispositive or lengthy motions—of cases cited in briefs. Third, as they do in every survey and in response to almost every question, they ask that briefs be just that—brief! Some of the judges noted the growing importance of this preference in light of the move by their courts to electronic filings. Fourth, they appreciate when lawyers are specific and succinct in stating (at the beginning of the motion or brief) the requested relief in plain and simple language. Finally, they appreciate when lawyers plainly state the requested relief at the outset of the motion or brief, and provide a proposed order granting it.

One judge included a "wish list" item that I found particularly interesting: working with opposing counsel to narrow the issues and move the focus of the case to the actual dispute.

VIII. CONCLUSION

This paper is so brief a collection of ideas about writing that it really constitutes little more than a random collection of personal pet peeves. In applying these suggestions, remember that rules – at least many of them – were made to be broken. So, to paraphrase Richard Bach's reluctant messiah:

Everything in this paper may be wrong.[70]

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*** At several points in this article, I use my own motions and briefs as examples (and sometimes those filed by opposing lawyers). I have gently edited many of these examples to better illustrate the points I am attempting to make; as a result, these examples are my creation and only based on source pleadings. To protect the identities of the parties involved in these cases and avoid any potential breach of client confidentiality, I have changed all the names and declined to provide any case citations.*

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1 Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 13389 (1984).

2 *Id.*

3 *See* Lynne Agress, *Teaching Lawyers the Write Stuff*, Legal Times, Oct. 2, 1995, at 37.

4 Irving Younger, *Symptoms of Bad Wrting,* MICH. BAR J. 44 (March 2003).

5 *See* Edward D. Re, *Increased Importance of Legal Writing in the Era of the "Vanishing Trial*, 21 Touro L. Rev. 665 (2005).

6 Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 568 (1999).

7 Ruggero J. Aldisert, Winning on Appeal: Better Briefs and Oral Argument 24-25 (1996).

8 Elmore Leonard, Mr. Paradise 1 (2004).

9 Robert B. Parker, Double Play 1 (2001).

10 *Gordon v. Marrone*, 590 N.Y.S.2d 649, 656 (Sup. Ct. 1992, *aff'd*, 616 N.Y.S.2d 98 (App. Div. 1994).

11 Quintin Jardine, Skinner's Festival 1 (1994).

12 Quintin Jardine, Skinner's Rules 1 (1993).

13 Quintin Jardine, Skinner's Trail 1 (1994).

14 Robert B. Parker, The Godwulf Manuscript5-6 (1973).

15 Bryan Garner, The Winning Brief 99 (2004).

16 Stuart Woods, Run Before the Wind 373 (1983).

[17] *Mileski v. Locker*, 178 N.Y.S.2d 911 (N.Y. Sup. Ct. 1958).
[18] ABSENCE OF MALICE (Columbia Pictures 1981).
[19] LEWIS CARROLL, THROUGH THE LOOKING GLASS 247 (Modern Library ed., Random House)
[20] *See* note ** at INTRODUCTION, p.103
[21] *Id.*
[22] *Id.*
[23] DeShaney v. Winnebago County Soc. Servcs. Dep't, 489 U.S. 189 (1989).
[24] *Texas v. Johnson*, 491 U.S. 397 (1989).
[25] Jacques L. Wiener Jr., *Ruminations from the Bench: Brief Writing and Oral Advocacy in the Fifth Circuit*, 70 Tul. L. Rev. 187, 192 (1995).
[26] *See* note ** at INTRODUCTION, p. 103.
[27] Jerry Buchmeyer, *Who Was That Masked Man?*, 69 Tex. Bar J. 491, 492 (2006) (and presumably giving whole new meaning to the term *hot sex*).
[28] *Iowa Supreme Court Board of Professional Ethics v. Conduct & Lane*, 642 N.W.2d 296 (Iowa 2002).
[29] *Id.* at 300-302.
[30] AMADEUS (The Saul Zaentz Company 1984).
[31] Robert B. Parker, Back Story 1 (G.P. Putnam's Sons 2003).
[32] *See* Bryan Garner, Legal Writing in Plain English 35(2001); Richard Wydick, Plain English for Lawyers 11(2d ed. 1985).
[33] Robert B. Parker, The Judas Goat 192 (1978).
[34] Henry Weihofen, Legal Writing Style 238 (1980).
[35] John Dernbach & Richard V. Singleton II, A Practical Guide to Legal Writing and Legal Method 174 (1981).
[36] *Cox v. Louisiana*, 379 U.S. 536 (1965).
[37] Bryan Garner, The Winning Brief 266 (2004).
[38] *Morgan v. State*, 685 N.E.2d 202, 207-08 (N.Y. 1977).
[39] *Id.*
[40] Michelle G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn from Literature*, 21 Touro L. Rev. 349, 358 (2005).
[41] Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 Yale L.J. 229, 229 (1922).
[42] John Grisham, The Last Juror 28 (2004).
[43] Robert B. Parker, The Godwulf Manuscript 6 (1973).
[44] Robert B. Parker, The Godwulf Manuscript 54 (1973).
[45] President Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863) (transcript avvilable in the Illinois State Historical Library at Springfield).
[46] LYNNE TRUSS, EATS, SHOOTS, AND LEAVES 96 (2004).
[47] President Abraham Lincoln, Lincoln's Farewell Address in Springfield (Feb. 11, 1861).
[48] H.W. Fowler, A Dictionary of Modern English Usage 558 (1944).
[49] *Id.*
[50] Tex. R. Civ. P. 192.3(e) (West 2006).
[51] Tex. R. Civ. P. 192.3(e) (West 2006).
[52] *Employers' Mut. Liab. Ins. Co. v. Tollefsen*, 263 N.W. 376, 377 (Wis. 1935).
[53] Tex. Disciplinary R. Prof. Conduct 1.01 cmt. 6 (2005), *reprinted in* Tex. Gov't Code Ann., tit. 2, subtit. G app. A (Vernon 2005)
[54] *Smith v. Lewis*, 530 P.2d 589, 595 (Cal. 1975).
[55] *Mortars v. Barr*, No. 01-2011, 2003 WL 115359, at *3-4 (Wis. App. Jan. 14, 2003).
[56] *See, e.g., Fletcher v. State*, 858 F. Supp. 169 (M.D. Fla. 1994) (party cited one case that had been overruled and another that was reversed).
[57] *Baldayaque v. United States*, 338 F.3d 145 (2d Cir. 2003) (attorney who advised client that deadline to file his habeas petition had passed, even though client still had fourteen months to file, violated ethical rule mandating competent representation).
[58] *See, e.g., Carlino v. Gloucester City High School*, No. 00-5262, 2002 WL 1877011, at *1 (3d Cir. 2002) ("flagrant failure to conduct any legal research" violated Rule 11(b) of the Federal Rules of Civil Procedure).
[59] *Kentucky Bar Ass'n v. Brown*, 14 S.W.3d 916 (Ky. 2000).
[60] *In re Hawkins*, 502 N.W.2d 770 (Minn. 1993).
[61] *In re Shepperson*, 674 A.2d 1273 (Vt. 1996).
[62] *Bradshaw v. Unity Marine Corp.*, 147 F. Supp. 2d 668, 670 (S.D. Tex. 2001).
[63] Jerry Buchmeyer, *Who Was That Masked Man?*, 69 Tex. Bar J. 491, 492 (2006).
[64] *Henderson v. State*, 445 So.2d 1364, 1367 (Miss. 1984).
[65] *Kentucky Bar Ass'n v. Waller*, 929 S.W.2d 181 (Ky. 1996).
[66] *See In re Wilkins*, 782 N.E.2d 985, 987 (Ind. 2003).
[67] *See, e.g., Dilallo v. Riding Safety, Inc.*, 687 So.2d 353, 355 (Fla. Dist. Ct. App. 1997).
[68] *See, e.g., White Budd Van Ness Partnership v. Major-Gladys Drive Joint Venture*, 811 S.W.2d 541 (Tex. 1991) (dismissing application for writ of error based upon improper type size and margins altered to comply with page limit).
[69] *See, e.g., Laitram Corp. v. Cambridge Wire Cloth Co.*, 919 F.2d 1579, 1584 (Fed. Cir. 1990).
[70] (Richard Bach, Illusions: The Adventures of a Reluctant Messiah 136 (1977).