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Patrick R. Hugg

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Professional Writing Methodology
by Patrick R. Hugg

In my professional experience writing and teaching writing, I have become more and more impressed with the complexity of writing, as both an intellectual process and a physical process. Dynamic intellectual machinations occur as formal and informal reasoning processes combine to produce legal reasoning. The resulting legal analysis is then assembled into the various structures of writing that we use in our work. To accomplish the ultimate, sophisticated function of expressing this process on paper in a clear manner, we must understand the basic principles of reasoning and writing.

These basic principles operate at many different levels. Our thoughts and reasoning are articulated in language. This is translated into meaningful combinations of words and phrases, which then become sentences and paragraphs. These, in turn, are organized according to some order to promote further goals of communication and, sometimes, persuasion.

Our mentors have taught us an incredible mass of technical forms and rules by which all of this is supposed to be done. Our normative guides range from elementary forms of logic, to acceptable basic sentence structure, and on to such advanced writing techniques as parallelism and literary allusion.

You have been taught these rules and you know generally what we refer to when we discuss the basic principles or building blocks of writing. Your desk references include style books and excellent treatises advocating the substantive and formal maxims of our art. Many of them you have heard so often you can recite them:

Write clear and direct sentences.
Use the active voice.
Avoid the passive voice.
Avoid nominalizations.

And on and on. Some are more important than others. They are all essential. Most of us agree that we should do a better job at following the basic

1Associate Dean, Loyola Law School, New Orleans, Louisiana.
rules, such as building in more and better transition words, phrases, and sentences. We should always try to aid our readers with thesis and topic sentences. And our formal structure should always force clear summaries or conclusions.

These basic principles of grammar and composition that you learned in high school are absolute prerequisites for effective writing, especially at your professional level. They must be thoroughly mastered by us all. We will refresh ourselves a little later about a few of the more interesting and valuable of these principles.

Unfortunately, these elementary building blocks alone will not equip one to develop into a professional legal writer. The professional writer’s perspective must be multidimensional. A broader set of writing principles is also essential to your writing development. Writing students often remind us that merely teaching the basic rules of composition will not enable the writer to master the lengthy and complex processes of translating legal reasoning into written form. We teachers tell students what to do, but we do not show them how to do it. We tell them to write clearly, but we do not show them how. To accomplish this broader goal, we must teach the entire writing process.

Thus, over the years I have concluded that a more abstract and comprehensive set of principles offers the secret to professional writing. The developing writer (something we all are) needs conceptual guidance regarding the complete task, from initial case review, through analysis, to final editing and rewriting. The enormity and complexity of the full process intimidate and confuse many writers. These destructive forces add to the difficulty, and the writer sinks further into frustration.

The following are the essential principles to what I term a Professional Writing Methodology:

1. Change Your View of Yourself and Your Work
   Consider Yourself a Professional Writer in the Literary Sense,
   Who Works in the Legal Milieu

2. Declare War on Mediocrity
   Declare Your Independence

3. Discipline is Everything
YOU ARE A WRITER!

PROFESSIONAL WRITING METHODOLOGY:

STEP 1: Change Your View of Yourself and Your Work

EMBRACE A PARADIGM SHIFT

Change your view of yourself and your work.

Rather than viewing yourself as a lawyer, who is compelled to force a work product on paper, consider yourself a PROFESSIONAL WRITER in the literary sense, who works in the legal milieu.

Writing is a wondrously creative and rewarding effort.

We must enhance our self-esteem and pride.

STEP 2a: Declare War On Mediocrity

NEVER - EVER ACCEPT MEDIOCRITY!

As Tom Peters explains in his best selling guide for a quality revolution, Thriving On Chaos, we must become OBSESSED WITH QUALITY.

If you knowingly ignore any tiny act of...poor quality, you have destroyed your credibility and any possibility of moral leadership on this issue. Period.

We must commit ourselves to quality, professional legal reasoning and writing - something in which we can take personal pride. You will perform better and feel better
if you view yourself as a **growing scholar** as well as a dedicated administrative law judge.

*Our greatest fear must be INSTITUTIONALIZED MEDIOCRITY!*  
*This is the phrase coined by the well-known writer Tom Robbins, and his fear is that the agents of orthodoxy, whether it be religious leaders or government bureaucrats, are manhandling the gene pool - working to smother creativity and inhibit creative thought and expression.  We must resist and insist on taking the time to fashion quality.*

*An artist’s revolution to assert the right to work well.*

*Do whatever it takes! It’s your reputation!  
“I have yet to find a poor lawyer who is a good writer.”*

— Arthur Rovine, 1987

**STEP 2b: Declare Your Independence**

**TWO DANGER SIGNS**

1) If you find yourself working in **PILES** rather than **FILES** and  
2) Your desk is out of control as you work in **LAYERS** ...

**SOLUTION:**  
Respect Yourself and Your Work  
**TAKE CONTROL**  
**ORGANIZE**  
**PRIORITIZE**

Create a Work Environment of Professional Calmness and Competence. Follow these steps, and your view of writing will improve dramatically!

**STEP 3: Discipline is Everything**

**DISCIPLINE IS THE KEY TO THE PROCESS**  
This key principle recurs throughout the methodology.

**PREWRITING**

**WRITING**

**REWWRITING AND REVISING**

168
Every writer from the beginning of time...has learned the art of writing by ceaseless toil and practice. The lawyer alone thinks himself immune.

— Urban A. Lavery, 1921

The hardest part is to fully analyze and outline before you write. Abraham Lincoln reportedly advised a colleague: “If I had eight hours to chop down a tree, I’d spend the first six hours sharpening the axe.”

As the Director of the Fifth Circuit Staff Attorneys, Tony Bonfante teaches: “Don’t write before you’re ready. Be patient.”

Research Assistant Mike Bark adds, “Think before you ink”!

**STEP 4: Demand Professional Tools and Resources**

An office must be sufficiently supplied to enable the professional writer to compose effectively. The day of typewriter and white-out has gone the way of the horse and buggy.

The Basics

Every office needs a word processor with features such as spell check and thesaurus. The thesaurus provides alternative words to the writer to grab the audience’s attention and pack the legal punch to fight the opposition in court. Spell check speeds the input process, but it is no cure for incorrect usage or fat fingers. Words may be spelled correctly and not speak the words you wish to say.

EXAMPLE: They will got and injunction too step the bridge form crossing then river. All the words are spelled correctly, but a cursory reading saves embarrassment.

The Essentials

But more than computers and programs are needed. Privacy, ample writing space, and books — lots of books. Spelling is important but grammar and diction are vital to conveying an important message to the agency, parties, or reviewing courts. A manual like *Texas Law Review Manual on Style* helps you remove annoying distractions such as improper comma usage that destroys the form and credibility of your argument.
The Coup de’ Grace

Now that you are ready to go, prepare yourself with the ultimate weapon: a book that steps up your writing technique to the next level. Books like Garner’s *The Elements of Legal Style*, Goldstein and Lieberman’s *Lawyer’s Guide to Writing Well*, and Weihofen’s *Legal Writing Style* give you ideas for stylistic writing that stands out in the crowd. No longer spouting trite phrases and worn out legalese, you begin to make the facts work for you. **Words you write MAKE A DIFFERENCE!**

**STEP 5: Strive to Excel Intellectually as a Writer**

Read and Read About Writing and Reasoning

> “Lucidity does not come naturally to most law students, perhaps because they have been forced in their legal studies to read so much bad writing that they mistake what they’ve read for the true and proper model.”

— Pamela Samuelson, 1984

**STEP 6: Know Your Basics**

“GOOD WRITING ARISES partly from qualities that cannot be taught: talent, experience, stamina, the spark that sometimes leaps between mind and subject matter. Good professional writing, however, is primarily a craft, not a mystery. It is fashioned from methods that can be learned and practiced separately and, in time, combined to form a skill larger than the sum of its parts.”

1. Brevity
2. Word Choice
3. Sentence Structure
4. Structural Cohesion

>You can’t learn the tricks of the trade until you learn the trade.

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CHANGE IN VIEW

As children, our first writings were judged by volume as much as by quality. In high school and sometimes in college, this measure was also important. Remember the ten or twenty page report?

This perception or feeling regarding length reveals a fallacy. Twenty pages sounds impressive, but the writing itself could be worthless. Our writing should stand on its merits, not on some formal attribute, largely unrelated to substance.

As professional writers, we must change the way we view and value BREVITY

One of the Ninth Circuit Judge Harry Pregerson’s Seven Sins is LONG, BORING WRITING

Administrative law judges read and write a large volume of legal writing monthly. We should seize the opportunity to impress our readers with the sharpness and clarity of our analysis and expression. Professional writers understand that clear writing and incisive editing produce the quality of BREVITY.

You can please your reader and distinguish yourself with BREVITY.

“Confusion of expression usually results from confusion of conception. The act of writing can help clarify one’s thoughts. However, one should spare the reader having to repeat one’s own extrication from confusion. The object is to be clear, not how hard it was to be so.”

— Geoffrey C. Hazard, Jr., 1987

BREVITY: MUSTER THE COURAGE TO WRITE LESS!

Oliver Wendell Holmes’s legend as a writer began with his BRIEF but trenchant dissent in Lochner v. New York, 198 U.S. 45, 74-76 (1905). In this three paragraph dissent, Holmes displayed his genius for logical analysis and clear expression. The dissent soon became the majority view of the court. The three paragraph dissent typifies Holmes’s judicial writing style. Conciseness and clarity became his trademark. Especially note his opening sentence in each paragraph.
Mr. Justice Holmes, dissenting

"I regret sincerely that I am unable to agree with the judgment in this case, and that I think it my duty to express my dissent.

"This case is decided upon an economic theory which a large part of the country does not entertain. If it were a question whether I agreed with that theory, I should desire to study it further and long before making up my mind. But I do not conceive that to be my duty, because I strongly believe that my agreement or disagreement has nothing to do with the right of a majority to embody their opinions in law. It is settled by various decisions of this court that state constitutions and state laws may regulate life in many ways which we as legislators might think as injudicious, or if you like as tyrannical, as this, and which, equally with this, interfere with the liberty to contract. Sunday laws and usury laws are ancient examples. A more modern one is the prohibition of lotteries. The liberty of the citizen to do as he likes as long as he does not interfere with the liberty of others to do the same, which has been a shibboleth for some well-known writers, is interfered with by school laws, by the Post Office, by every state or municipal institution which takes his money for purposes thought desirable, whether he likes it or not. The Fourteenth Amendment does not enact Mr. Herbert Spencer’s Social Statics. The other day we sustained the Massachusetts vaccination law. Jacobson v. Massachusetts, 197 U.S. 11. United States and state statutes and decisions cutting down the liberty to contract by way of combination are familiar to this court. Northern Securities Co. v. United States, 193 U.S. 197. Two years ago we upheld the prohibition of sales of stock on margins, or for future delivery, in the Constitution of California. Otis v. Parker, 187 U.S. 606. The decision sustaining an eight-hour law for miners is still recent Holden v. Hardy, 169 U.S. 366. Some of these laws embody convictions or prejudices which judges are likely to share. Some may not. But a Constitution is not intended to embody a particular economic theory, whether of paternalism and the organic relation of the citizen to the state or of laissez faire. It is made for people of fundamentally differing views, and the accident of our finding certain opinions natural and familiar, or novel, and even shocking, ought not to conclude our judgment upon the question whether statutes embodying them conflict with the Constitution of the United States.

"General propositions do not decide concrete cases. The decision will depend on a judgment or intuition more subtle
than any articulate major premise. But I think that the proposition just stated, if it is accepted, will carry us far toward the end. Every opinion tends to become a law. I think that the word 'liberty', in the Fourteenth Amendment, is perverted when it is held to prevent the natural outcome of a dominant opinion, unless it can be said that a rational and fair man necessarily would admit that the statute proposed would infringe fundamental principles as they have been understood by the traditions of our people and our principles as they have been understood by the traditions of our people and our law. It does not need research to show that no such sweeping condemnation can be passed upon the statute before us. A reasonable man might think it a proper measure on the score of health. Men whom I certainly could not pronounce unreasonable would uphold it as a first installment of a general regulation of the hours of work. Whether in the latter aspect it would be open to the charge of inequality I think it unnecessary to discuss."

"Brevity is very good when we are, or are not, understood."

— Samuel Butler, English novelist

"Brevity is the soul of lingerie."

— Dorothy Parker, American poet and short story writer

**THE ART OF BREVITY**

President Lincoln grew to be a powerful writer. He also chose brevity as his guide:

"Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

"Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

"But, in a larger sense, we can not dedicate—we can not consecrate—we can not hallow—this ground. The brave men, living and dead, who struggle here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget
what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us—that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion—that we here highly resolve that these dead shall not have died in vain—that this nation, under God, shall have a new birth of freedom—and that government of the people, by the people, for the people, shall not perish from the earth.

Abraham Lincoln November 19, 1863

Gary Wills, the author of *Lincoln at Gettysburg: The Words That Remade America*, noted that, “Lincoln was asked to memorialize the gruesome battle. Instead he gave the whole nation ‘a new birth of freedom’ - by tracing its first birth to the Declaration of Independence (which called all men equal) rather than to the Constitution (which tolerated slavery). In the space of a mere 272 words, Lincoln brought to bear the rhetoric of the Greek Revival, the categories of Transcendentalism, and the imagery of the ‘rural cemetery’ movement.”

**THE ESSENCE OF BREVITY IS CLEAR AND DIRECT EXPRESSION**

Clear expression requires thoughtful planning of your written presentation at multiple levels.

A. Overall Organization Or Framework
B. Analytical Structure And Logical Reasoning
C. Cohesion
   - Introductions Of Topics And Themes
   - Transitions
   - Placement Of Emphasis
   - Conclusions
D. Editing And Polish

The production of professional writing is far more complex than the average reader realizes. Far more challenging and far more rewarding. For example, many inexperienced writers rely primarily on the nefarious “STREAM OF CONSCIOUSNESS” method of composing their professional writing. As you know well, the resulting product will not resemble professional writing.
On the other hand, professional writers know that clear and cogent writing is the result of **squarely and carefully facing the infinite choices required to plan and construct the total product.**

We must methodically plot and plod through these writing decisions:

- **WORD CHOICE**
- **WORD ORDER**
- **SENTENCE DESIGN**
- **SENTENCE ORDER**
- **PARAGRAPH DESIGN**
- **OVERALL DESIGN**

All of these choices must be made with the basic principles of construction in mind.

"Every time a lawyer writes something, he is not writing for posterity, he is writing so that endless others of his craft can make a living out of trying to figure out what he said."

— Will Rogers, 1935

**TRY TWO MECHANICAL RULES FOR BREVITY CHECK**

1. Writing consultant Jefferson D. Bates offers this general rule to promote conciseness: "Keep your average sentence length under twenty words."\(^4\)

So, when you are concerned about the length of a sentence or several sentences, test by this standard.

2. Or try Bryan A. Garner's vicious surgical editing approach: "Ideally, legal writing is taut. To tighten you style, run your pen through every other word on the page."\(^5\)

"Less is more."

— Robert Browning

"If it is possible to cut a word out, always cut it out."

— George Orwell

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WORD CHOICE

1. Word Choices Put You In Control
2. Active v. Passive
3. Verbs to Avoid and Verb Alternatives
4. Verbs: "To Be"
5. Wasted Words
6. Avoid Legal Jargon and Hollow Expressions
7. Forbidden Words
8. Alternatives To Overused Words
9. No Latin Rule
10. Guide to Eliminating Empty Words and Phrases
11. Avoid Sexist Writing
12. Because/Since/As/That/Which/Where

WORD CHOICES CONTROL

In his new book on language and law, Poethics, Professor Richard Weisberg argues forcefully that form and substance are often the same thing in the law. He cites vivid examples, from Shakespeare and Faulkner to Holmes and Cardozo, of word choice controlling legal expression and ultimately legal result.

Often in the law, Weisberg explains, how a legal result is expressed is more important than what is expressed. Many times the "how" dominates the "what." In many of the cases within our personal and professional experience, we have seen this. You may remember in your first-year Property course, how the manner in which the manure was mixed with dirt and arranged in piles determined whether it was real or personal property.6

But especially in your work as administrative law judges making and writing decisions, you have seen the law emerge within a linguistic medium that contributes a creative element to everything from day-to-day tasks to decision making.

This is easily seen at the surface level:

---

6 See William R. Bishin and Christoher Stone, Law, Language and Ethics 11 (1972) (citing Haslem v. Lockwood, 37 Conn. 500 (1871)).
For example, in *Hynes v. New York Central R.R. Co.*, when Cardozo refers to the plaintiff as “a lad of sixteen,” the reader knows what result is coming.

On the other hand, you know that a less favorable result has been adjudged for the plaintiff when Cardozo again plainly signals his judicial attitude toward a litigant in the well-known *Wood v. Lucy*, *Lady Duff-Gordon*, introducing the text with a terse:

“The defendant styles herself ‘a creator of fashions.’”

In your every day writing, whether you term the Appellant a *petitioner* or a *prisoner*, the *assaulted tourist* or the *alleged victim* or the *corporate defendant* or the *local drug store*, it can make a critical difference in the presentation.

The lesson is clear:

Appreciate the power of word choice!

Edit, Review, Edit Again.

Search until you find the Best Words!

Word Choice drives your analysis and reasoning.

Active v. Passive

As you’ve been told a hundred times before,

THE ACTIVE VOICE SAVES WORDS AND IS MORE DYNAMIC.

Often, the active voice is also more specific and accurate. Here’s an example from one processed decision:

**Original**

“*After a jury trial, Lumbar was convicted of bank robbery.*”

**Rewrite**

“The jury convicted Lumbar of bank robbery.”

Pump life into your sentences by minimizing your use of frail auxiliary verbs like:

*be* give *hold* make *have* take

Choosing the right verb energizes your sentences.

Instead of:

Write:

hold meetings *meet*

take action *act*

---

222 N.Y. 88, 118 N.E. 214 (Court of Appeals, N.Y. 1917).
VERBS TO AVOID

As a legal analyst and communicator, strive to abandon the flaccid language of casual discourse in favor of more clear, precise, and direct verbs. Some words, and particularly some verbs, communicate weakness. Verbs such as

\textit{think} \quad \textit{feel} \quad \textit{believe}

should be given up \textbf{FOREVER!}

SUBSTITUTE STRONG VERBS OF ADVOCACY

Instead of: \textit{My client feels his privacy was invaded.}

Try: \textit{My client insists that his privacy was invaded.}

Or: \textit{These facts show...}

OR THE OTHER STRATEGY!

ELIMINATE OR STRIKE THE WEAK WORDS!

Instead of: \textit{My client believes that his rights were violated.}

Just: \textit{My client's rights were violated.}

Or better: \textbf{SWITCH TO ACTIVE VOICE:}

\textit{The defendant's unilateral and arbitrary actions violated this young man's rights.}

VERB ALTERNATIVES

A GOOD VARIETY OF VERBS WILL ENLIVEN YOUR WRITING

\begin{tabular}{lll}
\textbf{ALLEGED} & \textbf{CONCLUDE} & \textbf{INSIST} \\
\textbf{REVEAL} & \textbf{ARGUE} & \textbf{DEDUCE} \\
\textbf{MAINTAIN} & \textbf{ASSERT} & \textbf{DESCRIBE} \\
\textbf{NOTE} & \textbf{SHOW} & \textbf{CLAIM} \\
\textbf{EXPLAIN} & \textbf{OBSERVE} & \textbf{SPECULATE} \\
\textbf{COMPLAIN} & \textbf{FIND} & \textbf{OFFER} \\
\textbf{SUGGEST} & \textbf{CONCEDE} & \textbf{GRANT} \\
\end{tabular}
EDIT FOR DIRECTNESS AND CLARITY

Generally, forms of the verb "to be" are weak communicators. Additional force is lost when these verbs are used in the passive voice or with hollow nouns and pronouns.

Some combinations are especially troublesome. "There is" and "It is" are suspect constructions. They weaken the flow of meaning in a sentence.

ORIGINAL SENTENCE
The Government's burden is carried if there is clear and convincing evidence that the plea was voluntarily and intelligently waived.

EDITED VERSION
The Government carries its burden when clear and convincing evidence demonstrates that the plea was voluntarily and intelligently waived.

Nominalizations take the action out of verbs and deflate your sentences. Use care with words like "make."

ORIGINAL SENTENCE
If the record makes no disclosure of a Boykin waiver, the Government has the burden to prove the guilty plea was entered after the intelligent and voluntary waiver of the accused's constitutional rights.

EDITED VERSION
If the record discloses no Boykin waiver, the Government must prove that the guilty plea was entered after an intelligent and voluntary waiver of the accused's constitutional rights.

CLEAR, CRISP SENTENCES RESULT FROM FEARLESS EDITING

ORIGINAL SENTENCE
Apparently, Hamilton believed that there was no need for a Bill of Rights if there were sound limitations on government jurisdiction.

EDITED VERSION
Apparently Hamilton found no need for a Bill of Rights if sound limitations were imposed on government jurisdiction.
TRIM FAT FROM EVERYDAY PHRASES

Many of the writing texts listed in the Appendix of these materials target the archetypical offenders in this writing category, such as:

<table>
<thead>
<tr>
<th>Common Usage</th>
<th>Concise Form</th>
</tr>
</thead>
<tbody>
<tr>
<td>in order to</td>
<td>to</td>
</tr>
<tr>
<td>for the purpose of</td>
<td>for</td>
</tr>
<tr>
<td>prior to</td>
<td>before</td>
</tr>
<tr>
<td>until such time as</td>
<td>until</td>
</tr>
<tr>
<td>by means of</td>
<td>by</td>
</tr>
<tr>
<td>by virtue of</td>
<td>by</td>
</tr>
<tr>
<td>In Favor Of</td>
<td>for</td>
</tr>
<tr>
<td>For The Reason That</td>
<td>because</td>
</tr>
</tbody>
</table>

WORD WASTING IDIOMS

Richard Wydick illustrates additional word-wasting idioms in his classic, Plain English for Lawyers.

_The fact that she died_ was central to the case . . .

should be written as: .

_Her death_ was central to the case . . .

Wydick also targets the words _instance, case, and situation_ as troublemakers.

_IN SOME INSTANCES THE PARTIES CAN_ . . .

should be rewritten as: _SOMETIMES THE PARTIES CAN_ . . .

_IN MANY CASES YOU WILL FIND_ . . .

should be rewritten as: _OFTEN YOU WILL FIND_ . . .

_THAT WAS A SITUATION IN WHICH THE COURT_ . . .

should be rewritten as: _THERE THE COURT_ . . .

STRIKE DILUTERS

Some words _always weaken_ the force of your writing. Strike them to promote clarity and force in your sentences. _VERY, QUITE, and RATHER_ are the worst.
EXAMPLES

1. Weak I was very angry.
   Strong I was outraged. OR I was angry.

2. Weak I was quite impressed by the presentation.
   Strong I was intrigued by the presentation.

3. Weak The attorneys were rather pleased that the presentation was drawing to a close.
   Strong The attorneys were delighted that the presentation was drawing to a close.

FREE YOURSELF FROM LEGAL JARGON

Will Rogers spoke for most Americans when he said:

"The minute you read something and you can't understand it, you can be sure it was written by a lawyer."

Legal writing should not confuse the reader. It should communicate precisely and understandably. One way to clarify your writing is to free it from pompous, unnecessary language. There are several ways to rid yourself of Legal Jargon:

Banish outmoded genteelisms
Shun tautologies
Avoid fad words
Use the right word
Replace unnecessary word pairings
Eschew euphemisms
Edit Out Jargon & Hollow Expressions

How's this for an easy edit to encourage brevity?

"Lumbar filed the instant motion contending that he was denied his constitutional right."

just strike "instant."

---

“Lumbar filed the motion contending that he was denied his constitutional right.”

No loss of meaning or force at all - just a shorter, clearer sentence.

Or how about the oldest editing trick in the book?

“To establish prejudice, Lumbar must show that there is a reasonable probability that the result of the proceeding would have been different.”

strike the hollow “there is.”

“To establish prejudice, Lumbar must show a reasonable probability that the result would have been different.”

Shorter and more direct = better.

“They are verbose and redundant. They engage in polysyllabic obfuscation in order to convince their clients that lawyers know things that laymen don’t.”

James Simon Kunen, 1987

FORBIDDEN WORD LIST!

NEW FOR 1994 ARE:

FLAGRANTLY INTER ALIA SUCH
FOREGOING OPINE WHEREUPON
HEREBY SAID* VEL NON
INSTANT

* As Richard Wydick illustrated in his Plain English For Lawyers:

No lawyer in dinner conversation says: “The green beans are excellent; please pass said green beans.”

DANGER FORBIDDEN WORDS

AFFIX HEREIN QUITE
ARGUABLY HEREAFTER RATHER
CLEARLY HOPEFULLY SUBSEQUENT
COGNIZANCE IMPLEMENT UTILIZE

DEFINITELY   MOMENTARILY   VERY
FINALIZE   OBVIOUSLY   Add Your Own

NOTE: IRREGARDLESS is not shown above because it is NOT a word,
REGARDLESS of the assertions of one modern dictionary.

**BANISH FOREVER:**

Police, Government, & Military Talk

_Some lawyers use language to keep civilians at bay._
_Other lawyers are just not smart enough to overcome the technical gunk in the profession sufficiently to communicate clearly._

Roger Wilkins, 1987°

**GET REAL!**

I heartily recommend Professor Robert B. Smith’s advice for cutting words: “Strike out not just current fad words like “maximize” or “viable” or “interface,” but also long-popular official-sounding words like “proceed.”

Spot these overused words and substitute simple, strong alternatives:

<table>
<thead>
<tr>
<th>Overused</th>
<th>Alternatives</th>
</tr>
</thead>
<tbody>
<tr>
<td>apprise</td>
<td>tell, inform</td>
</tr>
<tr>
<td>commence</td>
<td>start, begin</td>
</tr>
<tr>
<td>desire</td>
<td>wish, want</td>
</tr>
<tr>
<td>evince</td>
<td>show, display</td>
</tr>
<tr>
<td>forward</td>
<td>send</td>
</tr>
<tr>
<td>function</td>
<td>operate, act, work</td>
</tr>
<tr>
<td>implement</td>
<td>do, carry out, start</td>
</tr>
<tr>
<td>in isolation</td>
<td>alone</td>
</tr>
<tr>
<td>initiate</td>
<td>start</td>
</tr>
<tr>
<td>proceed</td>
<td>go</td>
</tr>
<tr>
<td>purchase</td>
<td>buy</td>
</tr>
<tr>
<td>require</td>
<td>need, want</td>
</tr>
</tbody>
</table>

°Tom Goldstein and Jethro Lieberman, _The Lawyer’s Guide to Writing Well_, 45 (1889).

°° Smith, _The Literate Lawyer_, 14-15.
Smith offers more classic lawyerisms:

"The same goes for sonorous, important-sounding phrases, so familiar and overused that we often include them in writing without even thinking about them."12

**Instead Of This**

<table>
<thead>
<tr>
<th>Phrase</th>
<th>Write This</th>
</tr>
</thead>
<tbody>
<tr>
<td>afford an opportunity</td>
<td>allow, let, permit</td>
</tr>
<tr>
<td>due to the fact that</td>
<td>because</td>
</tr>
<tr>
<td>during the period when</td>
<td>when</td>
</tr>
<tr>
<td>in regard to</td>
<td>about, concerning</td>
</tr>
<tr>
<td>insure that</td>
<td>make sure</td>
</tr>
<tr>
<td>in the event of</td>
<td>if</td>
</tr>
<tr>
<td>in view of</td>
<td>since, because</td>
</tr>
<tr>
<td>it is requested that</td>
<td>please</td>
</tr>
<tr>
<td>no later than</td>
<td>by</td>
</tr>
</tbody>
</table>

Finally, Smith cautions us against the "It" phrases and shows how easily they can be streamlined.

**Cut:** "It is the defendant who shot the guard."

**To:** "The defendant shot the guard."

**Cut:** "It was the south wall that fell."

**To:** "The south wall fell."

Smith spotlights a few "Eighty-Five-Cent" words that lawyers love to overuse

<table>
<thead>
<tr>
<th>Word</th>
<th>Instead Of</th>
<th>Write This</th>
</tr>
</thead>
<tbody>
<tr>
<td>effectuate</td>
<td>instead of</td>
<td>do</td>
</tr>
<tr>
<td>facilitate</td>
<td>instead of</td>
<td>help or make easier</td>
</tr>
<tr>
<td>facility</td>
<td>instead of</td>
<td>building</td>
</tr>
<tr>
<td>ameliorate</td>
<td>instead of</td>
<td>improve</td>
</tr>
</tbody>
</table>

12 Inf.
He urges us to

**ESCHEW EUPHEMISMS**

Be careful of words such as underprivileged, disadvantaged, or disturbed. They are vague. Say precisely what you mean.

Professor Weihofen elaborates on our tendency to dress up our language and he terms them

**OUTMODED GENTEELISMS**

If the town drunk is carried home drunk, he should not have this transformed into: "The gentleman was conveyed to his place of residence in an inebriated condition." The writing problem with genteelisms is obvious: They are vague, wordy, and sometimes incorrect. **Banish Outmoded Genteelisms!**

**REDUNDANCY IN LEGAL WRITING**

Squires and Rombauer warn us about the historic roots of many of our redundant legal phrases.

"Our Anglo-Saxon ancestors gave us word pairing such as safe and sound. After the Norman Invasion, French synonyms were added to the Middle English word pairs. Thus many legal terms have come to us in triplicate, for example, give (Old English), devise (Old French), and bequeath (Old English)."

They explain that too many of these old expressions are still in use. We should muster the courage to split the pairings or triples, or replace the usage altogether. We must emphasize conciseness and clarity.

**No More:**

deem and consider

aid and abet

null and void

fit and proper

13 Remember George Orwell’s, “If thought corrupts language, language can also corrupt thought.”

Watch for these bad habits in typical usage listed in the Nutshell:

- **basic fundamentals**
- **telling revelation**
- **save and except**

Squires and Rombauer continue: "a more pervasive form of redundancy is the throw-away phrase:

<table>
<thead>
<tr>
<th>a certain amount of</th>
<th>in regard to</th>
</tr>
</thead>
<tbody>
<tr>
<td>as a matter of fact</td>
<td>the nature of the case</td>
</tr>
<tr>
<td>the necessity of</td>
<td>with reference to</td>
</tr>
</tbody>
</table>
| due to the fact that | in case of"¹⁵

**REDUNDANCY (AGAIN)**

The minimalist approach is useful in reducing words - make every word justify its use. Squires and Rombauer provide us with additional examples:

"**Instead of:**

| am hopeful | hope |
| give recognition to | recognize |
| in accordance with | by, under |
| despite the fact that | although, even though |
| have knowledge of | know |
| in the majority of | usually |
| instances | |
| is applicable to | applies |
| is dependent on | depends on |
| make provision for | provide for |
| provides an example | exemplifies"¹⁶

¹⁵ *Id.*

¹⁶ *Id.*

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INTERESTING CAVEAT: "While redundancy wastes a reader's time, repetition of key words saves a reader's time. From sentence to sentence, key nouns and verbs should be repeated. The line between helpful repetition and redundancy is thin, but with experience, the legal writer develops a sense for where that line is."  

Avoid "Latinisms, Pomposities, & Bureaucratese"  

Use Plain Everyday English As Much As Possible  

Jargon is a pejorative term for technical language that the reader does not understand, such as price/cost elasticity, although the writer and others in the writer's field of expertise would understand it.  

Legalese is jargon used by legal writers. Legalese includes both specialized words unfamiliar to nonlegal readers, such as "estopped" and flowery words that (1) are unfamiliar to the reader, such as "above mentioned" and "heretofore," and (2) could be avoided by using a more familiar word such, as "this" or "previously."

Here are two interesting examples of jargon from a recent university memo:  

1. Accordingly the committee is setting aside four (4) meetings in the Fall Semester to dialogue directly with representatives of the Colleges and Departments about the new document.  
2. Kindly refer to the enclosed schedule of meeting discussion and a listing of the areas pertinent to that day's discussion to facilitate providing discussants in your area of discipline.  

TRENDY WORDS present the same problem:  

"This candidate resonates well with the values of our institution."  
(Also impacted, interfaced, etc.)

\[17\] Id. at 112.  
GUIDE FOR ELIMINATING EMPTY WORDS AND PHRASES

<table>
<thead>
<tr>
<th>Empty Words or Phrases</th>
<th>Wordy Examples</th>
<th>Revision</th>
</tr>
</thead>
<tbody>
<tr>
<td><em>as a matter of fact</em></td>
<td><em>As a matter of fact, statistics</em></td>
<td>Statistics show that many</td>
</tr>
<tr>
<td></td>
<td>show that many marriages end in divorce.</td>
<td></td>
</tr>
<tr>
<td><em>because of the fact that</em></td>
<td><em>Because of the fact that a special</em></td>
<td>Because of a special exhibit, the</td>
</tr>
<tr>
<td></td>
<td>exhibit is scheduled, the courtroom will be open until ten o'clock.</td>
<td></td>
</tr>
<tr>
<td><em>case</em></td>
<td><em>In the case of the proposed use tax,</em></td>
<td>Residents were angry about the proposed use tax.</td>
</tr>
<tr>
<td></td>
<td>residents were very angry.</td>
<td></td>
</tr>
<tr>
<td><em>exist</em></td>
<td><em>The crime rate that exists is</em></td>
<td>The crime rate is unacceptable.</td>
</tr>
<tr>
<td></td>
<td>unacceptable.</td>
<td></td>
</tr>
<tr>
<td><em>factor</em></td>
<td><em>The trial's final cost was an essential factor to consider.</em></td>
<td>The trial's final cost was essential to consider.</td>
</tr>
</tbody>
</table>

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<table>
<thead>
<tr>
<th>Expression</th>
<th>Original Text</th>
<th>Natural Text</th>
</tr>
</thead>
<tbody>
<tr>
<td>for the purpose of</td>
<td>The attorney was hired for the purpose of writing the brief.</td>
<td>The attorney was hired to write the brief.</td>
</tr>
<tr>
<td>in fact</td>
<td>In fact, the attorney published the comment today.</td>
<td>The attorney published the comment today.</td>
</tr>
<tr>
<td>in view of the fact that</td>
<td>In view of the fact that the brief was so heavy, the clerk injured her back.</td>
<td>Because the brief was so heavy, the clerk injured her back.</td>
</tr>
<tr>
<td>seems</td>
<td>It seems that the attorney called a hearing concerning health benefits.</td>
<td>The attorney called a hearing concerning health benefits.</td>
</tr>
<tr>
<td>tendency</td>
<td>The law firm had a tendency to lose cases.</td>
<td>The law firm often lost cases.</td>
</tr>
<tr>
<td>that is to say</td>
<td>That is to say that we cannot afford another secretary.</td>
<td>We cannot afford another secretary.</td>
</tr>
<tr>
<td>the point I am trying to make</td>
<td>The point I am trying to make is that news reporters should not invade people's privacy.</td>
<td>News reporters should not invade people's privacy.</td>
</tr>
</tbody>
</table>
**SEXIST WRITING IS PASSÉ**

In today's legal arena, sexist expression has become recognized as inartful, if not inept. Women lawyers now constitute an integral part of the legal community. Thoughtful writers will respect this growing and influential presence.

Recently, I was reading a book review of the new Sheldon Novick biography, *The Life of Oliver Wendell Holmes*, reviewed by Professor Mathias Reimann of the University of Michigan Law School. In a fluid and clear style, Reimann unfolds his theme well. But early in his text, without warning of any type, he jolts the reader from his substantive presentation, drawing attention to his form, when he uses this pronoun in the following sentence:

“In the end, the reader is left with suspicion that she cannot see the forest for the trees.”
I did not expect the "she". I am a reader, but not a she. In fact, past (although outmoded) usage would recommend the masculine form. I consider this strategy to avoid sexism unsatisfactory because of its potential for distraction, and because it is too easy to avoid by using one of our strategies to avoid sexist expression.

STRATEGIES TO AVOID SEXIST WRITING

A) TO AVOID THE VEXATIOUS SEXIST PRONOUNS:

1) THE EASIEST — SWITCH TO THE PLURAL.
   BETTER: In the end, readers are left with the suspicion that they cannot see the forest for the trees.

2) EDIT OUT THE PRONOUN — USE THE ARTICLE.
   EXAMPLE: Anyone desiring a position with this firm should submit her resume to the hiring partner.
   BETTER: Anyone desiring a position with this firm should submit a resume to the hiring partner.

3) IF POSSIBLE, MOVE TO THE SECOND PERSON.
   BETTER: If you desire a position with this firm, you should submit your resume to the hiring partner.

4) REWRITE IN THE PASSIVE VOICE, BUT BEWARE OF THE PITFALLS.
   BETTER: The hiring partner will accept resumes from all persons desiring a position with this firm.

5) USE BOTH FORMS. ALTHOUGH THIS IS AWKWARD, IT IS SAFER THAN USING EITHER ONE ALONE.
   BETTER: The applicant should submit his or her resume to the hiring partner.

6) USING "ONE" WILL WORK, BUT IT MAY PRODUCE FORMALITY.
   BETTER: One should submit one's resume to the hiring partner.
B) TO AVOID SEXISM IN GENERAL EXPRESSION:

1) DO NOT USE EXPRESSIONS THAT IMPUTE A VALUE JUDGMENT.

EXAMPLE:  manly effort, the gentle sex ...

2) USE SEX NEUTRAL TERMS WHEN YOU CAN WITHOUT ARTIFICIALITY.

EXAMPLE:  worker instead of workman OR reasonable person instead of reasonable man.

BECAUSE, SINCE, OR AS

These words have potential for ambiguity if used interchangeably. Technically, they do not mean the same thing, and do cause some loss of precision when misused.²⁰

For example, the following sentence taken from an administrative law judge's report demonstrates the lack of clarity that arises when “as” is used for “because.”

“The district court's dismissal as to California State Hospital should be affirmed as it is a state institution and immune from suit under the eleventh amendment.”

(Citation omitted).

EDITED VERSION

“The district court's dismissal of California State Hospital should be affirmed because state institutions are immune from suit under the eleventh amendment.”

Since can cause the same problem. For example:

Since you left, we won the game.

Because or after he left? How would this statement make YOU feel?

²⁰ At least one author believes these distinctions are "grammatical folklore. "Unfortunately, many of the strongest defenders of this strict usage are old, crusty literary types, such as appellate judges and senior partners in law firms.
These are the Recommended Rules to Avoid the Ambiguities

1. Use *because* if you mean *because*. *Because* is a precise term; it means only that one event or thing is the cause of something else. *Because* provides an enhancement to the preceding action, giving the writer more power in the phrase.

   **Example:** *The minor should be executed for the murder because he shows no remorse for his actions.*

2. Use *since* only to show a relationship in time.

   **Example:** *Since Roe v. Wade, abortion has become a divisive political issue for any politician.*

3. Use *as* to denote simultaneity, comparison, or manner.21

   **Example:** *The Rehnquist Court is not as liberal as the Warren Court.*

Since reading these pages, you should be as confident as a Nobel laureate because of the writing for clarity knowledge you have learned.22

**STYLE TIP: THE ESSENTIAL “THAT”**

I enthusiastically recommend for your consideration Squires and Rombauer’s advice about the essential “that.” “Although it sometimes may be properly omitted, the word “that” is frequently essential to the easy and unambiguous reading of a sentence. This word is not an “extra” clue in these instances, but rather an essential structural signal. The italicized phrases or clauses in the following examples may be misread as discrete units. Without this essential structural word, the reader may have to reread these sentences for initial comprehension.”23

Here’s an example from administrative law judge writing:

> “Thus, the court found fair consideration was not given as defined by Nebraska law.”

---


The reader is slowed by the inherent contradiction in the sentence. The beginning of the sentence states directly that “the court found fair consideration,” but the full sentence reveals the opposite result: “was not given...” Working through this sentence causes the reader to pause and then reread for the correct meaning. This slowing construction constitutes poor sentence structure. The solution is easy! Insert “the essential that.”

“Thus, the court found that fair consideration was not given as defined by Nebraska law.”

You can see the improvement easily. Here are some classic examples:

**ORIGINAL VERSION:**

To prevail at trial, the plaintiff must show the car violates E.P.A. regulations. (“show the car”?)

**EDITED VERSION:**

To prevail at trial, the plaintiff must show that the car violates E.P.A. regulations.

**ORIGINAL VERSION:**

When a manufacturer advertises his product, he knows his acts may have consequences in another state and that he may be held liable. (The reader finds initially that a manufacturer “knows his acts,” a comforting, if obvious, idea.)

**EDITED VERSION:**

When a manufacturer advertises his products, he knows that his acts may have consequences in another state and that he may be held liable.24

**PRECISE WORD CHOICE SPEEDS COMPREHENSION**

Where should you use the words “in which”? Many writers frequently confuse “where” with “in which.” “Where” designates a place and should not be used to introduce what happened in a particular case.

24 Id. at 81-82.
INCORRECT: Jones, a case where the plaintiff ...
CORRECT: Jones, a case in which the plaintiff ...

INCORRECT: The police went to the home in which the victim was killed.
CORRECT: The police went to the home where the victim was killed.

Sentence Structure
1. Minimize Gaps
2. Rejuvenate Bland Writing
3. Clear and Direct
4. Grammar Rules to Break
5. Style Tips/No Flash
6. Punctuation Revisited
   a. Commas
   b. Semicolon/Colon/Dash

REJUVENATE BLAND FORMALISTIC WRITING BY BEING DIRECT.

Here are two examples from attorney writing:

Formalistic

"This memorandum is intended to assist the administrative law court in fully considering and evaluating the legal arguments raised in this appeal. This review of the record and analysis of the issues is limited to this court's required jurisdictional standards and to the arguments asserted in the appeal."

Direct

"Albert H. Smithson challenges the district court's denial of his motion for a new trial, alleging that Brady evidence was withheld from him. Because the evidence withheld was not exculpatory, the claim is without merit, and I recommend affirmation."
REJECT THE CUSTOMARY, THROAT CLEARING LEAD-INS.

For example, avoid: *Let me begin by saying that* the issue raised in this case would be better handled by the legislative branch of our government.

and,

It is important to note that *the defendant has not been identified by any of the witnesses*.

Instead, write:

*This issue demands the attention of Congress, not the Court.*

and,

*Not one witness has identified the defendant as the offender.*

CONSTRUCT CLEAR AND DIRECT SENTENCES

One attorney wrote this sentence:

> "I suggest Lumbar's claim that his attorney was ineffective because he did not file requested motions does not overcome the strong presumption that counsel's conduct fell 'within the wide range of reasonable professional assistance'."  
> *Strickland*, 466 U.S. at 689.

This sluggish sentence slows the reader. Thirty-four words strung together without planning for readability will not promote our goals. The sentence attempts to raise and stress too many points without using any supporting writing technique. An improved message may be communicated more directly and more clearly.

**Remember:** Clarity and readability require that the necessary elements of the analysis be stated explicitly.

> "The record offers no evidence supporting Lumbar’s claim that his attorney failed to file important motions: the *Strickland* presumption that counsel’s conduct falls ‘within the wide range of reasonable professional assistance’ is not overcome."

In the same number of words, more information can be more clearly stated. Here the colon is used for amplification and clarity. The new sentence also includes
the necessary explicit textual references to the record’s lack of evidence and to the Strickland authority.

**WRITING NATURALLY**

Oscar Wilde once wrote: “George Moore wrote brilliant English until he discovered grammar.”

**Three Good Grammar Rules To Break:**

1. **Occasionally beginning a sentence with and or but adds a natural flow to your writing.**

   Although one should avoid beginning several sentences with and or but, this use can ease the reader’s path.

   And, Ray and Ramsfield remind us that this placement of “and” draws special attention to this coupling conjunction.²⁵ Holmes gives other examples:

   ```
   Courts proceed step by step. And now we have to consider whether the cautious statement in the former case marked the limit of the law....²⁶
   ```

   But to many people the superfluous is necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them.²⁷

2. **Do not be hamstrung by old writing superstitions. Feel free to end sentences with prepositions to avoid cumbersome expression.**

   When chided about ending sentences with prepositions, Churchill retorted:

   "This is the sort of English up with which I shall not put."²⁸


²⁷ Id.
3. Sometimes, you need to split an infinitive to avoid cumbersome
expression.

Goldstein and Lieberman suggest this sluggish example:

"By demurring, defendants are only exercising their right
to litigate vigorously their claims."²⁹

In the following example, splitting the infinitive makes the sentence
flow more smoothly and makes the sentence less distracting to the reader.

"By demurring, defendants are only exercising their right to vigorously litigate their claims."

But keep in mind that some pedant purists will never condone
breaking any of these rules - smoothness be damned!

"Proper words in proper places make the true
definition of
style."

Jonathan Swift (1720).

REMEMBER!

Guides For Style Are Like Rules For Choosing Clothing.³⁰

ALWAYS SITUATION BASED

An elegant gown may be perfect for a formal occasion, a business suit
appropriate for another, while jogging pants are better at some other time.

Style choices depend on the circumstances of the writing.

So relax. Be flexible, and write for your reader.

TOUCHSTONE:

WHAT DOES MY READER NEED?

Be relevant. Tailor your diction, tone, and substantive content to your
audience.

³¹ The advice comes from one of the nation's most respected legal writing teachers, Anne Enquist,
NO FLASH

Remember the old trial lawyers' maxim about your clothes at trial? Never wear flamboyant or fancy clothes when addressing a jury because it will draw attention away from your substantive presentation. The same is true of your writing.

The ideal style is one that the reader will least notice. This is true even of purely literary writing; which is read for its substance by people who are not inclined to spend any time admiring its artistry. What they will appreciate most is a way of writing that allows them to comprehend the substance without noticing the form. It is bad usage that is noticeable. Even if it does not mislead or confuse the reader, it calls attention to itself and away from the message.

When friends told Cicero that he was the greatest of orators, he replied somewhat as follows: "Not so, for when I give an oration in the Forum people say, 'How well he speaks!' but when Demosthenes addressed the people they rose and shouted, 'Come, let us up and fight the Macedonians!'"

Dr. Samuel Johnson made this point over two centuries ago. He said, "Read over your composition, and when you meet with a passage that you think is particularly fine, strike it out."

All judges, like lawyers and writers, on occasion will have an inspiration or perform a brilliant bit of deduction on some obscure point, that viewed a few days later no longer seems so clever. This principle about smooth presentation was driven home to me recently as I was preparing these materials. I was reading a Hemingway short story with the explicit purpose of highlighting his smooth style and good diction. Suddenly, I found myself five pages into the text, having a grand time in the story before I remembered what I was doing. That's good writing! You do not want your reader to exclaim, "Oh, what eloquent prose!" To the contrary, you want the reader to follow your reasoning and agree, "That's right! That's solid reasoning."

Hemingway's short story that I recommend to you is The Short Happy Life of Francis Macomber. You'll be intrigued with the unfolding of the conflict between a man and his wife on safari in Africa, and you'll love the surprise ending.

"Chiefly I admire legal prose that eschews ostentation and so-called 'scholarship.' Footnotes and digression poison..."
most legal writing. The older I get, the more I admire succinctness, and the more I despise flash."

Milton S. Gould, 1987

READY REFERENCE FOR COMMAS
INCLUDING COMMA ANECDOTES

This advice may sound old fashioned, but commas in legal writing can be far more important than the novice may suspect. In their excellent book on writing, Clear Understandings, Ronald Goldfarb and James Raymond devote an entire chapter to the subject. The chapter name, Who Can Hang By A Comma?, gives away the punch line.

The authors tell the frightening tale of the criminal defendant awaiting sentencing for his conviction of murder, second-degree rape, and illegal use of a gun. The Maryland statute authorized the death penalty if “the defendant committed the murder while committing or attempting to commit robbery, arson, or rape or sexual offense in the first degree.”

In the absence of any legislative intent regarding the interpretation of the language, the judge was left with only his grammar books to decide whether the modifying phrase “in the first degree” must be read to apply to both “rape” and to “sexual offense.”

Fortunately for the defendant, the judge applied the usual comma rules to spare his life.

Goldfarb and Raymond recite several other interesting anecdotes, describing similar episodes of judicial interpretations of comma usage. For the interesting details on the Alabama statute regulating elections, the Kentucky Court of Appeals' reading of a will, the Maine Supreme Court’s interpretation of that state’s extradition stature, and more, see Clear Understandings, Chapter 3, pages 42-57.

REAL LIFE COMMA EXERCISE

A nasty little fight erupted at the 1984 Republican Convention over the use of a comma in the language proposed in a tax plank. The proposed plank objected to:
"any attempts to increase taxes which would harm the recovery."\textsuperscript{31}

If you were a member of the right wing of the Republican party and opposed all taxes, would you insert a comma or not?

HANDY COMMA REFERENCE

If you don't know the rules, you probably rely on guesswork in using commas. Guessing will work some of the time because your vocal intonation and pauses ("sentence contour") help you decide where commas belong. But guesswork is not infallible, and what sometimes happens is that, if you don't know the rules, you will omit commas where they belong and put them in where they don't belong. One good rule to follow: never separate the subject of a sentence from its predicate unless you have a good reason — like one of the ones listed below.

**USE A COMMA:**

(1) **Before coordinating conjunctions** (and, but, or, for, nor...) that join independent clauses:

*The defense was inadequate, and an appeal is probable.*

*The landlord was not liable for the defect, for he was unaware of it.*

*The Socratic method of teaching is pedagogically stimulating, but it has drawbacks.*

Pay particular attention to this use of the comma; most writers erroneously omit it.

(2) **After dependent clauses**, when they precede independent clauses:

*Although she has retired, [dependent clause] she is still active. [independent clause]*

*Before the defendant is sentenced, [dependent clause] the court considers mitigating circumstances. [independent clause]*

\textsuperscript{31}This anecdote is reported by writing experts Tom Goldstein and Jethro Lieberman in their informed text, *The Lawyer's Guide to Writing Well*, page 171.
NOTE: When the dependent clause follows the independent clause, use a comma if the dependent clause is fairly long, but if the dependent clause is short, no comma is necessary.

The landlord was not liable for the tenant's injury, because at common law he had no duty to repair the tenant's apartment.

The jury retired to deliberate after the trial ended.

(3) Following introductory language:
   a) Introductory phrases:
      Although nearly eighty years old, he still practiced law.
   b) Transitional phrases:
      On the other hand, the victim suffered no damages.
   c) Interjections:
      Amazingly, he suffered no injuries.
      Consequently, the claim failed.
      However, time would not allow another draft.

(4) After items in a series:

      Stolen during the armed robbery were credit cards, checks, and cash of an unknown amount.

NOTE: Some writers omit the final comma in the series. While not grammatically incorrect, including the comma adds clarity and parallelism in form.

(5) To set off appositives:

      John Jones, the lieutenant-governor, is a graduate of this law school.

(6) To set off interrupters (words, phrases, clauses):

      It is up to Congress, not the courts, to change the law.
(7) **To punctuate geographical names, dates, and addresses:**

*My address is 222 Fischer Street, Gainesville, Florida.*

*Summer term began on June 22, 1993.*

**Now, here's the one to really distinguish the craftsman.**

(8) **To separate non-restrictive relative clauses:**

Non-restrictive relative clauses are parenthetic, as are similar clauses introduced by conjunctions indicating time or place. Commas are therefore needed. A non-restrictive clause is one that does not serve to identify or define the antecedent noun.

*The audience, which had at first been indifferent, became more and more interested.*

*In 1796, when Napoleon was born, Corsica had but recently been acquired by France.*

*Nether Stowey, where Coleridge wrote The Rime of the Ancient Mariner, is a few miles from Bridgewater.*

In these sentences, the clause introduced by **which**, **when**, and **where**, are non-restrictive; they do not limit or define, they merely add something. In the first example, the clause introduced by **which** does not serve to tell which of several possible audiences is meant; the reader presumably knows that already.

Restrictive clauses, by contrast, are not parenthetic and are not set off by commas. Thus,

*People who live in glass houses shouldn't throw stones.*

Here, the clause introduced by **who** does serve to tell which people are meant; the sentence, unlike the sentence above, cannot be split into two independent statements. The same principle of comma use applies to participial phrases and to appositives.

*People sitting in the rear couldn't hear.* (restrictive)

*Uncle Bert, being slightly deaf, moved forward.* (non-restrictive)
My cousin Bob is a talented harpist. (restrictive)

Our oldest daughter, Mary, sings. (non-restrictive)

Non-restrictive - just adds something - use a COMMA.
Restrictive - limits, defines, or identifies - NO COMMA.

One lawsuit involved several hundred thousand dollars. The central issue in the case was whether a comma was intentionally omitted. Because it was omitted, the contract language was limited, and one party suffered. The comma business can be important.

Here’s a general rule about Which and That.

USE A COMMA WITH WHICH BUT NOT WITH THAT.

The use of that signals a limiting function; in other words, it introduces a restriction of the preceding word or phrase.

Restrictive: The judges will fully read only the briefs that are well written. (Only the well-written briefs will be read fully.)

The use of which signals a non-defining function; in other words, it does not restrict the preceding word or phrase.

Non-restrictive: The judges will fully read the briefs, which are well written. (All the briefs will be read fully; all the briefs are well-written.)

Because many writers use which for both defining and non-defining clauses, a comma must be used to make the distinction clear. A comma preceding a which clause signals a non-defining function. Absence of a comma signals that the clause is defining.

FRESHNESS

MEANS USING ALL OF THE COLORS ON YOUR PALETTE.

As a professional writer, consciously use as many techniques and devices as you can. Some seemingly mundane writing forms and functions can add Freshness and Emphasis to your writing.

For example, a paragraph break gives the reader visual relief, a chance to breathe. Or a single sentence paragraph places heavy emphasis on that sentence.
Even punctuation contributes to the overall presentation. Vary your sentence forms by using these three devices:

Semicolon  Colon  Dash

Occasionally joining two related clauses or sentences with a **semicolon** lends a sense of continuity to the thoughts and smoothness to the flow.

**ORIGINAL VERSION**

"Lumbar's claim that his counsel was racially prejudiced against him is vague and conclusory, and he presented no specific facts evidencing how such discrimination affected the trial."

Tighten up this sentence by deleting the comma and the **and**.

**EDITED VERSION**

"Lumbar's claim that his counsel was racially prejudiced against him is vague and conclusory; he presented no evidence of any discrimination affecting his trial."

The **colon** is underused by most legal writers. It has value as a lively announcement of things to come.

"The defendant and the prosecutor agreed on a plea bargain: a recommendation of leniency in exchange for a guilty plea to second degree robbery."

These style changes inject **liveliness** and **emphasis** into your writing.

The **dash** offers the most visually emphatic break to the reader.

"The dash is a deliberate interruption of continuity, similar to a comma but more abrupt and emphatic....Sometimes an abrupt interruption or pause is effective: (1) to indicate a sharp turn or thought or to give a contrasting idea; (2) to interpolate a parenthetical or side comment or to give striking detail, and to set it off in a more marked or emphatic way than by using commas or parentheses; or (3) to indicate a pause of suspense."

---


33 Ray and Ramsfield, p. 56-57.
"The defendant's action—both understandable and humane in this case—cannot be rightly condemned."\textsuperscript{34}

The dash can also be used as a dramatic introduction for a sudden change in direction.

"Mrs. Smith thought the intruder might be a burglar—or her husband."\textsuperscript{35}

Finally, a dash can be used in the place of commas when commas would be confusing. For example,

"Lumbar raised three claims of prejudicial error—his counsel was racially prejudiced, refused to let him see the presentence report, and failed to file adequate discovery motions—none of which were supported in the record."

Commas could be used in most of these situations, but the comma is more formal and less dramatic.

**Structural Cohesion**

1. Introduction
2. Thesis Sentence
3. Transition
4. Chart Your Reasoning
5. Fallacies of Distraction
6. A Streamlined Briefing Technique

**GRAB 'EM!!**

**OBSERVE HOW A GREAT OPENING PARAGRAPH ENTICES THE READER TO KEEP READING! MAKE YOUR INTRODUCTION COUNT**

Your introductory sentence may be the most important sentence in your writing. In it, you should begin immediately to communicate and persuade. Holmes was masterful at writing nonfrilly, direct openings. To open the major intellectual work of his life, *The Common Law*, Holmes wrote:

\textsuperscript{34} Id.

\textsuperscript{35} Id.

206
"The object of this book is to present a general view of the Common Law."

How direct! simple! and smooth! Most writers would have begun this major presentation with something fatuous like:

"For centuries the Common Law has ruled over the lives and fortunes of millions of people in the English speaking world... etceteras, etceteras."

You too can sharpen your writing, clarify your reasoning, and direct your reader to your point.

Rewrite your opening sentences to be more:

direct simple smooth

Remember Cicero's advice:

Your expression should communicate and persuade; it should not draw attention to itself.

"The lead is a sales job, to lure the reader into the story."

Goldstein & Lieberman, p.92

YOU NEED TO UNDERSTAND

THESIS SENTENCES/**TOPIC SENTENCES

Professor Richard Neumann presents clear instruction regarding the importance and proper use of these critical tools in crafting smooth and clear prose. He begins by explaining the distinction between the parts of our writing that are descriptive and those that are probative.

Descriptive writing merely describes conditions, events, or unanalyzed information. On the other hand, probative writing attempts to prove the validity of an analysis or other conclusion.

GENERAL RULE: Introduce your paragraphs of descriptive writing by building in a topic sentence to show the reader the path. For example, in a descriptive section summarizing the facts:

36His wonderful textbook, Legal Reasoning and Writing, contributes significantly to the resources available to the legal writer. See section 5.2 for discussion of this subject.
"The events that preceded the accident would become important at trial."

THEN FOLLOW WITH THE PARAGRAPH DETAILING THE EVENTS.

GENERAL RULE: Introduce your paragraphs of probative writing with a thesis sentence to show your reader where you are going.

For example, in a probative part urging a legal conclusion:

"The plaintiff’s conduct prior to the accident amounted to comparative negligence."

THEN FOLLOW WITH THE PARAGRAPH SHOWING WHY THIS IS THE MOST REASONABLE CONCLUSION.

As we have discussed, TRANSITION WORDS, PHRASES, AND SENTENCES explain to the reader how both kinds of writing relate to what precedes and what follows.

Using all three devices methodically will magnify your clarity and streamline your flow.

TRANSITION

DISTINGUISHES THE PROFESSIONAL WRITER

Many writers are untrained and unskilled in the importance and use of transition. Some others build in limited amounts of formal and substantive transition as a matter of intuition or habit. In contrast, professional writers consciously place transition as a necessary part of their writing. They scrutinize their transition as closely as their grammar or punctuation. This proper treatment of transition is a critical key to readability.

FIRST: Remember that you have already explained your plan of travel to the reader in your introduction. Legal writing is not mystery writing. We signal openly and vividly our course of intended communication. We use topic and thesis sentences in our paragraphs; this is a part of our transition. But separately, we must remember that we want to ease the reader’s path through the entire writing, from paragraph to paragraph and sentence to sentence.
Let's consider these levels of transition separately. On the larger scale, paragraph transition can be easy. Professor Robert Smith offers these guides:

A. Begin a new paragraph with a reference to a key phrase or important word in the last one. For example:

"...the lone woman can reasonably be expected to fear people lurking in parks as she walks home at night."

"Fear alone, however, may not justify carrying a weapon in violation of the statute."

B. Refer to the subject of the paragraph-to-come at the end of the preceding paragraph:

"...and when this is the case, it properly becomes the concern of the courts."

"When judicial attention is given to..."

C. Use a single word to provide effortless transition:

"...and when that is so, it becomes necessary to decide who has made the greatest investment in the project."

"Accordingly, weighing the contributions of both sides..."

D. Compare one thing against another, or otherwise balance countervailing considerations:

"...much weight must be given to achieving a permanent settlement, even at the price of cutting off meritorious claims."

"On the other hand, however, it would be inequitable to..."
TRANSITION between sentences and phrases is even easier. Single words and phrases can do the work. Professor Smith offers a list of what he calls “useful flow-words”:

- indeed
- on the whole
- anyway
- at best
- anyhow
- naturally
- elsewhere
- to this end
- above all
- on balance
- therefore
- in summary
- as a result
- consequently
- as a result
- hence
- first, second, next, besides
- in addition
- also

Squires and Rombauer offer an even more extensive list of transition words by category in their excellent Legal Writing Nutshell, pages 58-62, WEST (1982). See the following pages.

COMMON TRANSITIONAL WORDS AND PHRASES

**Introducing**

- under these
- in the first place
- circumstances
- the first reason
- in order to
- primarily
- to a certain extent
- viewed broadly
- initially, first
- in general
- to begin, to begin with

**Concluding**

- to conclude
- therefore
- to sum up, in sum
- consequently
- to summarize
- eventually
- in review
- in short
- to review
- in brief
<table>
<thead>
<tr>
<th>finally</th>
<th>in particular</th>
</tr>
</thead>
<tbody>
<tr>
<td>up to this point</td>
<td>on the whole</td>
</tr>
<tr>
<td>thus</td>
<td>as we have seen</td>
</tr>
</tbody>
</table>

**Restating**

<table>
<thead>
<tr>
<th>that is</th>
<th>in brief</th>
</tr>
</thead>
<tbody>
<tr>
<td>to clarify</td>
<td>in short</td>
</tr>
<tr>
<td>in other words</td>
<td>in particular</td>
</tr>
<tr>
<td>in simpler terms</td>
<td>on the whole</td>
</tr>
<tr>
<td>to simplify</td>
<td>to put it differently</td>
</tr>
<tr>
<td>more simply</td>
<td>to be sure</td>
</tr>
<tr>
<td>to repeat</td>
<td>as noted</td>
</tr>
</tbody>
</table>

**Exemplifying**

<table>
<thead>
<tr>
<th>for example</th>
<th>specifically</th>
</tr>
</thead>
<tbody>
<tr>
<td>for instance</td>
<td>in particular</td>
</tr>
<tr>
<td>to illustrate</td>
<td>incidentally</td>
</tr>
<tr>
<td>that is</td>
<td>namely</td>
</tr>
<tr>
<td>as an illustration</td>
<td></td>
</tr>
</tbody>
</table>

**Adding or Amplifying**

<table>
<thead>
<tr>
<th>again</th>
<th>in other words</th>
</tr>
</thead>
<tbody>
<tr>
<td>first, second, third</td>
<td>equally important</td>
</tr>
<tr>
<td>once again</td>
<td>of equal importance</td>
</tr>
<tr>
<td>further</td>
<td>incidentally</td>
</tr>
<tr>
<td>furthermore</td>
<td>nor</td>
</tr>
<tr>
<td>moreover</td>
<td>analogously</td>
</tr>
<tr>
<td>too</td>
<td>that is</td>
</tr>
<tr>
<td>additionally</td>
<td>provided that</td>
</tr>
<tr>
<td>similarly</td>
<td>alternatively</td>
</tr>
<tr>
<td>also</td>
<td>in the same vein</td>
</tr>
<tr>
<td>besides</td>
<td>after all</td>
</tr>
<tr>
<td>beyond this</td>
<td>a further reason</td>
</tr>
</tbody>
</table>
Journal of the National
Association of Administrative Law Judges

Alternatives for Overworked Transitions

<table>
<thead>
<tr>
<th>Therefore</th>
<th>And, In addition</th>
</tr>
</thead>
<tbody>
<tr>
<td>then</td>
<td>again</td>
</tr>
<tr>
<td>thus</td>
<td>further</td>
</tr>
<tr>
<td>hence</td>
<td>furthermore</td>
</tr>
<tr>
<td>accordingly</td>
<td>moreover</td>
</tr>
<tr>
<td>as a result</td>
<td>also</td>
</tr>
<tr>
<td>consequently</td>
<td>too</td>
</tr>
<tr>
<td><strong>However, But</strong></td>
<td>similarly</td>
</tr>
<tr>
<td>nevertheless</td>
<td>besides</td>
</tr>
<tr>
<td>on the contrary</td>
<td>likewise</td>
</tr>
<tr>
<td>contrarily</td>
<td></td>
</tr>
<tr>
<td>on the other hand</td>
<td></td>
</tr>
<tr>
<td>yet</td>
<td></td>
</tr>
<tr>
<td>still</td>
<td></td>
</tr>
<tr>
<td>nonetheless</td>
<td></td>
</tr>
<tr>
<td>by contrast</td>
<td></td>
</tr>
</tbody>
</table>

Comparing

| similarly               | by analogy            |
| in like form, manner    | analogously           |
| likewise                | in the same way       |

Sequencing

| first, second, third    | in the first place    |
| finally                 | last                  |
| initially               | soon                  |
| next                    | after                 |
| then                    |                       |
### Cause and Effect

<table>
<thead>
<tr>
<th>Cause</th>
<th>Effect</th>
</tr>
</thead>
<tbody>
<tr>
<td>therefore</td>
<td>since</td>
</tr>
<tr>
<td>then</td>
<td>because</td>
</tr>
<tr>
<td>thus</td>
<td>for this purpose</td>
</tr>
<tr>
<td>as a result</td>
<td>to this end</td>
</tr>
<tr>
<td>hence</td>
<td>thereupon</td>
</tr>
<tr>
<td>accordingly</td>
<td>provided that</td>
</tr>
<tr>
<td>consequently</td>
<td>in effect</td>
</tr>
<tr>
<td>in consequence</td>
<td></td>
</tr>
</tbody>
</table>

### Time or Place

<table>
<thead>
<tr>
<th>Time/Place</th>
<th>Date/Place</th>
</tr>
</thead>
<tbody>
<tr>
<td>above</td>
<td>later, lately</td>
</tr>
<tr>
<td>below</td>
<td>initially</td>
</tr>
<tr>
<td>beyond</td>
<td>eventually</td>
</tr>
<tr>
<td>simultaneously</td>
<td>meanwhile</td>
</tr>
<tr>
<td>subsequently</td>
<td>since</td>
</tr>
<tr>
<td>this time</td>
<td>more recently</td>
</tr>
<tr>
<td>until now</td>
<td>adjacent to</td>
</tr>
<tr>
<td>hitherto</td>
<td>opposite to</td>
</tr>
<tr>
<td>elsewhere</td>
<td>at length</td>
</tr>
<tr>
<td>formerly</td>
<td>ultimately</td>
</tr>
<tr>
<td>afterwards</td>
<td>shortly</td>
</tr>
<tr>
<td>earlier</td>
<td>thereafter</td>
</tr>
</tbody>
</table>

### Emphasizing

<table>
<thead>
<tr>
<th>Emphasizing</th>
<th>Expression</th>
</tr>
</thead>
<tbody>
<tr>
<td>of course</td>
<td>after all</td>
</tr>
<tr>
<td>to be sure</td>
<td>above all</td>
</tr>
<tr>
<td>indeed</td>
<td>actually</td>
</tr>
<tr>
<td>in fact</td>
<td>still</td>
</tr>
<tr>
<td>as such</td>
<td>especially</td>
</tr>
<tr>
<td>in effect</td>
<td>at least</td>
</tr>
<tr>
<td>certainly</td>
<td>normally</td>
</tr>
<tr>
<td>even, even so</td>
<td>notably</td>
</tr>
</tbody>
</table>
### Journal of the National Association of Administrative Law Judges

<table>
<thead>
<tr>
<th>Nonetheless and rightly so</th>
<th>In other words not only...but also</th>
</tr>
</thead>
<tbody>
<tr>
<td><strong>Contrasting</strong></td>
<td></td>
</tr>
<tr>
<td>However in contrast</td>
<td>Nonetheless</td>
</tr>
<tr>
<td>But nonetheless</td>
<td>Rather</td>
</tr>
<tr>
<td>As the same time rather</td>
<td>In opposition to</td>
</tr>
<tr>
<td>Nevertheless opposing</td>
<td>On the contrary opposing</td>
</tr>
<tr>
<td>Contrary to although</td>
<td>On the other hand in place of</td>
</tr>
<tr>
<td>Yet conversely</td>
<td>And yet actually</td>
</tr>
<tr>
<td>And yet actually</td>
<td>Despite</td>
</tr>
<tr>
<td>Though in spite of</td>
<td>Alternatively regardless</td>
</tr>
<tr>
<td>Alternatively in spite of</td>
<td>Provided that regardless</td>
</tr>
<tr>
<td>Provided that regardless</td>
<td>Still instead</td>
</tr>
<tr>
<td>Still instead</td>
<td>Unlike x notwithstanding</td>
</tr>
<tr>
<td>Unlike x notwithstanding</td>
<td>Otherwise even so</td>
</tr>
<tr>
<td>Otherwise even so</td>
<td>By contrast even though</td>
</tr>
<tr>
<td>By contrast even though</td>
<td>Although this may be true</td>
</tr>
</tbody>
</table>

### Advanced Transition Technique

As a part of your basic writing instruction, you were taught to ease the reader's path by building in transition from point to point, sentence to sentence, and paragraph to paragraph. The reader must be led from idea to idea to promote understanding and persuasion.

Generally, experienced writers begin their presentations with an introduction, and then walk their readers through the analysis using *logical transition* and
formal or structural transition
clearly and smoothly offering their discussion and analysis for review. Some Transition comes naturally, but consistently effective Transition requires some thinking ahead and careful planning.

Many novice writers get swept away with a sophomoric enthusiasm for building in Transition. The droll overuse of the pages of possible Transition words and phrases available in writing manuals causes their prose to become stilted and superficial. Remember the endless lists in the “Nutshell”; transition words for introducing, concluding, restating, exemplifying, emphasizing, contrasting, and on and on. How many However, Therefore, and In Additions can the reader endure?

These lists of words can be important when used appropriately. But too many writers overdo it, resulting in a sense of shallow presentation to the reader. Instead, build transition into your substance.

Recently, writing expert Alan DeWoskin chided me for failing to stress the importance of the more substantive, internal transition. He mailed me the following excerpt about “Bridging Versus Jumping Across” from the book Simple and Direct by Jacques Barzun.

BRIDGING VERSUS JUMPING ACROSS

Ideally, the perfect composition would consist of sentences so formed that the transition to the next would occur, without a word, in the reader’s mind. You instinctively feel what an amateur the writer is when you come across: Thus we see, In addition, In conclusion, alternating with Nevertheless’s and However’s in endless series. How do we reduce our need of them to a minimum, and what should that minimum be?

37 I was fortunate enough to be asked to review his excellent introductory writing text, The Little Book On Legal Writing, for the ABA’s General Practice Section on Legal Reasoning, Writing, and Research.

38 Jacques Barzun, Simple And Direct, p. 165-167.
As before, as always, the best answer is not a mechanical formula, but a conscious thought about what we are doing. The transitional words and phrases are the guiding touch to the elbow of someone you are piloting through new sights: look at this and now that. Or if you prefer, transitional words are signposts, which the reader relies on to stay on the road. When so conceived, they can be reduced in number by making the sentence itself do the work: “In such an atmosphere there could be only one sequel to the Madrid explosion. All Europe burned to emulate it. Vengeance! More blood!” By means of the phrase “only one sequel” we are made alert to hearing that sequel described in what comes next. Transition has taken place in our minds. We do not need tow ropes in the form of transitional phrases.

Suppose the wording had been: “In such an atmosphere the Madrid explosion provoked widespread concern. The result was [or In consequence]...” There, in this dull transitional matter, is the price you would pay for not having laid the ground of mental transition plumb in the middle of the earlier sentence. The lesson then is: think ahead; try to couch your thought in such terms as will prepare the reader for your next. He sees it coming because you have foreshadowed it adroitly. Think of your next sentences—or some of them—as leaning forward against the next, making that next necessary before it comes. These images I am using refer, of course, to the ideas in the sentences. But, you will say, one cannot have an endless lean-to; something has to stand upright and be the backstop. Quite right, and it is there, after the stopping place, that you do need transitional terms. You can use them without hesitation; they will be fewer (and stronger for being fewer) than if you had not taken pains to interlink your previous sentences in the manner described.

When you must use transition words, Barzun expresses his preferences:

*Remembering now that guiding the reader by bridgelike words should be minimal, we go on to choose those suitable to our subject and our temperament. For my part, however is a forbidden word, the sign of weakness in thought. I use it once in a great while, when I cannot get rid of neighboring but's and do not want to add one more. (I do not refer to the adverbial however, as in “However much you take, this drug will not hurt you.”) Moreover, if slipped in after the beginning of the sentence,*
is useful in showing that the previous subject or reason is still with us. The concessives of course, naturally, true (or it is true), similarly inserted in the body of the sentence, give little nudges for the reader's benefit. None the less can be kept for places where its meaning will be literal: not less by any amount. In addition is a grim presence at the head of a paragraph. Much better is something like: "Besides [this advantage]," which insinuates the idea: "the foregoing items make up a disadvantage—and there is more to come."

You will of course adapt these suggestions to your needs. Their upshot is: amalgamate the transitional idea with the sentence by (a) keeping it away from the beginning and (b) making it serve as a comment upon what has been or is being said. Transition in these explicit forms is best when it seems like the writer's giving quiet hints and directions in his own voice. Notice, though, the qualification quiet. The intrusion of the writer is not a happy one when it takes the form: "I propose in this paper to show . . . I have now demonstrated . . . Next, my object will be . . ."

Excellent in scientific reports and didactic works (such as a handbook of rhetoric), such phrases elsewhere chill the marrow of well-intentioned readers by making them feel lectured at.

"There is a great discovery still to be made in literature, that of paying literary men by the quantity they do not write."

Thomas Carlyle, Scotch essayist, historian, and biographer.

**CHART YOUR REASONING**

Judge Aldisert's well known book, *Logic For Lawyers: A Guide To Clear Legal Thinking*, provides clear and insightful comments and recommendations regarding the self-analysis of your legal reasoning. He insists that reason is the hallmark of all legal analysis and of judicial decisions.

"Reason justifies the legal rule emanating from the court decision. Where stops the reason, there stops the rule."\(^{39}\)

---

Judge Aldisert reminds us that common law reasoning is both inductive and deductive. A legal principle is inducted from a line of specific reasoned decisions, and once identified, becomes the major premise from which a conclusion may be deduced in the case at hand.

Many authors and experts recommend some form of the IRAC structure to support your reasoning.

<table>
<thead>
<tr>
<th>ISSUE</th>
<th>RULE</th>
<th>APPLICATION</th>
<th>CONCLUSION</th>
</tr>
</thead>
</table>

Slavish adherence to any form can produce absurd results in unusual cases, but this form is fundamentally sound. When confused about the way to clarify a muddled discussion, resort to the simple—the tried and true IRAC.

Also, be aware that your reasoning must consider the practical human and economic results of your analysis. Keep common sense close at hand. Judge Aldisert cautions against "elegantia juris," that inalterable, immovable application of rigid legal principles in ways that produce unjust or absurd conclusions. Four disciplines contribute to our decision making process, as a part of our legal reasoning: logic, morality, philosophy, and political theory. Holmes, Pound, and Cardozo legitimized this years ago.

As a legal analyst and crucial participant in the judicial decision-making process, you should be vigilant for the commonly employed fallacies of argument. As you probably recall they are categorized as fallacies as to form and as to substance—formal and material fallacies.

**TRICKS OF THE TRADE?**

**A.K.A.**

**FALLACIES OF DISTRACTION**

The sophisticated reader should be aware of the more common deceptive uses of the following logical fallacies:

A. Appeal To Prestige

"As the revered Justice Brandeis expressed in his oft-quoted Harvard Law Review article..."

B. Appeal To The Ages
"From the Ancient Greeks to the Founding Fathers,..."

C. Appeal To Pity:

"The poor defendant who grew up in a broken home as one of thirteen starving children..."

D. Appeal To Personal Ridicule

"The plaintiff, an ex-nazi and leader of the Ku Klux Klan,..."

E. Appeal To The Masses

"Generations of Americans have honored their inalienable right to bear arms. Your grandfather, father, and brothers and sisters, the rich and poor alike,..."

This can approach the Argumentum Ad Nauseum.

String cites, the overuse of footnotes and excessive length can be other attempts to impress the reader on a basis other than the merits of analysis. The sophisticated reader should be wary of anything other than the plain, clearly expressed truth.

A STREAMLINED BRIEFING TECHNIQUE

Professor Clyde Emery's pamphlet, A Streamlined Briefing Technique, describes a detailed system of legal analysis and research. Since its original printing years ago, it has enjoyed widespread acceptance. The American Bar Association now mails a copy to all new student members. When you read it, you'll agree that it is the most thorough and insightful systematic "briefing technique" in print.

The following outline highlights the principal elements of the technique.

SUMMARY: STEPS IN THE BRIEFING PROCESS

I. All facts on paper
II. All issues on paper
III. List books to use
IV. Gather authorities
V. List material in skeleton memorandum
VI. Formal memorandum
BRIEFING PROCESS EXPLAINED

I. ALL FACTS ON PAPER
   A. Write down all facts in narrative or outline form.
   B. If needed, consult a fact checklist such as those found in *American Jurisprudence Proof of Facts*.

II. ALL ISSUES ON PAPER
   A. Dig the legal questions out of the facts.
   B. If need, consult legal encyclopedias or treatises for insight.
   C. Use the TAP rule - What Things, Acts, or Persons suggest legal issues?

III. LIST BOOKS TO USE - Professor Emery suggests the following order
   A. Statutes (annotated)
   B. Digest
   C. American Jurisprudence 2d.
   D. A.L.R. (4th Series or Fed.)
   E. Corpus Juris Secundum
   F. Treatises and textbooks
   G. West's Words and Phrases
   H. Loose-leaf services
   I. Restatements
   J. Law Reviews
   K. American Digest
   L. Shepard's Citator

IV. GATHER AUTHORITIES
   A. Fact or Descriptive Word Method - TAP rule, simply look up key things, acts, and persons in the index.
   B. Analytical Method - skip the word index and go straight to the relevant topical heading in the digest, encyclopedia or treatise.
C. Chose the Short or Long Method of Finding the Law.

1. Short Method
   a. Exhaust the statutes, annotations, and digest
   b. Read the cases
   c. Shepardize

2. Long Method
   a. Go back to the twelve book list.
   b. Start at the beginning and stop when you have enough materials.
   c. Mark materials favorable or unfavorable and pile up in order of importance.

V. LIST MATERIALS IN A SKELETON MEMORANDUM
   A. List each issue from Step 2 in outline form.
   B. List favorable and unfavorable authorities in order of importance.
   C. Stop if appropriate, a formal memorandum may not be needed.

VI. FORMAL MEMORANDUM
   A. Only if requested.

STEP 7: Learn By Practicing Advanced Writing Techniques

The chief aim of style is clarity. But achieving clarity is only a first step; much remains - brevity, for example, and accuracy, variety, elegance, imagination, force, and wit.40

1. Parallelism
2. Repetition
3. Understatement
4. Emphasis
5. Contrast
6. Figurative Language

EDITING FOR AESTHETICS

I wandered lonely as a cloud
That floats on high o'er vales and hills,

---

40 Bryan A. Garner, The Elements of Legal Style.
Journal of the National Association of Administrative Law Judges

When all at once I saw a crowd,
A host, of golden daffodils;
Beside the lake, beneath the trees,
Fluttering and dancing in the breeze. 41

Why does this contrast so dramatically with most legal writing?

Well, the best legal writing can be fresh and lively, too.

Distinguish yourself by developing a style of writing that appeals to the reader’s and your sense of beauty and grace. This is the artistic, more pleasing side of professional writing. This process of polishing your work before its public showing is a natural part of everyone’s writing. Professional writers pay more attention to it. They know that the skill must be learned and can be improved with training and practice.

“Fine legal writing has a touch of class to it,” according to Professor Robert Smith. He reminds us that the better your writing is, the more persuasive it will be. Professors Squires and Rombauer teach us that “[p]rose that delights us also instructs us more efficiently and effectively than writing that deadens our senses.” Professor Henry Weihofen dedicates a whole chapter in his treatise to writing with eloquence. Lawyers should be able, when appropriate, “to express themselves with some grace and elegance.”

Good writing, especially good persuasive writing, pulls the reader in. Most legal writing is, by contrast, repulsive.

—Neil Skene, 1987

The many writing techniques and examples in the pages that follow illustrate how vigorous and appealing legal writing can be and how you can begin to experiment with your style.

Parallelism
Repetition
Understatement
Emphasis

41 William Wordsworth, I Wandered Lonely As a Cloud, (1804).
Figurative Language

The following materials will help you understand better the uses of these literary devices. Remember! These are not mere structures of form; they promote and reflect thoughtful substance in your thinking, as well as your writing. Professor Joseph M. Williams distills this principle from his material on elegant writing:

"True stylistic elegance demands a quality of thought that makes a reader feel he is confronting a writer of substantial intellectual quality."

Perception and Persuasion

The skilled administrative law judge should understand advanced literary techniques for three principal reasons:

1. To be able to read perceptively;
2. To be able to write professionally;
3. To enjoy the intellectual, artistic pleasure their use produces.

Administrative Law Judges are required to evaluate many kinds of writings and recommend dispositions to the agency head or board. Whether written by pro se appellants or by skilled attorneys, these documents are often characterized by enormous effort to persuade the readers of the correctness of the legal positions asserted.

You must be able to recognize the forms of persuasive writing used and to pierce through to the substantive realities of the case presented. Only when you understand the form of the written presentation can you comprehend its true substance. Only then will you be able to describe precisely to your reader the issues raised and expose any fallacies or other subtle attempts at persuasion built into the arguments.

Next, you must be able to communicate your findings, conclusions vividly, efficiently, and persuasively. Remember, the function of all professional writing is to persuade the reader. You want to guide your reader to two conclusions:

1. This report or decision is accurate, comprehensive, and logically reasoned.
2. The recommended resolution of this case is correct.
Finally, the creating and crafting of fine writing stimulates aesthetic pleasure in the writer. The sheer pleasure of creating a thing of beauty combines with the satisfaction of achieving quality writing. You, the writer, benefit in many ways.

“A little self-discovery never hurt anybody! Even you don’t know how good you can be.”

— Pat Hugg, Assoc. Dean, Loyola University School of Law, and write right maniac.

**PARALLEL STRUCTURE**

Parallel structure presents the writer with an effective and practical tool that serves two important purposes. First, parallel structure allows the writer to compress more information into a smaller area than with the standard, basic sentence format. One sentence containing multiple parallel elements can replace two or more sentences, benefiting the reader with its compression and brevity. Second, these occasional longer sentences also break the monotony of too many short, direct sentences in a row. The resulting rhythm and flow create a pleasing effect.

The cardinal achievement of parallel structures, however, is the clarity and ease of understanding produced. The multiple elements of information are communicated together and concisely. Parallelism should be a part of every writer’s strategy.

Parallelism can be expressed at several levels: by uniting parallel Words, Phrases, and Clauses to reflect parallel things and thoughts. These examples reveal how easy basic parallelism can be.

**Adjectives:**
The driver was bruised, bleeding, and angry.

**Verbs:**
The corrections officer ran, tackled, and handcuffed the escaped prisoner.

**Phrases and Clauses:**
The court listened to the testimony, examined the documents, and concluded that the statute had been violated.
Remember that parallel expression ought to be parallel in form and substance. "Apples, oranges, and David Koresh" will not conduce flow and ease of understanding.

**REPETITION**

Another commonly used and highly expressive technique is *Repetition*. This device can be the simple repetition of single words or the more elaborate repetition of phrases or clauses.

Observe in this well-known example how repetition of one word emphasizes that word and infuses power into the expression.

"When I hear any man talk of an inalterable law, the only effect it produces upon me is to convince me that he is an inalterable fool." 

**BASIC REPETITION IS EASY AND EFFECTIVE:**

**Nouns**

"The vendor agreed to the selling terms - terms that would later prove impossible to satisfy."

**Verbs**

"The writer's most important act is to rewrite - to rewrite as a passion and a compulsion."

**Adjectives**

"The right to represent one's self is not absolute because such a power cannot be absolute."

**Phrases**

"The Court must consider the delay and disruption in the proceedings. And in this case, the delay and disruption in the proceedings were substantial."

**REMEMBER** that *Repetition* also provides effective substantive *Transition* between sentences and paragraphs.

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42 Example provided by Sydney Smith, quoted in Professor Henry Weihofen's *Legal Writing Style*, 2d ed., 318.
... and the statute requires that the Court exercise its discretion.

The exercise of discretion in this case requires that the appeal be dismissed. The factors weigh too heavily...

Oates, Enquist, and Kunsch in their new book, *The Legal Writing Handbook*, also explain how repetition of key terms is an effective way to build coherence in your paragraphs.43

FINALLY, some fancy footwork (generally too fancy for our purposes here) can be done with *Repetition*. Garner refers to “cross-fashioning” (among other artistic uses of *Repetition*)44: the repetition of words, in successive clauses, in reverse grammatical order: He gives us two classic aphorisms to illustrate.

"Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist."


"[T]he rule follows where its reason leads; where the reason stops, there stops the rule."


Garner concludes his delightful discussion of *Repetition* by quoting Justice Scalia's wonderfully humorous example of polysyndeton, *Repetition* of conjunctions in close succession:

"A particular legislator need not have voted for the Act because he wanted to foster religion or because he wanted to improve legal education. He may have thought that the bill would provide jobs for his district, or he may have wanted to make amends with a faction of his party he had alienated on another vote, or he may have been a close friend of the bill's sponsor, or he may have been repaying a favor he owed the


Majority Leader, or he may have hoped the Governor would appreciate his vote and make a fundraising appearance for him, or he may have been pressured to vote for a bill he disliked by a wealthy contributor or by a flood of constituent mail, or he may have been seeking favorable publicity, or he may have been reluctant to hurt the feelings of a loyal staff member who had worked on the bill, or he may have been settling an old score with a legislator who opposed the bill, or he may have been intoxicated and utterly unmotivated when the vote was called, or he may have accidentally voted “yes” instead of “no,” or, of course, he may have had (and very likely did have) a combination of some of the above and many other motivations.


“What if one does say the same things—of course in a little different form each time—over and over? If he has anything worth saying, that is what he ought to do.”

- Oliver Wendell Holmes, Sr., *Over The Teacups* (1891).

**UNDERSTATEMENT**

*A thermonuclear explosion can ruin your whole day.*

Understatement is a subtle and powerful persuasive writing technique. Done well, it communicates thoughtfulness and a sense of professionalism to your reader.

The selling power of understatement is no secret. For years, leading professional schools, such as the Harvard Business School, have emphasized the primary rule of salesmanship:

“UNDERSELL, OVERDELIVER!”

If a car salesman tells you that a model on the showroom floor is a great buy, he has asserted a conclusion to you, hoping that you might be persuaded to buy the car.

Contrast the sophisticated salesman’s pitch, when he calmly recites to you fact after fact and then stops short of uttering the intended conclusion.

*This car gets 32 MPG*
Has rack and pinion steering

Power disc brakes

Was "Road and Track's" car of the year - 2 years in a row

It's $3,000 less than the comparable Honda

He lets you make the leap to the conclusion. Then it's your idea! And you are hooked! The technique of understatement has sold you.

LEGAL UNDERSTATEMENT

Understatement in legal writing is especially effective because lawyers instinctively resist being told what to think. They are skeptical, even cynical. They will resist pushy, conclusory assertions. And that is what you find in much of the legal writing that crosses your desk and that is why you find it unpersuasive.

Here is an example:

"The facts clearly prove that the state regulation egregiously and unconscionably violates Ms. Adams' constitutional rights."

UNDERSTATE IT:

"These unique facts suggest that the challenged regulation was not carefully tailored to accommodate the needs and expectations of the parties, the law, or society."

Understatement can also inject a sense of lightness or vigor into your writing. A good example is Holmes's descriptive reference to Senator Hoar's disapproval of Holmes being nominated to the Supreme Court:

"I think he doesn't lie awake at nights loving me."

This expression evokes a more impressive reader response than if Holmes had stated flatly:

"Hoar disapproves of my nomination to the Supreme Court."

Note well the difference! The first sentence conveys so much more than the second:

1. substantive insight
2. freshness in expression

Taking Understatement One Step Further

Legal writing expert Bryan Garner illustrates two forms of understatement in his book *The Elements of Legal Style*:

1. **Litotes**
2. **Meiosis**

**Litotes** We all use litotes in our everyday expression, though we are rarely aware of it. When used consciously as a writing tool, this advanced technique adds depth to your writing. Garner defines the technique:

"**Litotes:** 'frugality.' Negating an opposite to create a quiet emphasis."45

Garner illustrates with everyday expressions: *not bad, not guilty*, and a humorous example, "*He's no Clarence Darrow.*"

More recently, Phoenix Suns' coach Paul Westphal dryly described Michael Jordan's 55 point performance in game 4 of the NBA playoffs: "Michael Jordan wasn't bad tonight."

Litotes add a subtle touch of elegance to one's writing. In legal writing, litotes are expressive of a different way of looking at the law. For instance:

*The Appellant urged that the statute was not unconstitutional,*

is technically more correct and stylistically more appealing than

*The Appellant urged that the statute was constitutional.*

We all understand that there is a significant legal difference between "not guilty" and "innocent." Holmes's perspective on constitutional interpretation provides an excellent example.

Holmes believed "*that the question always is where do you find the prohibition—not where do you find the power.*" It became Holmes's habit not to find

45 *Id.*, 154-155.
statutes constitutional but to find them not unconstitutional—a legal litotes that made a substantial difference in constitutional interpretation.”

Avoid overusing the “not un” combination. Garner illustrates its potential for silliness and confusion:

“A not unblack dog was chasing a not unsmall rabbit across a not ungreen field.”

Meiosis Meiosis is a special form of understatement and refers to the purposeful de-emphasis of a point in order to emphasize it.

“Meiosis: ‘lessening.’ The use of understatement not to deceive, but to enhance the impression in the hearer.”

Garner spotlights this special variation of meiosis which can be used effectively in less formal discourse.

“Cardozo was some judge.”

Dagwood wakes up late, trips over the children’s toys, misses the bus, rushes up the stairs instead of waiting for the elevator, only to discover that it’s Saturday and he’s not supposed to be at work. Dagwood grumbles, “Today is not my lucky day.”

The professional writer should recognize these literary techniques and understand the role they play in persuasive writing.

EMPHASIS

Consciously construct your sentences and paragraphs to direct the reader’s point of view and to define the structure of the analysis

In legal writing, DIRECTION and CONTROL can be everything. Justice Brandeis once asserted that, if you allow him to frame the issues, he will control the analysis and be assured of winning the argument.


47 Garner, The Elements of Legal Style, 154.
As an administrative law judge, you want to use direction and control to impose order and comprehension on your analysis and report. Certain writing techniques help you establish that control.

**Joseph Williams sets out two basic guides:**

1. Whenever possible, express at the beginning of a sentence ideas already stated, referred to, implied, safely assumed, familiar, predictable, less important, and readily accessible.

2. Express at the end of a sentence the least predictable, the newest, the most important, the most significant information, and the information you almost certainly want to emphasize.

You guide the reader through the text smoothly, providing the reader with context and cohesion. You introduce, explain, and then emphasize. This is the basic plan. Follow it in making your decisions about sentence and paragraph organization and structure.

At other times and for special purposes, you will vary from these general guides to achieve emphasis and direction.

For example, when you want to communicate that the court abused its discretion:

"The court denied the motion without conducting an evidentiary hearing."

focuses immediately on the **court** and purposefully emphasizes "**without a hearing**."

On the other hand, if you want to communicate that the court acted appropriately:

"The defendant's motion was denied without a hearing by the court."

de-emphasizes "**without a hearing**" by hiding it in the middle.

Witness these two vivid examples from Weihofen.48

"He deliberately committed the crime."

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or,

"He committed the crime deliberately."

Notice how the placement at the end of the sentence emphasizes that word.

Another example of placement choices:49 Watch the shift in emphasis and the change in persuasive appeal.

"This, if the jury believes it, is the perfect defense."

or,

"This is the perfect defense, if the jury believes it."

Isn't it amazing what DIRECTION and CONTROL can do! Professional writers use all of the literary techniques available.

**General Rules of Emphasis:**

Weihofen also makes the following suggestions:

1. Put the point to be emphasized at a position of emphasis: the beginning or end of a sentence or paragraph. Conversely, bury phrases you want to de-emphasize in the middle.

   Most writers place words of emphasis at the end of a sentence.

   Whether the surveillance is electronic, optical, or human is irrelevant where there is no reasonable expectation of privacy. While on a public street, the defendant had no such reasonable expectation.

   The beginning of the sentence can also provide emphasis.

   Deceit or treachery he could not forgive.

   A subject coming first in its sentence may be emphatic, but hardly by its position alone.

   Great kings worshipped at his shrine.

2. State the point to be emphasized in concrete, specific terms. Conversely, use more abstract terms to de-emphasize a point.

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49 Id.
When a point is stated in concrete or specific terms, the reader creates a mental picture of the point; this picture makes the point easier to remember. In contrast, something stated abstractly or generally does not leave such a strong impression with the reader.

*When asked where he had been at 10:00 p.m. on the night of the assault, the alleged assailant looked away and mumbled, “nowhere.”* rather than

*When asked where he had been, he seemed uneasy.*

3. Put the point of emphasis in a short sentence. Short sentences are emphatic because they are abrupt yet easy to read. These qualities combine to make the point easier to remember.

*The defendant then fired three shots.*

4. Put the point to be emphasized in a one sentence paragraph. Use this technique only when you have a sentence that can stand on its own logically. When you can use a one sentence paragraph, however, it can make the point stand out from other paragraphs, just as a short sentence can.

5. Use strong subject-verb combinations that use terms central to your point, which may include terms of art or other words you want to emphasize.

*The Family Car Doctrine holds parents liable for their children’s accidents.*

6. Put the point to be emphasized in an inverted sentence structure. In general, something unusual gets more attention just because it is unusual.

*Imprudent it was, but not illegal.* But be aware of overusing this technique.

7. Use citations at the end of sentences, not as an introduction to a sentence.

8. Make affirmative assertions. Even negative ideas can be expressed in positive, therefore more appealing form.

This circuit's interpretation of the regulations has not been clear or consistent.

Rewritten:

This circuit's interpretation of the regulation has been vague and inconsistent.

Another effective way to emphasize or illustrate your analysis is to set opposing statements against each other. This uncommon structure can impress the reader with its freshness and grace.

Holmes phrased one of his most quoted aphorisms in this sentence structure:

"The life of the law has not been logic: it has been experience."

Professor Weihofen reminds us that the shorter the expression the better. Replace words with punctuation (comma, colon, or semi-colon). He chides us not to ruin our expression with too many words. Pope wrote,

"To err is human; to forgive divine."

Most lawyers would rewrite that into,

"To err is human, whereas to forgive is divine."

**FIGURATIVE LANGUAGE**

We use figurative language more than we realize. We use it because it adds dramatic power to our language, and it conveys images more vividly than mere description can.
Readers quickly understand that absolute "free speech" is impractical as a legal principle when we think about the danger that would be caused by shouting "Fire!" in a crowded theater.

Holmes's famous figure of speech is worth a thousand abstract words. By attaching a universal image to the idea, Holmes used figurative language to communicate more emphatically and descriptively.

I recently listened to the radio as a defense contractor opposed the closing of his facility:

"We shouldn't be shut down and forced out like a circus leaving town in the night."

What a negative spin that simple simile puts on the plea. We need to recognize the power of figurative language when it is presented in writing to us, and we need to use it consciously as a tool in communicating complex and abstract ideas to our own readers.

Joseph Williams explained:

Clarity, vigor, symmetry, rhythm — prose so graced would more than satisfy most of us. And yet, if it offered no virtues other than these, such prose would excite an admiration only for our craft, not for the reach of our imagination. Professional writers seek to go beyond mere craftsmanship; they strive to reveal new truths and insights into the ordinary. A primary literary tool for creating this dimension is figurative language. Administrative law judges can use this technique to communicate impressive depth of understanding to their readers.

"Asking a writer what he thinks about critics is like asking a lamp post what it thinks about dogs."

The three basic forms of figurative language in legal writing are:

Simile

A comparison using "like" or "as."

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50 Joseph Williams, Style: Ten Lessons In Clarity And Grace, 2d ed., p. 165.
As serious as a heart attack.

**Metaphor**

A comparison likening one thing to another by describing one as the other.

*The slippery slope of due process*

*The law is a ragbag of details.*

**Metaphor** is more striking in effect than **Simile** and has more force, according to writing guru Henry Weihofen. "The ability to create metaphor, said Aristotle, is the surest sign of originality. It is as useful a gift for the legal writer as for any other."据 Aristotle, 是原创性的最确证的标志。它对法学家来说和其他人一样是有用的礼物。

How about Fred Rodell's criticism of law review writing?

"[T]he average law review writer, scorning the common bludgeon and reaching into his style for a rapier, finds himself trying to wield a barn door."

**Personification**

This is a narrow form of metaphor in which the writer transforms the object of discussion into a person. We do it all the time! Garner illustrates:

"The law is silent on that point."

"The Smith analysis demands . . ."

"The rule in *Andrews v. Partington* is a somewhat battered veteran, but it still remains on its feet after upwards of 200 years."

**YOU BE THE JUDGE!**

Debate ensues about the propriety of using figurative language in judicial writing. Many writers insist that judicial opinions and other important legal

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51 This idiomatic expression ignores the traditional distinction between like and as. As requires a verb; like does not.


documents too seriously affect the parties and the public. Others consider the impact of a well-crafted and well-placed metaphor too valuable to give up.

Figures of speech can offer a unique view or perception of an idea or event, but some may seem inappropriately casual or informal for legal writing. In practice, we all use the more common figures of speech in our writing and discussions everyday. Think of the clichés, similes, and metaphors we use daily. On one hand, we casually refer to friends as "two peas in a pod," and at work we may refer to a "handful" of jurors or to the "slippery slope of due process." The principal question here is one of context and degree.

The issue for the legal writer is whether the particular literary device communicates appropriately in its presentation.

Identify the metaphor in each of the following samples and note your objection or approval of its use.

1. Justice O'Connor's dissent in Garcia v. San Antonio Metropolitan Transit Authority:

   The Court today surveys the battle scene of federalism and sounds a retreat. Like Justice Powell, I would prefer to hold the field and, at the very least, render a little aid to the wounded. I join Justice Powell's opinion. I also write separately to note my fundamental disagreement with the majority's views of federalism and the duty to this Court.55

2. Justice Frankfurter's:

   "The bite of the law is in its enforcement."

3. Justice Clark's dissent:

   Although there are many ways to kill a cat, drowning remains the most favored. The Court applies this method to this conviction—drowning it by watering down the Findings of Fact and Conclusions of Law. By attributing to them a diluted meaning, the judgments of the District Court and the Court of Appeals are rendered insupportable.

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55 Taken from Jordan, Judicial Imagery and Humor, 41 Miami 693, 705 (1987).
4. Judge Irving Goldberg's statement of reasons why a federal plaintiff should not complain about an injunction:

   Appellants themselves issued the invitation to dance in the federal ballroom, they chose their dancing partners, and at their own request they were assigned a federal judge as their choreographer. Now the dance is over, appellants find themselves unhappy with the judging of the contest. They urge us to reverse and declare that "Good Night Ladies" should have been played without the partial summary judgment having been granted and without the preliminary injunction having been issued. This we have declined to do, and in so doing we note that this is not "The Last Tango for the Parish." Appellants still have an encore to perform and their day in court is not over.

STEP 8: Accept Ruthless Editing and Revisions as a Positive Part of Professional Writing

EDITING AND CRITIQUING

Editing and critiquing the legal writing and analysis of others are two of the most powerful teaching tools available to the supervisor. They are also two of the most difficult supervisory functions. Accordingly, they should be approached with care.

In the legal world of abstract discussion, the concrete comments, marks, and notes that you write on other administrative law judges's writings are the most immediate and effective feedback that they will receive. For the new arrivals, these critiques appear at a time and in a new job context that makes them especially relevant and effective.

The editing and critiquing of the judge's first report can be powerful — for better or for worse. Supervisors should consciously exploit this opportunity to foster a constructive relationship with the writer. A more fragile neophyte with perfectionist aspirations may never overcome early inartful or even insulting criticism. The day-to-day pressures of the work alone can generate too much stress. We do not want to multiply that by causing defensive, fearful, or other negative reactions that will only hinder the writer's growth.
Writing effective legal analysis can be difficult. Organization and logical reasoning do not come naturally. We should acknowledge that and support the writer’s efforts. The training and support program outlined in the previous pages is designed to provide that support.

Intelligent editing and critiquing are essential parts to the program.

Prepare the editing table, with file at hand and all of the recommended references at the table.

Prepare yourself mentally. Constructively critiquing and editing the work of others is challenging. Do not rush. Do one thing at a time.

Read the report through once, looking for thoughtful analysis and expression. Style and form errors can be more easily corrected on the second reading. Read first for analytical features, such as:

EDITING AND CRITIQUING

Clarity
Coherence
Correct Law
Full Facts
Sound and Explicit Reasoning
Conclusion

Note your reactions in the margins. Your notes should be clear and readable. Cryptic remarks or vague symbols puzzle the writer on review and can cause resentment.

Now, reread the decision or report more slowly, looking for overall organization. On this read through, feel free to stop and edit for diction and style. The Editing and Critiquing Checklist on the following pages may be placed on the editing desk for refreshing your overall view.

Attach special significance to the nature of the report. They will be read by judges, and ultimately read, at least in some cases, by the litigants in the form of judicial opinions. Explain what content and form the director prefer, rather than what style you personally prefer. Then explain why.
If the editing and critiquing is of sufficient scope to warrant a personal writing conference, conduct the discussion promptly. Prepare for the conference and think about your goals for the meeting. Above all, communicate. Show the writer exactly and explicitly what's good and what's bad about the paper. Refer to form manuals and style books as needed.

Remember to focus first on something good in your comments before hitting the negative. Even disastrous writing can be viewed as posing an opportunity to teach skills to a professional who desperately needs them. Immediate intervention and specialized training for administrative law judges who demonstrate serious deficiencies will save enormous effort and pain later.

High standards should not be compromised. You should be firm in your teaching, but at the same time you should consider how best to motivate the writer.

Supervisors should attempt to develop uniform editing and critiquing phrases and symbols. Criticism is accepted more readily when uniform. Fairness should not be an issue.

Do not slavishly focus on minutiae or form errors. Avoid the appearance of pedantry. Concentrate on thoroughness and sound reasoning; then teach good work habits to resolve form deficiencies.
EDITING AND CRITIQUING CHECKLIST

The following outline is a general checklist of the highlights of effective legal writing.

I. TOPIC PARAGRAPH - STATEMENT OF THE ISSUE
   A. Identification of Issue
      ____ Issue clearly identified
      ____ Issue not clearly identified
      ____ Issue missed
   B. Issue Statement
      ____ Incorporates (fails to incorporate) relevant facts and law
      ____ (Not) Concise
      ____ Too broad

II. Analysis of Issue
   A. General Responsiveness
      ____ Does (not) respond to identified issue
      ____ Is (not) well reasoned and logical
      ____ Is thorough and well focused
      ____ Is superficial
      ____ Is conclusory
   B. Use of Authority
      ____ Precedent rules & holdings (not) adequately defined/explained
      ____ Relationship of precedent case to analysis (not) supported with facts/holding/reasoning of cited case
      ____ Authority does not support analysis
      ____ Extraneous facts from case obscure analysis
      ____ Quotations used appropriately
      ____ Quotations: too many, too long, not integrated into analysis
   C. Conclusion
      ____ Conclusions (not) adequately summarized
III. ORGANIZATION

A. Flow and Development of Analysis
   ___ Is logical
   ___ Is haphazard

B. Paragraphs
   ___ Are (not) unified and coherent
   ___ Are (not) well developed
   ___ Lack topic sentences
   ___ Lack transitions

IV. CITATIONS

   ___ Proper form and use
   ___ Incorrect citation format
   ___ Inadequate use of citations

V. FORMALITIES

   ___ Improper format
   ___ Appearance
   ___ Other

VI. OVERALL WRITING STYLE

A. Grammar
   ___ Pronouns lack identifiable antecedents
   ___ Nouns and pronouns disagree
   ___ Verb tenses are not consistent
   ___ Verb and subject numbers disagree
   ___ Other

B. Word Usage
   ___ Imprecision
   ___ Poor word choices
   ___ Wordy
   ___ Improperly used terms of art
   ___ Needlessly esoteric words used
Expressions of personal opinion
"Legalese"

C. Sentence Structure
   - Sentence fragments
   - Run-on sentences
   - Sentences too complex/long
   - Improper punctuation
   - Other

D. Aesthetic Editing
   - Parallelism
   - Repetition
   - Understatement
   - Emphasis
   - Figurative language

E. Spelling
   - Misspelled words
   - Typographical errors
Writers often get into ruts. Generally, write direct sentences. Add flow and rhythm with an occasional long, compound sentence.

The following paragraph illustrates the sluggishness created by successive sentences all begun with introductory words and phrases.

"Here, the record affirmatively discloses that Smith executed a written waiver of his constitutional rights when he pleaded guilty to robbery and armed robbery in 1979 (ER 40 and 49) and burglary in 1973 (ER 21 and 23). Thus, based upon his guilty plea to the two felonies in 1979, (which is treated as two prior convictions for purposes of sentence enhancement, see Wicks, 833 F.2d at 193) plus his conviction in 1973, Smith has three prior violent felony convictions. Further, because the record affirmatively discloses written voluntary waivers to these three felonies, Smith had the burden of proving that these pleas were the result of improper waivers of his constitutional rights (see RT 12/14/98 at 1-18; RT 2/3/88 at 3-5 and 8; CR 21).

Therefore, because Smith failed to produce any evidence to meet his burden of proving that his three prior convictions were constitutionally invalid, his sentence was properly enhanced.

REWRITE AND EDIT FOR CLARITY AND FLOW.

BREVITY IS THE SOUL OF WISDOM

Experts recommend that most sentences contain one primary thought and fewer than twenty to twenty-five words. Rhythm and flow are produced by an occasional longer sentence to break up choppiness, but most sentences should be short, direct, and clear,

Another expert has asserted that "[i]f you haven’t gotten to the verb by the sixth word in the sentence, you may be getting into trouble."

An old writer’s maxim applies: "In every fat book there is a thin book trying to get out."

The following writing excerpt demonstrates the excessive use of lengthy sentences. We must recognize that legal writing style and format encourage longer sentences, but we should strive to edit for brevity when possible.
Although pretrial detainees are not protected by the eighth amendment, their due process right not to be punished has been analogized to those of prisoners under the eighth amendment. *Cabrales v. County of Los Angeles*, No. 87-6061, slip op. at 15601, 15612 n.2 (9th Cir. Dec 28, 1988). To hold a prison employee individually liable for damages caused by an attack by another prisoner, the plaintiff must establish (1) that the specific official, in failing to act, was deliberately indifferent to the mandates of the eighth amendment, and (2) that his indifferences was the actual and proximate cause of the deprivation of the inmate's rights. *Leer v. Murphy*, 844 F.2d 628, 634 (9th Cir. 1988).

Here, the jury could have found that Smith, a pretrial civil detainee, was subjected to punishment based on evidence that Smith was placed among criminal detainees in violation of jail policy that civil detainees be housed separately from criminal detainees, and while housed among the criminal detainees, was subjected to an attack by a fellow inmate. The jury could have found that Wilson was deliberately indifferent to Smith's right not to be punished by concluding that (1) the jail police reflected an acknowledgment that placing civil detainees with criminals exposed them to danger of attack, (2) Wilson had more than a "mere suspicion" of the threat to Smith's safety by being aware of the policy, and (3) Wilson was individually culpable by striking Smith in the groin when Smith tried to tell him he was a civil detainee rather than following his normal procedure of bringing the error to his supervisor's attention. See *Berg v. Kincheloe*, 794 F.2d 457, 459 (9th Cir. 1986) (deliberate indifference involves individual culpability and more than mere suspicion that an attack will occur).

Based on this and other testimony that Wilson's conduct caused Smith to be too afraid to mention the error to anyone else, the jury could have found that Wilson was in the position to prevent what happened to Smith and, therefore, was the actual and proximate cause of Smith's constitutional deprivation. See *Wood v. Sunn*, No. 87-2056, slip op. at 331, 341 (9th Cir. Jan 17 1989) (defendants' acts were actual and proximate cause of of eighth amendment deprivation because defendants could have taken steps to prevent the deprivation).

"There is no such thing as writing; only rewriting and rewriting."

Associate Justice Louis Brandeis:
Most professional writers agree. Thornton Wilder echoed F. Scott Fitzgerald's definition of his "notebook" when he wrote, "I constantly rewrite, discard, and replace the cycle of plays. Some are on the stove, some are in the oven, some are in the wastebasket. There are no first drafts in my life. An incinerator is a writer's best friend."

I do a lot of rewriting. It's very painful. You know it's finished when you can't do anything more to it, though it's never exactly the way you want it.... Most of the rewrite is cleaning. Don't describe it, show it. That's what I try to teach all young writers—take it out! Don't describe a purple sunset, make me see that it is purple. The hardest thing in the world is simplicity. And the most fearful thing, too. You have to strip yourself of all your disguises, some of which you didn't know you had. You want to write a sentence as clean as a bone. That is the goal.

—James Baldwin

A final anecdote from writer Elizabeth Hardwick:

I'm not sure I understand the process of writing. There is, I'm sure, something strange about imaginative concentration. The brain slowly begins to function in a different way, to make mysterious connections. Say, it is Monday, and you write a very bad draft, but it you keep on trying, on Friday, the words, phrases, appear almost unexpectedly. I don't know why you can't do it on Monday, or why I can't. I'm the same person, no smarter, I have nothing more at hand. I think it's true of a lot of writers. It's one of the things writing students don't understand. They write a first draft and are quite disappointed, or often should be disappointed. They don't understand that they have merely begun, and that they may be merely beginning even in the second or third draft.

Rewriting & Revising CHECKLIST:

I. **EDIT FOR BREVITY**
   - STRIKE one entire sentence without losing any meaning.
   - OMIT one unnecessary phrase.
   - REWRITE your introduction to an issue. Be direct, simple, and smooth but be deep.
   - IDENTIFY and evaluate one explicit transition link between two paragraphs.
II. **INJECT FRESHNESS INTO YOUR WRITING**

- **TIGHTEN** up sentences with parallel structure (either parallel words, phrases, or sentences).
- **CONSCIOUSLY** build in understatement to persuade (perhaps use a "litotes").
- **INCLUDE** figurative language (simile, metaphor, or personification).
- **ENLIVEN** one sentence by switching from passive to active voice.
- **VERIFY** that every discussion contains a topic or thesis statement.
- **ADD** force with a contrast sentence.
- **REPEAT** a word or phrase for emphasis and cohesion.

III. **FREE YOUR WRITING FROM LEGAL JARGON**

- **LOCATE** and kill an outmoded Genteelism.
- **STRIKE** all stuffy, stiff words. All of them! (85 cent words, euphemisms, etc.).
- **SPOTLIGHT** double verbs—test them.
- **REPLACE** all unnecessary LATINISMS with plain English.
- **CUT** out all fad words and jargon.
- **EXCLUDE** redundant authority and citations.
- **SHORT** cite where possible.

**STEP 9: Deepen The Reservoir**

The ninth element of the Professional Writer’s Methodology is **Deepening The Reservoir**. This aspiration addresses the intellectual and aesthetic aspect of...
our work and our lives. We know that our daily activities become richer and more rewarding when our efforts advance our personal goals.

Taking the time and making the effort to develop as a professional writer will cause an unavoidable, irresistible enhancement in your creativity and enjoyment in your writing. You will share in the satisfaction of the professional writer.

Our aspirations and daily labor must transcend the ordinary, common copying of the scrivener. We must focus on the creativity of the abstract arts of reasoning and writing.

Learned Hand compared legal reasoning and writing, especially judicial writing, to art.

After all, why isn't it in the nature of art? It is a bit of craftsmanship, isn't it? It is what a poet does, it is what a sculptor does. [The writer] has some vague purposes and he has an indefinite number of what you might call frames of reference among which he must choose; for choose he has to, and he does.

Holmes spoke to our intellectual needs when he reportedly wrote:

"Life is painting a picture, not doing a sum. Life is endeavoring to see so far as one may, and to feel the great forces that are behind every detail—for that makes all the difference between philosophy and gossip, between great and small."

To satisfy our thirst for professional and aesthetic growth through our work is a gift that requires our participation—our attention and dedication.

Tennyson expressed it well in these few lines from the story of another traveler, searching for development:

I am a part of all that I have met;
Yet all experience is an arch wherethrough
Gleams that untraveled world whose margin fades
Forever and forever when I move,
How dull it is to pause, to make an end,
To rust unburnished, not to shine in use!

And this gray spirit yearning in desire
To follow knowledge like a sinking star
Beyond the bound of human thought.

STEP 10: Relax and Take Pride

Ultimately in the process, the writer should consider the perceptive and inspirational observation of the famous educator, Alfred North Whitehead:

Finally, there should grow the most austere of all mental qualities; I mean the sense for style. It is an aesthetic sense, based on admiration for the direct attainment of a foreseen end, simply and without waste. Style in art, style in literature, style in science, style in logic, style in practical execution have fundamentally the same aesthetic qualities, namely, attainment and restraint. The love of a subject in itself and for itself, where it is not the sleepy pleasure of pacing a mental quarter-deck, is the love of style as manifested in that study. Here we are brought back to the position from which we started, the utility of education. Style, in its finest sense, is the last acquirement of the educated mind; it is also the most useful. It pervades the whole being. The administrator with a sense for style hates waste; the engineer with a sense for style economizes his material; the artisan with a sense for style prefers good work. Style is the ultimate morality of mind.
RECOMMENDED BOOKS


Emery, Clyde *A Streamlined Briefing Technique*, American Bar Association, 1973 (one of a kind on system for research and analysis).


Smith, Robert B. *The Literate Lawyer*, Butterworth Legal Publishers, 1986 (scholarly, readable resource.)

Texas Law Review Manual on Style. 7th. ed. Texas Law Review Association, 1992 (style books are mandatory; this is a good one).


Williams, Joseph M. *Style*, 2nd. ed. Scott, Foresman and Company, 1985 (strong on nuts and bolts, pleasingly written, and offers clear examples).


