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Legal-Writing Myths—Part II

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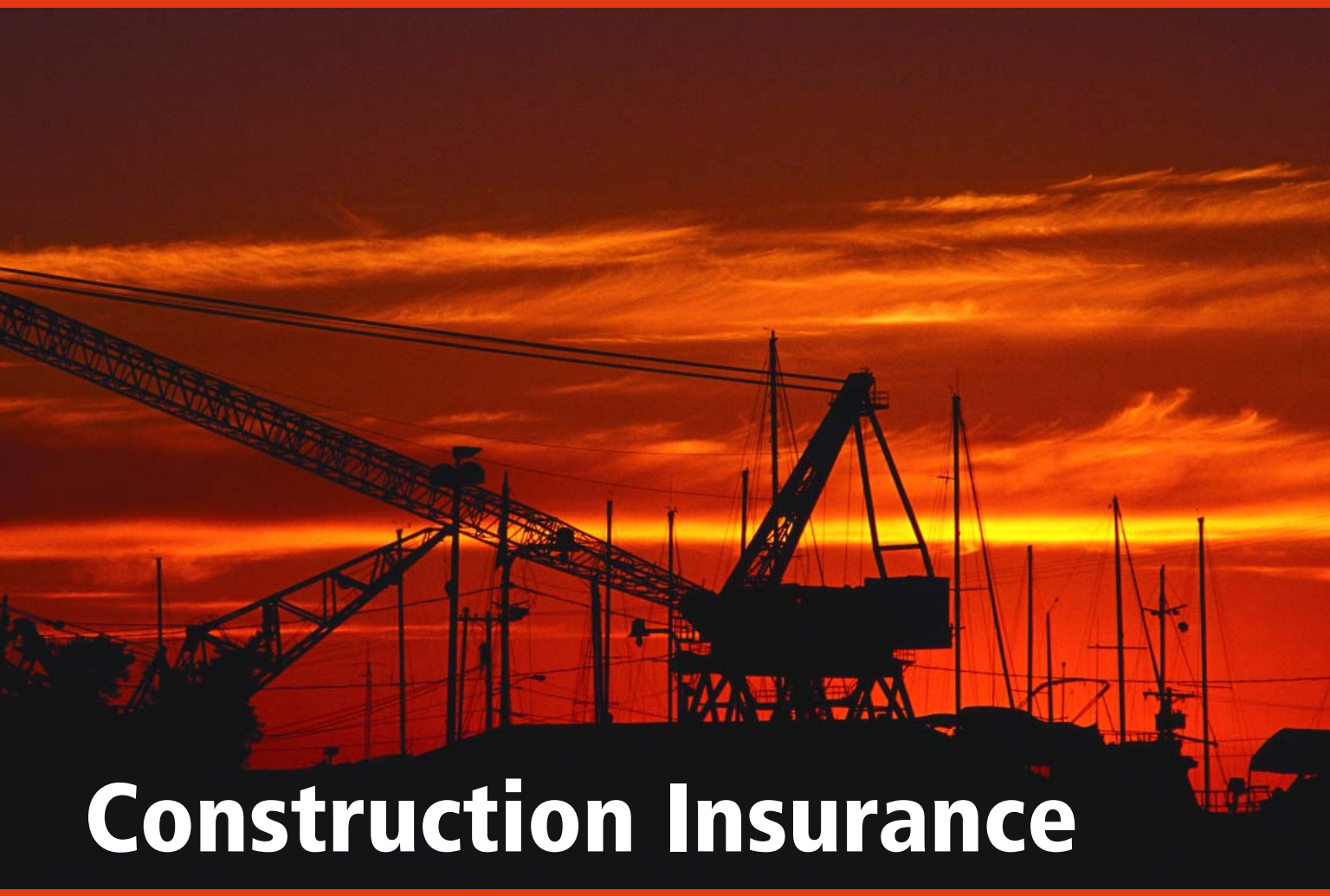

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Legal-Writing Myths — Part II

The Legal Writer continues from last month, discussing legal-writing myths.

Myth #11. Finish early.

Reality: Start early — and edit late. Your labor will be more efficient if you start before facts and argument get cold in your mind. Starting early lets you start over if you learn new facts, develop a new argument, or realize you went down the wrong path. Then take the time and make the effort to edit until your work is due. You'll have fewer regrets afterward.

Myth #12. Obsessive-compulsives make the best legal writers.

Reality: Obsessing over what you write is time-consuming and stressful. It distracts from the main goal of legal writing: to communicate in a clear, concise, and organized manner. If you're obsessing over just one element of your writing, you won't accomplish your goal.

Not obsessing over what you write means never sweating the small stuff. It'll paralyze you. Become obsessive, if at all, only at the very end, when attention to detail is important. Then submit your work and be done with it. As Howard F. Angione, the *Journal*'s ex-Editor-in-Chief, once told me, "Writing is like children. At some point you must let go and hope for the best."

Myth #13. Good legal writers rarely need time to edit between drafts.

Reality: According to William Zinsser, "A clear sentence is no accident. Very few sentences come out right the first time, or even the third time."[1] Put your project aside a few times while you write and edit. You'll catch mistakes you didn't see earlier and make improvements you might not have thought of earlier. Read aloud: "By relying on your ear — not just on your mind's ear — for guidance, you will also find more ways to improve your phrasing."[2] Self-editing requires objectivity. If you have an editor, take advantage. Welcome suggestions gratefully, and think about them, even if you ultimately reject them. Editors, unlike writers, always consider the only one who counts: the reader.

Myth #14. No one cares how you cite — so long as your citations can be found.

Reality: Legal readers can tell from the quality of your citation whether your writing and analysis will be good. If you're sloppy about citations, you might be sloppy about other, more important things. Readers know that writers who care about citations care even more about getting the law right.

Some judges and law clerks insist they care not at all how lawyers cite, so long as lawyers give the correct volume and section numbers so that citations can be found. Judges and law clerks who insist they couldn't care less about lawyers' citing say so for one or more false reasons: as code to suggest they're so fair and smart they can see through the chaff to let only the merits affect their decision-making; because they themselves don't know the difference between good citing and bad; or to communicate their low expectations of the lawyers who appear before them.

Many judges and law clerks tolerate improper citation. But you should make the effort to cite properly, for yourself and your client. Improper citations detract from your credibility. And citing improperly won't give you the chance to persuade now and to use your citations as future references. Citing properly "dictates that you include the information your readers need to evaluate your legal argument."[3] Use citations to strengthen, not lengthen, your writing, and use pinpoint citations to refer your readers to the exact page at which your point is made.

> Organizing before writing lets you focus on what to say and how to say it.

Myth #15. Only perfectionists care about occasional typographical errors.

Reality: Because lawyers want to catch their readers' attention, "something as trivial as a typographical error can detract from the message."[4] Spell-check every time you exit your file. Proofread carefully on a hard copy as well. Proofreading reflects pride of authorship. Readers find proofreading mistakes easily — more easily than writers do. These are the same readers who pay little attention to what you write until you make a mistake. Proofreading mistakes adversely affect legal writing to a degree out of proportion to their significance. The impor-

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tance of proofreading is reflected in the effect that the absence of proofreading has on readers: "Readers expect a level of competence, care, and sophistication in writing. When those elements are missing, [writers] presumably [do] not possess the necessary legal skills or fail to display consideration for [their] audience."[5]

Myth #16. Legal writing may be informal.

Reality: Whatever the legal writer's goal — to persuade, to inform — the correct tone when writing is formality without inflation. Formality and informality should be balanced. When writing, lawyers should use words they use only in polite conversation. Informal writing "suggest[s] a less respectful tone, an impression you certainly do not want to give a client or a court."[6] For example, contractions, which are warm and friendly, belong in e-mails and *Legal Writer* columns but not in briefs. Slang and colloquial and breezy writing, which indicate familiarity, don't belong in briefs either.

Myth #17. Prose in legal writing is best directed to the highest common denominator.

Reality: Many lawyers mistakenly use legalese in their writing. But legalese is "verbose and gratuitously technical, serving no purpose other than to mystify and shroud the subject matter in a veil of overblown prose."[7] The problem is that many lawyers say to themselves, "'If I don't use legalese, I won't sound professional.' . . . . 'If I change the specific phrases, the judge will rule against me.'"[8] Lawyers, judges, and clients alike favor concise, simple writing. Legalese makes writing lengthy and difficult to understand, but "[c]ourts now demand brevity, and clients demand plain English."[9]

Legal writing should be directed to smart high-school students. If they understand you, so will a more educated readership. Keep your words, sentence structure, paragraphs, and organization simple. Complex prose is weak prose. The erudite explain difficult concepts in easy-to-read language. From Harvard Law's Warren: "[T]he deepest learning is the learning that conceals learning."[10]

Myth #18. Legal writing has little to do with reading nonlegal subjects.

Reality: Writing has everything to do with reading — from finding good models, to assessing the merits of a written argument, to learning to think clearly.

Reading cases isn't the best way to learn legal writing. Frankly, some judges write poorly.[11] Some law school professors select cases under the Socratic method to make their students feel inadequate or to make them think like lawyers: "Not many readers can defend the prose of judicial opinions selected for case books — a style students instinctively assume is 'the way law looks.'"[12] Opinion writing sets the standard by which many lawyers write. According to Temple Law Professor Lindsey, "Unfortunately, court opinions influence the writing styles of students, lawyers, judges and even law professors. That [is] a distressing, or at least sobering, thought for all of us. If you are what you eat, you write what you read. Garbage in, garbage out."[13]

So what should you do if reading opinions won't teach you about good legal writing?

University of Connecticut's Professor Lindgren suggests returning to school, but "[i]f school is not the answer for most of us, what is? A few people may learn to write from their supervisors on the job, but most will have to learn the same way I am trying to — by reading style books."[14]

St. John's Professor Falkow "combat[s] the onslaught of poor legal writing in part by using non-legal examples to illustrate concepts of good legal writing."[15] She tells her students "to engage . . . in active reading, which can help them become better writers while simultaneously assuring them that models need not all derive from legal rhetoric."[16]

Only reading broadly and critically will lead a writer to study the vocabulary and rules of writing. Most great legal writers stress that reading nonlegal subjects is a prerequisite to good lawyering. This was Justice Frankfurter's advice to a 12-year-old who wanted to become a lawyer: "The best way to prepare for the law is to come to the study of law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give."[17]

Myth #19. Outlining increases the workload. It's just one more thing to do.

Reality: Organizing before writing avoids problems. One problem is not including important information: "A gap in your logic caused by poor organization can give your opponents an opening for attack."[18] Another is repetition. The key to organization is to say it once, all in one place. Organizing before writing lets you focus on what to say and how to say it.

One form of organization is a written outline. An outline helps. It "not only provides the organization necessary to complete a complex writing task, but serves as a perpetual reminder of the 'big picture.'"[19] Organizing by outline conserves energy, especially if the case is complicated.

There are many different methods of generating an outline. The traditional method is the Roman-style outline. In

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this outline, main ideas are listed by Roman numerals, with supporting sub-points listed in the English alphabet and the sub-sub-points in Arabic numerals. The main points and sub-points are ordered according to your analysis.

For lawyers who think visually, a diagram or flowchart will work. The core idea is written in the middle of a blank page. Arrows connect the main points to the core point and sub-points to the main points.

Brainstorming works for lawyers who have many ideas but can't connect them: list all possible points randomly, and then group the points. That leads to a group of main points and supporting points.[20]

These are just a few ways to generate an outline. Experiment until you're comfortable with a way to outline.

Those who hate to outline should be flexible, but outline they should. Not outlining often means spending more time overall. If you outline, you'll have a vision before you start, you'll know what goes where, and you won't forget or repeat things.

Once you've outlined, organize. In the argument section of a persuasive brief, start with your strongest points — those on which you're most likely to win. If two points are equally strong, go first with the point that'll win the largest relief: dismissing the indictment rather than reducing the sentence, if, say, you're representing a defendant in a criminal case. Alter that pattern to arrange your points logically, to order the elements or factors listed in a statute or seminal case, or to begin with a threshold argument, like statute of limitations before the merits.

Once you've ordered your arguments, order what goes within each argument. This, too, should be outlined. One way to do that in the argument section of a persuasive brief is to CRARC — *The Legal Writer*'s patent-pending formula — which stands for Conclusion on the Issue, Rules of Law, Application of Fact to Law, Rebuttal and Refutation, and Conclusion on the Requested Relief. Start ("C") by giving your conclusion on the issue ("The trial court allowed the People to offer inadmissible hearsay."); then ("R") state the law, giving your best rules and citations first; then ("A") apply law to the facts from your fact section, giving your best facts first; then ("R") present your adversary's leading facts and legal arguments honestly and rebut them without dwelling on them, making sure not to repeat what's in your Rule section; and then ("C") conclude by stating the relief you seek ("This Court should therefore reverse the conviction.").

Myth #20. Lawyers should trust their supervisors when they're told, "Just give me a draft."

Reality: Many new lawyers believe that a supervisory lawyer's most common fib is to instruct the new lawyer to submit "only a draft." The problem here is communication, not dishonest supervisors: "[When a supervisor tells you to] 'Just give me a *quick* draft', 'Just *whip off* a draft', or 'Just dictate a *rough* draft' . . . [t]he emphasized words should trigger red lights in your mind."[21] A seasoned lawyer's draft is a less-seasoned lawyer's final product. A less-seasoned lawyer's draft provides little help to a seasoned attorney, and especially a judge, who might've forgotten that it takes years to write well. The solution: New lawyers should hand in their best work even when they're told to hand in only a draft.

Conclusion

Confess: You've fallen for some legal-writing myths. It's not too late to change. Experiment with your writing. Incorporate realities. Edit your work. And do what good lawyers do: Separate fact from fiction. ■

1. William Zinsser, On Writing Well: The Classic Guide to Writing Nonfiction 12 (25th Anniv. ed. 2001) (quoted in Richard K. Newmann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, & Style, § 6.6, at 61 (4th ed. 2001)).

2. Bryan A. Garner, *An Approach to Legal Style: Twenty Tips for the Legal Writer*, 2 Scribes J. Legal Writing 1, 34 (1991).

3. Stacey L. Gordon, *Legal Citation in Montana: Teaching Lawyers the Proper Format*, 28 Mont. Law. 7, 8 (Sept. 2002).

4. Garner, *supra* note 2, at 34.

5. Martha Faulk, Writing Tips, *The Matter of Mistakes*, 13 Persp. 27 (2004).

6. Jacquelyn E. Gentry, *The Dirty Dozen — And How to Defeat Them*, 45 Orange County Law. 14, 17 (Sept. 2003).

7. Douglas Litowitz, *Legal Writing: Its Nature, Limits, and Dangers*, 49 Mercer L. Rev. 709, 712 (1998).

8. Susan Benjamin, *Attorneys: Cause or Cure?*, 7 Scribes J. Legal Writing 47, 49 (2000).

9. Wendy B. Davis, *Consequences of Ineffective Writing*, 8 Persp. 97, 97 (2000).

10. Edward H. Warren, Spartan Education 31 (1942).

11. *See, e.g.*, Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing*, 1 Scribes J. Legal Writing 25, 30 (1990) ("If law schools really want to improve the writing of lawyers, they should make their students study briefs, complaints, newspapers, advertisements, even direct-mail letters. But no more opinions, please. No more opinions.").

12. Terri LeClerq, Guide to Legal Writing Style xvi (2d ed. 2000).

13. John M. Lindsey, *Some Thoughts About Legal Writing*, N.Y.L.J., Oct. 27, 1992, p. 2, col. 2. Professor Lindsey overstated his case somewhat. Lawyers' and judges' writings have different functions. *See* William Domnarski, *The Opinion as Essay, the Judge as Essayist: Some Observations on Legal Writing*, 10 J. Legal Prof. 139 (1985) (arguing that judges' and lawyers' writings cannot be analyzed together). And if lawyers shouldn't emulate judicial writing styles, they shouldn't emulate law professors' styles, either. *See* Judith S. Kaye, *One Judge's View of Academic Law Review Writing*, 39 J. Legal Educ. 313, 320 (1989) (arguing that law professors "are writing for each other"). The last way to learn how to write a brief is to study the writing style of the law-review article.

14. James Lindgren, *Style Matters: A Review Essay on Legal Writing*, 92 Yale L.J. 168, 168–69 (1992) (book review).

15. Michele G. Falkow, *Pride and Prejudice: Lessons Legal Writers Can Learn From Literature*, 21 Touro L. Rev. 349, 350 (2005).

16. *Id.* at 351.

17. Felix Frankfurter, *Advice to a Young Man Interested in Going into Law*, *in* The Law as Literature 725 (Ephraim London ed. 1960).

18. Robert P. Charrow et al., Clear & Effective Legal Writing 135 (3d ed. 2001).

19. Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 J. Legal Writing Inst. 225, 236 (1999).

20. M.H. Sam Jacobson, *Learning Styles and Lawyering: Using Learning Theory to Organize Thinking and Writing*, 2 J. Ass'n Legal Writing Directors 27, 56 (2004).

21. Wayne Schiess, Writing for the Legal Audience 30 (2003) (quoting D. Robert White, The Official Lawyer's Handbook 109–10 (1983) (alteration in Scheiss).

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