

Columbia Law School

From the Selected Works of Hon. Gerald Lebovits

September, 2007

Do's, Don'ts & Maybes: Legal Writing Don'ts—Part II

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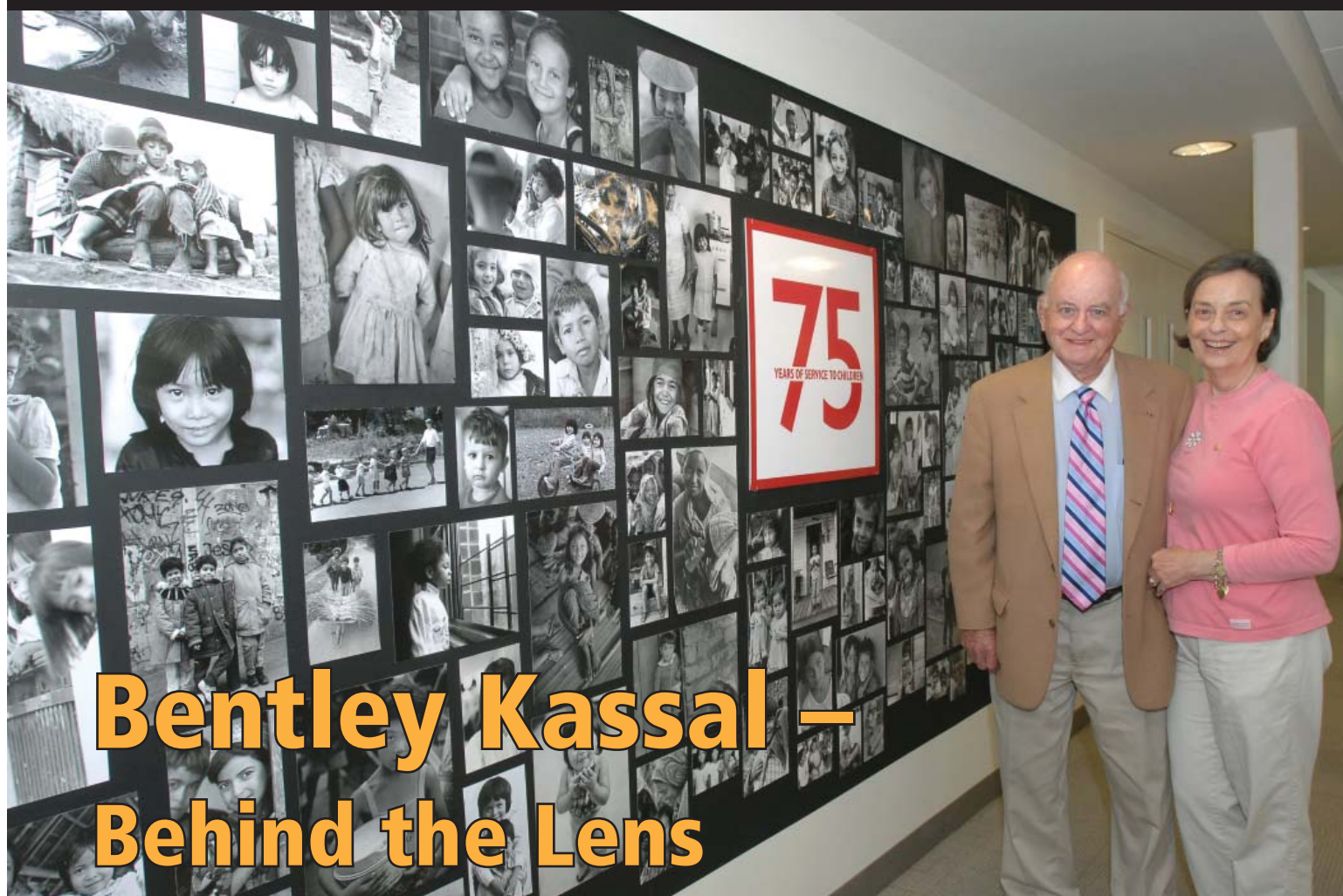
SEPTEMBER 2007

VOL. 79 | NO. 7

NEW YORK STATE BAR ASSOCIATION



Journal



Bentley Kassal – Behind the Lens

Judge, Attorney, Children's Advocate

by Skip Card

Also in this Issue

The Lesson of Yukos Oil
Resolving "Liens" in
Personal Injury Settlements
New York's Judicial
Selection Process
Successor Liability



Do's, Don'ts, and Maybes: Legal Writing Don'ts — Part II

In the last column, the Legal Writer discussed the 13 things you shouldn't do in legal writing. We continue with 13 more don'ts — the things writers should hate.

14. Hate Incorrect Tenses. Mismatched tenses confuse readers. State current rules in the present tense, past rules in the past tense, and past facts in the past tense. Past fact but current rule: "The court held in *Alpha v. Zeta* that statutory rape is illegal even if the victim consents." Past fact and past rule: "Until the court reversed *Zeta v. Alpha*, the rule was that . . ." Past fact: "The defendant ran the red light." (Not "runs.") Past but still-valid rule: "This court has held that . . ." Past fact, permanent truth in dependent clause: "Albert Einstein proved that E equals mc^2 ."

15. Hate Metadiscourse. Metadiscourse is discourse about discourse. It's throat clearing. Get to the point without a running start that occupies space but adds nothing. Delete the following: "After due consideration," "as a matter of fact," "bear in mind that," "for all intents and purposes," "it appears to be the case that," "it can be said with certainty that," "it goes without saying that," "it is clear that," "it is important (or *helpful* or *interesting*) to remember (or note) that," "it is significant that," "it is submitted that," "it should be emphasized that," "it should not be forgotten that," "the fact of the matter is," and "the point I am trying to make is that." Example: "Please be advised that your hair is on fire." *Becomes*: "Your hair is on fire."

16. Hate "Of." Readers who see "of" know you're wordy. Eliminate "of" by

creating possessives or by inverting or rearranging the sentence. *Possessive example*: "The foregoing constitutes the decision and order of the court." *Becomes*: "This opinion is the court's decision and order." *Rearranging and inverting examples*: "I am a fan of the Doors." *Becomes*: "I am a Doors fan." "Because of Judge Doe's status as a judge . . ." *Becomes*: "Because Judge Doe is a judge . . ." "He's a justice of the Supreme Court of the State of New York." *Becomes*: "He's a New York State Supreme Court justice." "You're not the boss of me." *Becomes*: "You're not my boss."

the grounds of" *becomes* "because." "Regardless of whether or not" *becomes* "Regardless whether." "With the exception of" *becomes* "except." Also, eliminate "type of," "kind of," "matter of," "state of," "factor of," "system of," "sort of," and "nature of."

17. Hate Redundancies. Redundancy is the unnecessary repetition of words or ideas. "Advance planning" *becomes* "planning." "Adequate enough" *becomes* "adequate." "Any and all" *becomes* "any." "As of this date" *becomes* "today." "At about" *becomes* "about." "At the present time" *becomes* "now." "At the time when"

Get to the point without a running start that occupies space but adds nothing.

If the possessive looks awkward, keep the "of." "Subdivision B's remedies." *Becomes* "The remedies of Subdivision B." "The Fire Department of the City of New York's (FDNY) policies." *Becomes*: "The policies of the Fire Department of the City of New York (FDNY)."

Delete "as of." "The attorney has not filed the motions as of yet." *Becomes*: "The attorney has not filed the motions yet." Don't use "of" prepositional phrases: "Along the line of" *becomes* "like." "As a result of" *becomes* "because." "Concerning the matter of" *becomes* "about." "During the course of" *becomes* "during." "In advance of" *becomes* "before." "In case of" *becomes* "if." "In lieu of" *becomes* "instead of." "In the event of" *becomes* "if." "On

becomes "when." "By the time" *becomes* "when." "Complete stop" *becomes* "stop." "During the time that" *becomes* "during." "Each and every" *becomes* "each" or "every," but not both. "Few in number" *becomes* "few." "For the reason that" *becomes* "because." "If that is the case" *becomes* "if so." "In the event that" *becomes* "if." "Necessary essentials" *becomes* "essentials." "Necessary requirements" *becomes* "requirements." "On the condition that" *becomes* "if." "Several in number" *becomes* "several." "Sworn affidavit" *becomes* "affidavit." "True facts" *becomes* "facts." "Until such time as" *becomes* "until." "Whether or not" *becomes* "whether."

18. Hate Jargon, Slang, Colloquialisms, Trendy Locutions,

CONTINUED ON PAGE 58

and Euphemisms. Jargon is terminology that relates to a specific profession or group. Don't use words or phrases only you or another lawyer might know. *Examples:* "In the instant case" or "in the case at bar" becomes "here" or "in this case." Or, better, discuss your case without resorting to "here" or "in this case."

Eliminate slang from formal legal writing. Slang is made up of informal words or expressions not standard in the speaker's dialect or language and which are used for humorous effect. Use "absent minded" instead of "out to lunch," "drag" or "take" instead of "schlep," "jewelry" or "money" instead of "bling," "marijuana" instead of "weed," "police" instead of "Five-O," "stolen goods" instead of "loot" or "stash," and "respect" instead of "props."

Don't use colloquialisms. Colloquialisms are expressions that aren't used in formal speech or writing. *Examples:* "gonna" and "ain't nothin."

Readers who see small typos
assume that the writer didn't get the big
things right.

Do away with trendy phrases. They're here today, gone tomorrow. *Examples:* "bottom line," "cutting edge," "interface," "maxxed out," "need-to-know basis," and "user-friendly." Eliminate the trendy "-ize" suffixes: "concretize," "finalize," "maximize," "optimize," "prioritize," and "strategize."

A euphemism is a word or phrase that replaces a negative, offensive, or uncomfortable word or phrase. Some euphemisms for dying: "passed away," "passed on," "checked out," "kicked the bucket," "bit the dust," "bought the farm," "cashed in their chips," and "croaked." "Sanitation engineer" and "sanitation worker" are euphemisms for "garbage man." "Hooker,"

"call girl," "escort," "working girl," and "sex workers" are all euphemisms for "prostitute." Replacing one euphemism for another won't eliminate negativity or discomfort. Replacing one euphemism for another perpetuates negativity and discomfort.

If you're quoting from a witness's testimony and the slang, colloquialism, or euphemism is material to your case, then quote it.

19. Hate Typos. Typos tell readers you don't care. No one will take your writing seriously if you make obvious errors in grammar, punctuation, spelling, or syntax. Typos distract readers from the substance of your writing and make you appear unprofessional. No typo is subtle. Readers give typos greater weight than they deserve. Readers who see small typos assume that the writer didn't get the big things right. The solution is to proofread. Use someone you trust to proofread. Use your word-processing program's spell and grammar checkers. Edit on a hard copy. Read your hard copy backward. Read it out loud if the document is

important. Go from big edits to small ones: Verify that your arguments make sense, that each sentence segues into the next, that your style is consistent, and that each sentence is grammatically correct and free of spelling errors.

20. Hate Adverbial Excesses. Adverbial excesses weaken and obscure. They suggest that those who disagree with you are stupid. They also make a good, skeptical reader question whether you're right. Is it really obvious? Eliminate "absolutely," "actually," "almost," "apparently," "basically," "certainly," "clearly," "completely," "extremely," "incontestably," "nearly," "obviously," "plainly," "quite," "really," "seemingly," "surely,"

"truly," "undeniably," "undoubtedly," "utterly," "various," and "virtually." The exception is if you're confessing an error: "I'm clearly wrong" is clearly O.K.

21. Hate Cowardly Qualifiers. Leave no room to equivocate. Be brave and decisive. It's better to be wrong than cowardly. Eliminate doubtful, hedged, timid, and weaselly equivocations, phrases, and words: "apparently," "at least as far as I'm concerned," "basically," "conceivably," "evidently," "if practicable," "practically," "perhaps," "probably," "purportedly," "in effect," "it may well be," "it might be said," "it is respectfully suggested," "it seems," "more or less," "nearly," "rather," "seemingly," "somewhat," "sort of," "virtually," and "would contend." Don't cowardly combine letters and numbers. *Incorrect:* "two (2)." Legal writing isn't a check that can be forged. Also, eliminate cowardly expressions. Not only are "at or near," "on or about," and "on or before" equivocal, these expressions, which signal approximations, may not precede exact places or times. Use "at or near," "on or about," or "on or before" only when you're writing a complaint and you don't know exact places or times. Use "generally," "typically," and "usually" if you need to discuss an exception to a rule, rather than the rule. *Example:* "Generally, a municipality is not liable for its failure to provide police protection. An exception arises when a municipality and an injured party have a special relationship. A special relationship arose here."

22. Hate Foreign, Latin, and Archaic (Old English) Words. Lawyers love romance languages: French, Italian, and Spanish. Don't use foreign words. They won't help you sound more educated or sophisticated. And don't mix foreign languages with English unless you're quoting or repeating dialect. Use Latin, a dead language, only when the word or expression is deeply ingrained in legal usage ("mens rea," "supra") and when no concise English word or phrase can substitute. Use "agendas" not "agendums"; "appendixes"

not “appendices”; “curriculum” not “curricula”; “dogmas” not “dogmata”; “formulas” not “formulae”; “forums” not “fora”; “indexes” not “indices”; “memorandums” not “memoranda” or “memorandas”; and “syllabuses” not “syllabi.” Replace Latin terms with their well-known English equivalents. “Ab initio” becomes “from the start.” “Arguendo” becomes “assuming” or “for the sake of argument.” “Ergo” becomes “therefore.” “Ex contractu” becomes “in contract” or “contractual.” “Inter alia” becomes “among others.” “In toto” becomes “on the whole.” “Ipso facto” becomes “by itself” or “necessarily.” “Pro se” becomes “self-represented” or “unrepresented.” “Sui generis” becomes “one of a kind” or “unique.” “Via” becomes “by” or “because of.” Eliminate archaic words like “behooves,” “betwixt,” “eschew,” and “hither.” Example: “It behooves you to eschew archaic words.”

23. Hate Vague Referents. Readers hate writing that’s unclear about what or to whom writers are referring. Be careful with “it,” “that,” “this,” “such,” “which,” “he,” “his,” “him,” “she,” “her,” “they,” and “them.” Writers use these referents for concision. But it’s better to be clear than concise. Use these referents if they refer to one thing only. Otherwise, use as many words as you need to make your writing clear. Example: “They won’t understand you as such.” Here, the writer doesn’t clarify who won’t understand you. Also unclear is what “as such” refers to. Example: “He told Judge John Doe that he should do some research.” In this example, it’s unclear to whom the second “he” refers: Judge John Doe or the person who spoke to Judge Doe. Example: “Plaintiff failed to deliver the widgets after defendant failed to pay for them. That started the lawsuit.” It’s unclear what started the lawsuit — plaintiff’s failure to deliver or defendant’s failure to pay. Or both. Clarify vague referents by using different nouns; by repeating the same nouns; by making one antecedent singular and another plural; or by rewriting the sentence to sharpen the antecedent.

24. Hate Elegant Variation. Elegant variation is the technique by which a writer uses different terms to identify one idea, person, place, or thing. Use different words to mean different things. Don’t use synonyms to say the same thing. It’s wrong to reach for a thesaurus in this way. *Incorrect:* “The prosecutor wanted to indict the defendant. That’s why the Assistant District Attorney [the prosecutor] secured a grand jury true bill [indictment] against the suspect who was arraigned [the defendant].” To be understood, be repetitious.

Repeating articles, nouns, prepositions, and verbs adds power and helps comprehension. Repetition makes writing powerful and clear. Repetition cures inelegant variation. Examples: “In Selma, as elsewhere, we seek and pray for peace. We seek order. We seek unity.”¹ (Repetition of “seek.”) “But this time, the world was not silent. This time, we do respond. This time, we intervene.”² (Repetition of the words “this time.”) In lengthy lists or for poetic value, repeat “because,” “that,” and similar words. Then make your lists parallel. Examples: “The court found *that* the attorney lied and *that* his behavior is sanctionable.” “Lawyers advocate *because* they have something to say and *because* they’re paid to advocate.”

25. Hate Personal Opinion or Emotion. Don’t interject personal opinion or emotion. Eliminate “I (or *we*) think,” “I (or *we*) feel,” and “I (or *we*) believe.” Don’t vouch for your client.

26. Hate Logical Fallacies. A fallacy is an invalid way of reasoning. Excessive reliance on logic is problematic. Accepting a fallacy is worse: Fallacies lead to incorrect conclusions. Here are some logical pitfalls.³ Post hoc fallacy: Assuming that because one thing happens after something else, the first caused the second. Examples: “Every time I brag about how well I write, I submit something with lots of typos.” The fallacy is that if you don’t brag about your writing, you’ll submit a typo-free document. “I never had any problems with the pipes. Only after

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you moved in did the pipes burst.” The fallacy is that if the tenant had never moved in, the pipes would be intact. Dicto simpliciter: Applying the general rule to the exception. Example: “Judge X never learned grammar, but she writes well.” The fallacy is that because Judge X never studied grammar, no one need study grammar. Hasty generalizations: Jumping to conclusions without adequate sampling. Example: “Lawyer Z never edits his briefs. All lawyers from Lawyer Z’s firm are lazy.” The fallacy is that Lawyer Z, who doesn’t edit, is lazy or that because Lawyer Z is lazy, all attorneys from the firm must be lazy. Circular reasoning: An argument that begs the question of the truth of its conclusion by assuming its truth. Example: “A good brief begins with a strong opening because a strong opening makes a brief good.” The fallacy is that a good brief is a good brief because a strong opening is a strong opening.

Resuming in the November/December *Journal*, the Legal Writer will address the do’s, don’ts, and maybes relating to grammar errors, punctuation issues, and legal-writing controversies. ■

1. Excerpt from President Lyndon B. Johnson’s “We Shall Overcome” speech on Mar. 15, 1965, available at <http://www.americanrhetoric.com/speeches/lbjweshallovercome.htm> (last visited Feb. 22, 2007).

2. Excerpt from Elie Wiesel’s “The Perils of Indifference” speech on Apr. 12, 1999, available at <http://www.americanrhetoric.com/speeches/ewieselperilsofindifference.html> (last visited Feb. 22, 2007).

3. For an excellent discussion of logical fallacies, see Gertrude Block, *Effective Legal Writing* 254–56 (5th ed. 1999).

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