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Getting to Yes: Affirmative Writing

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Journal

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GOVERNMENT EMPLOYEES INVOLVED IN RESCUE EFFORTS
FOR ISSUANCE OF DEATH CERTIFICATE

STATE OF _____

COUNTY OF _____

LEGAL STEPS

IN WTC AFTERMATH

AFFIDAVIT BY REPRESENTATIVE OF THE AIRLINE

_____, being duly sworn, state a
duly authorized representative

AFFIDAVIT BY PERSON WITH PERSONAL KNOWLEDGE
FOR ISSUANCE OF DEATH CERTIFICATE

AFFIDAVIT IN
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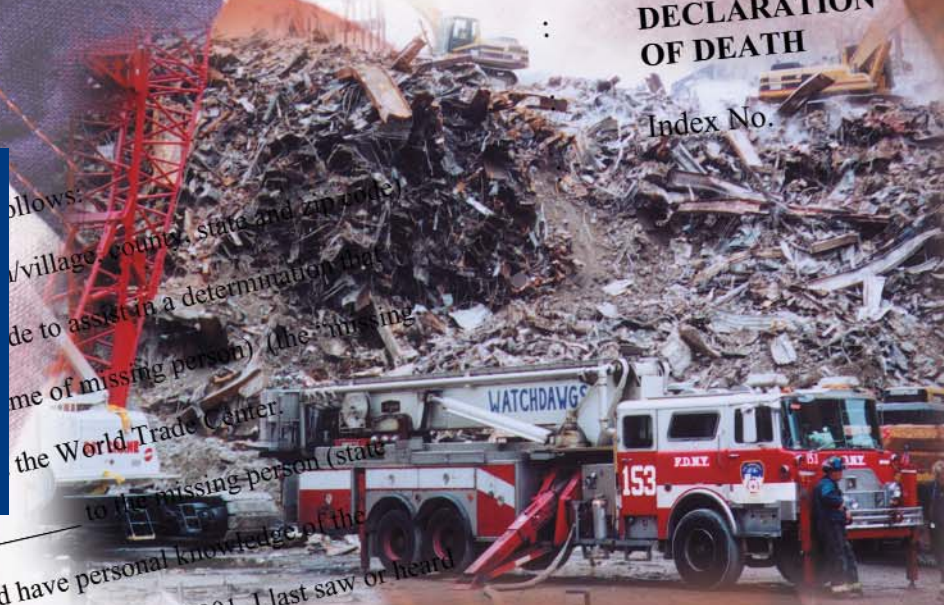
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follows:
_____, village, county, state and zip code
to assist in a determination that
me of missing person) (the missing
the World Trade Center.

person") died as a result

and have personal knowledge of the
I last saw or heard



Getting to Yes: Affirmative Writing

BY GERALD LEBOVITS

Which is the better Golden Rule? "Do unto others what you want them to do unto you" or "Do not do unto others what you would not want them to do unto you"? The answer depends on whether you emanate positive or negative energy.

Everyone knows that "thou shalt not never use no double negatives." But there is more to know about *no* than that. Clarity and honesty, in law and elsewhere, require that you prefer positives to negatives: "An affirmative statement is preferable to a negative one. The reader may doubt the scope of the negative."¹ Not for nothing, but here are some tips to help you whisper sweet little some-things.

Write even negatives in the positive. "Do not write in the negative" becomes "Write in the positive." "This argument is not without support in the cases" becomes "The cases support this argument." "We remand for proceedings not inconsistent with this opinion" becomes "We remand for proceedings consistent with this opinion."² "Do not appear in court before 9:30 a.m." becomes "Appear in court at 9:30 a.m. or later." "The non-monied spouse must not be prevented from . . ." becomes "The non-monied spouse must be allowed to . . ."

Negative vibrations. The emphatic negative is not infrequent among legal writers. "Totally null and void and of no further force or effect" becomes "Void."

Prefer negational antonyms to negatives. Write *false* instead of *not true* and *true* instead of *not false*. "Respondent was not present" becomes "Respondent was absent."

Nix negative words. If you can, avoid *barely*, *denial*, *disapprove*, *except*,

hardly, *neglect to*, *neither*, *never*, *nor*, *not*, *other than*, *prohibit*, *provided that*, *scarcely*, *terminate*, *unless*, *void*.

Knock negative prefixes and suffixes. Be on guard for *dis-*, *ex-*, *il-*, *im-*, *ir-*, *-less*, *mis-*, *non-*, *-out*, *un-*.

Eliminate negative combinations. Cut *never unless*, *none unless*, *not ever*, *not otherwise*, *not unlike*, *rarely ever*. Rarely use *seldom ever* and *seldom* use *rarely ever*: "The attorney rarely ever [or *seldom ever*] shows up on time" becomes "The attorney rarely [or *hardly ever*] shows up on time." Or "The attorney rarely if ever shows up on time." Do not use *but*, *hardly*, or *scarcely* with *not*. "I could not but laugh" becomes "I could but laugh."

One but is better than two. Use *but* instead of *but however*, *but nevertheless*, *but that*, *but yet*, *but what*, and *not but*. "The court does not question but that defendant is liable" becomes "The court does not question that defendant is liable." Or, in the positive, without metadiscourse: "Defendant is liable." "I do not own but one CPLR" becomes "I own but one CPLR." Or "I own only one CPLR."

Use "not" as a negative, not as a positive. "I need to know whether you cannot go to trial" becomes "I need to know whether you can go to trial."

Do you care about this? "The partner could care less who her associate will be" becomes "The partner could not care less who her associate will be."

Negative measurements do not add up. The phrase "no less than four" can mean "at least four" or "four or more." "No smaller than" can mean "as large as," "at least as large as," or "the smallest." "No more than" can mean "the maximum" or "the most." "The maximum" or "the most" can be limiting negatives (*everything is less*) or a positive (*the best*).

Negative pregnant. A *negative pregnant* is a deadly affirmative. Lender: "You owe me \$100." Borrower: "I do not owe you \$100." The borrower just admitted owing some money, though less than \$100. The borrower should have said, "I owe you nothing."

Affirmative pregnant. An "affirmative pregnant" is a deadly negative. Lender: "You owe me \$100. Borrower: "I paid you \$50." The borrower just admitted owing \$50. The borrower should have said, "I owed you only \$50, and I paid you already."

Never-never land. The word *never* means *not ever*. "I never made that argument last July" becomes "I did not make that argument last July."

Clarity and honesty, in law and elsewhere, require that you prefer positives to negatives.

Not only . . . but also. "Not only do I like civil practice but also family law" becomes "Not only do I like civil practice but I also like family law." Or "I like not only civil practice but also family law." Or, in the positive, "I like civil practice and family law."

So . . . as, as . . . as. Some (but not all) sticklers suggest using *so . . . as* in only negative combinations: "The prosecutor is not so clever as the defendant." All sticklers suggest using *as . . . as* in positive combinations: "The prosecutor is as clever as the defendant."

Every and all negatives. "Not everyone is a good writer" means "Some write well and some do not write well." The sentence "Everyone does

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not write well" is ambiguous. It means either "Some write well and some do not write well" or "No one writes well." "All these cases are not applicable" means "Not a single case is applicable," but the writer meant, "One or more of these cases is inapplicable."

Not/because. Placing a *not* before a *because* allows for an explanation different from what you mean. "I will not write this brief *because* I am tired" may mean "I will not write this brief, not because I am tired, but for a different reason."

The wordy no. "No other alternative" becomes "No alternative." "No such a reason" becomes "No such reason." "No such a thing" becomes "No such thing."

Be positive about negatives. The word *negative* is pretentious for *unfavorable* or *no*. "The judge's response was in the negative" becomes "The judge said no." *Affirmative* is pretentious for *favorable* or *yes*. "The judge's response was in the affirmative" becomes "The judge said yes."

The "if not" conundrum. Does the phrase "a necessary, if not critical, factor" mean that "the factor may be critical" or that "the factor is not critical"? Strike this ambiguous *if not* construction.

Drop double positives, not just double negatives. Do not use two imperatives in one sentence. Use only one *requires*, *must*, or *should*. "The statute requires that a plaintiff *must* . . ." becomes "The statute requires that a plaintiff . . ." Or "Under the statute a plaintiff *must* . . ." "The statute requires that a plaintiff *should* . . ." becomes "The statute requires that a plaintiff . . ." Or "Under the statute a plaintiff *should* . . ."

Requiem for requirement. Lawyers often write that a statute *requires* that a litigant do something. But the statute may require only that a litigant do something to secure a remedy. The problem is that the writer does not complete the sentence. Consider: "The Penal Law requires that

the People prove defendant's guilt." If the Penal Law were to require that proof, the People might go to jail if they failed to prove guilt. The Penal Law requires only that the People prove guilt before a defendant may be found guilty.

Do not reasonably doubt. Some legal expressions are ambiguously framed in the negative. Use them and you will be found guilty as charged. One example: "Found not guilty beyond a reasonable doubt" becomes "Not found guilty beyond a reasonable doubt."

A few exceptions arise to not being so negative. Among the exceptions are litotes, meiosis, and hidden negatives. Use litotes for understated negative emphasis. From Lloyd Bentson to Dan Quayle during the 1988 vice presidential debate: "I knew Jack Kennedy. Jack Kennedy was a friend of mine. And, Senator, you're no Jack Kennedy." From Justice Felix Frankfurter: "One who belongs to the most vilified and persecuted minority in history is not likely to be insensible to the freedoms guaranteed by our Constitution."³ From New Jersey, our not-incontiguous sibling state: "Mrs. Barber is the kind of a wife who stands by her husband in all the troubles he would not have had if he had not married her."⁴ Use hidden legal negatives without overusing them. For example, *constructive*, as in *eviction*, *notice*, or *possession*, is not real but may be treated as real. And use meiosis, not to deceive, but to understate: "Justice Brandeis wrote a dissent or two in his lifetime."

To avoid whispering sweet little nothings, Orwell had a Golden Rule. Memorize this, he wrote, to radiate positive energy: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."⁵ Writers should write for the ear, not the eye. But apply the smell test to negatives. When it comes to *aye's* and *no's*, the nose knows best. Writing in the negative is an affirmative way not to get to yes. Negatives make your glass

half empty and your glasses half blurry. Of that I am positive.

1. James D. Hopkins, *Notes on Style in Judicial Opinions*, 8 Trial Judges J. 49 (1969), reprinted in Robert A. Leflar, *Quality in Judicial Opinions*, 3 Pace L. Rev. 579, 585 (1983).
2. Witkin calls this the double-negative directive. See Bernard E. Witkin, *Manual on Appellate Court Opinions* § 82, at 146 (1977) ("Many courts have abandoned the double negative form and use an affirmative direction.").
3. *West Virginia State Bd. of Educ. v. Barnette*, 319 U.S. 624, 646 (1943) (Frankfurter, J., dissenting).
4. *Bondarchuk v. Barber*, 135 N.J. Eq. 334, 334, 38 A.2d 872, 872 (Super. Ct. 1944) (Jayne, V.C.).
5. George Orwell, *Politics and the English Language*, in 4 *The Collected Essays, Journalism and Letters of George Orwell* 127, 138 (1968).

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