Do's, Don'ts, and Maybes: Legal Writing

Do's—Part I

Gerald Lebovits
Harness Racing and New York’s Ethics Laws

How politicians’ interest in the harness tracks gave New York its ethics laws.

by Bennett Liebman

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The Wave of the Future or Blatant Copyright Infringement?
To create a legal document, you must know your audience, the purpose of your document, how to organize, and when to stop researching and start writing. You must follow deadlines. You must comply with court and ethics rules. You must edit your work and have pride in it. That’s the writing process.

Once you’ve perfected the process you can focus on the final product. The way to create a good final product is to know legal writing’s do’s, don’ts, and maybes. This column and the next offer the Legal Writer’s top 26 do’s — a double baker’s dozen. Following these two columns will be two columns on legal writing’s don’ts. The Legal Writer will then continue with columns on grammar errors, punctuation issues, and legal-writing controversies. Together this series of columns covers legal writing’s do’s, don’ts, and maybes.

There’s no one way to write it right. Good writers do things differently. But writers and readers always agree about whether a document is written well. Despite the controversies about some legal-writing details, there’s a consensus about what’s important: accuracy, brevity, clarity, and honesty. Here’s the consensus — the things writers should love.

1. Love the Right Tone. Tone helps determine whether readers will accept what you write. To get your tone right, ascertain whom you’re writing for. Anticipate the reader’s concerns. Always be measured, rational, and respectful. Never be bitter, condescending, defensive, defiant, sarcastic, self-righteous, or strident. Don’t

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infer that the spilling was intentional. When you later argue it was intentional, the reader will agree. Surround unfavorable facts with favorable facts for a halo effect. Emphasize favorable facts and de-emphasize unfavorable ones. In a brief, never let two sentences pass without letting the reader know which side you represent.

In an office memorandum, present the facts neutrally and objectively, with no intention to persuade the reader. The reader shouldn’t know from the facts what you’ll ultimately recommend or predict.

In a brief’s Argument section or an office memorandum’s Discussion section, apply only those facts mentioned in your facts. In your facts, use only those facts you’ll apply in the Argument or Discussion section. Review your facts after preparing the Argument or Discussion sections to confirm that you’ve included all necessary facts. Eliminate irrelevant dates, facts, people, and places. The record must support every assertion of fact, which comes from pleadings, affidavits, and deposition, hearing, and trial transcripts. Always cite the record for facts mentioned anywhere in a brief or office memorandum.

The brief’s Statement of the Case or Counterstatement should begin with something about the person you want the reader to identify with or hate. Start from that person’s perspective. End the Statement of the Case or Counterstatement with procedural history. The office memorandum’s Facts section should begin with procedural history.

5. Love Clarity. Jewelers say that the better the clarity, the better the quality. The same applies to legal writing. Omit unnecessary fact, law, and procedure. In sentences, paragraphs, and sections, put essential things first. Assume that the reader knows nothing about your case. Write directly, not indirectly. Example: “Justice is an important concept.” Becomes: “This court should reverse the conviction.” State clearly and repeatedly why you’re writing. What do you want? What relief are you seeking? Go from general to specific, but don’t generalize. Raise the issue before you explain it. Give the rule before you give the exception. Give rules and exceptions in separate sentences. Lay a foundation before you discuss something: Don’t discuss the terms of a contract before you establish that the parties have a contract. Familiarize readers with a case before you analogize or distinguish it. Introduce characters before you talk about them.

6. Love Getting to the Point Fast. State your point in the first paragraph on page one of your document or, in a brief, in the Argument section. Putting your main point up front gives your readers the conclusion in case they don’t read further. It tempts readers to continue and puts everything in context. Consider the shape of a funnel or inverted pyramid: give the conclusion (the big picture), then detail. Stating your point immediately in a brief means including a thesis paragraph after each point heading. The thesis paragraph is the roadmap, the organization to your argument. In the topic sentence — first sentence — of the thesis paragraph, state your conclusion on the issue. Then explain how you’ve reached that conclusion: why you should win. Conclude the thesis paragraph with a thesis sentence: what you want the court to do. In an office memorandum, begin the thesis paragraph with a topic sentence: a statement of your issue. Then state the law objectively on the issue from your topic sentence. Conclude the thesis paragraph with a recommendation or prediction.

7. Love Succinctness. Readers have short attention spans. Don’t repeat yourself: Say it once, all in one place. Don’t dwell on givens. Don’t give the entire procedural history unless doing so advances your argument or proves necessary in context. Include only legally significant facts, apply only relevant law to those facts, and tell your readers only what they need to know. Include only facts that advance your theme and help good arguments get noticed. Cite only to legal authority that’s helpful to your argument. Unless you want to analogize or distinguish your case from the authority you’re citing, don’t analyze the authority in depth or give its facts. Don’t add unnecessary text by defining and qualifying.

8. Love Concision. Use only necessary words: the fewest words without losing precision in language, because precision is more important than concision. Make every word count. If the last line of a paragraph has only a few words, cut words out of the paragraph to save a line. Deleting unnecessary words will make your writing tighter and your document shorter. This technique lets you come within the page limit. Obliterate the obvious. Incorrect: “If respondent is evicted, he will have to leave his apartment.” Replace coordinating conjunctions (“and,” “but,” “for,” “nor,” “or,” “so,” “yet”) with a period. Then start a new sentence. Transfer to a second sentence most parenthetical expressions, also called embedded clauses — an internal word group that has its own subject and verb. Doing so shortens your sentence and thus is concise, even though it might add text. Example: “The judge’s chambers, which has a view of the Empire State Building, is on the ninth floor.” Becomes: “The judge’s chambers is on the ninth floor. It has a view of the Empire State Building.” Delete “as” and “to be,” if possible. Examples: “Some consider cigarette smoking as a crime.” Or: “Some consider cigarette smoking to be a crime.” Become: “Some consider cigarette smoking a crime.” Don’t begin sentences with “in that” or use “in that” in an internal clause: “In that the judge’s cousin was a litigant, the judge recused herself.” Becomes: “The judge recused herself because her cousin was a litigant.” Delete “being.” Example: “The attorney was regarded as being a good writer.” Become: “The attorney was regarded as a good writer.” Wipe out “of” and “as of.” Delete the following: “in fact,” “in point of fact,” “as a matter of fact,”
“the fact is that,” “given the fact that,” “the fact that,” “of the fact that,” and “in spite of the fact that.” Save “in fact” to state facts, not opinions. Incorrect: “The opinion relies on the fact that testimonial statements are inadmissible at trial.” Correct: “The opinion relies on the rule that testimonial statements are inadmissible at trial.” Strike the nonstructural “who,” “who are,” “who is,” “whoever,” “whom,” “whomever,” “which,” “which is,” “which are,” similes, parallelism, and antithesis. Metaphors, which compare unlike things that have something in common, make abstract concepts concrete. Examples: “You don’t get a second bite from the apple.” “Property rights are a bundle of sticks.” “The court must suppress the fruit of the poisonous tree.” A simile is a comparison using “as,” “as if,” “as though,” or “like.” Examples: “A judge is like an umpire at a baseball game.” Judges are like funnels: an important case in which you must preserve the record for appeal. State your main point within 90 seconds. Recite facts chronologically. Add detail to tell a memorable story. Cut out facts that don’t advance your argument. Use 50 to 75 words to frame your issue.

In a brief, use separate sentences to create a statement-statement-question format for each Question Presented. Starting your question with “whether” and writing one long, convoluted

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“which were,” “that,” “that is,” “that are,” and “that were.” Example: “The point that I’m making is that . . . .” Becomes: “The point I’m making is that . . . .” Trim “to” stilts: “Help to prepare” becomes “help prepare.” “In an attempt to,” “in an effort to,” “in order to,” “so as to,” “unto,” “with a view to,” and “with the object being to” become “to.” “In order for” becomes “for.” “Is authorized to” becomes “may.” “With reference to,” “with regard to,” and “with respect to” become “about.” Eliminate pleonasms. They’re unnecessarily full expressions. Example: “The judge, who e-mailed me, he likes me.” Becomes: “The judge, who e-mailed me, likes me.”

9. Love Concreteness. Don’t just tell your readers something; Show them what you mean. Show by describing people, places, and things. Abstract conclusions don’t help readers understand the problem. Turn the general and vague into the particular and vivid. Write so that readers will hear, see, smell, taste, and touch your ideas. Prefer concrete nouns and vigorous verbs to adverbs and adjectives. Use adjectives and adverbs sparingly. Poor examples: “The man is tall.” Or: “The man is very tall.” Good example: “The man is seven feet, three inches tall.”

10. Love Memorable Rhetoric. Rhetoric is the art of marshaling and expressing argument. Embrace rhetorical strategies by using metaphors, There’s a big opening at the top and all the law clerks and the staff attorneys pour stuff in there.” Another effective device is parallelism: a similarity of structure in a pair or series of words, phrases, and thoughts. Examples: “A government of the people, by the people, and for the people.” “We will not tire, we will not falter, and we will not fail.” “I came, I saw, I conquered.” Antithesis is powerful when it concisely contrasts ideas of the same order. Examples: “Injustice anywhere threatens justice everywhere.” “Never in the field of human conflict was so much owed by so many to so few.” “We must all hang together or we will all hang separately.”

11. Love Issues. A common mistake law students make is to focus on citations instead of issues and arguments. Stress issues and arguments, not citations. Give rules first. Then support them with citations.

Here are some suggestions on writing issues, called Questions Presented in an brief or Questions Presented in an office memorandum. Choose one to four issues. An issue is an independent ground on which the relief you seek can be granted if the reader agrees with you on that issue and disagrees with you on everything else. Avoid trivial issues. The only time you should raise as many points as possible — the kitchen-sink approach — is if you have sentence is superficial and ineffective. The first two sentences in this statement-statement-question format present the legal controversy and introduce relevant facts. The last sentence is a question that goes to the heart of the issue. Write the question so that the answer is yes. The answers to the Questions Presented are found in your point headings. In an office memorandum, write the Issues Presented as a question, one sentence long, that addresses the issues. To prevent a long, intricate question, write the Issues Presented in a statement-statement-question format. After the Issues Presented, include an Answer section — answer the Issues Presented with a “yes,” “no,” or “maybe” and the concise reasons for your answer, without repeating the question and without using “because.”

First argue the issue that has the greatest likelihood of success. If all claims have the same likelihood of success, discuss the claim that’ll affect the litigation most. In a criminal appeal in which you represent the defendant, for example, discuss whether the court should grant your client a new trial before you discuss whether the court should reduce your client’s sentence.

Exceptions: Your first issue should be a dispositional threshold issue — jurisdiction or statute of limitations — if you have one. Move logically
through statutory or common-law tests. Discuss your issues in the order in which the statute or case laid out a multi-factor test. When the answer to one issue depends on the answer to an earlier question, resolve the first issue first. Discussing claims and issues in the order they arose facilitates understanding if the claims and issues arose chronologically. Resolve issues by a hierarchy of authority: constitutional issues first, then statutory issues, then common-law issues.

In opposition papers, don’t copy the way your adversary ordered the issues. Tell your reader which issue you’re opposing, but order your opposing issues the way it works for your client, not your adversary.

12. Love Large-Scale Organization: Headings. Structure your writing so that the reader follows your thoughts from the beginning to the end of the document. Identify each section in your brief or office memorandum: “Question Presented” or “Issue Presented”; “Statement of the Case” (opening brief) or “Counterstatement” (replying brief) or “Facts”; “Argument” or “Discussion”; and “Conclusion.”

After you’ve figured out the issues and how to order them, divide your brief’s Argument section or office memorandum’s Discussion section into headings to tell readers where you’re going. Headings are signposts. Use roman numerals for your point headings (I., II., III.). Some writers believe that you should use all capitals for your point headings. The Legal Writer recommends capitalizing only the first letter of each word. All capitals is unreadable. For your subheadings (A., B., C.), capitalize the first letter of each word: Don’t use all capitals. For your sub-subheadings, use figures (1., 2., 3.). You can’t have a subheading (A.) or a sub-subheading (1.) on its own.

With subheadings or sub-subheadings, you need two or more subheadings (A., B.) or sub-subheadings (1., 2.). The exception is that you can have a single point heading (I.) on its own. Use a period after each heading, subheading, or sub-subheading. Single-space your headings.

All headings, subheadings, and sub-subheadings should be one sentence long, although they may contain a semicolon. They must be concise, descriptive, and short.

Point headings in a brief answer the Questions Presented. Match the number and order of your Questions Presented with your point headings. If you have one Question Presented, you should have one point heading; if you have two Questions Presented, have two point headings. If you have two or more Questions Presented, mention them in the same order in the table of contents and in the Argument section. In the office memorandum’s Discussion section, address the issues in the same order as you did in the Issues Presented.

In a brief, write headings in an affirmative, argumentative, and conclusory way — the conclusion you want after applying law to fact. The more subheadings or sub-subheadings, the more conclusory the point headings. The argument in the subheadings should add up to the argument in the point headings. The sub-subheadings should add up to the subheadings. Too many headings will break up the text too much. Your document will be disjointed and have no flow. Too few headings will make your document disorganized. To determine whether you’ve enough headings, read all the headings in the table of contents as they appear in the brief. The argument should reveal itself.

In an office memorandum, write the headings in an objective, neutral, and informative way.

Keep your subject near its predicate. Don’t interject information between your subject and predicate. Never write ambiguous headings in which “not” precedes “because.” Will the sentence mean “Not because of this, but rather because of that”? Or “Not so, and for this reason”? Or “Because of this, but for a different reason”? Use “because” before “not,” but never use “not” before “because” unless you add a second clause or sentence.

What goes in the text after the heading, subheading, and sub-subheading shouldn’t repeat the heading, subheading, and sub-subheading. Be creative. Don’t regurgitate. Don’t even paraphrase.

In the body of your document, bold your headings, subheadings, and sub-subheadings, including the roman numerals, letters, and figures that come before them. Don’t bold anything in the brief’s table of contents or use a period after each heading. Use dot leaders in your table of contents to separate your headings from their corresponding page numbers.

13. Love Large-Scale Organization: IRARC and CRARC. For a brief’s Argument section, organize each issue using the CRARC method — the Legal Writer’s patent-pending way to organize. CRARC is an IRAC variant (Issue, Rule, Analysis, and Conclusion). CRARC stands for Conclusion, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the first Conclusion section of CRARC, state the issue and why you should prevail on it. In the Rule section, state your points from the strongest (those you’ll most likely win) to the weakest (those you’ll least likely win). After each rule, cite your authority from the strongest to the weakest and from the most binding on down. In the Analysis section, apply your rules — the law — to the facts of your case. The facts should come from the Statement of the Case or Counterstatement. In the Rebuttal and Refutation section, state the other side’s position honestly and refute it persuasively. Address adverse fact and law, even if your adversary didn’t or might not. Doing so will diffuse its impact before your reader figures out your adversary’s argument. The Rebuttal and Refutation section is placed here on purpose. The Rebuttal
and Refutation section is in the middle, not the beginning or end — places with the greatest emphasis — of the argument. You’ve begun with why you should win. You’re right because you’re right, more than because the other side is wrong. In the Rebuttal and Refutation section, don’t repeat anything you’ve written in the Rule section. In the second Conclusion section, state the relief you’re seeking on the issue.

For an objective office memorandum’s Discussion section, organize each issue using the IRARC method — the Legal Writer’s other organizational tool. IRARC, an IRAC variant, stands for the Issue, Rule, Analysis, Rebuttal and Refutation, and Conclusion. In the Issue section, state the issue objectively. In the Rule section, state the rule applicable to the issue. Then support each point with the law. In the Analysis section, apply your rules — the law — to the facts of your case. Facts come from the Facts section, which is compiled from affidavits, affirmations, and deposition, hearing, and trial transcripts. In the Rebuttal and Refutation section, create a strawman argument — the contrary argument — and then refute it. In the second Conclusion section, give your recommendation or prediction.

In the next issue, the Legal Writer will continue with a second set of 13 do’s. Following that column will be two columns on legal writing’s don’ts.

6. Sir Winston S. Churchill, 1940, on the debt due to the Royal Air Force pilots during World War II.
7. John Bartlett, Familiar Quotations 348 (15th ed. 1980) (attributing these words to Benjamin Franklin).