
Gerald Lebovits

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ADVANCED JUDICIAL OPINION WRITING
A HANDBOOK
FOR NEW YORK STATE TRIAL AND APPELLATE COURTS
Edition 7.4

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Foreword by Hon. Gary D. Spivey
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FOREWORD

*Advanced Judicial Opinion Writing* by Gerald Lebovits provides expert guidance on drafting opinions for New York State trial and appellate courts.

Gerry Lebovits is well qualified to offer this guidance. He holds advanced law degrees (M.C.L. and LL.M.) and serves as an adjunct professor (teaching “Drafting Judicial Opinions” and other courses) at New York Law School. A Housing Court judge in New York City, he was a principal court attorney in the New York State court system for almost 16 years. He has published on a broad range of legal subjects and authors a column on legal writing for the *New York State Bar Journal*. For a number of years, he has conducted judicial training seminars on opinion writing under the auspices of the New York State Office of Court Administration. Judge Lebovits’s *Handbook*, now in its seventh edition, was developed for those seminars and has been distributed widely to the New York bench.

As State Reporter, responsible for publishing the *New York Official Reports*, I examine every opinion submitted for publication in the *Reports*. The overall quality of these opinions is impressive, notwithstanding the canards about legal writing, and I’m sure that the widespread use of Judge Lebovits’s *Handbook* has contributed to that high quality. Those who seek to sharpen their writing skills but have not yet discovered the *Handbook* will find no better honing tool than this seventh edition.

Although addressed to judges, court attorneys, and law clerks, the *Handbook* is helpful to anyone involved in drafting and editing judicial opinions. (Many thumbworn copies are used in the office of the State Reporter.) And on the principle that successful attorneys write to make it easy for judges to incorporate their arguments into judicial opinions, the *Handbook* should be of interest to anyone who presents a writing to a court. Indeed, much of the *Handbook* offers advice relevant not only to judicial opinion writing, but also to any type of legal writing.

The *Handbook* explains the types and jurisprudential underpinnings of judicial opinions and the goals and philosophy of good opinion writing. It provides helpful advice on how to organize an opinion, strike the proper tone, and achieve concision. It offers practical guidance on matters of style and mechanics (including capitalization, quotation, and punctuation), grammar, and word usage (including the distinction between compliment/complement, discreet/discrete, proved/proven, and other troublesome word pairs).
Unlike the *Official Reports Style Manual*, which governs the style of the *Official Reports*, the *Handbook* focuses on writing rather than styling. But the *Handbook* also discusses styling and sometimes takes issue with the style rules in the *Manual*. My tolerance for those disagreements demonstrates that you don’t have to agree with Judge Lebovits on every point to appreciate the overall worth of his *Handbook*.

Judge Lebovits writes as he encourages others to write. His style is direct, unpretentious, and often witty. He displays the facility with language so often found among those who have mastered more than one tongue (he being at ease with the French language of his native Quebec).

Both as State Reporter and as a member and immediate past president of the American Society of Writers on Legal Subjects (Scribes), I have a strong interest in promoting excellence in legal writing. I commend the *Handbook* to those who share this interest.

Gary D. Spivey
State Reporter
ADVANCED JUDICIAL OPINION WRITING

DEDICATION

This Handbook is dedicated to the judge for whom I clerked for nearly 16 years: The Honorable Edward J. McLaughlin, Supreme Court, Criminal Branch, New York County.

PREFACE TO EDITION 7.4

In 1947, in an influential article on judicial expression, George Rose Smith asked lawyers, law professors, and judges to write about opinion writing:

"A striking omission in legal literature is the dearth of material concerning the mechanics of writing a judicial opinion. Any given case is remembered only by the decision of the appellate court, yet a law library of several thousand volumes will contain only a few pages on the technique of judicial expression. The books abound with studies of such obscure subjects as estovers, the writ of ne exeat, or the Rule in Wild's case, but almost nothing is written upon a subject that touches daily the work of lawyers and judges alike." (George Rose Smith, The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship, 1 Ark L Rev 89, 89 [1947].)

Some have published excellent pieces on opinion writing since Smith called for action. But no one, in New York or elsewhere, has covered the topic from citation to concision, precedent to parallelism, style to semicolons, temperament to tropes. The Handbook, devoted to New York opinion writing, tries to fill a void in a subject vital to the good administration of justice.

The Handbook is designed to accompany a brief lecture on opinion writing. Because the lecture is brief, the Handbook addresses details the lecture cannot cover. The Handbook and the lecture are meant to work together toward one goal: To help New York's judges and law clerks write judicial opinions.

Opinion writing cannot be taught in a lecture or learned from a handbook. Learning opinion-writing theory cannot substitute for the skills acquired by writing opinions. Writing a good opinion in a complicated case is difficult. Needed are years of practice, a judicious temperament, a devotion to detail, an ability to read critically, and an editor's strong hand. Writing a good opinion means more than getting the law and the facts right, itself a challenge. If legal writing is the hardest legal skill to master, then opinion writing is the hardest legal-writing skill to master. California Supreme Court Chief Justice Traynor said it best: Opinion writing is "thinking at its hardest." (Roger J. Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U Chi L Rev 211, 218 [1957].)
Opinion writing is hard thinking because opinion making is difficult. So difficult is opinion making that only the greatest judges can illuminate in words the process of justification. More than 80 years ago Judge Cardozo noted how hard it is for judges to explain how they rule: "The work of deciding cases goes on every day in hundreds of courts throughout the land. Any judge, one might suppose, would find it easy to describe the process which he had followed a thousand times and more. Nothing could be further from the truth." (Benjamin N. Cardozo, The Nature of the Judicial Process 9 [1921].)

Close to the truth is that teaching opinion writing is hard because the opinion writer’s mind is complex. Most opinion writers will disagree with some of my suggestions, often phrased as “do this” and “do not do that.” Some opinion writers, for example, incorporate legalese whenever they can. Most opinion writers advise against doing so, however, and so do I. But even a reader who rejects my suggestions will learn about conflicting accounts of what constitutes effective writing. Thinking about writing enables writers to decide for themselves what works and what fails.

The Handbook is not meant to promulgate edicts about the correct way to write a judicial opinion. No single way to write it right is writ, although accepted principles of good opinion writing abound. Rather, the Handbook is meant to encourage opinion writers to think as deeply about crafting their opinions as they do about deciding their cases. As a leading commentary noted, “What a court says, and how it says it, is as important as what the court decides.” (Federal Judicial Center, Judicial Writing Manual vii [1991].) It is important to the opinion reader and to the opinion writer.

Judges and law clerks know that drafting good opinions is important. They also know that their drafts must resolve issues correctly under the law. They might not know about the correlation between well-written opinions and accurate decision-making. Authoritative, empirical "research confirms the proposition that opinions that violate [accepted opinion-writing] guidelines all too often reach the wrong result from an objective, or philosophically neutral, point of view." (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual ix [1991].) In short, studying opinion writing leads to better decisions, not merely better-written opinions.

The New York State Office of Court Administration prints and distributes the Handbook but exercises no editorial control over it. Only I am responsible for its contents. I express great appreciation to Elise A. Geltzer and William J. Clark, formerly of the OCA’s Office of Education and Training, and to Samuel Catalano, currently of that office, who encouraged me to write the Handbook and have helped me offer opinion-writing programs for the court system since 1997. For their contributions to the various editions, I also extend my sincerest gratitude to New York County Civil Court Judge Arthur F. Engoron; Peter Shapiro, a principal court attorney with the Appellate Term, Second Department; Preetha Poomkudy, Esq.; Mary Intrabartolo, Justice McLaughlin’s secretary; Kevin Chapman, labor and employment counsel at Dow Jones & Company; and New York State Reporter Gary D. Spivey.

I would be honored if this work in progress helps law clerks and their judges render justice. I would be content if it makes them think about writing.

Gerry Lebovits
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November 2004
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TOP TEN RULES OF OPINION WRITING

1. Nothing excuses writing an opinion with which you are unhappy. Not a computer failure, weak briefs from counsel, lack of time, other commitments, a poor first-year legal-writing teacher, or “I majored in math.” Nothing. Recognizing this will lead you to accept responsibility for your opinion, to write your opinion as well as you can, and to be happy with your opinion.

2. Writing reflects thinking, proves ability, binds litigants, covers those similarly situated, and might determine the appeal. Writing well enhances confidence in the judiciary and brings justice to the litigants. Decisions and rules of law enunciated as part of a court’s adjudicatory function will be accepted only if the court’s publicly stated explanation is acceptable.

3. Know when and for whom to write, and when and how to publish.

4. Opinion writing is public writing of the highest order. Be credible, impartial, dignified, and temperate. Be accurate and honest in your research, facts, and analysis.

5. Write precisely, simply, and concisely. State the rule on which your decision turns. Apply law to fact. Spark interest: “[A] judicial opinion need not be a dull, stereotype, colorless recital of facts, issues, propositions, and authorities but can be good writing and make good reading.” (Bernard E. Witkin, Manual on Appellate Court Opinions § 103, at 202–203 [1977].)


7. Know the procedural context and the remedy sought, and focus on the judgment.

8. Write “pure” opinions, not “impure” or “grand” opinions, unless you sit on a high appellate court and share traits with Oliver Wendell Holmes Jr. or Benjamin N. Cardozo. A “pure” opinion begins with the issues and who wins and why, and relies on syllogisms and authority. An “impure” opinion uses nonformalist writing techniques. “Grand” opinions, like “impure” opinions, have few citations. “Grand” opinions announce important constitutional principles, consolidate law, and alter precedent.

9. Start early. Then edit until your deadline. If the issues are complicated, organize in advance, rewrite, and edit, edit, edit until the attorneys, the litigants, and those unfamiliar with the case will understand the opinion on their first read.

10. Write to set precedent for all, but consider the litigants, especially the losing litigant. Treat them and their arguments as you would want a judge to treat you and your arguments. Be formal but not inflated, in command but respectful, skeptical but tolerant.
II
PHILOSOPHY OF GOOD OPINION WRITING

1. It takes work, patience, dedication, and years of practice to be a good opinion writer. Great writers are born, not made. But good opinion writing can be taught and learned. The effort to learn opinion writing is worth it. The judiciary has no army; it controls no purse. Its power comes from words: “If the judicial decision is the most visible exercise of judicial authority, the writing of judicial opinions is the most important expression of that authority.” (Alan B. Handler, A Matter of Opinion, 15 Rutgers L J 1, 1 [1983].)

2. The opinion-writing process: madman, architect, carpenter, judge. (See Bryan A. Garner, The Winning Brief 4 [1996].) Madman: Start early, right after your passions cool. Skim the litigants’ papers and some cases and statutes. Assess quickly which side is right on which issues, but be prepared to change your mind. Architect: Outline in a complicated case. Divide your problem into issues. Note on your outline what law goes with what facts for each issue. Carpenter: Write a draft, researching and editing as you write. Judge: Rewrite and edit until your opinion is due. Do not organize your life before settling down to write. Rather, begin by thinking about the case and writing as soon as possible. End knowing that getting it done is less important than getting it right and on time.

3. Do not let your ego interfere. You are never too good to be edited, too busy to look up the answer, or too familiar with the issues not to study the litigants’ papers critically.

4. Always keep an open mind.

5. Learn and use proper format and legal-citation style.

6. Make your readers feel smart, not stupid.

7. Pay attention to detail.

8. Opinion writing is the hardest legal art to master. Compensate for that.

9. What makes the reader’s work easy makes the writer’s work difficult. It takes great effort to be a natural beauty. Writers need “sitzfleisch”: the ability to sit until the work is done.

10. Deciding the case correctly is critical. But tone, organization, style, and legal method are important, too. Poorly drafted opinions “all too often reach the wrong result.” (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual ix [1991].) Your conclusion depends on what you say and how you say it: “[T]he premise that judicial writing can be divorced from deciding or other aspects of judging is wrong. How the judicial opinion is written affects how cases are decided. Writing affects how judges judge.” (David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 Geo J Legal Eth 509, 513 [2001].)
III
TWENTY OPINION-WRITING MYTHS

1. Only geeks with thick glasses can write good opinions. That is fine; literary style is not very important in opinion writing.

Reality: Judges must be good writers. As professional writers, judges should dedicate themselves to a lifelong study of writing. You cannot be a great lawyer, law clerk, or judge, whatever your other qualities, unless you write well. Here is the reverse: No shoddy lawyers, law clerks, or judges are good writers. As Fordham Law School’s former dean, John Feerick, explained, “Without good legal writing, good lawyering is wasted, if not impossible.” (John D. Feerick, Writing Like a Lawyer, 21 Fordham Urb L J 381, 381 [1994].)

Legal educators agree on little. But they all agree that legal writing is the most important skill future lawyers and judges must acquire. (See e.g. American Bar Association, Legal Education and Professional Development—An Educational Report of the Task Force on Law Schools and the Profession: Narrowing the Gap 264 [1992] [MacCrate Report].) Legal ethicists have their debates. But they all agree that legal writing must be competent. (See e.g. Debra R. Cohen, Competent Legal Writing—A Lawyer’s Professional Responsibility, 67 U Cinn L Rev 491 [1999].) American opinion writing must be especially competent “because no judicial system in the common law world has featured the judicial opinion to the extent that the American system has.” (William Domnarski, In the Opinion of the Court xi [1996].)

The following goes in the “My Inferiority Complex is not as Good as Yours” Department. Those who assume that only geeks write well see writing as a series of complicated do’s and don’ts. That is not surprising. There are many rules, although the most difficult ones are rules of usage, not rules of grammar. Anyone who can speak English, though, can write English. To compose effectively, you need not know every style rule, which can be learned one by one anyway. Nevertheless, the sooner you learn the rules, the better. As the Chinese proverb goes, “The best time to plant a tree is 10 years ago; the second best time is now.”

Judges and law clerks know that they must periodically undergo continuing legal education to study substantive law and procedure. (See Robert A. Leflar, The Quality of Judges, 35 Indiana LJ 289, 304 [1960] [“It is a rare judge who does not appreciate the need for further self-education, and strive for it constantly.”].) All appellate judges and their law clerks know the value of studying writing in addition to substance and procedure. But some trial judges and their law clerks do not. Perhaps they do not know that resources are available to help them. Perhaps they believe that the magic of appointment elevated them above pedestrian activities like writing. Perhaps their egos are too large to acknowledge that their writing—that everyone’s writing—can improve. Perhaps they believe that they can get by on boilerplate, or oral opinions, or, in the case of judges, good law clerks. Perhaps they believe that they are too old to learn writing. Perhaps they believe that style is unimportant. Perhaps they suffered so greatly studying legal writing in law school that they do not care to repeat the experience.
You do not get experience until after you need it. But just as you can drive a car without knowing how an engine works, to write effectively you need not know the difference between syntax—the order of words in a sentence—and the parts of speech. With study, practice, an editor, and the right attitude, you can write as comfortably as you drive. Experienced motorists drive without thinking about every shift in gear. Experienced writers compose without thinking about every usage rule. To think constantly about gears is never to arrive at the destination, or never to be happy about the trip. To think constantly about usage is never to finish a document, or never to be happy about the product.

And literary style is important. If good opinion writing is critical to the good administration of justice, literary style is critical to good opinion writing:

"Some judges argue that literary style has little or nothing to do with the quality of opinions, that style is ‘dressing’ merely, and that the functions of opinions are served by their substantive content. This simply does not make sense. For one thing, every judge has a writing style, whether he knows it or not . . . . Whatever it is, it determines how effectively the substantive content of the opinion is conveyed . . . ." (Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 Colum L Rev 810, 816 [1961].)

An opinion that "presents a sound statement of the law will hold its own regardless of its literary style . . . . But, the fact that substance comes before style does not warrant the conclusion that literary style is not important." (American Bar Association, Section on Judicial Administration, Committee Report, Internal Operating Procedures of Appellate Courts 31 [1961].) Although literary style is important, a satisfactory "objective is not a literary gem but a useful precedent, and the opinion should be constructed with good words, not plastered with them." (Bernard E. Witkin, Manual on Appellate Court Opinions § 103, at 204–205 [1977] [emphasis in the original].)

2. Legal writing is subjective. Opinion writers see so much bad writing that they have little incentive to improve their own writing.

Reality: Objective standards determine whether legal writing is good. People disagree only about the less important aspects of legal writing. And precisely because so much legal writing is poor, opinion writers should strive to write well. Poor writing goes unread or is misunderstood. Good writing is appreciated. Great writing is rewarded lavishly. As Professor Fuller said:

"The great judges of the past are not celebrated because they displayed in their judicial ‘votes’ dispositions congenial to later generations. Rather their fame rests on their ability to devise apt, just, and understandable rules of law; they are held up as models
because they were able to bring to clear expression thoughts that in lesser minds would have remained too vague and confused to serve as adequate guideposts for human conduct.” (Lon L. Fuller, An Afterward: Science and the Judicial Process, 79 Harv L Rev 1604, 1619 [1966].)

Perfection in writing is impossible. But perfection should be the goal—so long as perfection does not interfere with a deadline. Poor opinion writing signals mediocrity or worse, and that is unhealthy for the administration of justice: “A judge need not be vicious, corrupt, or witless to be a menace in office. Mediocrity can be in the long run as bad a pollutant as venality, for it dampens opposition and is more likely to be tolerated.” (Maurice Rosenberg, The Qualities of Justice—Are They Strainable?, 44 Tex L Rev 1064, 1066 [1966].)

3. Write in a comfortable setting. Then finish a section before taking a break.

**Reality**: These are matters of personal preference. But most people find writing difficult. The work will be finished faster and more concisely if the writer writes in an uncomfortable setting. Moreover, many writers who take a break between sections become complacent. They find it hard to resume quickly. A writer who takes a break in the middle of a sentence has an unenjoyable break but returns to work quickly. However you do write, though, write at a time and place with few distractions.

4. Reread your opinion soon after you submit it.

**Reality**: The time to edit your writing is before you submit your final product. Rereading what you have written months after you have written it is helpful to measure progress. But rereading something too quickly after you submit it leads to frustration. Most writers’ egos are still wrapped up in their writing, and nothing can be improved after it is submitted.

5. Creativity is the essence of good opinion writing.

**Reality**: Except in hard cases, the law does not reward creativity. It rewards logic and experience. As Justice Holmes observed, “The law is not the place for the artist or poet. The law is the calling of thinkers.” (Oliver Wendell Holmes, quoted in Case & Comment 16 [Mar./Apr. 1979].) A good argument weighs little if, before you consider it, no one, not even a secondary authority, raised it, suggested it, or at least laid the foundation for it, regardless how logical and wise it seems. That is the system of precedent, well explained by New York’s Chief Judge John T. Loughran in Some Reflections on the Role of Judicial Precedent, 22 Fordham L Rev 1 (1953). Thus is it said that “a page of history is worth a volume of logic.” (New York Trust Co. v Eisner, 256 US 345, 349 [1921, Holmes, J.J.]) Legal writers gain nothing reinventing the wheel. And trial judges may not disregard binding appellate precedent. The most they can do is urge a change in the law that only legal authority itself can justify.
6. Good opinion writers write for themselves.

**Reality:** Good opinion writers write for their readers. Unfortunately,

"[t]oo often . . . judges write as if only the writer counted. Too often they write as if to themselves and as if their only purpose were to provide a documentary history of having made a judgment. Instead, they must realize that the purpose of an opinion is to make a judgment credible to a diverse audience of readers." (Dwight W. Stevenson, *Writing Effective Opinions*, 59 Judicature 134, 134 [1975].)

An honest, effective judicial opinion for a varied audience must be simple. The goal is to write an opinion "that will contribute to clear understanding of court opinions by laymen and the public in general; perhaps by lawyers, too." (Boyd F. Carroll, *The Problems of a Legal Reporter: Views on Simplifying Appellate Opinions*, 35 ABA J 280, 281 [Apr. 1949].)

7. Organizing increases the workload. It is just one more thing to do.

**Reality:** Organizing by outlining is a great timesaver if the case is complicated. Those who hate to outline should adopt a flexible approach, but outline they should. Not outlining often means spending more time overall. If you outline you will have a vision before you start, you will know what goes where, and you will not forget or repeat things.

8. Writing a lengthy opinion is harder and takes more time than writing a brief one.

**Reality:** Writing something short, concise, and to the point is harder than writing something lengthy or rambling. Pascal noted this phenomenon in the seventeenth century: "I have made this letter longer than usual because I lack the time to make it shorter." (Blaise Pascal, Provential Letters xvi, quoted in *Hayes v Solomon*, 597 F2d 958, 986 n 22 [5th Cir 1979, Hill, J.], cert denied 444 US 1078 [1980].)

9. If you have little to say about something, even something important, do not use much space writing it.

**Reality:** If you have nothing to say, or nothing good to say, do not say it. The same applies to writing. Consider James Russell Lowell's comment about the loquacious: "In general those who have nothing to say/Contrive to spend the longest time in doing it." But something that must be communicated will get lost if little space is devoted to it. Expand your important point to give it the stress it deserves.

10. Real opinion writers never compose on wordprocessors. They write longhand.
Reality: The best writers under 40 are computer literate. They make their final edits on a hard copy but compose on the screen. They rarely write in longhand. They never dictate anything longer than a page or two, for “[d]ictating an opinion invites amendment and re-writing to shorten and strengthen its structure.” (James D. Hopkins, Notes on Style in Judicial Opinions, 8 Trial Judges 49 [1969], reprinted in Robert A. Leflar, Quality in Judicial Opinions, 3 Pace L Rev 579, 585 [1983].) Beware, though: Wordprocessing lets writers write more than readers care to read. Judge Matthew J. Jason explained the problem:

“[I]n recent years we have witnessed great technological advances in the methods of reproduction of the written word. Too often this process is merely viewed as a license to substitute volume for logic in an apparent attempt to overwhelm the courts, as though quantity, and not quality, was the virtue to be extolled.” (Slater v Gallman, 38 NY2d 1, 5 [1975].)

11. Know everything about your topic before you begin to write.

Reality: Some argue that “[a]n effective brief is fully thought through before a word is set to paper.” (Judith S. Kaye, Callaghan's Appellate Advocacy Manual [John W. Cooley, ed], quoted in Albert M. Rosenblatt, Brief Writing and Oral Argument in Appellate Practice, 24 Trial Lawyers Q 22, 22 [1994].) On the other hand, you will never start to write, or you will start to write only the night before your opinion is due, if you insist on knowing everything before you begin. The key is to know everything by the time you finish. You can always change focus in midstream, especially if you compose on a computer. Outlining in advance and constant editing will control your writing.

12. Do not start to write an opinion until inspiration hits you.

Reality: Reflection and deliberation assure fair and accurate decisions. But your opinion will be late if you wait until inspiration strikes. Waiting to become inspired will turn you into a procrastinator, if you ever get around to procrastinating. Waiting for sudden bursts of insight or energy is an excuse to delay writing. These excuses are symptoms of writer’s block—which, because the law rewards logic over creativity, except in hard cases—should not afflict the opinion writer. (See Stewart G. Pollock, The Art of Judging, 71 NYU L Rev 591, 593 [1996] [“To deny the similarities between artistic and judicial endeavors, however, would ignore the reality that judging, particularly in hard cases, is unavoidably creative.”].) Legal writing requires more sweat than inspiration. Writers often begin sentences not knowing how they will end. Inspiration comes as you write and edit.

It is hard to write judicial opinions. Together with emotional strain and the requirements of research and technical accuracy, “as a writer, a[n appellate] judge is under a pressure to produce and publish more severe than that felt by any college professor or journalist.” (Johnson, What Do Law Clerks Do?, 22 Tex B J 229, 230 [1959].) If your strength ebbs, you, the trial or
appellate opinion writer, are an important public servant who “does not have the luxury of setting aside the case and coming back to it in a month because you have writer's block; you wade through to the end, no matter how paralyzed your pen.” (Patricia M. Wald, *The Rhetoric of Results and the Results of Rhetoric: Judicial Writings*, 62 U Chi L Rev 1371, 1385 [1995].)

All cases must be decided, even when the equities appear balanced and law and fact seem unclear. After all, “[a]ppellate judges, indeed all judges, have one overriding responsibility: to decide cases.” (Eugene A. Wright, *Observations of an Appellate Judge: Use of Law Clerks*, 26 Vand L Rev 1179, 1179 [1973].) Do not worry if you cannot decide a case immediately. A few days' thought and study will resolve doubts, lead to an epiphany, and allow the opinion-writing process to begin. Judge Cardozo beautifully described an experience through which every opinion writer lives from time to time:

“I have gone through periods of uncertainty so great, that I have sometimes said to myself, 'I shall never be able to vote in this case one way or the other.' Then, suddenly, the fog has lifted. I have reached a stage of mental peace . . . . [T]he judgment reached with so much pain has become the only possible conviction, the antecedent doubts merged, and finally extinguished, in the calmness of conviction.” (Benjamin N. Cardozo, *The Paradoxes of Legal Science* in Selected Writings of Benjamin Nathan Cardozo: The Choice of Tycho Brahe 80–81 [Margaret E. Hall ed 1947].)

13. Finish your opinion early.

**Reality**: Start early, as soon as reason overcomes emotion and you have the feeling of decision—who should win and, roughly, why. Your labor will be more efficient if you start to draft before the case gets cold in your mind. Starting early lets you start over after a false start and still submit your opinion on time. False starts happen from time to time: “A judge . . . often discovers that his tentative views will not jell in the writing.” (Roger J. Traynor, *Some Open Questions on the Work of State Appellate Judges*, 24 U Chi L Rev 211, 218 [1957].) But take the time and make the effort to edit until the project is due. You will have fewer regrets afterward. If you write in haste you will repent in court. As Chief Justice Marshall wrote, “The past cannot be recalled by the most absolute power.” (*Fletcher v Peck*, 10 US [6 Cranch] 87, 135 [1810].)

14. Obsessive-compulsives and the omniscient make great opinion writers.

**Reality**: I wish I had written this 16 times by now: Do not obsess over what you write. Never sweat the small stuff. It will paralyze you. Become obsessive, if at all, only at the very end, during your final edit, when attention to detail is important. Then submit your work and be done with it. Opinions are like children. At some point you must let them go and hope for the best.
Doing your best and trying your hardest also means not worrying about being reversed. Obsessing over the possibility of reversal might lead to a timid opinion or indecision. The most experienced and learned trial judges sometimes suffer reversal. Just as appellate judges must be open to the possibility of error below, so must trial judges be grateful for appellate review if they make mistakes, or even if others see things differently. The potential for appellate correction should relieve anxiety, not create it.

The omniscient are even worse opinion writers than the obsessed. According to Ninth Circuit Judge Merrill, the omniscient do not recognize an occupational hazard of judging:

“There is both prospective and retrospective danger to the judge who demands of himself nothing less than omniscience. In the first place he will find it difficult ever to let loose of an opinion, feeling that further study may expose some lurking error in his reasoning. He simply will not get his work out. In the second place, having reached a decision, he may have rendered himself immune to all further enlightenment on the subject.” (Charles M. Merrill, Some Reflections on the Business of Judging, 40 J State B Cal 811, 812 [1965].)

15. Good opinion writers rarely need time to edit between drafts. And good opinion writers do not need editors.

**Reality:** Put your project aside, however briefly, a few times while you write and edit. You will catch mistakes you did not see earlier and make improvements you might not have thought of earlier. Self-editing requires objectivity. You cannot be objective if you do not distance yourself from your work. Thus, start early—but edit late. 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.

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

**Reality:** Just as a few dents greatly diminish the value of a fine car, so does improper citation mar legal writing. Just as a gourmet can tell whether the main course in a restaurant will be good by how good the bread is, so can legal readers tell from the quality of the citation format whether the writing and analysis will be good. If the writer is sloppy about citations, the writer 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 that 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 that they could not care less about lawyers’ citing do so for one or more false reasons: as code to suggest that they are so fair and smart that they can see through the chaff to
let only the merits affect their decision making; because they themselves do not do not know the
difference between good citing and bad; or to communicate their low expectations of the lawyers
who appear before them. Judge and law clerks should tolerate lawyers' imperfect citations but
must cite proficiently.

17. Only perfectionists care about occasional typographical errors.

*Reality:* What applies to imperfect citation format applies even more to typographical
errors. Spell-check every time you exit your file. Proofread carefully on a hard copy.
Proofreading reflects pride of authorship. Arkansas Supreme Court Justice and later NYU Law
Professor Leflar explained why pride of authorship is important: “An opinion in which the author
takes no pride is not likely to be much good.” (Robert A. Leflar, *Some Observations Concerning
Judicial Opinions*, 61 Colum L Rev 810, 813 [1961].)

Readers find proofreading mistakes easily—more easily than writers can. These are the
same readers who pay little attention to what you write until you make a mistake. Proofreading
mistakes adversely affect the opinion to a degree vastly out of proportion to their significance.

If your final drafts regularly drop words and contain typographical, citation, formatting,
and quotation errors, you might be learning disabled (LD) to one degree or another and in one
form or another. In the United States, “15% of the population is affected to varying degrees” by
dyslexia. (Unmesh Kehr, “Medicine—Deconstructing Dyslexia: Blame it on the Written Word,”
*Time Magazine*, Mar. 26, 2001, at 56, 56.) It is not a matter of intelligence. Dyslexics have
difficulty breaking down the written word, especially the notoriously variable and complex
written English word. English has 1120 ways to spell its 40 phonemes, sounds needed to
pronounce words. Italian, by contrast, needs only 33 letter combinations to spell its 25
phonemes. (*Id.*) Those who speak Italian are as dyslexic as those who speak English, but dyslexia
affects readers and writers of English, not readers and writers of Italian.

A learning disability is a gift. The learning disabled have talents the differently abled will
never know. Some of the best writers have been learning disabled. Think of Albert Einstein,
whose penetrating writing proves that he was not merely a physicist. Think of Sir Winston S.
Churchill, whose History of the English Speaking People won him the 1953 Nobel Prize for
Literature and proved that he was not merely a politician with a gift for gab. LD writers must
compensate by proofreading with special care and a second set of eyes. With that extra care, LD
writers can often be better writers than non-LD writers.

For an inspirational, autobiographical piece about an LD opinion writer, see Jeffrey Gallet,
*The Judge Who Could Not Tell His Right from His Left and Other Tales of Learning Disabilities*, 37
Buff L Rev 739, 740 (1989) (“I am a kind of talking frog—a learning disabled judge.”). The late
Judge Gallet, then a Family Court judge for the State of New York in the City of New York and
later a U.S. Bankruptcy judge for the Southern District of New York, discovered at 34 that he
was dyslexic (reading), dysgraphic ('riting), and dyscalculic ('rithmetic). Yet he wrote more articles, books, and opinions than many people have read.

18. Prose in opinion writing is best directed to the highest common denominator.

**Reality:** Legal writing is best 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 Professor Warren: “[T]he deepest learning is the learning that conceals learning.” (Edward H. Warren, Spartan Education 31 [1942].)

19. Legal writing has little to do with reading nonlegal subjects. It is enough to read judicial opinions to learn good legal writing.

**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. The goal is to read widely and critically.

Reading cases is not the best way to learn opinion writing. Frankly, some judges write poorly. (See e.g. Steven Stark, *Why Judges Have Nothing to Tell Lawyers About Writing*, 1 Scribes J Legal Writing 25 [1990].) Some law-school teachers select cases to make their students feel inadequate: “Not many readers can defend the prose of judicial opinions selected for case books—a style students instinctively assume is ‘the way law looks.’” (Terri LeClerc, Guide to Legal Writing Style xvi [2d ed 2000].)

Opinion writing sets the standard by which many lawyers write. If imitation is thought to flatter, it is not flattering that writing gurus like Temple Law Professor Lindsey consider opinion writing a poor legal-writing model: “Unfortunately, court opinions influence the writing styles of students, lawyers, judges and even law professors. That is 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.” (John M. Lindsey, *Some Thoughts about Legal Writing*, NYLJ, Oct. 27, 1992, at 2, col 2.)

Professor Lindsey overstated his case. 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 Profess 139 [1985] [arguing that judges’ and lawyers’ writings cannot be analyzed together]; 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”].) But many, including many opinion writers, share Professor Lindsey’s opinion about opinion writing.

If reading opinions will not teach you how to write a good opinion, how can you learn good opinion writing? Not on a wing and a prayer. It is not enough to recognize good writing when you see it. (*Cf. Jacobellis v Ohio*, 378 US 184, 197 [1964, Stewart, J., concurring] [“I know
[obscenity] when I see it . . . "). Nor is it enough to choose one grammatical construct over another just because the chosen option looks good.

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.” (James Lindgren, Style Matters: A Review Essay on Legal Writing, 92 Yale LJ 161, 168–169 [1982] [book review].)

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 boy who wanted to prepare for a career in the law:

“My dear Paul:

“No one can be a truly competent lawyer unless he is a cultivated man. If I were you, I would forget about any technical preparation for the law. 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 bring . . . .

“With good wishes,
“Sincerely yours,
“Felix Frankfurter”

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

20. Law clerks should trust their judges when they are told, “Just give me a draft.”

Reality: Many new attorneys believe that a supervisory attorney’s most common fib is to instruct the new attorney to submit “only a draft.” The problem here is communication, not dishonest supervisors. A seasoned attorney’s draft is a less-seasoned attorney’s final product. A less-seasoned attorney’s draft provides little help to a seasoned attorney, and especially a judge, who might have forgotten that it takes years to write well. The solution: New attorneys should hand in their best work even when told to submit only a draft.
IV
WHAT READERS OF JUDICIAL OPINIONS HATE: THE TOP 30 VICES

1. Late decisions.
2. Boilerplate decisions.
3. Personal attacks (although some readers find them entertaining).
4. Poor typeface and design.
5. Sarcasm, humor directed at the litigants, condescending language.
6. Pontificating, pomposity, rhetorical questions.
7. Exaggerating.
8. Too many acronyms, especially undefined acronyms.
9. Unnecessary facts and dates and, worse, getting facts wrong.
10. Long quotations.
11. Wordiness, redundancy.
12. Typos, miscites, misquotes.
13. Subject-verb separation.
14. Long sentences and long paragraphs.
15. A result-oriented opinion, a preordained agenda, excessive dicta.
17. Legalese and bureaucratese.
18. String citations (except as research tools).
19. Footnotes (with argument or discussion).
20. Lengthy case-law analysis.
21. Setting out facts without analysis and applying law to fact.

22. Ignoring the losing side's major arguments.

23. Buried points and mystery-novel writing, all leading to an unfocused holding.

24. Ignoring opposing persuasive authority.

25. Rambling and anything boring.


27. Passive voice and nominalizations.

28. Kitchen-sink approach in which multiple justifications are offered for the holding.

29. Undeveloped argument or discussion.

30. Whatever makes the reader work hard.

Inspired by a 1996 lecture by Bryan A. Garner
WHAT READERS OF JUDICIAL OPINIONS LOVE: THE TOP 30 VIRTUES

1. In a pure opinion, the 20-second rule: A beginning that contains a concise statement of the procedural context, the critical facts, the issues, and who wins and why. Even in an impure opinion the reader should know in 20 seconds who will win and why.

2. Clarity and precision.

3. Succinctness and concision.

4. Plain, simple, common language.

5. Including only legally significant facts, applying the law to those facts, and then articulating a clear holding.

6. Varying sentence length, with an emphasis on short sentences.

7. Large-scale organization: structure, transitions, fluency.

8. Honesty and accuracy in facts and law (including contrary facts and authorities).

9. Pinpoint (jump) citations.

10. Pungent quotations with lead-ins, including essential, and only essential, language from cases, statutes, and contracts.

11. Good storytelling at no one's expense, with memorable prose.

12. Correct grammar and punctuation.

13. Concrete, vigorous, active verbs.

14. Concrete, descriptive nouns.

15. Certainty, command.

16. Straightforward use of precedent and statutes, supported by the underlying justification for the law.

17. Well-reasoned articulation of what is not obvious; conclusory remarks about what is obvious.
18. Emphasizing content more than writing flourishes.

19. Addressing issues raised.

20. Citing seminal cases.

21. Citing majority opinions, not dissents and concurrences, and citing holdings, not dicta.

22. Years, Departments, and leave and certiorari dispositions bracketed in citations, even though the New York State Official Style Manual (Tanbook) does not require you to include years, Departments, or leave and certiorari dispositions.

23. Cases decided correctly.

24. One-thought sentences.

25. Emphasizing rules, not citations.

26. Opinions that do not rely on the litigants' characterizations.

27. Timely decisions.

28. Attention to detail.

29. Decisions that make it easy to understand, predict, and follow the law.

30. Whatever makes the reader's work easy.

Inspired by a 1996 lecture by Bryan A. Garner
VI
THE GOALS OF A JUDICIAL OPINION

1. Why Should Trial Judges Write?

Under CPLR 2219 (a), all orders that determine motions must be in writing. But the writing may be brief and conclusory, for record-keeping only. The question is, When should a trial judge write a full opinion? The answers are given in John B. Nesbitt, View From the Bench, The Role of Trial Court Opinions in the Judicial Process, 75 NY St BJ 39 (Sept. 2003).

Trial judges write to communicate to the litigants and their counsel the court’s conclusions and the reasons for them when

(1) an issue is novel;

(2) the matter is complex;

(3) the facts are in dispute;

(4) an issue or a case is important to the litigants or the public;

(5) the scope of future litigation must be narrowed;

(6) the decision and its reasoning must be maintained for record keeping;

(7) the decision is likely to be appealed and the court wants the appellate court to appreciate its reasoning;

(8) the litigants and their lawyers cannot be present for an oral opinion;

(9) writing will focus the court’s mind; or

(10) a written opinion will enhance confidence in the judiciary.

If none of these factors is present, the trial judge should rule from the bench and follow up with a brief order to memorialize the decision. According to CPLR 2219 (a), a court must reduce to writing or otherwise record all orders and rulings “upon the request of a party.” (For an excellent text on how to formulate orders and judgments in civil cases, see Supreme Court, Civil Branch, New York County, Guide to the Form of Orders and Judgments 8–9 [2d ed 1998].) Ruling from the bench speeds resolution, which aids litigants and reduces backlogs. Ruling from the bench also promotes compliance with CPLR 2219 (a), which requires that motions relating to provisional remedies be decided within 20 days and that orders determining all other motions be decided within 60 days.
It is risky, however, to announce that a written opinion will follow an oral ruling. The judge might not get around to it, and if the judge does write, the written opinion might conflict with the bench ruling.

Writing is commendable. But writing a full opinion is not always important for a trial judge. In the trial courts, writing quickly, fairly, and accurately, with a record for appellate review, is vastly more important than writing an erudite opinion. An oral opinion can accomplish a trial judge’s goals better than a full written opinion except when one or more of the above 10 factors are present.

Trial judges publish their opinions to guide lawyers, academics, students, other judges, and the public on substantial and novel legal issues. Publication ought not be the vanity press. Publication should not be directed only to the litigants or appellate courts.

2. The Purposes of a Reasoned Opinion

Judgments are primary. Opinions merely explain judgments: “judicial opinions are simply explanations for judgments—essays written by judges explaining why they recorded the judgment they did.” (Thomas W. Merrill, Judicial Opinions as Binding Law and as Explanations for Judgments, 15 Cardozo L Rev 43, 62 [1993].) What immediately counts for the litigants is what a court does, not its reason for doing so. But for other lawyers and judges, who rely on the precedent-setting function of reasoned opinions, and for the litigants in the event of an appeal, what counts is the basis for the judgment.

Often judges should decide issues and even render judgment without giving an opinion, either oral or written. To speed things along and for other reasons, trial judges, for example, frequently judge decline to give their grounds for decision when they rule on objections. Lord Mansfield, in particular, advised “new judges to state their judgments and withhold their reasons, since their judgments were probably right and their reasons probably wrong.” (Philip B. Kurland, Politics, the Constitution, and the Warren Court 94 [1970].)

Arbitrators rarely and jurors never justify their decision making. Continental Europeans of the civil-law tradition believe that judges, too, need not justify for the litigants and the public. Justification is unimportant in the civilian tradition, in which “only experienced jurists are able to understand and admire” a judicial opinion. (Rene David and John E.C. Brierley, Major Legal Systems in the World Today 129 [2d ed 1978]; accord Michael Wells, French and American Judicial Opinions, 19 Yale Intl L] 81 passim [1994].) Judicial opinions in civil-law jurisdictions are terse, opaque, and conclusory not only because they have no precedential value. They are written as syllogistic, authoritarian assertions without candor, argument, and policy justification because continental judges, given historical, cultural, and political influences, see themselves as “technician[s] who mechanically appl[y] existing law to a factual situation, rather than as . . . social engineer[s] who exercise[] judgment and lay[ ] down general rules of conduct.” (Wells, supra, at 98.) Opinions in common-law jurisdictions, whose history of judging has always
included winning battles for judicial independence, carry precedential force. Since the 1800s, the American way has been to justify and thus engage readers of judicial opinions in participatory democracy—for judges to give a candid, persuasive, accessible response to a litigant's reasoned argument. Indeed, many have argued that the American way of writing reasoned opinions that stress law as something other than a naked exercise of power is a response to European positivism and authoritarianism. (See e.g. G. Edward White, The Evolution of Reasoned Elaboration: Jurisprudential Criticism and Social Change, 59 Va L Rev 279, 282–283, 285–286 [1973], cited in Wells, supra, at 83 n 6.)

All remember one sentence from Marbury, but the Court’s next sentence sheds light on the first: “It is emphatically the province and duty of the judicial department to say what the law is. Those who apply the rule to particular cases, must of necessity expound and interpret that rule.” (Marbury v Madison, 5 US [1 Cranch] 137, 177 [1803] [Marshall, Ch. J.].) Most understand Marbury to mean that under the separation-of-powers doctrine, the judicial branch interprets laws the legislative branch enacts and the executive branch enforces. Marbury means more than that. Marbury requires judges to give reasoned opinions, not merely judgments, in cases that call for explanation.

Reasoned judicial opinions that explain judgment are unnecessary in the world of the legal positivists. Positivists believe that the law is the state’s authoritative command backed by the state’s might. To render law in that sense, a court need only rule. It need not explain its reasoning. Its role is limited to resolving cases and controversies, not to pronouncing, expounding, and interpreting the law. It need not render an opinion that justifies its conclusion. (See e.g. Gary Lawson and Christopher D. Moore, The Executive Power of Constitutional Interpretation, 81 Iowa L Rev 1267, 1328 [1996] ["[T]he issuance of opinions is not an essential aspect of judicial power . . . "].)

A democratic society and the rule of law are disserved, however, by naked assertions of law as power. As Justice Douglas explained, "confidence based on understanding is more enduring than confidence based on awe.” (William O. Douglas, Stare Decisis, 4 Record of Ann of Bar of City of NY 152, 175 [1949]; accord William O. Douglas, The Dissent: A Safeguard of Democracy, 32 J Am Jud Soc 104 [1948].) Moreover, “that the public believe that justice is done is no less important than that it be done with the greatest possible precision.” (Roscoe Pound, Justice According to Law, 13 Colum L Rev 696, 701 [1913].) Judicial decision making has many goals, chief among them interpreting the will the people expressed through the Legislature, imposing constitutional safeguards, and promoting efficiency, equal justice, stability, and fairness in reaching decisions and in adhering to moral values. These goals are best achieved—indeed, they are achieved only—when a court explains how and why it decided a case.

Justice Smith asked and answered the question, "Why an opinion at all?" He gave two of the ten reasons:
“Above all else to expose the court’s decision to public scrutiny, to nail it up on the wall for all to see. In no other way can it be known whether the law needs revision, whether the court is doing its job, whether a particular judge is competent. A second reason... is that there is no test of a decision equal to the discipline of having to compose an opinion.”

(George Rose Smith, A Primer of Opinion Writing, for Four New Judges, 21 Ark L Rev 197, 200–201 [1967].) These two reasons keep opinion writers in line—accountable to others and to themselves—because reasoned opinions limit judicial discretion and expand judicial candor and because “[w]here a judge need write no opinion, his judgment may be faulty.” (Moses Lasky, Observing Appellate Opinions from Below the Bench, 49 Cal L Rev 831, 838 [1961].) A third reason for an opinion is that “[w]ithout... opinions the parties have to take it on faith that their participation in the decision has been real, that the arbitrator has in fact understood and taken into account their proofs and arguments.” (Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv L Rev 353, 388 [1978].) Fourth, opinions enable litigants “to know what impressed the judge, and why.” (David Mellinkoff, Legal Writing: Sense & Nonsense 68 [1982].) Fifth, opinions tell the litigants whether “it [is] worthwhile to challenge the result by further appeal.” (Id.) Sixth, opinions help higher courts resolve appeals. Seventh, opinions impose consistency within and among the courts. Eighth, opinions explain the law so that people can predict the law in analogous cases and govern themselves by it. (Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 26 [1960] (“[T]he opinion has as one if not its major office to show how like cases are properly to be decided in the future.”).) Ninth, opinions allow students to study the law, advocates to argue it, and other judges to be persuaded by it. Tenth, the public has the right to know who creates and interprets the law: “The common law is not a brooding omnipresence in the sky, but the articulate voice of some sovereign or quasi sovereign that can be identified...” (Southern Pacific Co. v. Jensen, 244 US 205, 222 [1917, Holmes, J., dissenting].) Opinion writing identifies those who write and interpret the law.

Some judges write for personal reasons:

“Transplants from academia [write] to communicate their intellectual processes to the world. Refugees from the world of politics... write to persuade their colleagues and the public that they are moving the law in the right direction. Some judges write for the personal gratification that comes from being quoted, cited, and republished.... Ambitious judges write in hopes of promotion to higher office....” (Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U Chi L Rev 1371, 1372 [1995].)

3. The Goals of a Reasoned Opinion
Written opinions, as opposed to oral opinions, have many purposes, but the writer “should concentrate on a single goal—to write an opinion supported by adequate authority that expresses the decision and rationale of the court in language and style that generate confidence in the reader that justice has been fairly and effectively administered.” (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual 1 [1991].)

The most important thing the opinion must do is “state plainly the rule upon which the decision proceeds. This is required, in theory, because the court’s function is to declare the law and in practice because the bar is entitled to know exactly what rule they can follow in advising clients and in trying cases.” (1 John H. Wigmore, Evidence in Trials at Common Law § 8b, at 624 [Peter Tellers rev ed 1983].) To write a good opinion, though, the writer must do more than state the rule plainly. The opinion writer must also persuade: “[I]t is not enough that an opinion produce a just result and provide a clear precedent. The opinion must also persuade its audience that its rationale is sound . . .” (Ron Moss, Rhetorical Stratagems in Judicial Opinions, 2 Scribes J Legal Writing 103, 104 [1991].)

The goal of a trial-court opinion: To decide cases by weighing and resolving issues of fact and law thoughtfully and with a disinterested approach for the litigants and to freeze the record below for appellate review. (See generally Dwight W. Stevenson and James P. Zappen, An Approach to Writing Trial Court Opinions, 67 Judicature 336, 337–339 [1984].)

The goal of an appellate opinion: The lower the appellate court, the greater the need to review for correctness, to flesh out high-court doctrine, and to sharpen issues for higher appellate consideration. The higher the appellate court, the greater the need to “expound, declare, and expand the law rather than to decide the issues in particular cases.” (Id. at 338.) A trial court may, and should, make oral rulings quickly to move cases along. On the other hand, the New York Court of Appeals and the United States Supreme Court would lose legitimacy if they rendered bench rulings right after oral argument and issued unpublished opinions. For appellate opinions of courts of last resort,

“the test of the quality of an opinion is the light it casts, outside the four corners of the particular lawsuit, in guiding the judgment of the hundreds of thousands of lawyers and government officials who have to deal at first hand with the problems of everyday life and of the thousands of judges who have to handle the great mass of the litigation which ultimately develops.” (Henry M. Hart, Jr., The Supreme Court 1958 Term, 73 Harv L Rev 84, 96 [1959].)

Temple Law Professor Cappalli agreed: When all is said and done, “The mark of greatness becomes how well the opinion’s inchoate rule is understood by generations of future lawyers.” (Richard B. Cappalli, Viewpoint, Improving Appellate Opinions, 83 Judicature 286, 320 [2000].)

4. Should Intermediate Appellate Judges Always Write?

Much has been written, pro and con, about whether judges of intermediate appellate jurisdiction, who hear appeals mostly as of right rather than not by leave, should always write and publish.

Some argue that with the proliferation of published appellate opinions, cases that involve no novel issues should be summarily affirmed without opinion. The advantage to doing so is that many cases are so cut-and-dried that it is wasteful to devote limited appellate resources to them and, conversely, that it is smart to devote attention to important cases and novel issues. Moreover, a proliferation of published opinions diffuses precedent, allows lawyers to identify a case for almost any proposition, and adds great expense for practitioners who buy law books. (See e.g. Charles M. Merrill, Could Judges Deliver More Justice If They Wrote Fewer Opinions?, 64 Judicature 435, 471 [1981].)

Others argue that litigants who may appeal of right are entitled to know why they lose, that not writing or publishing opinions results in an underground body of conflicting law, that limited writing or publishing diminishes judicial responsibility, and that confidence in the judiciary is enhanced when the public believes that the court gave due consideration to all cases. (See e.g. David Greenwald and Frederick A. O. Schwarz, Jr., The Censorial Judiciary, 35 UC Davis L Rev 1133 passim [2002]; Ruth Bader Ginsburg, The Obligation to Reason Why, 37 U Fla L Rev 205, 221 [1985].) Those who argue that all appellate opinions should be written and published note that no-opinion cases are rendered in cases that sometimes are not clear-cut. In short, some believe, unwritten decisions or unpublished opinions lead to secret, sloppy, and unequal justice.

For better or worse, all the judicial departments of the Appellate Division currently issue written, published opinions in most appeals they hear of right, although many opinions are brief memorandum opinions so conclusory on the facts and the law that someone who has not read the briefs will not fully understand the facts and issues.

The federal courts of appeals have resolved the debate by writing in nearly every case. The courts of appeals write, but they often affirm, reverse, or modify in unpublishable, or really uncitable, opinions. These opinions do not constitute precedent. (See Hart v Massanari, 266 F2d 1155 [9th Cir 2001, Kozinski, J.].) Unpublishable opinions constituted precedent only in the Eighth Circuit, and only briefly. (See Anastasoff v United States, 223 F3d 898 [8th Cir 2000, Arnold, J.], vacated en banc as moot 235 F3d 1054 [8th Cir 2000, Arnold, J.].) In 1999 the federal courts of appeals decided nearly 25,000 appeals. More than 17,000 went unpublished. (William Glaberson, Unprecedented: Legal Shortcuts Run into Some Dead Ends, NY Times, Oct. 8, 2000, at 4, col 1 [noting also that in some states, more than 90 percent of appellate opinions go unpublished].) Unpublishable federal opinions are available in full in West's Federal Appendix
and on Westlaw and LEXIS, but they appear in the Federal Reporter Series only in the Table of Cases. Under the circuits' noncitation rules, it is contempt of court to cite, other than for res judicata or collateral estoppel purposes, an unpublishable opinion.


5. For Whom Do Judges Write?

Appellate judges devote a great deal of their time writing. According to one source, nearly half of an appellate judge's time involves opinion preparation. (See Charles R. Haworth, Circuit Splitting and the "New" National Court of Appeals: Can the Mouse Roar?, 30 Sw L J 839, 855 n 12 [1976].)

Judges write for their own benefit to clarify their reasoning, to assess arguments and law objectively, and to decide what to include. California Chief Justice Traynor explained the process of justification: "A judge must do more than decree. He must reason every inch of the way." (Roger J. Traynor, The Limits of Judicial Creativity, 29 Hastings L J 1025, 1037 [1978].)

Judges write for others, too: to enable litigants to comply with their rulings and to understand why they won or lost; to help lawyers and judges research opinions for legal principles; to teach law students and the public the law; and to enhance confidence in the judiciary. Appellate judges also write for their colleagues by circulating drafts.

For trial judges who write brief opinions and for appellate judges who write memorandum opinions, the primary audience is the litigants and their lawyers. In all other cases, "the primary audience for the judicial communication comprising an opinion must be the world of future lawyers and judges who, as part of their daily professional work, have to know what rights and duties are imposed by law." (Richard B. Cappalli, Viewpoint, Improving Appellate Opinions, 83 Judicature 286, 286 [2000].)

For an excellent discussion of whom judges write for, see Abner Mikva, For Whom Judges Write, 61 S Cal L Rev 1357 (1988).

6. Why Write Well?

Whether judges write for others or primarily for themselves, a poorly written opinion is ineffective. Poor opinion writing brings disrespect to the court and to the opinion. A poorly written opinion reflects and exacerbates the author's poor clarity of thought. Poor clarity of thought leads to incorrect decisions, misunderstood decisions, and embarrassing decisions.

In response to a poorly written opinion, litigants and others might also fail to comply with the ruling or misapply the law, innocently or not. When that happens, it is the opinion writer's
fault, not the lawyer's, because "one of the most important skills of effective lawyering is the ability to find room for interpretive maneuver and to exploit it to advantage." (Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style § 3.2, at 38 [4th ed 2001].) Every opinion, therefore, "must be crafted in a way that blocks misreadings and distortions . . . ." (Richard B. Cappalli, Viewpoint, Improving Appellate Opinions, 83 Judicature 286, 287 [2000].) An opinion writer who drafts poorly fails to view the "lawyer-with-cause as an enemy bent on dismantling the logic and sense and structure of the judicial precedent to serve his client's interests." (Id. at 318.)

Poor opinion writing even produces additional litigation. For example, the New Jersey Supreme Court so poorly drafted Southern Burlington County NAACP v Mt. Laurel Township (Mt. Laurel I) (67 NJ 151, 336 A2d 713 [1975], cert denied & app dismissed 435 US 808 [1975, mem]) that after eight years of litigation, the court rewrote its opinion—a rewrite that took 103 printed pages to undo the effects of one unclear opinion. (See Southern Burlington County NAACP v Mt. Laurel Township [Mt. Laurel II], 92 NJ 158, 456 A2d 390 [1983].) Mt. Laurel II contains none of the opinion-writing mistakes found in Mt. Laurel I. Unlike Mt. Laurel I, Mt. Laurel II uses a strongly worded introduction and headings to impart structure. Mt. Laurel I and II prove Witkin's point: "[O]nly a well-written opinion can tell anyone what it really holds. A badly written opinion, with inconsistent statements or unclear grounds of decision, can do a great deal of harm." (Bernard. E. Witkin, Manual on Appellate Court Opinions § 53, at 85 [1977].)

How opinions are written affects all legal writing and the law itself. As Mellinkoff noted, "The recollection of how it is said often outlasts the recollection of what was said. For better or worse, the opinion affects the basic writing pattern of the profession. And that pattern is inseparable from 'the law' itself." (David Mellinkoff, Legal Writing: Sense & Nonsense 70 [1981].) Lawyers' writing is famously incomprehensible. Therefore, "[t]o aid in eradicating such obsfuscatory legal writing, judges should take the approach often advocated in sports: the best defense is a good offense. Judges should become models of clarity, conciseness, and logical organization through their opinions." (Nancy A. Wanderer, Writing Better Opinions: Communicating with Candor, Clarity, and Style, 54 Maine L Rev 47, 55 [2002].)

To affect the law and the profession positively, and to bring respect for the court and the law, judicial opinions must be written well. Opinions, after all, "represent the judiciary to the public, but they are not voices merely. They are what courts do, not just what they say. They are the substance of judicial action, not just news releases about what the courts have done . . . ." (Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 Colum L Rev 810, 819 [1961].)
VII
JUDICIAL OPINIONS: TYPES AND JURISPRUDENTIAL UNDERPINNINGS

1. Grand Style

The Grand Style, seen from 1820–1860 and in some opinion writing again from 1920 onward, is rooted in the view that law must serve social ends. The Grand Style of opinion writing encompasses three separate but related styles from the work of some great common-law judges:

Chief Justice Lemuel Shaw of the Supreme Judicial Court of Massachusetts. His opinions, and those of many other pre-Civil War contemporaries, broke with the past by emphasizing common sense over generalities and reasoning over precedent. In Norway Plains Co. v Boston & Maine R.R. (1 Gray 263, 61 Am Dec 423 [Mass 1854]), for example, Chief Justice Shaw changed the law of strict liability without citing a single case or statute for his holding.

Chief Judge Benjamin Nathan Cardozo. When considering a set of facts, Judge Cardozo used every opportunity to reformulate the law. For one of many examples, see MacPherson v Buick Motor Co. (217 NY 382 [1916].)

Justice Oliver Wendell Holmes. Justice Holmes turned relatively small disputes into cases of major constitutional significance. The constitutional question then overshadowed the dispute. Though written by Justice Louis B. Brandeis, Erie R.R. Co. v Tompkins (304 US 64 [1938]), which requires federal courts to apply state substantive law in diversity cases, was decided in the Grand Style. The Court could have decided Erie on the simple grounds the lawyers argued, but it used Erie to decide a larger question.

2. Formal Style (Positivism) and Neoformalism (Legal Process)

From the Civil War until the 1920s, most opinions were written in the Formal Style of the legal positivists. Many opinion writers continued to use the Formal Style into the 1960s; some continue to use it today. The Formal Style offers rules without giving their underlying reasons. Formalism stresses precedent, deductive reasoning, and inevitability over reason, and reflects a high degree of depersonalized writing and legalisms.

Opinion writing changed dramatically in the 1960s. Professors Llewellyn, Hart, and Sacks, legal realists who founded the Legal Process school of jurisprudence, complained about positivist judges, who decide cases by applying old precedents to new facts. (See Henry M. Hart and Albert M. Sacks, The Legal Process: Basic Problems in the Making and Application of Law [tentative ed 1958]; Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals [1960]; see also Lon L. Fuller, The Forms and Limits of Adjudication, 92 Harv L Rev 353 [1978].) The positivists' pure formalism, they argued, prevents the law from growing and from being just in unique or difficult cases. Llewellyn, Hart, and Sacks offered ways for lawyers and judges to distinguish precedent, interpret statutes, and be reckonable. Their process is summed up in
Llewellyn's aphorism: "Technique without ideals is a menace. But ideals without technique are a mess." (Karl N. Llewellyn, On What Is Wrong with So-Called Legal Education, 35 Colum L Rev 651, 662 [1935].) Their neoformalist theories of legal method are now taught in every American law school, and good judging is widely believed to depend on following correctly accurate precepts of legal method. (See Robert E. Keeton, Judging 1 [1990] ["[T]he quality of judging depends on commitment to method."].)


The Supreme Court has long cautioned against excessive formalism: "[T]his court in a very special sense is charged with the duty of construing and upholding the Constitution; . . . it ever must be alert to see that a doubtful precedent be not extended by mere analogy to a different case if the result will be to weaken or subvert what it conceives to be a principle of the fundamental law of the land." (Dimick v Schiedt, 293 US 474, 485 [1935, Sutherland, J].)

When formalism becomes excessive, the law is nothing but the state's authoritative command. The law of the positivists, led by British Judge John Austin, American Professor John Chipman Gray, and émigré to America Professor Hans Kelsen, was inflexible, nonutilitarian, and unrealistic. Positivism is grounded on never-changing black-letter rules that fail to recognize that precedent must yield to social and moral ends. As Professor Fuller argued, positivists recognize only what the law is, not what the law should be. (See Lon L. Fuller, The Law in Quest of Itself [1940].)

As far back as 1458, Chief Justice Sir John Fortescue satirized excessive formalism: "Sir, the law is as I say it is, and so it has been laid down since the law began; and we have several set forms which are held as law, and so held and used for good reason, though we cannot at present remember that reason." (Y.B. 36 Hen. VI, ff. 25b–26, quoted in David Mellinkoff, The Language of the Law pre-preface [1963].)

As recently as 1988, now-Chief Judge Kaye condemned excessive formalism: "I doubt that anyone today would seriously question the proposition that appellate decision-making is
more than a mechanical exercise of locating citations and affixing them to facts found below. The view of the function as entirely formalistic, as a matter of pure reason and scientific search, manifests not judicial restraint but intellectual nonsense.” (Judith S. Kaye, *The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern*, 73 Cornell L Rev 1004, 1006 [1988].)

According to Judge Posner, formerly chief judge of the Seventh Circuit, “the formalist idea dies hard,” partly because it serves as a “judicial defense mechanism.” (Richard A. Posner, *The Federal Courts: Crisis and Reform* 202 [1985].) Most modern judges have adopted the neoformalist opinion-writing style of the legal process school, which recognizes that black-letter law must be interpreted flexibly. The neoformalist limits the old, excessive reliance on precedents and maxims while recognizing that judges must follow a legal process that prevents them from deciding cases based on what they ate for breakfast. The neoformalist judge will first approach the decision by trying to do justice for the litigants and those similarly situated. Then, in writing the opinion, the judge will rely on logic and precedent to apply the law to the facts. Adding a touch of legal realism, Judge Gurfein of the Second Circuit explained the neoformalist mystery:

“It is still a mystery of the appellate process that a result is reached in an opinion on thoroughly logical and precedential grounds while it was first approached as the fair and right thing to do.” (Murray L. Gurfein, *Appellate Advocacy, Modern Style*, 4 Litigation 8, 9 [1978].)

Neoformalist legal-process judges do not decide cases simply by reading briefs, listening to argument, conferring with colleagues and law clerks, researching the law, studying the facts, and assembling the product into a logical written form dictated by law, justice, and morality. Those who believe that are naive. Rather, neoformalist judges use legal method and rhetoric to shape their raw material and to foreshadow their intended result.

The criticisms of and responses to neoformalism:

**Critique:** The strongest critique of neoformalism is that its adherents engage in unprincipled decision making under the disingenuous pretense of following theories of legal process: “[I]t is not entirely surprising or mysterious that judges will so often find logical and precedential grounds to reach the result that they have already decided is ‘the right thing to do.’” (Girvan Peck, *Writing Persuasive Briefs* 79 [1984].)

**Response:** Those who offer this critique would have judges revert to the formalism of legal positivism, which so relies on precedent as an end in itself that the social ends of law become irrelevant. The neoformalism of the legal process school offers the potential that law and justice will not have a merely fortuitous relationship and, at the same time, that judges will follow the common law except if it leads to unfair or absurd results. And this critique assumes, incorrectly,
that legal process necessarily calls for deciding first and justifying later. Llewellyn’s legal process school stresses reckonability, not ad hoc decision making. As then-First Department Justice and later Chief Judge Breitel remarked, “Llewellyn completely negates the notion that courts invariably merely provide a rationalistic façade to accommodate ad hoc judgments engendered or intuited by the nonintellectual responses of individual judges.” (Charles D. Breitel, Book Review, 61 Colum L Rev 931, 933, [1961], reviewing Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals [1960].)

Moreover, although an opinion writer’s values affect the final decision, a reasoned opinion incorporating the doctrine of stare decisis inhibits the opinion writer from giving full effect to those values. As the current Chief Judge noted, “Though it must move, the law also must have stability, certainty, and predictability so that people will know how to conduct themselves in order to come within the law, and will know what rights they may reasonably expect will be protected or enforced.” (Judith S. Kaye, The Human Dimension in Appellate Judging: A Brief Reflection on a Timeless Concern, 73 Cornell L Rev 1004, 1014 [1988].) Thus, “self-restraint by the courts in lawmaking must be their greatest contribution to the democratic society.” (Charles D. Breitel, The Lawmakers, 65 Colum L Rev 749, 777 [1965].

Finally, nothing is wrong with deciding cases first and justifying later. No less than Justice Holmes wrote, “It is the merit of the common law that it decides the case first and determines the principle afterwards.” (Oliver W. Holmes, Codes, and the Arrangement of the Law, 5 Am L Rev 1, 1 [1870].)

Critique: According to some schools of jurisprudence, neoformalism and Legal Process deserves criticism for failing to evaluate issues by their philosophical or theological underpinnings (natural-law school), by the people’s customary behavior (historical school), by the costs and benefits of legal issues (law-and-economics school), by the assumptions underlying the social structure (Critical Legal Studies and legal realism movements), by policy analysis to achieve sensible results (pragmatism), and by doctrines that exclude women (feminist jurisprudence).

Response: “[T]he great majority of judges write opinions that accept legal process as the proper guide to decision-making . . . . It does provide judges with a methodology of determining in a relatively neutral and predictable fashion what the law should be.” (William L. Reynolds, Judicial Process in a Nutshell 51 [2d ed 1991].)

3. High Style vs. Low Style

The tone of the “high style” is directed to sophisticated readers. The tone of the “low style” is directed to the average reader. At the end of the spectrum, the high style favors multi-structured headings and subheadings, detailed law-review footnotes, numerous acronyms, and legal jargon. The high style is not conversational. No one speaks in headings, footnotes, acronyms, and jargon. High and low styles are distinguished in all writing by word choice
(unfamiliar vs. familiar), sentence structure (long vs. short, complex vs. simple), and tone (lofty vs. forthright).

Tone: Tone is the most important factor in an opinion, assuming that the case is decided correctly and honestly from an objective point of view. As Barzun, the great stylist, explained, “Tone—that is the starting point of any teaching in composition. What effect are you producing and by what verbal means?” (Jacques Barzun, *English as She’s Not Taught*, in *A Word or Two Before You Go* 24, 30 [1986].) All words, word arrangements, capitals, commas, and citations reflect tone. Tone reveals, but does not describe, the writers’ beliefs and feelings about the writers and their readers. Tone is part of style, as opposed to usage. Style, the writer’s voice or persona, is the impression writers create through language—the way one writes—and is made up of such things as word choice, sentence and paragraph structure, organization, figures of speech, and tone. (See Timothy P. Terrell, *Organizing Clear Opinions: Beyond Logic to Coherence and Character*, 38 Judges’ J 4, 38 [Spring 1999] [“S]tyle can be understood as the writer’s projection to the reader of the writer’s image of his or her professional character.”], citing Steven Armstrong and Timothy P. Terrell, *Thinking Like a Lawyer: A Lawyer’s Guide to Effective Writing and Editing* § 8, at 5–10 [1992].) Usage is how writers manipulate the elements of language.

As Emory School of Law Professor Terrell explains, “style has to do with the relationship of writer to reader, a relationship that can be, for example, authoritarian or collegial or deferential.” (Id.) On the other hand, the “tone of an opinion . . . depends for its legitimacy on autocratic claims to professional authority, or, less arrogantly, on invocations of reasoned discourse, or, even more familiarly, on appeals to simple humanity or fundamental values.” (Id.) Tone can be neutral, businesslike, friendly, condescending, contemptuous, obsequious, lofty, or forthright.

4. **Lofty Style vs. Forthright Style**

Judge Posner explains it this way: “Some opinions have a lofty, formal, imperious, impersonal, ‘refined,’ ostentatiously ‘correct’ (including ‘politically correct’) even hieratic tone, while others tend to be more direct, forthright, ‘man to man,’ colloquial, frank, even racy, even demotic.” (Richard A. Posner, *Judges’ Writing Styles (And Do They Matter)*, 62 U Chi L Rev 1421, 1427 [1995].) Lofty opinion writing is solemn, sometimes stuffy, always magisterial. Lofty opinion writing has been criticized: “[T]he magisterial’ voice should have fallen out of favor in our time [because opinion readers] should not be patronized.” (Walker Gibson, *Literary Minds and Judicial Style*, 36 NYU L Rev 915, 923 [1961].) Forthright opinion writing is less certain and pretentious than lofty opinion writing. Judge Jerome Frank, the legal realist, justified the forthright style:

“The conventions of judicial opinion-writing—the uncolloquial vocabulary, the use of phrases carrying with them an air of finality, the parade of precedents, the display of seemingly rigorous logic bedecked with ‘therefores’ and ‘must-be-trues’—give an impression
of certainty (which often hypnotizes the opinion-writer) concealing the uncertainties inherent in the judging process.” (United States v Rubenstein, 151 F2d 915, 923 [2d Cir 1945, Frank, J., dissenting], cert denied 326 US 766 [1945].)

Overly forthright opinions have also been criticized: “It is obvious that [the opinion reader] should not be slapped on the back with wisecracks and jocularity; neither should he be spoken to as if he were somehow intransigently stupid in the face of a 'plain meaning.'” (Gibson, supra, at 923.)

Some critics prefer not to debate whether opinion writing should be lofty or forthright. They believe that context determines tone:

“The point is that flat advice about being simple, about being direct in writing is not always relevant. It depends on the context, and the context depends on one’s view of the world. One finds this tension between complication and simplicity running through a great deal of legal writing. Literary critics like to take a piece of simple sheet music and make an orchestration of it; lawyers, on the other hand, or at least the ones I have been reading here, like to work a symphony down into something that will go into a player piano.” (Glenn Leggett, Judicial Writing: An Observation by a Teacher of Writing, 6 Scribes J Legal Writing 137, 144 [1997], reprinted from 58 L Libr J 114 [1965].)

5. Pure Style vs. Impure Style

A pure opinion style represents both formalist and neoformalist jurisprudence—and with it the reliance on legal authority in varying degrees. At its extreme the Formalist Style pure opinion is lofty and polished; it conveys a “high” tone. It contains certitude, declaratory pronouncements, and dogmatism. It is canonical and detached. At that extreme it is the formalist opinion of the legal positivist. The New York State Court of Appeals’s current style is the pure style without the excesses of a lofty and high tone or the formalist’s excesses of legal positivism. In other words, its style is the neoformalist style of Llewellyn’s legal process school. Every American law school teaches legal-writing courses geared to persuade judges who write pure opinions. The pure opinion comes from Justices Brandeis, Brennan, Cardozo, Frankfurter, and the second Harlan, “and is characteristic of the vast majority of opinions written by law clerks, which means most opinions in all American courts today.” (Richard A. Posner, Judges’ Writing Styles (And Do They Matter), 62 U Chi L Rev 1421, 1432 [1995].)

An impure opinion represents pragmatic jurisprudence closer to the lines of the Grand Style. An impure opinion will have no traces of the positivist’s extreme reliance on authority. On the continuum, an impure opinion represents the most “neo” of the neoformalist school—the
belief that because the law should be practical, opinions should be accessible. The impure opinion has a “low” and “forthright” style; it is conversational and marked by candor. It is discursive and dramatic; it engages as a story with exploration and debate. It is structured, not by scholarly touches or heavy reliance on precedent, but by what the impure writer believes an audience of nonlawyers would see as just. Because every case is different, impure writers write with a consistent voice but vary their styles to avoid repetition. An impure sampling, from Judge Posner: Justices Black, Douglas, Holmes, and Jackson, and Chief Judge Learned Hand. (Id.)

Pure opinions are immediately marked by their organization. Indiana Court of Appeals Judge Buchanan favored the pure approach when he wrote that “[u]sing a structured opinion results in more than efficiency and readability . . . . The discipline of organizing, dividing, and identifying the parts of an opinion is a process which, if honestly pursued, necessarily produces brevity, clarity, and accuracy.” (Paul H. Buchanan, Jr., For Structured, Digestible, Streamlined Judicial Opinions, 60 ABA J 1249, 1251 [Oct. 1974].) This approach makes it easier for practicing lawyers, reporters of decisions, and digesters to assemble the law contained in an opinion.

Impure opinions, conversely, are marked by their lack of structured organization. Lasky favored the impure approach when he condemned straitjacketing “an opinion like a brief, harnessed in all the paraphernalia of chapters, headings, and footnotes. With that we have come a long way from Justice Holmes’ ideal [that] ‘an opinion . . . should be quasi an oral utterance.’” (Moses Lasky, Observing Appellate Opinions from Below the Bench, 49 Cal L Rev 831, 831 [1961], quoting 1 Holmes–Laski Letters: The Correspondence of Mr. Justice Holmes and Harold J. Laski 675 [Mark DeWolfe Howe ed 1953].)

Which approach is better, the pure or the impure? Both approaches, after all, yield decisions with integrity in the hands of judges who have skill and integrity. The answer is complicated because the purists love to quote the impurists. The impurists have written the best lines. Yet for most trial judges in New York and elsewhere, the pure opinion is the only opinion, so long as the pure opinion avoids the excesses of positivism, formalism, loftiness, and haughtiness. First, trial judges exercise wide discretion, but they are bound by appellate precedent. The pure opinion is designed for those who may not deviate from precedent. Second, it is much easier to write a good pure opinion than a good impure opinion. American lawyers are trained in the pure style of the formalist and the neoformalist; only the most accomplished, gifted judges can write good impure opinions one after another with a consistent voice and without being reversed for relying on abstract notions of justice at the expense of precedent. Third, when impure opinions fall flat, they fail as no pure opinion can. An impure opinion is justified only if it is successful.

As judges ascend the appellate ladder, they may become impurists. As impurists, they can bring joy to their readers while attending to the consequences of their decisions and cutting through doctrine to find the law’s deep springs. If legal writing is the hardest legal art to master, and opinion writing the hardest legal-writing art, then writing artful, controlled impure opinions

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is the hardest thing a lawyer can ever do. But the greatest rewards go to those who master the hardest tasks, and great rewards await those who master the impure opinion.

Becoming an impurist judge is a wise choice, though, only if the impurist remains true to the impure spirit and avoids the pseudo-impure: stream-of-consciousness writing, amateurish rhetorical devices, uncertainty, unfocused holdings, embellished facts designed more to entertain than to illuminate legal issues, nonconcrete explanations of the law, emotional expositions, self-indulgent asides, reveling in one's own acuity, and disregard of precedent and statute.


"Judges may face a dilemma in trying to write opinions that are figurative, quotable, humorous, or unique. While they may want to forsake the wooden form of judicial opinion writing (issue, facts, law, application, conclusion), they must, in some way, maintain the dignity and integrity that, at least in part, give the judiciary its legitimacy."
VIII
THE ROLE OF LAW CLERKS AND COURT ATTORNEYS IN OPINION WRITING

1. Generally

In 1875, Massachusetts Chief Justice Horace Gray hired a law-school graduate to be his secretary. The Chief Justice paid the young man—whom he called a puisne (pronounced "puny") judge—from his own pocket. His secretaries came and went, and a few years after the Chief Justice was elevated to the Supreme Court, the government decided to pay for a clerk for each Justice. (See 24 Stat 254 [1886].) Most Justices hired stenographers, but Justice Gray continued to hire young law graduates. Only in 1919, after the government decided to pay for typists and a clerk, did the other Justices hire recent law graduates. Thus began the institution of law clerks.

In New York, court attorneys are called law clerks when they work for a Court of Claims judge or as the personal appointment of an elected Supreme Court justice. Otherwise, they are court attorneys—from the court attorneys in the Housing Part of the New York City Civil Court, to the pool attorneys in Supreme Court, to the court attorneys to the Chief Judge of the State of New York. Law clerks and court attorneys used to be called, respectively, law secretaries and law assistants.


2. To Whom Law Clerks Answer

Central staff court attorneys of the Court of Appeals answer to the Chief Judge and the court rather than to any particular Associate Judge. Court attorneys in the Appellate Division and the Appellate Term answer to the Presiding Justice of the Department or Term. Court attorneys assigned to a trial-term judge answer first to their judge, then to their administrative
judge, and ultimately to the person who actually appoints them: the Deputy Chief Administrative Judge for New York City Courts or the Deputy Chief Administrative Judge for Courts Outside New York City. Law clerks are hired and fired by their justices alone. Trial Term court attorneys not assigned to a judge answer to their Chief Court Attorney, then to their administrative judge, and ultimately to their respective Deputy Chief Administrative Judge.

The distinction between personally appointed law clerks and court-appointed court attorneys affects law clerks' and court attorneys' ethical obligations. (See e.g. Gerald Lebovits, *Judicial Ethics, Law Clerks and Politics*, NYLJ, Oct. 21, 1996, at 1, col 1.)

3. What Good Law Clerks Do

Law clerks, the generic title used in this handbook, are integral to the decision-making process. They do “time-consuming and essential tasks: checking the record, checking citations, performing legal research, and writing first drafts . . . . Law clerks are indispensable to the judges, enabling them to focus on the decision itself and the refinement of the decision in writing.” (Jefferson Lankford, *Judicial Law Clerks: The Appellate Judge's "Write" Hand*, Arizona Attorney 19, 21 [July 1995].) Dan White, the satirist, explains the law clerk's role this way: “All judicial clerks do the same thing, namely, whatever their judges tell them to do.” (D. Robert White, *The Official Lawyer's Handbook* 71 [1983].)

A good law clerk will excel at research, writing, and conferencing cases if called upon to do so in a busy trial part. Good law clerks maintain all personal and judicial confidences, play devil's advocate with and be a confidant to the judge, leave the decision making to the judge, save the judge from committing errors, and commit few of their own. A poor law clerk, according to Justice Braucher, is “[o]ne who dislikes library work, or who is unhappy unless agitating for a cause, or who is addicted to the telephone or cannot stand solitude.” (Robert Braucher, *Choosing Law Clerks in Massachusetts*, 26 Vand L Rev 1197, 1199 [1973].)

How should a judge select a law clerk? With care: The judge-clerk relationship is “the most intense and mutually dependent one . . . outside marriage, parenthood, or a love affair.” (Patricia Wald, *Selecting Law Clerks*, 89 Mich L Rev 152, 153 [1990].)

4. Law-Clerk Confidentiality

Rarely while they work for judges have law clerks been known to share secrets. History records only one notorious example, told best in Chester A. Newland, *Personal Assistants to Supreme Court Justices: The Law Clerks*, 40 Or L Rev 299, 310 (1961), and John B. Owens, *The Clerk, The Thief, His Life as a Baker: Ashton Embry and the Supreme Court Leak Scandal of 1919*, 95 Nw U L Rev 271 (2000). In 1919, Justice Joseph McKenna's law clerk was accused of leaking word of the decision in *United States v Southern Pacific Co.* (251 US 1 [1919]). The clerk's alleged coconspirators profited in a form of insider trading. When the plot was uncovered, the clerk resigned and was indicted for “conspiracy to defraud the Government of its right of secrecy
concerning the opinions.” The clerk argued that no law forbade his supposed conduct, but his motion to dismiss was denied, as was his appeal to the D.C. Circuit and his application for certiorari to the Court of his former employ. (See Embry v United States, 257 US 655 [1921].) But the Government eventually moved to dismiss the charges. Everything else about this affair is shrouded in mystery, except this: When the clerk, later a successful Washington baker, died at 83, he was cremated, and his ashes were “strewn on court property . . . under the cover of darkness.” (David J. Garrow, “The Lowest Form of Animal Life”? Supreme Court Clerks and Supreme Court History, 84 Cornell L Rev 855 n 27 [1999] [book review].)

Current law clerks may not reveal current confidences, but may they discuss their duties after they retire? The conventional wisdom is that law clerks must take confidences to the grave. (See Comment, The Law Clerk’s Duty of Confidentiality, 129 U Pa L Rev 1230 [1981].) But for a long time now, dozens of the nation’s most eminent attorneys and judges have written in surprising detail about their judges and the role they and their judges played in cases of national consequence. For an illuminating look at the extent to which former Supreme Court law clerks have disclosed confidences, see Garrow, supra (reviewing Edward Lazarus, Closed Chambers: The First Eyewitness Account of the Epic Struggles Inside the Supreme Court [1998], and Dennis J. Hutchinson, The Man Who Once Was Whizzer White: A Portrait of Justice Byron R. White [1998] [footnotes in title omitted]). From the ample evidence he provides, University of Chicago Law Professor Garrow concludes that law-clerk disclosure is a “long-standing historical tradition that has developed over the past sixty years.” (Id. at 893.)

One law clerk to Justice Robert Jackson was accused of betraying confidences about other law clerks. (See William H. Rehnquist, Who Writes Decisions of the Supreme Court?, US News & World Rep, Dec. 13, 1957, at 74.) In an article that created a firestorm of protest and support, then-Mr. Rehnquist wrote that “a majority of the clerks I knew [showed] extreme solicitude for the claims of communists and other criminal defendants.” (Id.) Apparently recovered from that controversy, Justice Rehnquist later wrote a beautiful portrayal of his judge in an article that disclosed no confidences. (See William H. Rehnquist, Robert H. Jackson: A Perspective Twenty-Five Years Later, 44 Albany L Rev 533 [1980].)

One can write about experiences as a law clerk and divulge nothing secret. For an article of this kind from a two-year Court of Appeals clerk, see Mario M. Cuomo, The New York Court of Appeals: A Practical Perspective, 34 St John’s L Rev 197 (1980).

5. Law-Clerk Writing

According to a federal judge who knows, “most judicial opinions are written by the judges’ law clerks rather than by the judges themselves.” (Richard A. Posner, Cardozo: A Study in Reputation 148 [1990].) Law-clerk opinion writing comes as no surprise to those who work in the courts: “It is widely recognized . . . that law clerks now draft many of the decisions that emanate from . . . chambers.” (Jeffrey O. Cooper and Douglas A. Berman, Passive Virtues and
Casual Vices in the Federal Courts of Appeals, 66 Brooklyn L Rev 685, 697 [2001].) To some extent, law-clerk writing plays a role in decision making itself:

“[M]any judges, if not most, require their law clerks to draft opinions for motions before the judges even skim the briefs. The judge then reviews and edits the clerk’s draft before rendering a final decision. The clerk’s view of the motion often persuades the judge. Of course, the judge will not agree with a law clerk’s decision if it is wrong, but many motions present a close call. The person who gets to take the first crack at it (i.e., the law clerk) may influence the outcome.” (Abby F. Rudzin and Lisa Greenfield, Ten Brief-Writing Don’ts—The Judicial Clerk’s Perspective, 85 III BJ 285, 285 [1997].)

The reality that law clerks contribute to judicial-opinion writing explains the need for this section—indeed, for much of this handbook.


- A concise statement of the facts, with a verification of the litigants’ statements of fact by reference to the record;
- A statement of the issues in contention;
- The litigants’ arguments on the issues, verifying the authorities;
- An analysis of the issues and the law;
- A list of questions that inquiry at oral argument might resolve;
- A recommendation on whether the court should decide the matter with a full, per curiam, or memorandum opinion; and
- A draft per curiam or memorandum opinion if the law clerk recommends either following a screening process.

The precise format of the bench memorandum depends on the court’s tradition, but the memorandum should emphasize the relevant issues and be impartial, critical, and thorough—but not so thorough that the panel of judges might as well have read the briefs and the record before oral argument. The law clerk’s goal is to familiarize the court with the case before oral argument
and to focus a judge who wishes to do further research. It is appropriate for neutral, objective law clerks to state their views preargument. The court may, and often does, disagree with the law clerks' views after oral argument and additional study. Moreover, "the only mission of a memorandum opinion is to inform the parties why the court is deciding as it is and to assure them that the court considered and understood the case . . . . Staff in these cases can relieve the judges of the initial drafting job, simple though it may be, thereby freeing judge time for the other demands of the court's business." (Daniel J. Meador, Appellate Courts: Staff and Process in the Crisis of Volume 49 [1974].)

To avoid the dangers of allowing pool, or central staff, attorneys to produce "no judge" opinions, see an article by (later recalled) California Chief Justice Rose E. Bird, The Hidden Judiciary, 17 Judges' J 4 (1978).

To make effective use of law clerks in opinion writing while preventing bureaucratic, or committee, writing, see a piece by Second Circuit Judge J. Daniel Mahoney, Law Clerks: For Better or Worse, 54 Brooklyn L Rev 321 (1988), and another by a justice of the Arkansas Supreme Court, George Rose Smith, A Primer of Opinion Writing for Law Clerks, 26 Vand L Rev 1203 (1973).


"It is an ill-kept secret that law clerks often do early drafts of opinions for their judges.

". . . . The clerks' contribution to judicial rhetoric has been the subject of much critical comment. He who wields the pen on the first draft, it is said, controls the last draft . . . . In my experience, judges who write every word of their own opinions (except for a few certifiable geniuses) do not produce works of markedly greater clarity, cogency, or semantic skill. The opposite is more likely true . . . . I for one would not return to the days when law clerks sharpened pencils and checked citations; the present system for deciding cases could not sustain that development . . . . Few judges are so disarmed by the rhetoric of their . . . clerks that their substantive judgments are eroded, and the readability of an opinion can be enhanced by a really talented clerk who turns out a nice phrase—or on occasions a memorable one."

Some believe that a rule should be enacted to make it unethical for law clerks to write judicial opinions. (See e.g. David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 Geo J Legal Eth 509, 555 [2001] ["Judges should write their own published opinions. They
should not have law clerks or anyone else do the writing for them."].) But that is a minority view. Most believe that law clerks should be allowed to write opinions and that law-clerk writing is good for the courts. (See e.g. Alex Kozinski, Making the Case for Law Clerks, 3 The Long Term View: A Journal of Informed Opinion 55 [1995].)

6. The Interplay Between Law Clerk and Judge in Opinion Writing

Much law clerk–judge writing is collaborative. (Douglas K. Norman, Legal Staff and the Dynamics of Appellate Decision Making, 84 Judicature 175, 175 [2001].) But whether the law clerk prepares the initial drafts or the final edits, the entire adjudicative function and decision-making process must remain exclusively with the judge. The litigants' rights and public confidence in the judiciary demand no less. Even if the law clerk writes every word of a particular opinion, the judge must agree with and understand every one of those words as if the judge alone wrote each word. Every word and citation must be the authentic expression of the judge’s thoughts, views, and findings. This requirement should force judges to review, with an eye toward editing, every opinion but the most routine, mundane, and brief draft.

In the end, “no matter how capable the clerk, the opinion must always be the judge's work.” (Federal Judicial Center, Judicial Writing Manual 11 [1991].) That is because “[w]e lose the judge's processed involvement when technically proficient law clerks write the opinions and the judge understands his role more as a decision maker and editor, if that, than as a writer.” (William Domnarski, In the Opinion of the Court x [1996].) Witkin said it well:

“[C]ourts need not seek excuses for delegating part of the opinion-writing function to talented experts, with superior legal training and experience in writing. It is the task of stating the reasons for the decision, not the authority to decide, that is delegated. No matter how elaborate or polished the draft opinion may be, the justice must make the final version his own opinion, because he is responsible for what it says.” (Bernard E. Witkin, Manual on Appellate Court Opinions § 10, at 16 [1977].)

So did Leavitt:

“As a near-warranty of integrity in these appellate procedures, the strongest control over staff personnel in their dealings with the judges is an ordinary sense of personal relationships. The judge is the boss. What he says and does are the final mandates on an issue . . . . A trained legal staff, relied on by judges aware of their own duties, is an inescapable feature of our . . . court structure.” (Jack Leavitt, The Yearly Two Foot Shelf: Suggestions for Changing Our Reviewing Court Procedures, 4 Pacific LJ 1, 17 [1973].)
Third Circuit Judge Aldisert agreed:

"You were not selected by me to be a 'yes man.' I value your opinions and your intellectual independence. Prior to the decisionmaking of the court, I invite your impressions and solicit your views. You are not to express a viewpoint simply to please me during the process of decisionmaking. Nevertheless, there is only one judge in these chambers. Once a decision is made, your role changes. Although you are my intellectual equal, it is I, and only I, who has the judge's commission. It is my ultimate decision that will control. And when the decision is in, that is it." (Ruggiero J. Aldisert, Duties of Law Clerks, 26 Vand L Rev 1251, 1256–1257 [1973].)

A judge should never acknowledge that a law clerk or judicial intern wrote the opinion. Doing so makes it appear that someone other than the judge decided the case. (See e.g. Parker v Connors Steel Co., 855 F2d 1510 [11th Cir 1988, Gibson, J.] [mandating recusal of federal district judge who credited in footnote his law clerk's "preparation of this opinion"], cert denied 490 US 1066 [1989].) If a federal judge thanks an intern for assisting in writing an opinion, the West Group will print that appreciation. (See e.g. Veras v Strack, 58 F Supp 2d 201, 201 n 1 [1999, Baer, J.] [acknowledging student intern]; Masayesva for & o/b/o Hopi Indian Tribe v Zah, 794 F Supp 889, 900 n * [D Ariz 1992, Carroll, J.] [acknowledging law clerk].) So will the New York Law Journal. A Westlaw check disclosed a surprising 129 cases (72 in the First Department, 57 in the Second Department) from 1990 to October 4, 2001, in which the Law Journal printed acknowledgments to interns from New York State judges.

Judges who thank their interns do so out of kindness to interns who, mostly without pay, make a significant contribution. What is kind to the interns, however, is unkind to the litigants and the public. This is not to suggest that judges not use interns to help research and write opinions. To the contrary, judges and their law clerks improve legal education and sometimes their opinions when they delegate research, writing, and editing tasks to interns. But crediting the intern makes it appear that the court delegated its decision-making obligations to an unadmitted, unaccountable law student. It is hard for the bar to take these opinions seriously.

A higher authority forbids what the New York Law Journal and the West Group permit. For the past decade, the Law Reporting Bureau has put into effect a Court of Appeals policy in which the State Reporter will not print judicial acknowledgments to law clerks or interns. This Court of Appeals policy suggests that judges who want to thank their interns reconsider their impulse, however well meaning. Before the Court announced that policy, the New York State Official Reports printed textually irrelevant acknowledgments that law students provided "research assistance" "in the preparation of this opinion." (See Matter of the Application of the Dist. Atty. of Queens County, 132 Misc 2d 506, 512 n 5 [Sup Ct, Queens County 1986, Rotker, J.]; People v Sadacca, 128 Misc 2d 494, 501 n 3 [Sup Ct, NY County 1985, Rothwax, J.].) One
reported opinion went even further: “The hard work, thorough research and scholarship of Edward Larsen, New York Law School Intern participating in the Richmond County Bar Association Summer Intern Program, is gratefully acknowledged and in large measure credited in the formation of this opinion. Mr. Larsen has the sincere thanks of this Court.” (Wolkoff v Church of St. Rita, 132 Misc 2d 464, 473 [Sup Ct, Richmond County 1986, Kuffner, J].)

Exception: Federal case law is filled with textually relevant judicial acknowledgments that law clerks performed legal research. (See e.g. Conroy v Aniskoff, 507 US 511, 527–528 [1993, Scalia, J., concurring] [noting that legislative history “examined and quoted” was “unearthed by a hapless law clerk to whom I assigned the task”]; Hazelwood Sch. Dist. v United States, 433 US 299, 318 n 5 [1977, Stevens, J., dissenting] [noting his law clerk’s statistical analysis]; Noto v United States, 76 S Ct 255, 258 n 4 [1955, Harlan, J.] [noting that data came from the record “or from the research of my Law Clerk”].)

Nor, heaven forbid, may a law clerk slip language or references past a judge. That happened in United States v Abner (825 F2d 835 [5th Cir 1987, Garza, J.]), which contains multiple allusions to the songs and albums of the Talking Heads rock band. The law clerk included these references to get free Talking Heads concert tickets.

To no one’s dismay, law clerks have been fired for including non-judge-approved writing in judicial opinions. One federal judge (Jerry Buchmeyer, Criminal Law: The Escape, 45 Tex B] 541, 542 [Apr. 1982]) tells the story of the soon-to-be-dismissed law clerk in State v Lewis (19 Kan 260, 27 AR 113 [1878]) who so admired a lawyer’s complaint that without consulting a judge, the clerk included the lawyer's lament, written as a fictional “reporter,” in the Kansas official reports:

“Statement of Case, by Reporter
This defendant, while at large,
Was arrested on a charge
Of burglary’s intent,
And direct to jail he went.
But he somehow felt misused,
And through prison walls he oozed,
And in some unheard-of shape
He effected his escape.

“....

“LEWIS, tried for this last act,
makes a special plea of fact:
‘Wrongly did they me arrest,
‘As my trial did attest,
‘And while rightfully at large,
'Taken on a wrongful charge.
'I took back from them what they
'From me wrongly took away.'

"..."

"Opinion of the Court. PER CURIAM:
We don't make law. We are bound
To interpret it as found.
The defendant broke away;
When arrested, he should stay.
This appeal can't be maintained,
For the record does not show
Error in the court below,
And we nothing can infer.
Let the judgment be sustained—
All the justices concur."

Neither may a judge use an outside expert—as opposed to an intern, law clerk, special master, or referee—to assist in writing an opinion. (See e.g. Matter of the Judicial Disciplinary Proceedings Against Tesmer, 219 Wis 2d 709, 580 NW2d 307 [1998, per curiam] [reprimanding judge for having law professor write 32 opinions].) As the Court wrote in Matter of Fuchsberg (43 NY2d (j), (y) [1978, per curiam] [Opn of Censure.Ct on the Jud]),

"We are mindful that law clerks often contribute substantially to the preparation of opinions. There are, however, important distinctions between a law clerk and an outside expert. The law clerk is a sworn court employee (22 NYCRR 25.23). He is a recognized figure of the judicial institution, familiar to the litigants and fully exposed to the submissions of both parties to the adversarial proceeding. We cannot accept respondent's explanation that he looked upon the law professors he consulted as 'ad hoc' law clerks."

Law clerks, who come and go, must learn a valuable talent: how to emulate their judge's opinion-writing style. Writing is connected to personality. Personality is reflected in the tone of the writing. Personality traits and writing styles do not change easily or overnight. Judges have preferences. Law clerks should learn them. Learning them maintains consistency, lets the judge adjudicate rather than edit for style, and, no small benefit, improves the law clerk's writing. The best ways to learn the judge's writing style is to study the judge's opinions and to profit in future cases from the judge's edits to current drafts.
May a law clerk refuse to draft an opinion? Who knows? In the decade-old and still-pending case of *Sheppard v Beerman*, a law clerk to a justice in Supreme Court, Queens County, declined to draft a speedy-trial opinion that, the clerk claimed, would result in “railroading” a defendant. The justice fired the clerk in December 1990 after the clerk called him a “son of a bitch” and “corrupt.” The clerk sued the justice under § 1983. Judge I. Leo Glasser of the District Court for the Eastern District of New York twice granted the justice’s motions to dismiss the complaint. Citing the law clerk’s First Amendment free-speech rights, however, the Court of Appeals for the Second Circuit reversed—twice. (See *Sheppard v Beerman*, 822 F Supp 931 [ED NY 1993], *affd in part & vacated in part* by 18 F3d 147 [2d Cir 1994, Altimari, J.] [Sheppard I], *cert denied* 513 US 816 [1994], *on remand to and dismissed* by 911 F Supp 606 [ED NY 1995], *vacated & remanded*, 94 F3d 823 [2d Cir 1996, McLaughlin, J.] [Sheppard II].) The following comes from a unanimous Second Circuit in *Sheppard II*:

“An amicus brief, submitted on behalf of the Chief Administrative Judge of the Courts of the State of New York, reminds us of what we well know—that the relationship between a judge and clerk is one based upon trust and faith. If a judge cannot believe that his clerk is competent, loyal, and discrete, the working relationship between the two is not just injured, it is nonexistent. We also recognize that Sheppard’s choice of language was inappropriate for a professional setting. But the First Amendment protects the eloquent and insolent alike.” (94 F3d at 829.)

On remand, Judge Glasser heard the case again. On February 7, 2002, Judge Glasser granted the now-retired justice’s summary-judgment motion, which the justice filed after he and others, including his two children, were subjected to 31 depositions. See *Sheppard v Beerman*, 190 F Supp 2d 361, 362 (ED NY 2002). Finally, in early 2003, in *Sheppard III*, the Second Circuit affirmed, “[g]iven the explosive exchange between Beerman and Sheppard and Sheppard’s inability to produce any evidence supporting his claim of improper motive,” and the Supreme Court denied certiorari in late 2003. *Sheppard v Beerman*, 317 F3d 351, 357 (2d Cir.), *cert. denied* 124 S Ct 135 (2003). With that, the 13-year saga ended on a First Amendment analysis, not on whether a law clerk may refuse to write an opinion.

For more on law-clerk writing, see Gerald Leovits, Reflection, *Judges’ Clerks Play Varied Roles in the Opinion Drafting Process*, 76 NY St BJ 64 (July/Aug. 2004).
IX
THE LEGAL METHOD OF TRIAL AND APPELLATE OPINION WRITING

Dean Wigmore read thousands of opinions while researching his treatise on evidence. To kill two birds with one stone, he wrote, in his 1914 first edition, second supplement, an essay on shortcomings in opinion writing. Wigmore’s brief essay—a mere six pages, to which he added another two in his 1940 third edition—was deeply influential. It remains the benchmark for the bench. He never told judges how to write well, but he told them what mistakes to avoid and left it to others to pick up where he left off. The first significant American law-review article on opinion writing, written in 1947, used Wigmore’s techniques to assess opinion writing. (See George Rose Smith, The Current Opinions of the Supreme Court of Arkansas: A Study in Craftsmanship, 1 Ark L Rev 89 [1947].) Justice Smith, Professor Robert A. Leflar (once a colleague of Justice Smith on the Arkansas Supreme Court), California Reporter Bernard Witkin, Third Circuit Judge Ruggiero J. Aldisert, Judge Joyce J. George, and all the other scholars and judges who have opined about opinions have been building on Wigmore’s edifice.

The first “shortcoming to be noted,” Wigmore explained, “is the lack of acquaintance with legal science. By ‘legal science’ is meant all that is above, below, between, and behind the particular rules and precedents—the system of legal knowledge—that which distinguishes the architect from the carpenter.” (1 John H. Wigmore, Evidence in Trials at Common Law § 8a, at 614 [Peter Tellers rev ed 1983].) This section is intended to make opinion writers familiar with the method of their craft.

1. Importance of Oral Argument as Opposed to Briefs. It depends on the court and the judge, and often on the attorney’s advocacy skills. (See e.g. Myron H. Bright and Richard S. Arnold, Oral Argument? It May be Crucial!, 70 ABA J 68 [Sept. 1984].) Controversy might result when, as in the CIA censorship case of Snepp v United States (444 US 507 [1980, per curiam]), an appellate court summarily affirms without oral argument.

2. Judicial Conferences and Assigning Appellate Opinions. Different appellate courts have different practices. Supreme Court tradition: After oral argument, during the voting conference, the Chief Justice assigns an Associate Justice to write the Supreme Court majority opinion when the Chief Justice is in the majority. When the Chief Justice is not in the majority, the majority’s senior Associate Justice assigns the opinion. New York Court of Appeals practice: Every judge, taking a turn in random order, gets a seventh of the opinion-writing assignments. During both Courts’ conferences, the Justices and Judges agree on the contours of the courts’ opinions, but voting shifts might occur afterward. Both courts are “hot” benches. All the Justices and Judges read the briefs and law-clerk bench memorandums before oral argument.

For an explanation of how assignments are made in the Court of Appeals, see Judith S. Kaye, Foreword, 1996-1997 Term: “Year in Review” Shows Court of Appeals Continuing its Great Traditions, 42 NY L Sch L Rev 331, 335 (1998) (“At the close of the day’s oral arguments, each judge selects an index card, turned face down, bearing the name of a case argued that afternoon.
We are then responsible for reporting that case at Conference the following morning and, assuming the reporting judge carries a majority, for the writing.

Both the Supreme Court and the New York Court of Appeals use procedures that preclude the one-judge opinion, in which opinion writing is assigned to one judge in advance of oral argument. NYU Law Dean and later New Jersey Chief Justice Vanderbilt is one of many who called the one-judge opinion "[t]he greatest bane of appellate courts." (Arthur T. Vanderbilt, Improving the Administration of Justice—Two Decades of Development, 26 U Cinn L Rev 155, 257 [1957].)

For an NYU professor's comparative, and only slightly outdated, explanation of the internal opinion-writing procedures of the First Department, the Court of Appeals, the Second Circuit, and the Supreme Court, see Delmar Karlen, Appellate Courts in the United States and England [1963].

3. Opinions. A “judicial opinion” is a court's reasoned explanation of its decision: “An opinion is simply an explanation of reasons for the judgment.” (Edward A. Hartnett, A Matter of Judgment, Not a Matter of Opinion, 74 NYU L Rev 123, 126 [1999].) An opinion may be oral or written. An attorney gives a “legal opinion” to a client or on a client's behalf.

4. Per Curiam Opinions. “Per curiam opinions” are unsigned and decided by “the court.” In the federal appellate courts, per curiam opinions are reserved for cases deemed routine and squarely controlled by precedent or for cases in which the court wants to control the result without writing to explain why. In most appellate courts in New York, opinions are rendered per curiam because a majority of the judges agree with the result but not with the reasoning or because, for one reason or another, the judges or justices do not wish to be personally identified with the court's opinion. Thus, opinions in disciplinary appeals and judicial-misconduct appeals are decided per curiam.

True per curiam opinions are more authoritative than signed opinions when they contain no reservations or exceptions. But the authority extends only to the result, not to the reasoning. Per curiam opinions are less authoritative than signed opinions when the court uses them to decide mundane questions.

Per curiam opinions are the most authoritative opinions of all when the court wants to make a politically important decision come from a unanimous court, not from an individual judge appointed by a particular appointing authority. Some readers might have heard about a few recent examples of this form of per curiam opinion writing. (See Bush v Gore, 531 US 98 [2000, per curiam] [presidential election case]; Bush v Palm Beach County Canvassing Bd., 121 S Ct 471 [2000, per curiam] [finding that Florida Supreme Court did not clearly articulate whether its ruling was based on federal law, state statutory law, or state constitutional law], vacating & remanding for reconsideration Palm Beach County Canvassing Bd. v Harris, 772 So 2d 1220 [Fla 2000, per curiam] [extending deadline by which Florida Secretary of State could receive hand-
counted ballots before she would be allowed to certify presidential election results in Florida), upheld on state legislative law on remand 772 So 2d 1273 [Fla 2000, per curiam].)


The Appellate Term, First Department, which for historical reasons denominates all its opinions per curiam, does not render true per curiam opinions. The Appellate Term's per curiam opinions are signed only to the extent that the justices concur or dissent separately. The Appellate Term's opinions are really memorandum opinions. The Appellate Term's judgment is set out in the concurrences, but "[a] true per curiam opinion has neither a concurrence nor a dissent" that sets out a judgment. (Joyce J. George, Judicial Opinion Writing Handbook 236 [4th ed 2000].) A true per curiam opinion itself contains the judgment, not the signed concurrences and dissents attached to it.

5. Memorandum Opinions. True "memorandum opinions" are unsigned, except by the clerk of the court. In New York, memorandum opinions are unsigned in the First, Second, and Fourth Departments. Because the justices in the Third Department sign their memorandum opinions, the Third Department does not render true memorandum opinions. Memorandum opinions are brief and conclusory on the law, the facts, and the procedural history. Memorandum opinions, typically written when the court believes that the matter is not of first impression, are directed to the litigants and not to the public at large. They always have less weight than signed, or full, opinions.

At least one commentator explains that "a memorandum opinion should not be used when disposing of a case by reversal or remand . . ." (Ruggero J. Aldisert, Opinion Writing 20 [1990].) That is not the policy of the New York State appellate courts, which affirm, reverse, modify, and remand in memorandum opinions when the court believes that the case does not warrant a full, signed opinion.

6. En Banc Opinions. A case decided "en banc"—pronounced in bank by many—is decided by an entire court of intermediate appellate jurisdiction, not just by one panel. This procedure is used in the federal circuits but not in New York State courts. Unless an en banc opinion has numerous concurrences or dissents, it is the most persuasive opinion in the federal system below a Supreme Court opinion.

7. Concurrences, Dissents. Concurrences and dissents should not be written unless the judge has something significant to express beyond personal dissatisfaction. (See generally Ruth Bader Ginsburg, Remarks on Writing Separately, 65 Wash L Rev 133 [1990]; Alex Simpson, Jr., Dissenting Opinions, 71 U Pa L Rev 205, 216 [1923] ["[N]o dissent should be filed unless it is reasonably certain that a public gain, as distinguished from a private one, will result."].) The only debate is, What is "significant"? Unanimity enhances stability in the law, promotes collegiality,

Both concurrences and dissents are written for the future, when another panel might adopt the reasoning; for a higher appellate court, which might consider the concurrence and dissent and even affirm or reverse for the reasons stated there; for the other judges on the panel, who might ultimately adopt part or all of the concurrence or dissent; or for outside forces, like the Legislature, to correct perceived mistakes.

A concurrence agrees with the result but for different reasons. Some concurrences are written to disagree with the majority’s rationale. Others are written to assure the losing side that all is not lost, to highlight a ground the majority did not mention prominently enough, or, in cautioning against too-broad an interpretation, to note that the majority did not go as far as its language suggests. Sometimes concurrences are written to create a majority and avoid a plurality. (See e.g. Gertz v Robert Welch, Inc., 418 US 323, 353–354 [1974 Blackmun, J., concurring].) Most agree that unexplained concurrences have little utility and frustrate litigants and readers. (See e.g. Ira P. Robbins, Concurring in Result Without Written Opinion: A Condemnable Practice, 84 Judicature 118 [2001].) Conncurrences are calm. Dissents are often agitated.

Dissents object to the result. Most judges dissent reluctantly. Dissenting means disagreement, makes no law, requires extra work, and possibly not being read. Busy practitioners tend to read only majority opinions, not dissents. They care about what the law is, not what some judges believe it should be.

Dissents fail when they are overly collegial: “A sense of urgency and of impending doom is almost a sine qua non of the dissenting voice.” (Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U Chi L Rev 1371, 1413 [1995].) Dissenting judges need not play hostage to judicial politics. They can exercise their First Amendment rights using whatever rhetorical flourishes they wish. Some of the most famous judicial writings come from dissents, and many famous judicial writers—Justices Black, Brandeis, Douglas, and Holmes, to name a few—were great dissenters. Often, though, spirited dissents lead to judicial jab-trading, which is something to avoid. (See e.g. Maurice Kelman, Getting in the Last Word: The Forensic Style in Appellate Opinions, 33 Wayne L Rev 247, 248 [1987] [arguing that forensic opinion writing “disfigures the Court’s opinion and is always to be avoided”].)
Until it was dropped in from the 1972 Code revision by an ABA committee headed by California Chief Justice Traynor, Canon 19 of the 1924 ABA Canons of Judicial Ethics, drafted by Chief Justice William H. Taft, provided as follows:

"It is of high importance that judges constituting a court of last resort should use effort and self-restraint to promote solidarity of conclusions and the consequent influence of judicial decision. A judge should not yield to pride of opinion or value more highly his individual reputation than that of the court to which he should be loyal. Except in case of conscientious difference of opinion on fundamental principal, dissenting opinions should be discouraged in courts of last resort."

Canon 19 was enacted because of sentiments like these:

"A dissenting judge is not limited in his dissent and often is tempted to go beyond the record. He sometimes may indulge in sarcasm and far-fetched logic, unreasonable constructions and interpretations . . . . He wants to make his view stand out in bold relief, and by undue emphasis, unreasonable criticism, unfair interpretation, and a failure to follow the record he affords by his dissent much that makes good reading in the press, all to the harm of the court as a whole." (Herbert Gregory, Shorter Judicial Opinions, 34 Va L Rev 362, 366 [1948]; accord Roscoe Pound, Cacoethes Dissentiedi: The Heated Dissent, 39 ABA J 794 [Sept. 1953].)

The 1972 Code revisors dropped Canon 19 because they deemed it unhelpful to make dissenting an ethical issue. (E. Wayne Thode, Code of Judicial Conduct Reporter's Notes 50 [1973].) One of New York's solutions to avoid unfair dissents is to allow the majority to respond to dissents. Before an appellate opinion is issued, drafts are circulated, and the majority may answer the dissent. Another solution is to allow a dissenter to "give his reasons without entering into a debate with the majority or even referring to the majority opinion," except in shorthand to explain the rationale for the dissent. (John J. Parker, Improving Appellate Methods, 25 NYU L Rev 1, 13 [1950].)

Dissenting and concurring opinions should offer explanations. As Professor Cappalli has observed, "Dissents without opinion serve no useful purpose. The dissenter or concurrer should state, even if briefly, her disagreement in reasoning and result from the majority." (Richard B. Cappalli, Viewpoint, Improving Appellate Opinions, 83 Judicature 286, 319 [2000].)
The majority's decision is the court's decision. Concurring and dissenting judges do not speak for the court. Thus, one may never write that a concurring or dissenting judge "found," "held," or "decided." A concurrence is dictum. A dissent is argument.

Special rules apply to dissents in the Appellate Division. Under CPLR 5601(a), the Court of Appeals takes leave as of right if two Appellate Division justices dissent on a question of law. For a study of current "Great Dissenters" in the Appellate Division, see Joseph C. LaValley III, The Calculus of Dissent: A Study of Appellate Division, 64 Albany L Rev 1405 (2001).

8. Majority Opinions. A "majority opinion" is an opinion in which more than half the court agrees with the result and the reasoning.

The desire for unanimity, or even for a majority, causes institutional pressures that greatly affect appellate opinion writing. As Judge Wald explained, "Opinion writing among judges of widely disparate views and temperaments is, like governing, the art of the possible." (Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U Chi L Rev 1371, 1377 [1995].) To reach consensus, for example, a judge's "best lines are often left on the cutting room floor." (Id.) Moreover, "the writer may sacrifice full treatment of all nonfrivolous issues properly before the court." (Id. at 1378.) In a close case, rationales change for votes: "[A] would-be dissenter may agree to go along with a disfavored result if a disfavored rationale is avoided." (Id. at 1379.) Influenced as well are the precedents on which the judges rely. According to Judge Wald, pariahs include Korematsu v United States (313 US 214 [1944]), the Japanese-interruption case, and Rust v Sullivan (500 US 173 [1991]), the abortion gag-rule case. (Id.) To achieve consensus, authors of books and articles are included or excluded because of personalities and views. (Id.) Language, too, is sacrificed, from "literary allusions or humor" to "style preferences" to "generalities or expressions of high-flown precepts." (Id. at 1379–1380.)

Many appellate opinion writers, such as Chief Justice Charles Evans Hughes, sacrificed language for consensus: "[I]f in order to secure a vote he was forced to put in some disconnected or disjointed thoughts or sentences, in they went and let the law schools concern themselves with what they meant." (Edwin McElwain, The Business of the Supreme Court as Conducted by Chief Justice Hughes, 63 Harv L Rev 5, 19 [1949].)

9. Plurality Opinions. A "plurality opinion" resolves an appeal in which a majority agrees with the result but not with the reasoning. Only the result of a plurality opinion is binding; the reasoning in a plurality opinion is dictum. Plurality opinions sometimes lead to unusual results. In National Mutual Ins. Co. of Dist. of Col. v Tidewater Transfer Co., Inc. (337 US 582 [1949]), for example, a plurality opinion upheld a statute the majority considered unconstitutional. And in Oregon v Mitchell (400 US 112 [1970]), Justice Hugo Black's opinion became law even though eight Justices repudiated his views.

The rule for plurality opinions: "When a fragmented Court decides a case and no single rationale explaining the result enjoys the assent of a majority of five Justices, 'the holding of the
Court may be viewed as that position taken by those Members who concurred in the judgments on the narrowest grounds . . .” (Marks v United States, 430 US 188, 193 [1977], quoting Gregg v Georgia, 428 US 153, 169 n 15 [1976, opinion of Stewart, Powell, and Stevens, JJ].)

A plurality is best labeled “Opinion Announcing the Court’s Judgment,” not “Opinion of the Court.”

10. Decrees. A “decree” decides a motion or matter that sounds in equity.

11. Orders. An “order” is an oral or written court directive on a question of law (as opposed to equity) punishable by contempt if disobeyed. Orders are directed to preliminary matters like motions. Every motion is an application for an order under CPLR 2211, and, under CPLR 2219 (a), an order in long or short form must resolve every motion. Rather than write “Settle order,” trial judges should render opinions that are also orders. Doing so saves litigants from settling orders. (See Supreme Court, Civil Branch, New York County, Guide to the Form of Orders and Judgments 8–9 [2d ed 1998].) The magic words for trial judges in the decretal paragraph are, “It is ordered that” and, at the end of the written order and opinion, “This opinion is the court’s decision and order.” The suggested phraseology is more active and concise, and less legalistic, than the current standards: “It is hereby ordered” and “The foregoing opinion constitutes the decision and order of the court.”

12. Rulings. A “ruling” is a court order made during litigation, and necessarily before judgment. “Rules” are “reaffirmed” (if followed later by the same court), “adopted,” “accepted,” “no longer followed,” and “stated.” Rules are not “laid down,” “set down,” or “set forth.”

13. Judgments. A “judgment” is the final or interlocutory resolution of an action or proceeding. (CPLR 5011.) The word is spelled “judgement” in England but “judgment” in America. A judgment should state, “It is adjudged.” If a judgment contains declaratory aspects, it should state, “It is ordered and adjudged,” or separate decretal paragraphs may cover the order and judgment. There can only be one judgment in a case. For an excellent guide to preparing judgments, see Guide to the Form of Orders and Judgments, supra. Note that cases, not judgments, are remanded.

Judicial opinions legitimize judgments by giving reasons for them, but “[t]he operative legal act performed by a court is the entry of a judgment.” (Edward A. Hartnett, A Matter of Judgment, Not a Matter of Opinion, 74 NYU L Rev 123, 126 [1999].)


15. Seriatim Opinions. A “seriatim opinion” is a separate writing such as a concurrence or dissent that accompanies a full or per curiam opinion. Before Chief Justice Marshall (1801–1835) changed the policy to conserve judicial resources, all federal appellate opinions rendered before 1801 were rendered seriatim, with each judge writing separately. (Scott Douglas

16. Reversed, Affirmed, Reversed or Affirmed in Part, Remanded. Rulings and judgments, not rules or reasoning, are affirmed or reversed. Rules and reasoning are followed or not followed. An appellate decision that affirms the judgment below, but which uses reasoning different from the reasoning of the court below, is still an affirmation. (*E.g.* *Helvering v Gowan*, 302 US 238, 245 [1937, Brandeis, J.] ["T]he rule is settled that, if the decision below is correct, it must be affirmed, although the lower court relied upon a wrong ground or gave a wrong reason."].) If a case has more than one result, one result can be affirmed and another reversed. A case remanded is returned to a lower court with directions to redo or reconsider some aspect of the case. The Court of Appeals may remand to the Appellate Division or to the court of first instance.

17. Overturned, Upheld, Sustained, Overruled, Disapproved. A case “overturned” or issue “overruled” on appeal is overturned or overruled by another, later case of the same court, and thus only indirectly. A lower court’s opinion is “disapproved,” not overturned or overruled, by a later case not reversed or modified directly. Res judicata does not affect an earlier case whose holding or rationale is overturned. A case, or issue, “upheld” on appeal is upheld by another, later case. Courts “sustain” or “overrule” objections, but motions are “granted” or “denied.” Dictum is “approved” or “disapproved,” not “affirmed” or “overruled.”

18. Modified. Modifications cover one or more aspects of a determination below but do not reverse the judgment below. For example, a conviction is affirmed, but a sentence is modified.

19. Questions of Fact, Questions of Law, Mixed Questions of Fact and Law. New York State and federal appellate courts review legal determinations de novo (plenary review). All federal appellate courts may review questions of fact and law. Both the Appellate Division and Appellate Term may review questions of fact and law. (CPLR 5501 [c], [d].) But the New York Court of Appeals may review only questions of law, unless the Appellate Division below decides a matter on facts not determined in first instance. (CPLR 5501 [b].) If the Appellate Division’s finding on a mixed question of law and fact has record support, the Court of Appeals’s review is at an end.
20. **Interest-of-Justice Discretion.** New York intermediate appellate courts have the discretion in the interest of justice to consider claims of error unpreserved at trial. The federal standard, other than for jurisdictional matters or for fundamental constitutional questions, which may be raised for the first time on appeal, is whether the error is “plain error.” If so, the error need not be preserved. The New York Court of Appeals has no interest-of-justice prerogative to review unpreserved claims.

21. **Clearly Erroneous.** That is the federal appellate standard to review questions of fact. New York State’s intermediate appellate courts review factual determinations under their factual review power with varying degrees of deference depending on the issue, the factfinder, and the proceeding.

22. **Substantial Evidence.** An Article 78 proceeding uses the substantial-evidence standard to determine whether substantial evidence supports an administrative-law ruling.

23. **Substantial Deference.** Courts give “substantial deference” to the expertise of an administrative agency to interpret its own regulations.

24. **Substantial Justice.** This concept lowers procedural and evidentiary hurdles in Small Claims Court. Judges follow substantive law in Small Claims Court and on appeal from a small-claims judgment. (See e.g. Gerald Lebovits, Small Claims Courts Offer Prompt Adjudication Based on Substantive Law, 70 NY St B 6, 9 [Dec. 1998]; Gerald Lebovits, Special Procedures Apply to Enforcing Judgments in Small Claims Courts, 71 NY St B 28, 29 & n 14 [Jan. 1999].)

25. **Reversible Error and Harmless Error.** This doctrine applies to errors of law. Jurisdictional issues are not subject to harmless-error analysis. Errors of constitutional magnitude are subject to harmless error if the error is harmless beyond a reasonable doubt. The classic justification for harmless-error analysis: “Wrong directions which do not put the traveler out of his way, furnish no reasons for repeating the journey.” (Cherry v Davis, 59 Ga 454, 456 [1877, Bleckley, J].)

26. **Brandeis Briefs.** When Louis D. Brandeis, Esq., appeared before the Court in Muller v Oregon (208 US 412 [1908]), he included in his brief scientific studies outside the trial record. The Court found the studies reliable. Brandeis’s briefing technique has borne his name since then. A brief on Brandeis: Justice Brandeis had a profound influence on the Court and in opinion writing. He was the first to footnote heavily, to cite law-review articles, and to hire law clerks in a formal program. (William Domnarski, In the Opinion of the Court 64–65 [1996].)

27. **Leave and Certiorari Granted or Denied.** When a New York State appellate court may hear or decline to hear an appeal, the decision is called “leave granted” if the court agrees to do so and “leave denied” if it declines to do so. The decision is not called “appeal granted or denied,” although Westlaw calls it that. In the federal system, according to U.S. Supreme Court terminology, the decision to hear an appeal or to decline to hear an appeal is called “certiorari
granted” or “certiorari denied.” In both the New York and the federal systems, the decision no longer to hear an appeal on which leave or certiorari was granted is called “appeal dismissed.”

Before the Court of Appeals, two Judges must grant leave before the Court may review a civil case (CPLR 5602[a]); in criminal cases, only one Judge decides whether to grant leave. The Appellate Division may also grant an applicant leave to appeal to the Court of Appeals. (Id.) A litigant obtains a right to appeal if two Appellate Division justices dissent on a matter of law (CPLR 5601[a]), unless the case originated from Civil Court. Four Justices must grant certiorari for the Supreme Court to hear the matter. (See generally Joan Maisel Leiman, The Rule of Four, 57 Colum L Rev 975 [1957].) Execution of the judgment below is stayed pending appeal before the Court only if five Justices grant the application for a stay. Several times prisoners have been executed because the Court, having granted certiorari, denied a stay. (See e.g. Hamilton v Texas, 497 US 1016–1017 [1990, mem, Marshall, J., dissenting from denial of stay] [“[F]our Members of this Court have voted to grant certiorari in this case, but because a stay cannot be entered without five votes, the execution cannot be halted.”].)

Leave denials and denials of certiorari have no precedential value. But opinion writers should add to their citations all leave and certiorari denied citations, even though the Bluebook instructs writers to add only recent ones. Adding them proves that the writer completed the research and that the reader need not conduct additional research. Opinion writers should also always add all leave and certiorari granted citations to show that the cited proposition might quickly be affected by a more authoritative affirmance, reversal, or modification.

Petitions are granted and writs are issued. Lawyers apply for leave and writs. They do not move for them.

28. **Certified Questions.** A “certified question” is a lower court’s question to a higher court, or a question from a court of one jurisdiction to a court of another jurisdiction. For example, the Second Circuit may certify a question to the Court of Appeals if a state matter is in federal court on diversity jurisdiction and if the Second Circuit cannot determine the answer to a question posed by state law. A certified question seeks an advisory opinion to resolve a question of law. Certified questions are different from questions raised for appellate review, such as questions on certiorari. For a review of New York law on certified questions, see Judith S. Kaye and Kenneth I. Weissman, Interactive Judicial Federalism: Certified Questions in New York, 69 Fordham L Rev 373 (2000).

29. **Advisory Opinions.** They are not binding. New York courts may not give advisory opinions except in response to a certified question. Federal courts may never give advisory opinions. Courts may decide only real, justiciable controversies. For some pros and cons of that rule, see Jack B. Weinstein, Rendering Advisory Opinions—Do We, Should We?, 54 Judicature 140 (1970); Felix Frankfurter, A Note on Advisory Opinions, 37 Harv L Rev 1002 (1924).
30. **Affirmed by an Equally Divided Court.** When an appellate court splits evenly (3–3, 4–4), the preceding opinion is automatically affirmed. An opinion affirmed by an equally divided court has no precedential value. (See e.g. United States v Pink, 315 US 203, 216 [1942].) When the Supreme Court affirms by an equally divided vote, the Court does not announce which Justices fell on which side of the question. The Supreme Court states only that the opinion below is affirmed by an equally divided vote.

31. **Mootness Doctrine.** New York and federal courts may not decide a case that lacks a controversy. Thus, a court may not decide an academic question unless the issue is likely to recur, either between the litigants or among members of the public; unless the issue has evaded review; and unless the issue is substantial and novel. Moot cases include collusive and fictitious actions and proceedings, settled cases, controversies disposed of by lapse of time (such as injunctions), criminal cases abated by death, and criminal appeals in which a defendant has not appeared.

32. **Judicial Notice.** This rule of evidence allows trial and appellate courts to accept facts outside the record not subject to reasonable dispute. From Justice Frankfurter: "[T]here comes a point where this Court should not be ignorant as judges of what we know as men." (Watts v Indiana, 338 US 49, 52 [1949].)

For more on this subject, see Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part One*, 75 NY St BJ 64 (June 2003); Gerald Lebovits, The Legal Writer, *Technique: A Legal Method to the Madness—Part Two*, 75 NY St BJ 64 (July/Aug. 2003).
THE ANATOMY OF A PURE OPINION: ORGANIZATION AND CONTENT

1. Opening Paragraph(s)

Write the opinion so that the reader understands the essentials in the first 20 seconds. An introductory paragraph or two that gets to the point quickly allows the reader to research quickly—like a headnote that has the force of law, written by the court, from a judge’s pen. A blurry introduction causes the reader to get lost. A reader who does not immediately know who won and why will have trouble assessing and understanding the rest of the opinion.

Some opinion writers—the mystery writers—weigh fact and precedent before they state the conclusion. They believe that a conclusion can be justified only by the preceding discussion. This technique is common in literary writing, which tells the story before disclosing the conclusion. The mystery-opinion writers also believe that opinions that preview the holding lend credence to the suspicion that judges decide cases first and justify later. In the end, mystery writing works for mystery novels but not for opinions. All forms of legal writing, including opinion writing, are best written as inverted pyramids, in which the conclusion is stated at the beginning, with the details to follow.

Other opinion writers—the impurists—prefer to suggest the conclusion up front by the way they frame the issues, the introductory facts, and the procedure. From the impurists’ introduction, a sensitive reader will know who should win and why. The impure opinion writer need not spell anything out directly at the beginning. This impure introductory style works best for the most literate judges who occupy positions on the nation’s highest courts.

The purists believe that a tight opening—variously called a thesis, roadmap, or orientation, or a preview when the opening also contains the ending—helps not only the reader but also the writer. (See Charles R. Wilson, Appellate Advocacy Symposium, How Opinions Are Developed in the United States Court of Appeals for the Eleventh Circuit, 32Stetson L Rev 247, 257–263 [2003] [outlining the structure of pure opinions].) Framing and answering the issues in a nutshell crystallizes tentative views, organizes the entire opinion, and lends focus to what is important. What applies to advocates applies to opinion writers: “A clear orientation marks the difference between a brief that is either joyful and informative, or dark and incomprehensible.” (Albert M. Rosenblatt, Brief Writing and Oral Argument in Appellate Practice, 24 Trial Lawyers Q 22, 22 [1994].) For strong, additional reasons to begin with an opening or a preview, see Bernard E. Witkin, Manual on Appellate Court Opinions §§ 56–57, at 90–94 (1977).

A tip: Write the opening first, regardless how much time you spend on it. Keep rewriting the opening until you get it right. If you do that, you will be amazed at how sharp and easy to write the rest of your opinion will be. Then polish your opening last, just before your final proofreading edits.
Another tip: Nowhere in the opinion does succinctness and concision count more than in the opening. (E.g. Douglas K. Norman, An Outline for Appellate Opinion Writing, 39 Judges' J 26, 26 [Summer 2001] ["Brevity and readability are extremely important in the opening paragraph."].) Unless you write to resolve a split in authority or to weigh in on the meaning of a case, cite only binding authority in your preview. Give only the most essential procedural history and facts. Formulate the issue in general terms, and answer the question in dispute without detail. If possible, combine the procedure, the facts, the issue, and the answer to the issue in one fell swoop. Then conclude. Tell the reader who wins in conclusory terms.

Below are the two approaches to open a pure opinion.

a. **All the News That's Printed to Fit** (the less common technique)

- Who? Who are the litigants? If this is an appeal, who is appealing and who won below?
- What? What are the claims and issues?
- When? When was the purported error committed? If this is an appeal, did the error happen at trial? At a pretrial hearing?
- Where? If this is an appeal, where does the appeal come from? A trial court? An administrative agency? A court of intermediate appellate jurisdiction?
- How? If this is an appeal, how did the judgment or order appealed from arise?

or

b. **Thesis/Roadmap/Orientation/Preview** (the more common technique)

- Name the type of action.
- State the procedural posture.
- Introduce the litigants.
- Identify the issues (although you may set them out as facts).
- Conclude (preferably here, or at the latest after the issue section).

An opening that resolves the issues and states the conclusion is called a “preview.” Opinion writers debate whether to preview—to resolve issues and conclude in the opening of a pure opinion. It is more discursive and dramatic not to preview, some believe. But others argue that “opinions are more user-friendly if they state the outcome right off. They are not just
‘storytelling’ exercises seeking to create dramatic tension. Real lives and fortunes are at stake.”
(Patricia Wald, A Reply to Judge Posner, 62 U Chi L Rev 1451, 1453 [1995].)

2. Claims and Issues

a. Generally

A claim is a large contention or a request for relief. Trial judges deal mostly with claims and counterclaims, such as whether to grant summary judgment or a Huntley hearing. Appellate judges deal mostly with issues within claims, such as whether the trial court properly considered precedent in granting summary judgment or the extent to which the right to counsel affects a statement’s admissibility.

Detail the competing claims or issues after the roadmap, if helpful; otherwise go right to the facts.

Clean-up phrases (e.g., “We have considered appellant’s remaining arguments and find them meritless”). Some writers put their clean-up phrases here, but most put them in the conclusion-and-disposition section.

Resolve only those claims and issues before the court: “It’s hard enough to resolve the questions actually presented by the parties, and treacherous to venture beyond them.” (Judith S. Kaye, Judges as Wordsmiths, 69 NY St BJ 10, 10 [Nov. 1997].)

A court may resolve a case on a point of law neither side argued. Litigants are free to chart their litigation. But opinion writers decide cases; they do not judge debates between counsel. Our Court of Appeals has offered a famous justification for considering issues sua sponte:

“To say that appellate courts must decide between two constructions proffered by the parties, no matter how erroneous both may be, would be to render automatons of judges, forcing them merely to register their reactions to the arguments of counsel at the trial level.” (Rentways, Inc. v O’Neill Milk & Cream Co., 308 NY 342, 349 [1955, Fuld, J].)

Some great cases have been decided sua sponte, including Erie R.R. Co. v Tompkins (304 US 64 [1938, Brandeis, J.]). Deciding cases sua sponte, however, leads to bitterness among counsel and to dissents. See, for example, the dissents in Rentways (308 NY at 350 [Conway, Ch. J., dissenting]) and Erie (304 US at 82 [Butler, J., dissenting]).

If the litigants do not address a dispositive issue, consider asking counsel before oral argument to brief or orally argue the issue. This technique is consistent with due process, causes
little delay, and saves the majority from encountering dissents and considering motions to reargue. Doing so also leads to better opinions. Many judges are only as good as the lawyers who appear before them.

For two good discussions of this question, see Albert Tate, Jr., Sua Sponte Consideration on Appeal, 9 Trial Judges J 68 (1970); Allen D. Vestal, Sua Sponte Consideration in Appellate Review, 27 Fordham L Rev 477 (1959).

b. Formulating and Phrasing Claims and Issues

Where you stand depends on where you sit. One of the most important aspects of opinion writing is one of the most ineffable: How a claim or issue is framed determines how the claim or issue is decided and whether the reader will agree with the opinion. As Justice Frankfurter wrote, "In the law . . . the right answer usually depends on putting the right question." (Rogers' Estate v Commr. of Internal Rev., 320 US 410, 413 [1943].)

Take the U.S. Supreme Court's opinion in United States v Morrison (529 US 598 [2000]). The Morrison Court considered the constitutionality of the Federal Violence Against Women Act (VAWA) (42 USC § 13981 [b]). The dissent defined the issue as whether society needs to use the federal courts to compensate victims of gender-based violence and to punish its perpetrators. But the majority, which found VAWA unconstitutional, defined the issue as the extent to which the Commerce Clause permits federal law to be imposed on the states.

How you come out depends on how you came in. Frame your issue with your conclusion in mind, but state all issues of fact and law neutrally, without language that anticipates an answer. As one authoritative manual explains, "An impartial statement of the . . . issues is as important to the ultimate acceptance of the opinion as an impartial application of the rules of law." (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual 5 [1991].)

Advocates are taught to compose persuasive questions presented. Judges, however, must "[w]rite a judicious opinion, not a brief. State the question to be decided neutrally." (Robert E. Keeton, Judging 143 [1990].) Consider whether the first two sentences from Gordon v Green (602 F2d 743, 743–744 [5th Cir 1979, Brown, Ch. J.]) [footnote omitted]) suggest the answer:

“As we see it, the only issue currently before the Court in these five consolidated cases is whether verbose, confusing, scandalous, and repetitious pleadings totaling into the thousands of pages comply with the requirement of 'a short and plain statement' set forth in F. R. Civ. P. 8. We think that the mere description of the issue provides the answer . . . ."
A famous dichotomy in presenting the issue occurred in Bowers v Hardwick (478 US 186 [1986].) Writing for the Court, Justice White framed the issue as “whether the Federal Constitution confers a fundamental right upon homosexuals to engage in sodomy.” (Ibid. at 190.) Justice Blackmun, taking exception to that characterization, recast the issue as whether people have “the right to be let alone.” (Ibid. at 199 [Blackmun, J., dissenting], quoting Olmstead v United States, 277 US 438, 478 [1928, Brandeis, J., dissenting].)

A more recent dichotomy:

“On the question of irreparable harm, however, a few words are appropriate. The issue is not, as the dissent puts it, whether ‘counting every legally cast vote can constitute irreparable harm.’ One of the principal issues in this appeal we have accepted is precisely whether the votes that have been ordered to be counted are, under a reasonable interpretation of Florida law, ‘legally cast votes.’” (Gore v Harris, 121 S Ct 512, 512 [2000, Scalia, J., concurring], quoting Stevens, J., dissenting, staying Gore v Harris, 772 So 2d 1243 [Fla 2000, per curiam].)

Many opinions contain slanted issue statements. Are you certain from the following statement in United States v Yazell (382 US 341, 342–343 [1966, Fortas, J.] [opening two sentences]) that the Supreme Court decided this case on the law?

“This case presents an aspect of the continuing problem of the interaction of federal and state laws in our complex federal system. Specifically, the question presented is whether, in the circumstances of this case, the Federal Government, in its zealous pursuit of the balance due on a disaster loan made by the Small Business Administration, may obtain judgment against Ethel Mae Yazell of Lampasas, Texas.”

Unless the issue is written to resolve a split in authority, blend law and fact in formulating the issue: “do not use the law alone for the law component of the issue.” (Mary Bernard Ray and Barbara J. Cox, Beyond the Basics: A Text for Advanced Legal Writing 104 [1991].) Instead, combine law with fact.

c. Ordering Claims and Issues and the Rules Within Issues

An opinion must resolve claims or issues in a logical order. No hard-and-fast rule controls; every case is different. But here are some guidelines:

Consider deciding claims and issues in the order the litigants present them to the court. A few warnings, though. Advocates are trained to start with the argument that has the greatest
likelihood of success. Judicial-opinion writers have a different agenda. Moreover, “slavishly following the briefs, point by point . . . makes the opinion seem mechanical.” (George Rose Smith, A Primer of Opinion Writing, for Four New Judges, 21 Ark L Rev 197, 206 [1967].) Adopting the litigants’ organization can, additionally, make it appear that the court did not exercise independent judgment:

“A quick, and therefore seductively attractive, way to organize any opinion is to let the parties supply its pieces and order . . . .” Reasoning by reacting could be effective in certain circumstances, but more often it is a sign of judicial despair or fatigue. Some judges seem to believe that this form of organization is the only method for the court to demonstrate appropriate respect for the arguments of the litigants, carefully responding in turn to each side’s points. But respect of this sort does not require the judge to concede the structure of his or her opinion to the parties. Respect is owed not just to the parties, but to the court as well.” (Timothy P. Terrell, Organizing Clear Opinions: Beyond Logic to Coherence and Character, 38 Judges’ J 4, 39 [Spring 1999].)

Decide threshold issues before you decide the merits. A threshold issue is often a procedural issue, such as whether the court has jurisdiction to consider the merits. Sometimes a threshold issue is substantive, such as a statute-of-limitations question. Depending on the ruling, threshold issues can be dispositive.

. Put essential things first.

Resolve the large claims or issues before you decide less significant matters.

If all the claims are equally large, resolve the claim that most affects the litigation. Thus, in a criminal appeal in which a defendant seeks a new trial or, in the alternative, a reduced jail sentence, the appellate court should first decide whether to grant a new trial. If the court grants a new trial, it should not consider the request for a reduced sentence.

Exception: From time to time appellate courts instruct trial judges on how to handle issues at a retrial. It is entirely appropriate for an appellate court, in its discretion, to advise a trial judge so that a difficult question will be resolved correctly or so that an error will not be repeated. Guidance for a retrial “not only simplif[i]es] the task of the trial judge but also minimizes the chances of another appeal in the case.” (Bernard E. Witkin, Manual on Appellate Court Opinions § 87, at 157 [1977].)

Move logically through statutory or common-law tests. Often a decision depends on whether a litigant satisfied a multi-factor test enumerated in a statute or a seminal case. Resolve the claim in the sequence in which the statute or case laid out the factors.
When the answer to one question depends on the answer to an earlier question, resolve the first question first. The reader will understand relationships more easily that way, and the writer will avoid awkward cross-referencing.

Deciding claims and issues in the order in which they arose facilitates understanding if the claims and issues arose chronologically.

Everything else being equal, resolve issues by a hierarchy of authority: constitutional questions first, then statutory questions, then common-law questions.

Use topic sentences and thesis paragraphs to tell readers, up front, how the court will resolve the issue, if the case presents more than one issue: “like the opening paragraph, the initial paragraph presenting a point of error may be brought to a close by revealing the appellate court’s conclusion as to whether the trial court reversibly erred on that point.” (Douglas K. Norman, An Outline for Appellate Opinion Writing, 39 Judges’ J 26, 32 [Summer 2001].) This rule also applies to trial-court opinions that consider multiple issues.

3. Facts

a. Accurate Facts

Rule number one: Use accurate facts. Rule number two: Use facts accurately. Failing to follow rules one and two is called “cooking the books.” As one attorney explained, “An opinion writer is entitled to the greatest leeway both in his law and in his reasoning, for they are his. But honesty allows no leeway in his statement of facts, for they are not his.” (Moses Lasky, A Return to the Observatory Below the Bench, 19 Sw L J 679, 689 [1965].) Trial judges, not only attorneys, hate appellate courts that fudge facts: “The prime expectation of the trial judge, when his adjudication goes to an appellate court, is that the latter, in its published decision, will make an honest statement of the case.” (William J. Palmer, Appellate Jurisprudence as Seen by a Trial Judge, 49 ABA J 882, 883 [Sept. 1963].)

As a great judge has taught, “If there is anything that we can instill in our young clerks, who seldom need instruction in legal analysis, it is a healthy respect for a factual record.” (Frank M. Coffin, The Ways of a Judge: Reflections from the Federal Appellate Bench 167 [1980].) Citations can be verified, but the average reader will never see the transcript or study the exhibits. The only time the average reader learns that the opinion writer skewed the facts is when an appellate court or a dissenting judge intervenes. Because that rarely happens, accurate judicial fact-finding is a special obligation.

b. Procedural Summary
Add a procedural summary, if warranted. The procedural summary may be at the
beginning of the opinion, in a separate section before the facts, or, most commonly, at the end of
the facts section.

c. Where to Get Facts (and Law)

Do not rely on statements in the litigants’ submissions without verifying their accuracy
from the record itself. Lawyers, who have an interest in the litigation, can err or shade meaning.

Do not, moreover, “adopt verbatim the findings of fact . . . that the prevailing party puts
forward in its memorandum of law” or elsewhere. (Kristen Fjeldstad, Comment, Just the Facts,
Ma’am—A Review of the Practice of the Verbatim Adoption of Findings of Fact and Conclusions of
Law, 44 St. Louis U L J 197, 197 [2000].) True, “[t]he practice of inviting counsel to submit
proposed findings of fact and conclusions of law is well established as a valuable aid to decision
making.” (In re Las Colinas, Inc., 426 F2d 1005, 1008 [1st Cir 1970, McEntee, J.].) But “‘[t]he
making of the findings is purely a judicial function.”” (Id. at 1009 n 4, quoting Brenger v Brenger,
142 Wis 26, 125 NW 109, 113 [1910, Marshall, J.], quoting Harrigan v Gilchrist, 121 Wis 127, 99
NW 909, 993 [1904], quoted in Merrill E. Otis, Improvements in Statements of Findings of Fact and
Conclusions of Law, 1 FRD 83, 85 [1940] [original in Harrigan: “making of a finding”].) Copying
a lawyer’s proposed findings of fact is a risky practice that leads to a heightened appellate scrutiny
of copied facts. (See Las Colinas, 426 F2d at 1008–1009 & nn 4–7 [analyzing case law pro and
con and concluding that copying proposed findings is justified only in extraordinary cases
involving matters “of a highly technical nature”].)

If copying facts from a lawyer is problematic, copying an opinion wholesale is error. The
Third Circuit unanimously held in Bright v Westmoreland County (380 F3d 729 [3d Cir 2004])
that reversal and remand is required when a trial court adopts nearly verbatim an attorney’s
proposed order an opinion.

Whatever the source of the facts, make it clear in every sentence of the opinion whose
position is being advanced. Readers get confused when an opinion writer does not differentiate
between the litigants’ contentions and the court’s findings:

“Defendant urges that his conviction be reversed because the trial judge improperly
instructed the jury.” Becomes: “Defendant urges that his conviction be reversed because,
he argues, the trial judge improperly instructed the jury.”

d. What Facts?

Do not include legally irrelevant facts, dates, places, persons, things, or procedural history.
Exclude evidentiary minutiae.
Irrelevant facts, procedure, and evidence distract and confuse: “There is an accuracy that defeats itself by the over-emphasis of detail . . . . The picture cannot be painted if the significant and the insignificant are given equal prominence.” (Benjamin N. Cardozo, Law and Literature, 39 Colum L Rev 119, 122, 52 Harv L Rev 471, 474, 48 Yale L J 489, 492 [1939] [simultaneously published], reprinted from 14 Yale Review [N.S.] 699 [July 1925].) The goal, according to Professor Terrell, is to sift, not regurgitate. A poorly organized opinion, he explains,

“is usually encumbered with loads of detail—every fact presented seems to find its way into the court’s description of the background of the dispute . . . . Although the urge behind overinclusion is the defendable one of thoroughness, a truly controlled presentation is also focused. That impression requires a writer to sift the material of the document rather than simply reproduce all of it and then try to make sense of it all.” (Timothy P. Terrell, Organizing Clear Opinions: Beyond Logic to Coherence and Character, 38 Judges’ J 4, 38 [Spring 1999].)

Colorful but legally irrelevant facts, procedure, and evidence also lead to dictum. Do not include facts immaterial to the reasoning, even if they add color. Their inclusion trivializes the case and makes the reader believe that the immaterial facts contributed to the outcome.

When in doubt, however, err on the side of overinclusion to assure a full and fair statement of facts and to provide context.

Assume that your readers do not know your case—even when they are fully familiar with your case. That assumption will lead to a logical flow of ideas and a complete, if succinct, factual statement to help your readers understand context and to aid appellate review.

Include—and wrestle with—facts important to the losing side:

“Extreme care must always be taken to assure a fair and impartial statement. This is particularly true with respect to the facts favorable to the side which is going to lose . . . . It has been said that a lawyer may forgive a judge for mistaking the law. But, not so if his facts are taken away from him.” (American Bar Association, Section on Judicial Administration, Committee Report, Internal Operating Procedures of Appellate Courts 31 [1961].)

Note absent facts and omissions, which become relevant if they should be in the record but are not. (See e.g. Harrison v PPG Indus., 446 US 578, 602 [1980, Rehnquist, J., dissenting] [“[J]udges as well as detectives may take into consideration the fact that a watchdog did not bark in the night.”], referring to Arthur Conan Doyle, Silver Blaze, in The Complete Sherlock Holmes 335 [1927].) Precisely because they are absent, these facts are easy to miss. Yet, just as
circumstantial evidence is sometimes more compelling than direct evidence, absent facts sometimes lead to a more compelling finding than apparent facts.

Use concrete nouns, not abstractions or conclusions, to recite facts you deem relevant. Concreteness provides important context and persuades the reader that your result is correct. Being concrete means being specific. As Judge Wald advised, write in “Joe Six-Pack language. You would be surprised how often abstract concepts conceal a failure to come to grips with the precise issues or facts in a case.” (Patricia M. Wald, How I Write, 4 Scribes J Legal Writing 55, 59 [1993].) Writing non-abstractly is what separates great judges from merely competent ones: “The power of vivid statement [is what] lifts an opinion by a Cardozo, a Holmes, a Learned Hand out of the swarm of humdrum, often numbing, judicial opinions, rivets attention, crystallizes relevant concerns and considerations, provokes thought.” (Richard A. Posner, Cardozo: A Study in Reputation 136 [1990].)

e. Ordering Facts

Never parrot the record witness by witness, document by document. Some advocates write the facts sections of their briefs that way. Doing so is boring. It is not storytelling. It is unpersuasive. It forces the writer to dwell on irrelevancies and contradictions. As Fourth Department Justice Boehm wrote, “In setting forth the facts, avoid like the plague a witness-by-witness recital of testimony.” (David E. Boehm, View from the Bench, Clarity and Candor are Vital in Appellate Advocacy, 71 NY St B 52, 54 [Nov. 1999]; accord Douglas K. Norman, An Outline for Appellate Opinion Writing, 39 Judges’ J 26, 28 [Summer 2001] (“The statement of facts . . . should not be written as merely a summary of each witness’s testimony.”).) Instead, order facts as follows:

- Order facts chronologically. Doing so is the most typical, and typically the most successful. When giving a chronological narrative, sequence evidentiary and conclusory facts. Do not “mix reports of testimony with found facts in order to maintain a chronology.” (Elizabeth Ahlgren Francis, The Elements of Ordered Opinion Writing, 38 Judges’ J 8, 12 [Spring 1999].)

- Order facts by issue (thematic approach). This approach works well for trial-court opinions that decide multiple claims and counterclaims.

- Order facts by importance. A minority of those who write about opinion writing believe that “facts should be presented . . . most important to least important, rather than chronologically.” (Dwight W. Stevenson and James P. Zappen, An Approach to Writing Trial Court Opinions, 67 Judicature 336, 343 [1984].)

A handful of current opinion writers, using a technique from an earlier generation of opinion writers, set out each side’s factual (and sometimes legal) claims before setting out the court’s findings. That approach succeeds when the opinion writer believes it appropriate to enumerate the diverging factual contentions in a hotly disputed case. An opinion writer who
charts this course should avoid repeating the facts in detail when it comes time to explain which version the court accepts.

f. **Tone of Facts**

Never let the reader believe that you have an ax to grind or that you delight in humiliation.

Whatever tone you adopt, do not shift from formal to casual, from legalisms to plain English. Use words consistent in tone.

Inconsistent tone: “A third-party park-sitter, unbeknownst to Plaintiff, contacted said Plaintiff's head with a wine bottle. Plaintiff now has two metal plates and twelve screws holding things together.” (From Lynn B. Squires and Marjorie Dick Rombauer, Legal Writing in a Nutshell 107 [1982].)

g. **Theme, Perspective, and Organization**

Use theme, perspective, and organization to get the reader to agree with and understand your facts.

Theme: Every case presents two sides in conflict. Figure out both sides' themes and the theme you want your opinion to convey. A smart high-school student should understand your theme. Themes involve right and wrong, good and bad. When you develop your theme, the law is mere window dressing, used to justify your theme. Include every important and helpful issue, fact, and authority that supports your theme and contradicts the losing side's theme. It is in your facts section that your theme should shine. Do not state or argue your theme in your facts. Save argument for your discussion, or conclusions of law. Otherwise you will blur the line between facts and law, and your writing will appear more emotional than rational.

VAWA once more. Was the Supreme Court’s theme in United States v Morrison (529 US 598 [2000]) victims’ rights or states’ rights? In finding key provisions of VAWA unconstitutional, the majority concentrated on states’ rights, while the dissent concentrated on victims’ rights.

Consider Eisenstadt v Baird (405 US 438 [1972]), in which the plaintiff attacked a state law that forbade selling contraceptives to unmarried persons. The Court found that the government may not intrude on the privacy rights of single and married persons to have or not have children. (Id. at 453.) Would the ruling have been different if the Court’s theme had been whether the Constitution compels a state to allow stores to sell items that facilitate adultery and fornication?
**Perspective:** Facts are best understood when the reader can identify with someone who has lived through the events described in the opinion.

An opinion writer's use of perspective affects the opinion's persuasive impact. For example, opinion writers who wish to affirm a conviction in a criminal case might invoke the victim's perspective and describe the crime in graphic detail. Those who wish to reverse can write from the defendant's perspective and describe the crime blandly and generally. Opinion writers who wish not to find negligence will present conduct matter-of-factly and not focus on the victim's suffering. Opinion writers who wish to find negligence can use the opposite technique. Perspective affects the ethics of an opinion. Writers should use perspective, but honest writers will impose rhetorical restraint.

**Organization:** Get your reader to prejudge your facts at every stage. As an opinion writer, you have prejudged nothing. But if your reader does not agree with your ruling after reading only your facts, you will not persuade your reader that your ruling is correct and just. Minor, "negative" facts might contradict your premise, but for the sake of fairness you should include them. If you begin with facts favorable to your conclusion, the reader will rationalize later "inconsistent" facts with facts the reader already believes are true.

Example: A man you already described in detail as a pillar of the community walks into a bar and spills beer on someone. The reader will infer that the spilling was accidental. When you later conclude that it was accidental, the reader will agree with you.

Example: A man you already described as dishonest and vile walks into a bar and spills beer on someone. The reader will infer that the spilling was intentional. When you later conclude that it was intentional, the reader will agree with you.

h. **Use Facts, Not Law**

When writing facts, do not state law. Save your legal argument for your discussion, analysis, or conclusions-of-law section.

A tip: In the facts section, state facts, not what the facts mean. Let your readers determine the meaning of the facts for themselves. Thus, write "1 + 1," but do not write "= 2." That is the difference between show and tell. To "show" is to describe in concrete, nonconclusory language. To "tell" is to characterize and conclude. Show: "The witness testified to X and later to Y." Permissible tell in facts section: "Because of the witness's contradictions under oath, the witness is incredible as a matter of law." Permissible tell in law section only: "Because the court discredits the witness, the motion to suppress is granted."

i. **Persuasive Writing Techniques**
Writers persuade through logos, or logical argument and reason; pathos, or appealing to the audience's emotions; and ethos, or establishing credibility. The goal is to motivate the reader to agree with you and to give the reader grounds on which to do so.

Techniques of persuasive writing apply to facts in particular and to the rest of the opinion in general. Opinion writers must never write polemics, but they must always write persuasively. As Chief Judge Kaye explained, "Writing opinions is a lot like writing briefs. Both are, at bottom, efforts to persuade." (Judith S. Kaye, Judges as Wordsmiths, 69 NY St B J 10, 10 [Nov. 1997]; accord Alan B. Handler, A Matter of Opinion, 15 Rutgers L J 1, 2 [1983] ["The good judicial opinion . . . must emerge in its finished state a persuasive and convincing document."].)

Former Attorney General and Fifth Circuit Judge Bell wrote that facts "must be stated as favorably as possible to the losing party . . . . The opinion lacks judicial advocacy absent the best view of the facts for the losing party." (Griffin B. Bell, Style in Judicial Writing, 15 J Pub L 214, 216 [1966].) That is not, however, the conventional view. The opinion must include all the facts important to the losing litigant. Justice Hopkins had "[O]ne cardinal rule: do not omit facts which are stressed by the unsuccessful party or a doctrine which may be at war with the ultimate disposition." (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].) But once the opinion writer includes facts at war with the winner's facts and states them fairly, the writer need not slant them toward the losing side.

Judges rarely set out facts objectively, and they never should. They shape their facts: "The conventional wisdom is that the 'Facts' portion of an appellate opinion merely recites neutral, predetermined 'facts' found by a lower court or an agency . . . . Yet nothing could be further from the truth." (Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U Chi L Rev 1371, 1386 [1995]; accord Richard Weisberg, How Judges Speak: Some Lessons on Adjudication in Billy Budd, Sailor with an Application to Justice Rehnquist, 57 NYU L Rev 1, 34 [1982] ["Few would argue against the propriety of rhetoric and form in the service of a substantive position."] [footnote omitted].)

Nor may an opinion writer go beyond the actual facts or ignore facts that contradict the result. But an opinion writer "knows how the case will come out and she consciously relates a 'story' that will convince the reader it has come out right." (Id.) Storytelling has always been an essential part of opinion writing. (See e.g. Anthony G. Amsterdam and Jerome Bruner, Minding the Law [2000] [subtitling book "How courts rely on storytelling, and how their stories change the ways we understand the law—and ourselves"]). Judges must coherently mold, massage, emphasize, de-emphasize, and characterize facts, always mindful of the intended result. An opinion cannot reproduce an entire transcript, readers get confused and distracted if they see facts irrelevant to the issues, and skill at storytelling expands judicial discretion to allow writers to arrive at a truthful, correct decision.
Here are some leading persuasive-writing devices, followed by suggestions about using these devices ethically to arrive at an honest decision:

- Emphasize content, not the writing itself.

- Climax to the bottom and to the right: The points that require greatest emphasis go first at the end of the sentence, paragraph, or section, and second at the beginning of the sentence, paragraph, or section.

  Consider: “Judge X is a great opinion writer, but he decides cases slowly” vs. “Judge X decides cases slowly, but he is a great opinion writer.”

- The points to de-emphasize go in the middle of the sentence, paragraph, or section.

- To emphasize, use the active voice, concrete nouns, concrete and vigorous verbs, and, with some variety, short, simple sentences and paragraphs. The shorter the sentence or paragraph, the greater the emphasis. If you want to slow readers down, use long sentences and paragraphs.

- The less abstract and conclusory you are, the more you will persuade. Lead your readers to the cliff, but let them jump off themselves. Do not push them, for they will push back.

  Example: “Defendant was contemptuous” vs. “Defendant told the judge, ‘Go to hell.’” The first example is abstract, mere opinion. Your reader cannot agree with you without knowing more. The second example is concrete. The second example does not create resistance or even require the writer to state the obvious conclusion, that “defendant was contemptuous.”

- To be concrete is to persuade. From the editor-in-chief emeritus of the New York State Bar Journal:

  “Legal writers often deal in abstractions. Abstract concepts are usually vague because no word ever means exactly the same thing to two different people. Our writing cannot remain at the abstract level for long and still be clear . . . . When we make our writing less abstract and more personal, we also make it clearer, more readable, and therefore more interesting.” (Eugene C. Gethart, Improving our Legal Writing: Maxims from the Masters, 40 ABA J 1057, 1058 [Dec. 1954].)

- Tell a revealing, nonconclusory story about people. Even the way you refer to people has an effect.
Begin, if possible, with the character with whom you want the reader to identify.

Think of a good movie. The first major character was the good guy, not the bad guy, unless (1) the screenwriter wanted the viewer to identify with the bad guy or (2) the screenwriter wanted the viewer to see the bad guy as truly bad. Lead with a bad guy only when your story is about how the bad guy becomes a good guy, about how the bad guy is downright awful, or, if you want to fool the reader, about how the good guy is really the bad guy.

Punctuation can speed readers up or slow them down: Use em dashes ("—") to grab readers, semicolons to pause, periods to arrest. Recast sentences to excise commas if you want the reader to get through your material quickly.

Consider in a custody-dispute case the persuasive effect of asyndetons, or using punctuation instead of conjunctions, and polysyndetons, or using conjunctions instead of punctuation. (The following examples, with some editing, come from Laurel C. Oates et al., The Legal Writing Handbook: Analysis, Research, and Writing § 25.2.2, at 689 [2d ed 1998].)

Objective style: “Mr. Lundquist had certain responsibilities regarding his daughter Anna’s care: He drove her to school, checked her homework, and took her to medical appointments.”

Persuasive style favoring the father: “Mr. Lundquist had several significant responsibilities regarding his daughter Anna’s care: He drove her to school, and checked her homework, and took her to medical appointments.” (Using conjunctions and punctuation forces the reader to digest the writing.)

Persuasive style favoring the mother: “Mr. Lundquist had minimal responsibilities regarding his daughter Anna’s care: He drove her to school, checked her homework, took her to medical appointments.”

Use emotional facts without writing emotionally. Emotional facts hit the reader’s gut.

Emotional writing, which must be avoided, includes overheated writing: “It is truly remarkable, but not at all surprising . . . .”

Avoid overwrought writing:

“’The record is devoid of even a mere scintilla of evidence that . . . .”

“Counsel has offered a series of bald assertions.”
Overwrought and overstated metadiscourse the ABA condemned in a report written mostly by Ninth Circuit Judge (and previously Washington Chief Justice) Frederick G. Hamley:

"Avoid expressions such as 'a cursory examination is sufficient' or 'this point need not detain us long.' The losing lawyer will feel the examination has been too cursory and that the court should have detained itself a little longer. The phrase 'no citation of authority is needed' is redundant. If the citation of authority is not needed the informed reader will know it. But where this expression is used many will suspect that a citation was really needed but could not be found." (American Bar Association, Section on Judicial Administration, Committee Report, Internal Operating Procedures of Appellate Courts 37 [1961].)

Understatement and subtlety are more powerful than overstatement. The more obvious you are, the less reliable you sound. A reader might wonder why you wrote "very," but no one will ask why you put something in a dependent clause instead of an independent clause. Effective, persuasive writing acts subliminally. Overt language manipulation harms credibility. Using facts inaccurately destroys credibility.

- Forgo false intensifiers: "absolutely," "beyond cavil," "certainly," "clearly," "inevitably," "irresistibly," "necessarily," "obviously," "truly," "very." Some writers use false emphatics when they cannot persuade without artificial lifelines. As literally everyone knows, it is undoubtedly plain that false intensifiers enhance no writing whatsoever.

Exception: False intensifiers are true intensifiers when they confess error or express modesty. During the trial of Rex v Zenger, Alexander Hamilton told the jury the following: "I am truly very unequal to such an undertaking [representing defendant] on many accounts." (John Peter Zenger, A Brief Narrative of the Case and Tryal of John Peter Zenger, in The Law as Literature 168, 173 [Ephraim London ed 1960].) (By the way—for those who have not heard yet—Hamilton won that trial.)

- Hesitate and you are lost. The opposite of an intensifier's exaggeration is a coward's overcaution. Readers often believe that opinion writers sometimes hedge because most of the time they are generally afraid to be wrong even when they are just about right.

- Forget false intensifiers that hedge:
  - "Almost . . . ."
  - "Apparently . . . ."
  - "As I see it . . . ."
- "Nearly . . . ."

- "Seemingly . . . ."

- "Substantially . . . ."

- "To me . . . ."

- "In my opinion, the witness lied." (Cut preamble "In my opinion." You need not tell your reader that you are giving your opinion. It is obvious that this is your opinion. By emphasizing your opinion, moreover, the preamble weakens your conclusion that the witness lied.)

- Be careful when characterizing: Characterization modifiers ("Defendant is a wicked man") suggest bias. Bias is unsubtle, unpersuasive, and distracting. Opinion writers may not appear biased.

- To de-emphasize, use double passives ("the mouse was eaten," not "the cat ate the mouse"), abstract nouns, subordinate clauses, and lengthy compound-complex sentences and paragraphs, where more room is available to bury points in the middle.

j. Ethical Considerations in Persuasive Writing

Opinion writing must exhibit the pathos of good moral character: candor, respect, honesty, and professionalism. Smith offers three guidelines: (1) Focus on the litigants' behavior, not on the litigants; (2) focus on behavior that relates to the matter under discussion; and (3) do not evince hostility toward an attorney. (Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 125 [2002].)

Good opinion writers de-emphasize the irrelevant to stress what is important. But to be ethical, they must write fairly and clearly. (Cf. Wendy B. Davis, An Attorney's Ethical Obligations Include Clear Writing, 72 NY St BJ 50 [Jan. 2000].) The following is offered to alert opinion writers to the unfair, unclear style of misdirection through blank passives and character shifting.

**Intended unclarity.** A test, inspired by Joseph M. Williams, Style: Ten Lessons in Clarity and Grace 123 (5th ed 1997): Read a letter from a utility company notifying its customers of a rate increase. The company will likely not simply say, "X Company is raising its prices next month." In fact, it will not use its company name in the body of its letter, or it will do so but once—in the third person, in the middle of a sentence, in the middle of a paragraph. Instead, the company will likely begin its letter by giving the name of the regulatory agency that authorized the "rate restructuring." Then it will discuss how the restructuring is consistent with some state statute or regulation. The company will not emphasize the precise increase, although it will note
how long it has been since the last restructuring went into effect. Rather, it will direct the customer to how its improved bill will look and explain self-serving terms like “proration.”

Can you spot the difference a writer can create by shifting characters?

“After I tripped over Susan, I knocked over the vase.” Vs. “After Susan and I bumped, the vase was knocked over.”

The next example is from a newspaper advertisement that a company placed after the California Attorney General’s Office accused it of overcharging for car repairs. The example that immediately follows, written by Joseph M. Williams, Style: Ten Lessons in Clarity and Grace 125–126 (5th ed 1997), inverts the company’s blank passives and repairs its dangling participle—to the horror of the company’s publicists.

Actual advertisement: “With over two million automotive customers serviced last year in California alone, mistakes may have been made. However, Sears wants you to know that we would never intentionally violate the trust customers have placed in our company for 105 years.”

The apology rewritten: “When we at Sears serviced over two million automobile customers last year in California, we made some mistakes. However, you should know that no intentional violation of 105 years of trust occurred.”

Unintended unclarity. Sometimes writers do not plan to deceive, but they hide their feelings just the same. Opinion writers must recognize the subtle effects of communication. Consider:

“You make me sad when you don’t talk to me” vs. “I am sad when we don’t talk” vs. “People get sad when they don’t talk to one another.”

Judge to law clerk: “Please rewrite this paragraph; you are too wordy” vs. “Please rewrite this paragraph; it is too wordy” vs. “Please rewrite this paragraph; I think it is too wordy.”

The best way to show intelligence, ability, and integrity in opinion writing is through well-written, substantive argument. The cheapest and least effective way is by highlighting. The following are some highlighting techniques.

The ethical appeal. Perhaps the famous ethical appeal comes from Justice Holmes in Lochner: “The 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 study it further and long before making up my mind.” (Lochner v New York, 198 US 45, 75 [1905, Holmes, J., dissenting].) Justice Holmes subtly tried to show his credibility by explaining that he is impartial and does not jump to conclusions. But as Judge Posner explained, “Many judges voting to uphold
statutes they personally dislike will say so, to make themselves sound more impartial. This is an ethical appeal, but of a somewhat crass and self-congratulatory sort.” (Richard A. Posner, Law and Literature: A Relationship Reargued, 72 Va L Rev 1351, 1381 [1986].)

The informed judge. A Westlaw check of May 31, 2002, discloses 31 times that New York State judges have congratulated themselves in the Official Reports for conducting “a thorough review of the record,” 60 times for conducting “exhaustive research,” 131 times for conducting “a close reading” of the papers, cases, or statutes, 23 times for conducting “thorough reading” of them, and a notable 1285 times for conducting “a careful reading” of them. Seventy-seven times in the Official Reports, judges told their readers that they engaged in “careful deliberation,” 90 times that they conducted a “complete review,” and 46 times that “it is necessary to understand” a line of argument or factual issue.

Do judges use highlighting strategies to assure skeptical readers that they spend their time deciding cases rather than at the golf course? Or do judges use these strategies out of habit? Either way, verbiage that tells a reader that a judge is honest, smart, deliberate, detail-oriented, impartial, articulate, or empathetic has a negative effect: the words “sound hollow, contrived, and overly defensive,” and at best “readers may find them offputting.” (Michael R. Smith, Advanced Legal Writing: Theories and Strategies in Persuasive Writing 137, 151 [2002].)

Instead of explaining how closely the judge analyzed the papers, the judge should analyze the papers closely—and prove it by thorough written analysis, not by expressions of candor. Instead of explaining how exhaustively the judge researched the law, the judge should, if appropriate, discuss the research exhaustively. Instead of explaining how carefully the judge considered the issues, the judge should carefully consider the issues. Instead of explaining how articulate the judge is, the judge should write well.

Speaking to the reader directly is inmodest, patronizing, theatrical, and insincere. And worse, doing so tells critical legal readers—the best lawyers, in other words—that perhaps the judge did not read the papers closely or research the matter exhaustively—that the judge’s naked metadiscourse masked true deliberation and empathy.

One highlighting strategy that works is to note the honesty of lawyers who appear before the court. So long as court does not use the strategy too often, it is appropriate to acknowledge a lawyer’s “commendable candor” in disclosing adverse fact or law. A Westlaw check of May 31, 2002, shows that New York courts have used that phrase 171 times in officially reported opinions.

k. Record Citations

Cite the record (transcripts, affidavits, memorandums, court files) if one side makes a significant admission, if the court will need to refer to that point in the future, or if the court is concerned that the reader will not trust its factual recitation. Citing every source for every fact
gives the opinion a false sense of authority. Readers of judicial opinions assume that judges do not invent facts. Note that many federal opinions cite the record for every proposition. The rule is different for lawyers. They should always cite the record for every fact to assure that the record supports those facts, to allow opinion writers to verify facts, and to instill confidence.

4. Standard of Review

Before courts apply law to fact, they must set out, or at least use, a standard of review to interpret those facts. Standards include “reasonable doubt,” “clear and convincing,” “preponderance,” “legally sufficient evidence,” “probable cause,” “reasonable suspicion,” “substantial evidence,” “arbitrary and capricious,” “clearly erroneous,” “evidence interpreted in the light most favorable to the nonmoving party,” “assuming all facts in the complaint to be true,” “evidence interpreted in the light most favorable to the side that won the jury trial,” “strict scrutiny,” “intermediate scrutiny,” and “rational-relation test.”

The standard of review often determines the outcome. How the standard of review is written also affects the outcome. Compare these two polarized passages, both written by the same judge within a year of each other. The examples come from Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U Chi L Rev 1371, 1391 (1995). In one case the National Labor Relations Board won. In the other it lost. Which case did the NLRB win?

“The courts accord a very high degree of deference to administrative adjudications by the NLRB. [The NLRB’s] finding is upheld unless it ‘has no rational basis’ or is ‘unsupported by substantial evidence.’ It is not necessary that we agree that the Board reached the best outcome in order to sustain its decisions. The Board’s findings of fact are ‘conclusive’ when supported by substantial evidence on the record considered as a whole. The Supreme Court has recently instructed that a decision of an agency such as the Board is to be reversed only when the record is ‘so compelling that no reasonable factfinder could fail to find’ to the contrary.” (United Steelworkers of Am. Local Union 14534 v NLRB, 983 F2d 240, 244 [DC Cir 1993] [citations omitted].)

And

“The Court will not disturb an order of the NLRB unless, reviewing the record as a whole, it appears that the Board’s factual findings are not supported by substantial evidence or that the Board acted arbitrarily or otherwise erred in applying established law to the facts at issue . . . . However, our review ‘must take into account whatever in the record fairly detracts from [the] weight’ of the evidence cited by the Board to support is conclusions. We will not ‘merely rubber stamp NLRB decisions.’” (Synergy Gas Corp. v NLRB, 19 F3d 649, 651 [DC Cir 1994] [alteration in original] [citation omitted].)
Courts should avoid polarized standards. Polarized standards confuse future litigants over what is the real standard. By using the “winning” or “losing” versions of the standard-of-review boilerplate, polarized standards also do too much of the court’s work: Polarized standards lead to an inevitable conclusion. Using polarized standards leads opinion writers to cite one line of cases in which one class of litigant (e.g., defendants) prevailed and to exclude another line of cases in which a different class of litigants (e.g., the People) prevailed. Citing one line of cases based on the litigant’s class sounds biased and is biased.

5. Law and Applying Law to Fact (analysis; discussion; conclusions of law)

a. Outlining

The Whirlybird: How to outline, and why:

[To be filled in at the opinion-writing lecture.]

b. Deductive Reasoning

A strong way to organize an opinion’s discussion, analysis, or conclusions-of-law section is to use CRARC: “C”: Conclusion-topic; “R”: Rule; “A”: Application of rule to facts; “R”: Rebuttal & Refutation of fact and law; “C”: Conclusion-thesis. CRARC is similar to your IRAC of first-year legal-writing days, except that (1) the first “C” in CRARC states the conclusion, not the issue, and (2) CRARC adds a rebuttal and refutation section, sometimes anticipating an argument using the rhetorical device prolepsis, to cover the losing side’s points.

CRARC is a persuasive deductive-reasoning device. Here is an elementary induction: When opinion writers research and formulate thoughts, they should use inductive reasoning, which analogizes and generalizes from particulars known and unknown. Inductive reasoning is
learning from experience. When opinion writers write, they should use deductive reasoning modeled on an Aristotelian syllogism: identify the issue, state the rule, and apply the rule to the facts. The conclusion will be true if its premises are true.

Legal realists and critical legal studies theorists contend that judicial decision making is not a deductive enterprise. They argue that cases, at least those of first impression from high appellate courts, are decided by storytelling, rhetoric, political considerations, ideological choices, cultural values, economic policies, the judge’s personality, and semantic categorization.

The CRARC method organizes the discussion section of an opinion. CRARCing eliminates what Dean Wigmore called “the factual opinion” and “the rambling opinion”:

“[T]he factual opinion . . . begins by rehearsing copiously the facts, and then adds a few well-known general propositions of law, without indicating specifically how they apply to the facts, and concludes with ‘New trial denied.’” (1 John H. Wigmore, Evidence in Trials at Common Law § 8b, at 625 [Peter Tellers rev ed 1983].)

“Then there is the rambling opinion. It pieces together a great many semi-irrelevant propositions of law, wanders through numerous cited cases, sometimes makes a law lecture out of them, and ends with the impression that somewhere or other the opinion has told what the law is. But just what detail of the rule of law is newly decided remains unclear to the bar.” (Id.)

CRARCing also prevents lengthy case discussions. After all, “few things [are] more boring than . . . page after page of case discussion in which each paragraph begins: ‘In A v. B . . .’; In C v. D . . .’; In E v. F . . .’ By the third one, the reader feels like saying ‘who cares?’” (Paula Samuelson, Good Legal Writing: Of Orwell and Window Panes, 46 U Pitt L Rev 149, 159 [1984].)

Most important, CRARCing gives the opinion writer control. Control is critical because “the judge’s . . . role is to dominate the opinion just the way any good trial judge dominates his or her courtroom.” (Timothy P. Terrell, Organizing Clear Opinions: Beyond Logic to Coherence and Character, 38 Judges’ J 4, 39 [Spring 1999].)

[To be filled in at the opinion-writing lecture.]

C (or I)

R (major premise)
c. Logical Fallacies in the Discussion, Analysis, or Conclusions-of-Law Section

Some opinion writers adhere too much to formal logic: “A substantive flaw in opinion writing that frequently gives rise to misunderstanding is over-reliance on logic.” (Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 Colum L Rev 810, 816 [1961].) Over-reliance on logic fails because “[t]he life of the law has not been logic; it has been experience.” (Oliver Wendell Holmes, The Common Law 5 [1881].)

Worse than hiding behind Euclidian or Aristotelian logic is illogic. A fallacy is an invalid way of reasoning. If excessive reliance on logic is problematic, accepting a fallacy is worse, for a fallacy can lead to an incorrect conclusion. Opinion writers must be familiar with fallacious reasoning to avoid it in their own writing and to recognize it in the writing of others. As Illinois Supreme Court Justice Schaefer explained, “an opinion . . . whose logic is faulty is not likely to enjoy either a long life or the capacity to generate offspring.” (Walter V. Schaefer, Precedent and Policy, 34 U Chi L Rev 3, 11 [1966].)

Here are some logical pitfalls, taken in part from Gertrude Block, Effective Legal Writing 254–256 (5th ed 1999):

Post hoc fallacy (Post hoc ergo propter hoc): “After this; therefore, because of this.” Because one thing happens after something else happens does not mean that the first thing caused the second.

"Every time I brag about how well I write, I submit something with lots of typos.”
The fallacy: If you do not brag about your writing, you will submit a typo-free document.

This fallacy often appears in legal writing. For example, appellate defense counsel who challenges a jury charge might quote the charge and then immediately note that the jury found
defendant guilty, all to suggest that because the guilty verdict followed the charge, the charge must have caused the verdict and therefore that any error in it was not harmless.

*Dicto simpliciter:* Applying the general rule to exceptions.

"Judge X never learned grammar, but she writes well." The fallacy: Studying grammar is unnecessary.

*Hasty generalization:* Jumping to conclusions without adequate sampling.

"Chief Court Attorney Y never edits draft opinions from his law department. All chief court attorneys are lazy." The fallacy: A chief court attorney who does not edit is lazy, or if one is lazy, all must be lazy. Just because Y does not edit drafts does not mean that she or any other chief court attorney is lazy. Countless reasons can explain why Y does not edit drafts.

*Non sequitur:* "It does not follow." A conclusion that does not flow from its supposed proof.

"No local court can survive without an all-powerful administrative judge, for without a strong captain a ship will founder." The fallacy: A local court is like a ship.

Premises: (1) "The president of the local bar association urged all members to take MCLE courses." (2) "The bar-association president has never taken MCLE." Conclusion: "If the bar president does not take MCLE, I do not have to either." The fallacy: If a bar president does not take CLE courses, you do not have to, either. Perhaps the bar president is a hypocrite, but the only relevant question is whether it is smart to take MCLE, not whether the bar president is good or bad.

*Distraction:* Appeals to pity, personal ridicule, vanity, or pride divert the listener from applying their own logic. Appeals in the us-versus-them line of thinking also lead to a dishonest judicial opinion. For example, sacrificing lives in a just war is different from practicing eugenics. But Justice Holmes used this non sequitur in *Buck v Bell* (274 US 200, 207 [1927]) to uphold a forced sterilization order: "We have seen more than once that the public welfare may call upon the best citizens for their lives." He then warned of calamity to justify his appeal to patriotism: "It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind." (Id.) Not surprisingly, those Nuremberg defendants prosecuted for executing the retarded quoted Justice Holmes's illogic chapter and verse.

*Ad hominem fallacy:* "To the person." An attack on a person, not the person's ideas.
"The contracts professor cannot walk and chew gum at the same time. He
certainly knows nothing about offer and acceptance." The fallacy: A contracts
professor’s lack of physical coordination means that all mental functions are
impaired.

**Guilt by association:**

"I would not cite Judge X. Do you know who his law clerk is?" The fallacy: Judge
X’s opinion is unpersuasive because of who his law clerk is. But Judge X’s opinion
might be persuasive regardless who his law clerk is.

**Evading the issue:** Beware those who answer a question with a question, who rephrase
questions, and who answer questions with euphemisms, clichés, or platitudes.

**Poisoning the well:** Presumes your adversary’s guilt by forcing your adversary to answer a
question.

Consider the classic assumption, or presupposition, which takes something for
granted without asserting or arguing its validity: “When did you stop beating your
wife?” The fallacy: The question assumes that you used to beat your wife; that
you stopped beating your wife if you ever beat her; that you are married; and that
if you are married, you are married to a wife.

**Rhetorical question:** Posed as a question but implying an answer, even though the question
sometimes cannot be answered with a yes or no.

"When will that know-nothing lawyer object to the inadmissible hearsay?" The
fallacy: That the lawyer knows nothing, and that is why the lawyer does not
object. The question fails to prove the presumption on which the question rests.
Just because the lawyer fails to object does not mean that the lawyer knows
nothing, that the evidence is hearsay, that if it is hearsay it is inadmissible, or that
if it is inadmissible hearsay it is in the lawyer’s interests to exclude it.

**Pseudo-question:** A pseudo-question is a question no one can answer: “What is the
difference between green and twelve?"

**Begging the question:** A conclusion based on an unproven assumption. To beg the
question is not to evade the issue or to invite an obvious question.

**Circular reasoning:** A form of begging the question that appears to give an answer but
really does not. This argument begs the question of the truth of its conclusion by assuming its
truth.
"A good opinion begins with a strong opening. That is because a strong opening makes an opinion good." The fallacy: A good opinion is a good opinion because a strong opening is a strong opening.

*Either/or:* Presumes no alternative.

"You will win your case if you cross-examine well or you will lose." The fallacy: You will win or lose, all because of cross-examination. Your case might end in a draw, your case might end in a mistrial, or your case might be won or lost for reasons other than cross-examination.

*Argumentum ad populum:* An appeal to the masses, not to logic: racial bias, religious prejudice, listeners’ perceptions of superiority or inferiority, and similar misbegottens.

"The judge is a liberal. She’ll never give us a fair trial." The fallacy: Liberal judges give unfair trials.

*Tu quoque:* "You do it yourself." If one group or individual may do it, everyone should have the right to do it.

"Law clerks, like judges, should be allowed to set their vacation schedules." The fallacy: Law clerks should set their schedules because judges may. Perhaps law clerks should have that privilege, perhaps not. But an argument that rests on comparing two groups fails if the groups are not identical, if the situations are different, if one group inappropriately holds the right, or if the group to which the comparison is made does not hold that right.

*Misplaced and illegitimate authority:* A person who excels in one area holds credentials in unrelated areas.

*Misplaced authority:* "Ms. X is a lawyer’s lawyer. Let’s nominate her for the State Assembly.” The fallacy: A good lawyer will be a good politician.

*Illegitimate authority:* "I’m not a dentist, but I play one on TV. Buy X toothpaste to reduce cavities." The fallacy: Because I play a dentist on TV, I am competent to tell you that X toothpaste will reduce cavities.

Note: Even a bona fide authority in the field might not be objective, and thus not authoritative.

*Analogy as fact:* What is true in an analogous case will apply to the case under consideration. This fallacy plagues lawyers because they analogize so often.
An example: the parade of horribles:

“If abortion is not criminalized, we will soon tolerate infanticide and genocide.” The fallacy: If abortion is allowed, infanticide and genocide will occur.

Another example: argument by association:

“The Chief Judge likes ice cream. Boy Scouts like ice cream. The Chief Judge is a boy scout.” The fallacy: Because one thing is associated with a second thing, the first thing is identical to or part of that second thing.

The worker and the tool: Poor performance can be blamed on, and is attributable to, poor help.

“No wonder I cannot write. I had a terrible opinion-writing teacher at the OCA MCLE seminars for court attorneys and law clerks.”

d. Common Errors in a Pure Opinion’s Discussion, Analysis, or Conclusions of Law Section

The neoformalist’s pure opinions—those from the legal process school—err when they revert to excessive formalism. Along with the multi-structured headings and subheadings, detailed law-review footnotes, numerous acronyms, and legal jargon, the pure opinion’s discussion section might overcite, over-rely on authority, discuss law in minutiae, fail to connect law to facts, offer precedent over reason, over-quote, and use Latin, maxims, boilerplate, and pompous language that hides meaning.

Formulas. Pure opinions exhibit excessive formalism by relying on formulas.

“The phrase ‘assumption of risk’ is an excellent illustration of the extent to which uncritical use of words bedevils the law. A phrase begins life as a literary expression; its felicity leads to its lazy repetition; and repetition soon establishes it as a legal formula, undiscriminatingly used to express different and sometimes contradictory ideas.” (Tiller v Atlantic Coast Line R.R. Co., 318 US 54, 68 [1943, Frankfurter, J., concurring].)

Doctrines and maxims. Pure opinions are excessively formalistic when they rely on doctrines and maxims. Judge Cardozo himself wrote a few maxims, such as “danger invites rescue.” (Wagner v International Ry. Co., 232 NY 176, 180 [1929].) But he warned that judges must beware “the extension of a maxim or a definition with relentless disregard of consequences.” (Hynes v N.Y. Cent. R.R. Co., 231 NY 229, 235 [1921, Cardozo, J.].) Nearly a century ago Dean
Pound condemned those who rely on doctrines and maxims mechanically. (See Roscoe Pound, *Mechanical Jurisprudence*, 8 Colum L Rev 605 [1908].) So did Justice Holmes in *Lochner v New York* (198 US 45, 76 [1905, Holmes, J., dissenting] ["General propositions do not decide concrete cases."].) And more than a century ago, Lord Esher wrote that "[m]axims are invariably wrong, that is, they are so general that they always include something which is not intended to be included." (*Yarmouth v France*, 19 QBD 647, 653 [1887].) The formalistic, positivist, "authority-minded judge... is... more likely to apply precedent mechanically, in light of the literal meaning of sentences or phrases, rather than in light of underlying substantive reasons." (Robert S. Summers, *Two Types of Substantive Reasons: The Core Theory of Common-Law Justification*, 63 Cornell L Rev 707, 732 [1978].)

**Authority.** Pure opinions become excessively formalistic if they fail to parse precedent properly. Case law is critical in common-law jurisdictions. This is why:

"If lawyers ever lose their capacity for believing that precedents enable them to predict what the courts will do in the future, they would advise their sons to study dentistry or plumbing or some other respectable and highly remunerative profession. A lawyer would experience only frustration from his practice if candor compelled him to advise his client: 'The courts held this way last month, but heaven only knows how they'll hold next month!' And the bewildered client—what would he do? Probably seek a lawyer with more illusions or less candor." (Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 ABA J 628, 666 [July 1957].)

Moreover, the rules from the cases, not the cases themselves, should be emphasized. According to New York's Chief Judge Pound, "judges too often fail to recognize that the decision consists in what is being done, not in what is said by the court in doing it." (Cuthbert W. Pound, *Defective Law—Its Cause and Remedy*, 1 NY St Bar Assn Bull 279, 282 [Sept. 1929].) Over-reliance on authority spells a positivist, Formal Style approach to the law in which cases count for more than reason, distinctions among cases are ignored, and reasoning is hidden by long, dull discussions of authority. Over-reliance on authority also leads to disorganized opinion writing in which the factual minutiae of cases are discussed paragraph after paragraph and in which citations are strung together at length.

Unless the weight of the authority is important, the better approach in the pure opinion is to cite cases for their rules, not as ends in themselves: Discuss the facts of cases only to distinguish or analogize them to the facts of the case under consideration. (See e.g. Deborah A. Schmedemann and Christina L. Kunz, *Synthesis: Legal Reading, Reasoning, and Writing* 41–50 [1999] [explaining how to fuse cases to note governing rule or pattern].) In our common-law democracy, judges must follow binding precedent and legal-process rules of statutory interpretation. But not all precedent is binding, and not all statutes can be interpreted at face
value. As Illinois Chief Justice Schaefer explained, “lawyers tend to treat all judicial opinions as currency of equal value . . . . Yet, when the judicial process is viewed from the inside, nothing is clearer than that all decisions are not of equal value . . . .” (Walter V. Schaefer, Precedent and Policy, 34 U Chi L Rev 3, 7 [1966].) Professor Merryman noted the problem a half-century ago:

“By emphasizing ‘the law’ to the exclusion of ‘the legal process,’ by perpetuating the illusion that all there is to decision of a case is location of the appropriate rule, . . . these works perpetuate an unsophisticated concept of the legal process in which the actual bases of decision are concealed not only from the society but from the judge who decides.

“A first step in freeing himself from this view of law is that the judge recognize that headnotes from previous decisions, no matter how carefully arranged, how accurately copied, how smoothly run together into text, no matter how carefully weighed, distilled and condensed into higher abstractions, do not themselves decide cases . . . . [Judges should] ignore the false front of mechanical jurisprudence . . . .” (John Henry Merryman, The Authority of Authority: What the California Supreme Court Cited in 1950, 6 Stan L Rev 613, 673 [1954].)

What about an opinion that cites no authority at all? Justice Holmes once wrote a majority opinion in which he cited not a single case. (See Springfield Gas & Elec. Co. v City of Springfield, 257 US 66 [1921].) In Abrams v United States (250 US 616, 624 [1919, Holmes, J., dissenting]), which critics agree is the greatest dissent anyone ever wrote, Justice Holmes again cited no case. In a symposium on favorite cases, a judge of the Court of Appeals for the First Circuit picked one of his own opinions as his favorite. He loved the idea that he published an opinion in which he cited nothing at all. (See Bruce M. Selya, Favorite Case Symposium: In Search of Less, 74 Tex L Rev 1277 [1996], discussing Levesque v Anchor Motor Freight, Inc., 832 F2d 702 [1st Cir 1987, Selya, J.].)

Reality bites. Opinion writers have their favorite precedents. Judges, especially trial judges, often re-use cases that have worked in the past, forcing novel facts into familiar analyses to facilitate quick decision making. Judges prefer or dislike some cases and doctrines. Sometimes judges so prefer or dislike cases or their authors that they expand, contract, or ignore the principles in the cases and the authors’ writings. Cases and authors ignored or criticized lose their durability. Judges may cite cases written by doctrinal adversaries to show that “even they” agree with the point. Judges who wish to expand precedent state principles broadly, and cite supportive law-journal articles, to show the unimportance of the facts that distinguish the case to be expanded from the current one. The facts of cases to be contrasted are set out in detail to highlight the differences between the case to be contrasted and the current case. If the judge wants to ignore precedent on point, the precedent must be belittled on any of a dozen
grounds—poorly reasoned, unreasoned, relied on poor authority, old case, widely critiqued by secondary authority, distinguished by later cases, generating confusion in the courts and among litigants, split opinion, memorandum opinion, rejected by other courts, rarely cited, and outdated policy. Often lower courts express dissatisfaction with precedent to signal higher courts that the precedent should be overruled. Often, higher-court judges cite a series of cases on point to tell a lower-court judge that the failure to follow precedent was egregious. Sometimes higher-court judges in the same situation ease their rhetoric to be charitable or because they are friends with the trial judge.

A contradiction with precedent. We urge judges to follow precedent, but we celebrate judges who subvert precedent:

"[M]uch as we value order and predictability in the law, we also celebrate those judges whose strong, creative visions eventually capture the allegiance of the legal and social culture. A judge who commands a majority by adopting an interpretation that covers no new ground will probably not be remembered as great; to be great, a judge must both break from precedent and ultimately succeed in having his or her views accepted." (David Cole, Agon at Agora: Creative Misreadings in the First Amendment Tradition, 95 Yale LJ 857, 867 [1986].)

Technicalities. Pure opinions display excessive formalism by stressing technical rules over reason. Dean Wigmore explained that opinions often have an "overemphasis on the technical legal rules in detail, with corresponding underemphasis on policies, reasons, and principles . . . . Too much of our law is dead bark, at least in judicial opinions." (1 John H. Wigmore, Evidence in Trials at Common Law § 8a, at 616 [Peter Tellers rev ed 1983].)

Quoting. Pure opinions reveal excessive formalism by quoting too extensively, by block quoting, by not weaving quotations into the analysis, and by not weaving quotations into sentences. In his article on opinion writing, former ABA President Beardsley criticized the habit of quoting facts of minimal relevance and authorities to support self-evident propositions. (See Charles A. Beardsley, Judicial Craftsmanship, 24 Wash L Rev 146 [1949].)

Pettifog. Pure opinions are excessively formal when they use foreign, fancy, and legalistic words.

Quality is Job One: “First, we need to make sure that our communications are accessible. For sitting judges, this starts with sensitive courtroom behavior and speaking clearly—in English, not in Latin, not in French, and not in pettifog . . . . We need to say what we mean in a way that people can understand.” (Judith S. Kaye, Rethinking Traditional Approaches, 62 Albany L Rev 1491, 1497 [1999].)

**Passive voice.** "Voice" is the form of the verb that shows whether the subject performed the action or received the action. Single passives invert the order of the sentence. Blank passives hide the actor or subject. Nonagentive passives do both. A judge's nonagentive passive "removes, reduces, or at least downplays responsibility for her decision." (Id. at 97.) Compare "Death-penalty litigation is eliminated from habeas corpus review" with "Today we eliminate death-penalty litigation from habeas corpus review."

**Nominalizations.** Nominalizations are verb constructions turned into noun constructions. Nominalizations "mystify a particular topic, obscure a writer's attitude, and conceal the agent responsible for an action or process." (Id. at 98–99.) Compare "An instance of the commission of torture appeared on the record" with "Our examination of the record discloses that the police officer tortured the prisoner."

**Subject complements.** Subject complements appear after the verb "to be" and after linking verbs like "to appear" and "to become." "Angry" is the subject complement of "The judge became angry." This construction hides because it does not explain how the judge became angry. Compare "Petitioner's claim is procedurally barred" with "Petitioner is procedurally defaulted in not preserving his claim."

**Role reversal.** A writer who reverses roles moves the object of the sentence to the first agent or subject in the sentence. Compare "Police Shoot and Kill Blacks During Riot" with "Rioting Blacks Shot Dead." (Newspaper headline quoted from Professor Little's article at page 101.)

**Naming.** With this device a legal writer creates a noun compound to represent a legal finding in a compact way. Those who create new, memorable terminology forever characterize the way in which the finding is seen. The law is filled with named jargon.

**Verb forms as distancing.** Findings of law in the present tense convey honesty and directness. Compare "Our three-pronged test failed" with "Our three-pronged test fails."

6. Conclusion and Disposition

a. Summary

When an opinion is decided after a complex and lengthy discussion of several issues, the opinion writer is wise briefly to restate or summarize the holding, defined as the key rules and facts that govern the decision. The restatement should not repeat the opening verbatim, but it
should be consistent with the opening. Short, one-issue, or memorandum opinions need not restate the holding.

b. Peroration

When an opinion is of relative first impression or deviates from precedent, an opinion writer may summarize the holding and then “add[] a literary touch, stressing the policy or other persuasive considerations that call for this conclusion . . . .” (Bernard E. Witkin, Manual on Appellate Court Opinions § 79, at 140 [1977].)

Here are two notable perorations:

“By way of conclusion . . . , I deny that recognizing the ancestral right of Chief Moose Dung to pitch his tepee by the waters of Thief River is sufficient legal authority to give away the entire Panama Canal without benefit of Congress.” (Edwards v Carter, 580 F2d 1055, 1096 [DC Cir 1978, MacKinnon, J., dissenting], cert denied 436 US 907 [1978].)

In a case in which the majority concluded that a plaintiff may not recover damages after a bull chased her, a dissent wrote: “In recapitulation I wish to go on record that the policy of non-liability announced by the Majority in this type of case is unsupportable in law, logic, and elementary justice—and I shall continue to dissent from it until the cows come home.” (Bosley v Andrews, 393 Pa 161, 194–195, 142 A2d 263, 280 [1958, Musmano, J., dissenting].)

c. Clean-Up Phrases

“This court has considered appellant’s remaining contentions and concludes that they lack merit [or that no extended discussion is necessary].”

“Because we dismiss the complaint for failure to state a cause of action, we need not reach defendant’s contention that the trial court’s jury charge was erroneous.”

All agree that clean-up phrases suffice in most civil cases. But Judge Aldisert recommends that in criminal cases, “whether on direct appeal or collateral review . . . the better practice is to list the issues that have been rejected by the court without having been discussed. This is important in order for a record to be kept of what the court has considered, no matter how frivolous the contention.” (Ruggiero J. Aldisert, Opinion Writing 87–88 [1990].) New York’s trial and appellate courts rarely enumerate rejected contentions. Doing so, however, would aid state trial and appellate courts assess CPL 440 motions; help federal courts on habeas
corpus review; and satisfy defendants, counsel, and the public that the court addressed all the litigants’ contentions.

Although the better practice for a state court is to list rejected contentions, it need not do so to trigger federal habeas deference under the 1996 Antiterrorism and Effective Death Penalty Act (AEDPA), codified at 28 USC § 2254 (d) (1). The Second Circuit originally held otherwise in Washington v Schriver (240 F3d 101 [2d Cir 2001]), writing in January 2001 that federal deference to a state’s judicial decision applies only if a state court addresses a rejected federal contention in chapter and verse. Six months later, the court superseded its order, leaving open what level of deference a federal court will give a state court’s summary decision that denies a federal constitutional claim without referring to or discussing it. (See Washington v Schriver, 255 F3d 45 [2d Cir 2001].) Finally, in August 2001, the Second Circuit resolved the issue:

“For the purposes of AEDPA deference, a state court ‘adjudicate[s]’ a state prisoner’s federal claim on the merits when it (1) disposes of the claim ‘on the merits,’ and (2) reduces its disposition to judgment. When a state court does so, a federal habeas court must defer in the manner prescribed by 28 U.S.C. § 2254(d)(1) to the state court’s decision on the federal claim—even if the state court does not explicitly refer to either the federal claim or to relevant federal case law.” (Sellan v Kuhlman, 261 F3d 303, 312 [2d Cir, Walker, Ch. J.].)

New York’s appellate judges complained that the original Schriver opinion imposed “an enormous burden on their courts, since the vast majority of convictions raise, in some form, something that could be construed as a federal constitutional claim.” (John Caher, Circuits Lift Burden on Appellate Judges: State Courts Need Not Address Every Federal Issue, NYLJ, June 19, 2001, at 1, col 5.) Now the defense bar is complaining that Sellan v Kuhlman has given federal courts carte blanche to defer to New York decisions that reject, without explanation, legitimate federal claims. The judicious middle-course is for state courts to adopt Judge Aldisert’s suggestion, offered above. In a criminal case, a state court may use a clean-up phrase to reject frivolous federal claims, but the court should list the claims it rejects. Listing rejected claims will take but a few extra minutes and will not detract from an otherwise-elegant opinion.

d. **Decretal Paragraph**

Make certain that your judgment, decree, or order and decision articulates your ruling to the litigants and the court clerk: “The statement of relief granted should be sharply defined. Otherwise the preparation of the judgment (or order) to be entered becomes difficult and subject to mistake.” (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, 586 [1983].)

e. **Signature Line and Date**

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No set policy dictates how trial judges sign their opinions. Some judges affix their initials next to a "J." or other abbreviation that denominates their court, such as "J.S.C." for "Justice of the Supreme Court" or "J.H.C." for "Judge of the Housing Court." Other trial judges use a full signature line and affix their full signature. CPLR 2219 (a) permits either a signature or initials for orders that determine motions.

CPLR 2219 (a) also provides that orders that determine motions note the "place . . . of the signature." A caption that specifies the name of the court and the county where the court presides satisfies that requirement.

A judge or justice must sign appellate orders, unless the presiding judge or justice allows the clerk of the court to do so. (CPLR 2219 [b].)

Whatever signing policy the judge adopts, neither the signature nor the date of the opinion should be on a page separate from the rest of the opinion.
XI

TO ONE AND TEMPERAMENT IN A JUDICIAL OPINION

1. Maintain Neutrality

Do everything possible to maintain credibility, impartiality, neutrality, and objectivity. Judicial writing is public writing of the highest order. It is held to a higher standard than any other writing.

2. Remain Restrained

Judicial writing must be patient, courteous, restrained, and dignified, not flippant, arrogant, or influenced by provocation, disrespect, or ridicule. A reader should not be left believing that the court took advantage of an insulated position by being injudicious.

3. Underscore Understatement

Overstating anything in an opinion causes a reader to lose confidence in everything the court writes. Opinion writing is most effective when it is subtle.

4. Consider the Litigants

Take the litigants’ perspectives into account before you decide a case. Make certain that their perspectives are reflected in the finished opinion.

5. Obviate Overconsideration

Trying to refute the losing side’s contentions point by point is unnecessary, time-consuming, leads to an adversary tone, and obscures the major reason for the ruling. As Dean Wigmore wrote, “overconsideration of every point of law raised on the briefs . . . . tends to remove the decision from the really vital issues of each case and to transform the opinion into a list of rulings on academic legal assertions.” (1 John H. Wigmore, Evidence in Trials at Common Law § 8a, at 617 [Peter Tellers rev ed 1983].) Nor is it possible for an opinion writer to consider everything and still keep the opinion short and relatively dictum-free: “To keep opinions within reasonable bounds precludes writing into them every limitation or variation which might be suggested by the circumstances of cases not before the Court.” (Armour & Co. v Wantock, 323 US 126, 133 [1944, Jackson, J.].)

In the end, it is far more important to explain why you are right than why anyone else is wrong. Emphasizing why the losing side is wrong more than why you are right is to lead with your chin.
If you deem it necessary to refute all the litigants' points, at least choose the manner of response. An opinion reacts, not dominates, if it refutes contentions point by point in the order the litigants present them. Do not sacrifice structure to accommodate the litigants' organization. Rather, determine structure independently:

“For a judge to demonstrate appropriate professional control of any case, the decision should emphasize the court's thought process rather than the litigants’. That thought process can indeed ultimately contain a response to each point raised by each party, if necessary, but the order and method of response should clearly be under the judge's control.” (Timothy P. Terrell, Organizing Clear Opinions: Beyond Logic to Coherence and Character, 38 Judges’ J 4, 39 [Spring 1999].)

6. Listen to the Losing Side

Opinions explain the decision to the parties, especially the loser. (Lord Devlin, Judges and Lawmakers, 39 Mod L Rev 1, 3–4 [1976].) Many who read opinions are unsympathetic. They include the losing litigant, the losing litigant's lawyer, the dissenting judges, the trial judge being reversed, those the analysis will affect in current or future cases, and members of the public and commentators who disagree with the court's conclusion or reasoning. A judicial opinion must be fair—and be seen as fair. To be both fair and seen as such, an opinion must reach all audiences, hostile and friendly. A court should therefore use language, develop reasons, note facts, and cite authorities that will persuade the losing side that it deserved to lose or which an unsympathetic reader will concede are fair.

The most important thing a court can do in terms of substance “[t]o persuade its various audiences, including these most resistant ones, [is] 'that opposing evaluations of the cases have been considered and seriously weighed.'” (Nancy A. Wanderer, Writing Better Opinions: Communicating with Candor, Clarity, and Style, 54 Maine L Rev 47, 53 [2002], quoting Walker Gibson, Literary Minds and Judicial Style, 36 NYU L Rev 915, 922 [1961] [alteration added].) The important thing a court can do in terms of language is not to patronize or offend the losing side, but rather to treat the losing side, and all readers, with dignity and respect.

Listening to the losing side makes for better opinions. Listening carefully to the losing side sometimes causes a shift in which the side that originally lost ultimately prevails.

7. Restrained Honesty is the Only Policy

Give the real reason for your decision. (See generally Robert A. Leflar, Honest Judicial Opinions, 74 NW UL Rev 721 [1979].) If you feel uncomfortable doing that, the case should be decided differently or on different grounds. Moreover, do not omit relevant facts. A “judge [who] consciously or unconsciously feels that to relate the full relevant truth about a case would
weaken the convincingness of a decision he wants to deliver ... ought to question that decision with soul-searching cognition." (William J. Palmer, *Appellate Jurisprudence as Seen by a Trial Judge*, 49 ABA J 882, 883 [Sept. 1963].)

Only through decisions written with honesty, integrity, and candor will readers be persuaded, will arbitrariness be constrained, and will current decisions be reliable guides to future decisions. Judges must, above all, be trusted. That trust must never be betrayed. Integrity is as important as justice and fairness; without integrity neither justice for fairness is possible. (Ronald Dworkin, *Law’s Empire* 166 [1986].)

On the other hand, you ought not divulge all your thoughts: “[T]o ‘tell all,’ with complete and unmitigated candor, is not always a virtue in judicial opinions or elsewhere. Restraint may be a virtue, too, for reasons sometimes of decency and sometimes wise planning.” Robert A. Leflar, *Some Observations Concerning Judicial Opinions*, 61 Colum L Rev 810, 819 [1961].)

Being candid means “[a]void[ing] legal fictions, if possible. If you conclude that precedent requires you to invoke a legal fiction, explain what you are doing and why.” (Robert E. Keeton, *Judging* 144 [1990].)

Being candid means that you “not make an argument of which you personally are not convinced. If you do, it may reflect on your other arguments and, more importantly, on your credibility, which usually results from sincerity.” (Denis McInerney and Ernst Rosenberger, *Appellate Advocacy* 2 [2000] [unpublished outline for the NYCLA American Inn of Court] [emphasis deleted].)

It is sometimes difficult for judges to be candid. Precedents, collegiality, the litigants’ and lawyers’ personalities, and politics often test the limits of candor. Discussing life-and-death struggles over euthanasia and jury nullification, former Yale Law School Dean and now-Second Circuit Judge Calabresi argued that judges should dissemble when values conflict and the options are tragic. (See Guido Calabresi and Philip Bobbitt, *Tragic Choices* 17–28 [1978].) NYU Law Professor Dworkin, perhaps today’s leading philosopher of jurisprudence, believes that judges should lie when legal and moral rights conflict. (See Ronald Dworkin, *Taking Rights Seriously* 326–327 [1978].) To take an extreme case, if you were a judge in Nazi Germany, would you quit, follow the law, or draft opinions that lack candor but adhere to a moral code superior to Nazi law? For a discussion of these problems, see David L. Shapiro, *In Defense of Judicial Candor*, 100 Harv L Rev 731 (1987).

Being candid might, in exceptional cases, require a “tentative” conclusion. Opinion writers who render tentative conclusions are said to be *dubitante*. For the pros and cons of writing tentative opinions, see Philip M. Saetta, *Tentative Opinions: Letting a Little Sunshine into Appellate Decision Making*, 20 Judges’ J 20 (1981). Being tentative means being unsure and expressing findings and conclusions with reservations.
One form of candor that goes too far is to anticipate, on the basis of the proclivities of a higher court’s personnel, how a higher court will rule. A court may consider a higher court’s slants or tendencies as a whole, but it should not count noses. (See Calvert Magruder, The Trials and Tribulations of an Intermediate Appellate Court, 44 Cornell LQ 1, 4 [1959].)

For an unusually candid opinion, see People v Davis (43 NY2d 17, 39 n. [1977, Breitel, Ch. J., dissenting in part]):

“Speaking for myself alone among the dissenters I find capital punishment repulsive, unproven to be an effective deterrent (of which the James case itself is illustrative), unworthy of a civilized society (except perhaps for deserters in time of war) because of the occasion of mistakes and changes in social values as to what are mitigating circumstances, and the brutalizing of all those who participate directly or indirectly in its infliction.”

8. Promote Principles

A written opinion must reflect principled decision making: one free from personal bias or prejudice; one restrained in the use of power; one that depends on legal principles, not will; and one “neither laden with emotion nor totally bloodless.” (William A. Babitch, Reflections on the Art & Craft of Judging, 37 Judges’ J 40, 40 [1998].) An opinion writer’s principled decision making may not emulate Groucho Marx, who once said, “Those are my principles. If you don’t like them, I have others.”

9. Belie Belligerence

Do not appear angry, belligerent, or extravagant. This is an imaginary example of going too far:

“Respondent-tenant’s position is outrageous, untenable, and unabashedly far-fetched. She wins this court’s chutzpah award. (See Jack A. Guggenheim, The Evolution of Chutzpah as a Legal Term: The Chutzpah Championship, Chutzpah Award, Chutzpah Doctrine, and now, the Supreme Court, 87 Ky L J 417 [1999].)”

10. Fairness as Fiction

Do not describe the efforts the court made to be fair. Opinion writers are assumed to be fair. It is unnecessary, and even defensive, to assure people that they are fair.

Opinion writers who tell people that they are fair are fair game for those who would argue that they are unfair. That happened in Gideon v Wainwright (372 US 335, 336 [1963]), in which Justice Hugo Black noted in the opinion’s first paragraph that the Florida “Supreme Court, ‘upon
consideration thereof but without an opinion, denied all relief" to the defendant, who had argued that "[t]he United States Supreme Court says I am entitled to be represented by Counsel."

(Note: Justice Black’s “impure style” opinion in Gideon is especially brilliant. He did not have to say in his first paragraph what the issues are or who will win. The imagery from his procedural references suffice to tell the reader what the case is about and who will win and why.)

Do you like these expressions?

- "The court has considered all the facts, law, and arguments and has read all the litigants’ submissions. After due consideration, the court finds that . . . ."

- "The court has pondered the question long and hard."

11. Belittle Bluster

Never say “never.” Always avoid “always.”

12. Threaten Temperately

Threatening idly is ill-advised.

You and what army? "I will lock up the next attorney who miscites a case."

Think before you threaten. Threaten only with cold reason, not hot emotion. Do not threaten over trivial matters or personal slights. Then threaten only if you plan to carry out your threat. Finally, except in exceptional circumstances, warn that you will shoot before you pull the trigger.

13. Do Not Describe Decisions

Do not describe the decision-making process. Illuminating steps and missteps sheds more heat than light. As Bismark noted, “Nobody who likes the law or sausages should watch either being made.”

Current neoformalist jurisprudence, which emphasizes judicial restraint, a high degree of confidence in the ultimate result, and the rhetoric of closure, has turned opinion writing away from legal realism to the “rhetoric of inevitability.” (See e.g. Robert A. Ferguson, The Judicial Opinion as Literary Genre, 2 Yale JL & Hum 201, 213–216 [1990].) The reality is that many decisions are hard to make. Sometimes opinion writers must rely on hunches and intuition, as Fifth Circuit Judge Joseph C. Hutcheson, Jr., noted in his classic, candid essay, The Function of the
Hunch in Judicial Decision, 14 Cornell LQ 274 (1929). But the public and the profession do not want to read that a judge found it difficult to reach a decision. Judges must do their agonizing before they write. Only in exceptional cases should a judge render a tentative opinion. From Mortimer Levitan, Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?, 43 ABA J 628, 630 & 666 (July 1957), with much tongue-in-cheek:

"An opinion can withstand any infirmity except vacillation. An umpire who promptly, resolutely, and incorrectly calls a strike when the ball was wide by a mile doesn't harm the game of baseball; the national pastime could be ruined, however, by an umpire who massaged his chin, then scratched his head, and finally confessed that since he wasn't sure whether it was a ball or a strike, he might as well call it a two-base hit."

Avoid expressing these sentiments:

- "No legal solution does the facts justice. The court thus declines to rule."
- "The court spent hours researching the law."
- "Insta citing did not provide the answer. The court therefore read secondary authority. When that did not help, the court consulted opinions from other jurisdictions."
- "The court went back and forth deciding who should win."
- "This was the court's most difficult decision in 20 years."
- "After three seconds, the court realized that the issue is not close."

But the critical requirement that opinion writers be honest prevents them from hiding facts or the grounds on which, as opposed to the process by which, the decision was reached.

14. Right Your Wrongs

When you are wrong, say so. For an example of how Justice Robert Jackson, with self-deprecating wit, disavowed a position he took a few years earlier as Attorney General, see McGrath v. Kristensen (340 US 162, 177–178 [1950, Jackson, J., concurring]). This is what Justice Frankfurter said when he changed his mind: "Wisdom too often never comes, and so one ought not to reject it merely because it comes late." (Henslee v Union Planter Natl. Bank & Trust Co., 335 US 595, 600 [1949, Frankfurter, J., dissenting].)

15. Control Conveying Candor
Extinguish expressions of false candor:

- "To be perfectly honest . . . ."
- "If you cannot trust a judge, whom can you trust?"
- "The court genuinely believes that . . . ."
- "I can assure you that . . . ."
- "It is the court's considered opinion that . . . ."
- "Frankly, . . . ."

A relative of false candor is false modesty:

- "I humbly disagree . . . ."

16. Master Modesty With Humanity and Humility

We have all seen it: "There have sometimes been martinets upon the bench as there have also been pompous wielders of authority who have used the paraphernalia of power in support of what they called their dignity." ([*Bridges v California*, 314 US 252, 289 [1941], Frankfurter, J., dissenting].) This section is not about being a martinet on the bench. This section is about a close cousin: vanity in opinion writing.


"In the hope of seeing their 'brilliant' opinion published in the law reports or having them create favorable impressions when promotion is being considered, there is a danger that some judges will treat the decision as the point of departure for a brilliant essay rather than a bridge of passage to the just conclusion—the true function of the judicial process. The judge who is intent only upon presenting casual readers with the delight of a literary masterpiece, instead of offering a just solution to the suffering of the parties, fails to comprehend the holy function of justice.

". . . .
"[T]he best judge is the one in whom a ready humanity prevails over cautious intellectualism. A sense of justice, the innate quality bearing no relation to acquired legal techniques, which enables the judge after hearing the facts to feel which party is right, is as necessary to him as a good ear is to a musician; for, if this quality is wanting, no degree of intellectual pre-eminence will afford adequate compensation."

New York's Chief Judge Pound said it realistically: "[T]he judge should no doubt . . . be both lawyer and philosopher of the highest grade, blessed with saving common sense and practical experience as well as sound comprehensive learning, but such men are rare." (Cuthbert W. Pound, Defective Law—Its Cause and Remedy, 1 NY St Bar Assn Bull 279, 285 [Sept. 1929].)

Levitan wrote perhaps the best piece of legal satire. (See Mortimer Levitan, Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?, 43 ABA J 628, 630 [July 1957].) Here is an excerpt from his almost-unknown master-work:

"Courts, in order to make their products more acceptable, must be endowed with superhuman knowledge, infinite wisdom and virtual infallibility. Everybody, then, should be indoctrinated with the idea that judges possess those supernatural qualities—everybody, that is, except the judges themselves. A judge should always remain sufficiently human so that if he overhears a whispered conversation about a divine figure in a black robe, he'd know instantly that the subject under discussion was not the judiciary."

For an immodest opinion, see Bianchi v Savage (83 Misc 2d 1007, 1008–1009, 373 NYS2d 976, 978–979 [White Plains City Ct 1975, Reap, J.]). This opinion, written by an Acting City judge, should be read in the unofficial version; the State Reporter charitably lowcased the capitals. Although the landlord-tenant issue in the case had minimal legal significance, the court treated the issue as if civilization itself depended on the court's ruling. Notice the judge's use of the royal "we" and "us"; the capitals; the italics; the italicized capitals; the adverbs and adjectives ("grossly," "unjust"); the Latin in the text ("contra"); the metadiscourse ("we are aware that"); the exclamation mark; the self-congratulatory phrases (not being "blindly" bound by another court; saving time and money; exalting substance over form; the "torch has been passed to us"; "a beginning must be made"); "challenged to tread" on an issue novel to the White Plains City Court; "judicial courage"); the (inaccurate) mention that the case is "of very first impression"; the pretense at modesty (that some have "intellects far greater than ours"); and the excessive degree of confidence in the appellate process ("Appellate Courts will reverse us if we err").

"We are aware this result is contra to 353 Realty Corp. v. Disla, 81 Misc.2d 68, 364 N.Y.S.2d 676 (1974), but we do not feel bound as a matter of Stare Decisis doctrines to blindly follow the
determination of the Civil Court of the City of New York, in the case at bar. To do so here would work a grossly unfair and unjust result on the parties because they would be right back in court litigating what is really only ONE KEY ISSUE in this matter. What a waste of time, talent, money, energy, and exercise in futility that would be all around!

"REASONING:

"A. This Court is now and always will be concerned with EXALTING SUBSTANCE OVER FORM, and LAW OVER PROCEDURE.

"...

"C. The substantive issue before us is one of very first impression in the State of New York. We must not lack the judicial courage to plunge in where intellects far greater than ours have not yet been challenged to tread. It is questionable courage in any event because Appellate Courts will reverse us if we err. A beginning must be made and the torch has been passed to us."

Compare the Bianchi court’s treatment with Justice Holmes’s more modest opening sentence in Haddock v Haddock (201 US 562, 628 [1906, Holmes, J., dissenting]): "I do not suppose that civilization will come to an end whichever way this case is decided."

Judicial modesty is hard to master: “Most writers are beset by the healthy worry that they won’t be read. The writer-judge suffers no such humbling agony. For a time at least, whatever the judge writes is law; readership not always meek but guaranteed. A tendency to write as though the whole world were waiting. Can pompousness be far away?” (David Mellinkoff, Legal Writing: Sense & Nonsense 121 [1982].)

But modesty must be mastered, in part because most people care about things more important than judicial opinions: “[F]ew citizens will sit down with a volume of our opinions, yet many will spend days on jury duty, seek an order of protection in family court, or live in a neighborhood where they see the effects of the criminal justice system’s revolving door.” (Judith S. Kaye, Changing Courts in Changing Times: The Need for a Fresh Look at how Courts are Run, 48 Hastings LJ 851, 853 [1997].)

Be it ever so humble, scholarship is humility, not the vanity press: Nothing should be vanity. Trial judges should cite their own opinions only if they must. On the other hand, appellate courts should quote from and cite their own opinions to show adherence to precedent.
Judicial pomposity has been the subject of much satire. A favorite, from the Lord Chancellor in Iolanthe (Sir William S. Gilbert and Arthur Sullivan, Trial by Jury [1875], reprinted in Sir William S. Gilbert, The Savoy Operas 6 [1926]):

“The Law is the true embodiment
Of everything that’s excellent
It has no kind of fault or flaw
And I, my Lords, embody the Law.”

Gossip from Judge Posner: Chief Justice William H. Rehnquist’s four yellow stripes on each arm of his robes were “inspired by the costume worn by the Lord Chancellor in a production that Rehnquist had seen of Gilbert and Sullivan’s operetta Iolanthe.” (Richard A. Posner, An Affair of State: The Investigation, Impeachment, and Trial of President Clinton 168 [1999].)

Eliot was right: “Humility is the most difficult of all virtues to achieve.” (T.S. Eliot, Shakespeare and the Stoicism of Seneca 8 [1927].) One way to avoid pompous, martinet opinion writing is to take compliments with several shakers of salt. From Second Circuit Judge Medina: “[W]e cannot deny the fact that a judge is almost of necessity surrounded by people who keep telling him what a wonderful fellow he is. And once he begins to believe it, he is a lost soul.” (Harold J. Medina, Some Reflections on the Judicial Function: A Personal Viewpoint, 38 ABA J 107, 108 [Feb. 1952].)

17. Banish Boilerplate to the Boiler Room

Writing quickly is an important skill. (See generally Elizabeth Ahlgren Francis, How to Write A Faster, Better Opinion, Judges’ J 26 [Fall 1988].) But boilerplate is not the solution.

Forms over substance: “For writers, the virtue of the forms is that they save time—thinking time, learning time, writing time. They also save reading time. For the reader in a rut—e.g., judges, clerks, lenders—reading the same old stuff everyday, the forms are a blessing . . . The virtue of the forms is also their vice. They are a cheap, quick substitute for knowledge and independent thinking.” (David Mellinkoff, Legal Writing: Sense & Nonsense 101 [1982].)

Boilerplate is found in trial judges’ opinions when they use forms to decide cases. In criminal cases in New York City, for example, judges often grant or deny hearings by checking off boxes on a form. That hasty procedure causes hearing judges, defense counsel, and the People extra work and much confusion because the motion judge failed to limit the hearing to the contested issues. Assume that defendant submits a boilerplate request for a Huntley hearing. Assume further that the People consent to the hearing in a boilerplate response and that the motion judge orders a Huntley hearing. Will the Huntley hearing review right-to-counsel issues and the legitimacy of the predicate arrest (Dunaway)? It should not, but it might if the motion judge did not limit the hearing to the issues in dispute.
Boilerplate results when trial judges rely too heavily and too often on a selected few appellate cases they rarely reread and never re-evaluate. New issues are treated as old, citations become rote, distinctions get blurred.

Boilerplate also results when trial judges rely too much and too often on particular paragraphs plugged into their wordprocessors. A trial court is too busy to reinvent the wheel every time it decides a case, but "[a] court must constantly be the alert against mental laziness. The decision suggested by habit may not necessarily be the right one." (William L. Reynolds, Judicial Process in a Nutshell 63 [2d ed 1991].) Even when the boilerplate decision is correct, the reasoning and language might be wrong: "High-volume courts may wish to codify patterns for efficiency's sake, but courts should carefully examine standardized language and other fixed language for aim, audience, and style before committing to them." (Elizabeth Ahlgren Francis, The Elements of Ordered Opinion Writing, 38 Judges' J 8, 9 [Spring 1999].)

Boilerplate leads to deciding to little: "[T]here is a Law of Judicial Parsimony, which states that a court should decide no more than it must . . . . But sometimes courts extend this 'law' to the point of deciding no more than is necessary to get the case off the desk. Judicial Parsimony then becomes judicial shortchange. And this often happens . . . . The court's opinion slithers out through some pinhole, and back the case goes for further anguished and expensive litigation." (Moses Lasky, Observing Appellate Opinions from Below the Bench, 49 Cal L Rev 831, 837 [1961].)

The solution to avoid boilerplate: Approach each case with an open, questioning mind. Imagine how new and important the case is for the litigants before you. Always remain open to the newness of a case, even if it resembles cases already decided. Then mind your open-mindedness and avoid sentiments like this one: "After the pro se litigant's first argument proved meritless, the court refused to read the rest of his papers.”

A problem related to boilerplate opinions is a trial judge's copying an attorney's proposed order and opinion verbatim or nearly verbatim. That practice will lead to reversal and remand. (See Bright v Westmoreland County (380 F3d 729 [3d Cir 2004].)

18. Deplore Defensiveness

We have not yet reached, and in the near future are unlikely to reach, perfect, impartial judgment in which unsuccessful litigants and their lawyers view adverse decisions as just and correct. While we await that perfection, opinion writers waste ink and create animosity trying so hard to persuade that they become defensive.

Opinion writers sometimes become defensive if they fear that they will be accused of partiality or incompetence, or simply because of a neurotic need always to be right and to be perceived as right. Courts, however, always have the last word. Propriety, dignity, and humility require that courts not be defensive. Defensive opinion writers are advocates, not impartial
adjudicators. Outside a court room, to be defensive is to spoil an apology with an excuse. In opinion writing, it is to spoil adjudication with an apology and an excuse.

To apologize is to be defensive, and "[t]here is no reason for the judge to apologize for his decision. It is the duty of the judge to decide, and the litigants understand that one or the other usually loses. An absence of apology will avoid such practices as pointing to an argument that was not made, or stating that the result might be different if this or that fact were not present." (Griffin B. Bell, Style in Judicial Writing, 15 J Pub L 214, 218 [1966].)

Similarly, "there is no need to apologize to the trial court by using such phrases as 'the learned trial judge' where the judgment is being reversed." (Id.)

Do you like these sentences? The first is exaggerated for effect; the second is a commonplace method to avoid taking responsibility for a decision:

- "In a footnote, counsel suggests an instance of purported error on my part in a decision I rendered last year. Counsel is wrong, for 38 reasons. First, . . . ."

- "The court is constrained to hold that . . . ."

A Westlaw check of May 31, 2002, disclosed an astonishing 6830 times that New York courts, in officially published opinions, have been "constrained" to decide a case in a particular way. Of those 6830, they were "constrained to hold" 994 times.

19. Mutilate Melodrama

Melodrama in opinion writing is maddening, regardless whether the opinion writer has anything to fear but fear itself. For some fearful, narcissistic melodrama, see Planned Parenthood of Southeastern Pa. v Casey (505 US 833, 923, 943 [1992, Blackmun, J., concurring & dissenting] ["I fear for the darkness . . . ."]; "I am 83 years old. I cannot remain on this Court forever . . . ."); Webster v Reproductive Health Srvs. (492 US 490, 537 [1989, Blackmun, J., concurring & dissenting] ["I fear for the future."]).

20. Judge Not, That Ye Be Not Judged

Courts often punish lawyers for writing and citing poorly. (See e.g. Judith D. Fischer, Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers’ Papers, 31 Suffolk UL Rev 1 [1977].) Former Berkeley and Columbia Journalism Dean Goldstein and New York Law School Academic Dean Lieberman tell the following story in their introduction to their excellent legal-writing text:
"In the fall of 1987, [now-retired] Justice ____ of New York State Supreme Court in Manhattan embarrassed opposing lawyers in a divorce case by saying in open court that he could not understand the papers filed by either of them. He ordered the lawyers to rewrite their motions and objections . . . . [The justice told the parties]: ‘Upon a careful reading of all the voluminous papers submitted herein, the court is frank to state that it cannot ascertain the basis for the relief sought by the plaintiff on the motion and by the defendant on the cross-motion.’" (Tom Goldstein and Jethro K. Lieberman, The Lawyer's Guide to Writing Well 4 [1989].)

Deans Goldstein and Lieberman then charge the justice, who spoke in legalisms, passives, and appeals to candor, with violating the rules of good English: "In admonishing the lawyers, Justice ____ ___ rambled a bit himself." (Id.) The moral: Do not critique lawyers' writing in your decisions. Then-Fifth Circuit Judge Bell was right: "The opinion writer should be careful not to disparage counsel. If counsel is to be reprimanded, he is entitled to be heard." (Griffin B. Bell, Style in Judicial Writing, 15 J Pub L 214, 218 [1966].) Rather, struggle to allow only the merits—not the lawyers' advocacy, written or oral—determine the outcome of litigation.

In Bradshaw v Unity Marine Corp. (147 F Supp 2d 268, 271 [SD Tex, June 27, 2001, Kent, J.]), the court criticized the attorneys for their unprofessional papers. In turn, the court's opinion circulated around the country on lawyers' e-mail within days of its issuance. The e-mails critiqued the attorneys and the judge in equal measure. Here is a small part of the opinion:

"Despite the continued shortcomings of Plaintiff's supplemental submission, the Court commends Plaintiff for his vastly improved choice of crayon—Brick Red is much easier on the eyes than Goldenrod, and stands out much better amidst the mustard splotched about Plaintiff's briefing . . . . Now, alas, the Court must return to grownup land."

Bradshaw stands for the proposition that opinion writers who live in glass houses should not throw stones.

21. Explain Yourselves

Opinions often choose one line of nonbinding authority over another without noting the opposing persuasive authority. The opinion writer may have ignored the contrary authority so as not to embarrass judges by disagreeing with them. But a reader aware of the unmentioned opposing authority will assume that the judge's research was sloppy, that the judge had an agenda, or that the judge was unable to explain why one line of authority was chosen over the other.
According to Judge Aldisert, the occasional failure of judges to explain themselves is a "falling from grace": Judges err when they "fail to set forth specific reasons for choosing one line of cases over others, saying, 'We think that is the better view' and, 'We prefer the majority view' without explaining why." (Ruggiero J. Aldisert, Opinion Writing 7 [1990].)

Levitan was kidding, sort of, when he wrote the following:

"When courts decide, they must assign some reason in writing, primarily to avoid the accusation of capriciousness. It is, of course, much easier to reach a decision than to explain to one's self or to others the basis of the decision. Conscientious judges sometimes mar their excellent decisions by their attempts at explanation." (Mortimer Levitan, Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?, 43 ABA J 628, 666 [July 1957].)

22. Do Not Be Afraid

New York courts have published their share of scary opinions. One chiller is Stambosky v Ackley (169 AD2d 254 [1st Dept 1991, Rubin, J.]), in which the First Department held 3–2 that a house was inhabited by ghosts "as a matter of law" and accordingly that its seller must take it back for failing to divulge that fact. Here is a some haunting language from the opinion:

"While . . . , in his pursuit of a legal remedy for fraudulent misrepresentation against the seller, plaintiff hasn't a ghost of a chance, I am nevertheless moved by the spirit of equity to allow the buyer to seek rescission of the contract of sale and recovery of his downpayment . . . . Therefore, the theoretical basis for granting relief, even under the extraordinary facts of this case, is elusive if not ephemeral.

"'Pity me not but lend thy serious hearing to what I shall unfold' (William Shakespeare, Hamlet, Act I, Scene V [Ghost]).

". . . [A] very practical problem arises with respect to the discovery of a paranormal phenomenon: 'Who you gonna' call?' as the title song to the movie 'Ghostbusters' asks. Applying the strict rule of caveat emptor to a contract involving a house possessed by poltergeists conjures up visions of a psychic or medium routinely accompanying the structural engineer and Terminix man on an inspection of every home subject to a contract of sale. It portends that the prudent attorney will establish an escrow account lest the subject of the transaction come back to haunt him and his client—or pray that his malpractice insurance coverage extends to
supernatural disasters. In the interest of avoiding such untenable consequences, the notion that a haunting is a condition which can and should be ascertained upon reasonable inspection of the premises is a hobgoblin which should be exorcized from the body of legal precedent and laid quietly to rest.” (169 AD2d at 256–257.)

The dissent, by then-Justice George Bundy Smith, was frightened by the majority's ruling: “If the doctrine of caveat emptor is to be discarded, it should be for a reason more substantive than a poltergeist. The existence of a poltergeist is no more binding upon the defendants than it is upon this court.” (ld. at 262, Smith, J., dissenting.)

Stambousky is not the only real-estate case about ghoulies, ghosties, long-legged beasties, and things that go bump in the night. Read Daniel M. Warner, Caveat Spiritus: A Jurisprudential Reflection upon the Law of Haunted Houses and Ghosts, 28 Val U L Rev 207 (1993), for more haunting opinions on that topic. But this is my caveat emptor: Do not read this article when you are alone, or late at night.

For another frightening opinion, see Lamb's Chapel v Center Moriches Sch. Dist. (598 US 384, 399 [1993, Scalia, J., concurring]) [citations omitted]):

“Like some ghoul in a late-night horror movie that repeatedly sits up in its grave and shuffles abroad, after being repeatedly killed and buried, Lemon stalks our Establishment Clause jurisprudence once again, frightening the little children and school attorneys of Center Moriches Union Free School District. Its most recent burial, only last Term, was, to be sure, not fully six feet under: Our decision in Lee v. Weisman conspicuously avoided using the supposed ‘test’ but also declined the invitation to repudiate it. Over the years, however, no fewer than five of the currently sitting Justices have, in their own opinions, personally driven pencils through the creature's heart (the author of today's opinion repeatedly), and a sixth has joined an opinion doing so. The secret of the Lemon test's survival, I think, is that it is so easy to kill. It is there to scare us (and our audience) when we wish it to do so, but we can command it to return to the tomb at will . . . . Such a docile and useful monster is worth keeping around, at least in a somnolent state; one never knows when one might need him.”

23. Equalize Equal Justice

Years ago a commentator explained that “the judge who realizes that all men are biased before listening to a case, is more likely to make a conscientious effort at impartiality than one
who believes that elevation to the bench makes him at once an organ of infallible logical truth.” (Morris R. Cohen, The Place of Logic in the Law, 29 Harv L Rev 622, 638 [1916].) Thus, “[a]n ethical judge must demand of herself that she identify and understand her own biases and how they affect her reaction to a case. Writing opinions has an important role in this effort.” (David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 Geo J Legal Eth 509, 515 [2001].)

Did the writers’ scornful views about the mentally retarded, African–Americans, Native–Americans, lesbians and gay men, women’s rights, immigrants, and victims of sexual harassment motivate these passages and the writers’ decision-making processes?

“Three generations of imbeciles are enough.” (Buck v Bell, 274 US 200, 207 [1927], Holmes, J.) [affirming order forcing sterilization].

If African–Americans are offended by compelled segregation despite supposedly equal treatment, it is “solely because the colored race chooses to put that construction upon it.” (Plessy v Ferguson, 163 US 537, 551 [1896, Brown, J].)

When the Sioux Nation sued to get land promised by the Fort Laramie Treaty of 1868, a majority of the Court enforced the treaty. (See United States v Sioux Nation of Indians, 448 US 371 [1980].) One Justice, however, argued that “the Indians did not lack their share of villainy” (id. at 435 [Rehnquist, J., dissenting]) and quoted Morison:

“The Plains Indians seldom practiced agriculture or other primitive arts, but they were fine physical specimens; and in warfare, once they had learned the use of the rifle, [were] much more formidable than the Eastern tribes who had slowly yielded to the white man. Tribe warred with tribe . . . . They lived only for the day, recognized no rights of property, robbed or killed anyone if they thought they could get away with it, inflicted cruelty without a qualm, and endured torture without flinching.” (Id. at 436–437, quoting Samuel Eliot Morison, Oxford History of the American People 539–540 [1965] [alteration in opinion].)

Relying on values expressed from Roman law to Blackstone to uphold a statute that criminalized sex between consenting adults in private, a concurring Justice wrote, “To hold that the act of homosexual sodomy is somehow protected as a fundamental right would . . . cast aside millennia of moral teaching.” (Bowers v Hardwick, 478 US 186, 196–197 [1986, Burger, Ch. J., concurring] [“Blackstone described ‘the infamous crime against nature’ as an offense of ‘deeper malignity’ than rape . . . .”], quoting 4 William Blackstone, Commentaries on the Laws of England 215 [1775].)
A majority of the Court forbade gender-based discrimination in peremptory jury challenges. (See J.E.B. v Alabama ex rel. T.B., 511 US 127 [1994].) The majority’s decision, the dissent wrote, “is an inspiring demonstration of how thoroughly up-to-date and right-thinking we Justices are in matters pertaining to the sexes (or, as the Court would have it, the genders) and how sternly we disapprove the male chauvinistic attitudes of our predecessors.” (Id. at 156, Scalia, J., joined by Rehnquist, Ch. J., and Thomas, J., dissenting) [opening sentence].

A concurring Justice believed that the National Endowment for the Arts (NEA) discriminated on the basis of viewpoint. According to the concurrence, “It takes a particularly high degree of chutzpah for the NEA to contradict this proposition, since the agency itself discriminates—and is required by law to discriminate—in favor of artistic (as opposed to scientific, or political, or theological) expression. Not all the common folk, or even all great minds, for that matter, think that is a good idea. In 1800, when John Marshall told John Adams that a recent immigration of Frenchmen would include talented artists, ‘Adams denounced all Frenchmen, but most especially “schoolmasters, painters, poets, & C.” He warned Marshall that the fine arts were like germs that infected healthy constitutions.’ J. Ellis, After the Revolution: Profiles of Early American Culture 36 (1979).” (Natl. Endowment for the Arts v Finley, 524 US 569, 597 [1998, Scalia, J., joined by Thomas, J., concurring].)

In Rodriguez-Antuna v Chase Manhattan Bank Corp. (871 F2d 1, 1, 3 [1st Cir 1989, Selya, J.]), bank employees asserted that a bank vice president caused them emotional distress by falsely accusing them of making “dial-a-porn” toll calls from the bank’s telephones. The vice president forced the employees to listen, with others present, to a recording of a call that “presented a woman having sexual relations with a man, and telling him how she wanted him to do it.” Deciding that the plaintiffs’ claims were untimely, the court wrote: “Enforced exposure to salacious dialogue notwithstanding, the record establishes no justification for us to rescue these six suitors from their self-dug hole. In calling upon us for extrication, plaintiffs have dialed yet another wrong number.”

24. Keep Sex Out of Print

Grimace over grossly graphic sexual scenarios, even when quoting someone else, unless the scenario is essential to the opinion. In an opinion this handbook will not reprint, the Chief Justice of Florida, in Lason v State (12 So 2d 305, 305 [Fla 1943]), did not follow that advice. The Chief Justice’s legacy is that his decision is so popular that most first-year law students cannot find it. Lason is ripped out of most law-school volumes. Judicial writing should not titillate voyeurs. Only the minimum facts necessary to resolve the case should be articulated.

Contrast Lason with the classic United States v Thomas (32 CMR 278 [Ct Mil App 1962, Kilday, J.]), which considered whether two Navy airmen were guilty of attempting to rape a deceased woman they believed was drunk. The court wrote that “[t]he evidence adduced at the trial presents a sordid and revolting picture which need not be discussed in detail other than as necessary to decide the certified issues.” (Id. at 280.)
A federal magistrate found a defendant guilty of “creating a physically offensive condition” for taking off his wet clothes in a nearly deserted parking lot at Lava Beds National Monument. U.S. District Judge McBride set aside the conviction because the magistrate did not record the proceedings. In doing so, the judge quoted a limerick from defense counsel’s brief. (See United States v David Irving, No. 76–151 [ED Cal 1977, Thomas J. McBride, J.] [unpublished opn quoted in George Rose Smith, A Critique of Judicial Humor, 43 Ark L Rev 1, 14 [1990]].) For defendant, the opinion represented good news and bad. The good news: The court set aside the conviction for the petty crime. The bad news: The opinion itself was small consolation. Here is the opinion’s short limerick:

“There was a defendant named Rex
With a minuscule organ for sex.
When jailed for exposure
He said with composure,
De minimis non curat lex.”

25. Scuttle Sarcasm

Sarcasm, a form of ridicule, has no place in opinion writing. (See e.g. James D. Hopkins, Notes on Style in Judicial Opinions, 8 Trial Judges J 49, 50 [1969], reprinted in Robert A. Leflar, Quality in Judicial Opinions, 3 Pace L Rev 579, 586 [1983] [“[S]arcasm directed toward the parties is seldom in good taste.”].)

“Counsel represented his client well. He avoided the dangers of over-preparation.” (Verbal irony as sarcasm.)

“That was a good point. I shall file it in ‘Nice To Know.’” (Verbal irony as sarcasm.)

“[I]n the Land of the Free, democratically adopted laws are not so easily impeached by unelected judges.” (Bd. of Educ. of Kiryas Joel Vill. Sch. Dist. v Grumet, 512 US 687, 737 [1994, Scalia, J., dissenting].) (Capital letters as sarcasm.)

“The parties and the amici have favored us with more than two hundred pages of briefs, rich in detail that we can ignore.” (Continental Illinois Corp. v Commr. of Internal Rev., 998 F2d 513, 515 [7th Cir 1993, Posner, J.], cert denied 510 US 1041 [1994].)

“Defendant should be assured that it is not embarking on a three-week-long trip via covered wagons when it travels to Galveston. Rather, Defendant will be pleased to discover that the highway is paved and lighted all the way to Galveston, and thanks to the efforts of this Court’s predecessor, Judge Roy Bean, the trip should be free of rustlers, hooligans, or vicious varmints of unsavory kind . . . . [I]t is not this Court’s concern how [Defendant] gets here, whether it be by plane, train, automobile, horseback, foot, or on
the back of a huge Texas jackrabbit, as long as [Defendant] is here at the proper date and
time." (Smith v Colonial Penn Ins. Co., 943 F Supp 782, 784 [SD Tex 1996, Kent, J].)

Buried in the literature, however, is one authority who believes that judges may be
sarcastic: "Judges can sometimes make good use of sarcasm. It can be highly persuasive, in the
hands of a master." (Frank E. Cooper, Effective Legal Writing 36 [1953].)

26. **Be Priggish About Pretensions**

Do you like this opening sentence?

> "This matter arises on an infrastructure of important concerns
> involving the prophylaxis to be accorded to attorneys' work
> product and the scope of trial judges' authority to confront case
> management exigencies in complex multi-district litigation."
> (Matter of San Juan Dupont Plaza Hotel Fire Litig., 859 F2d 1007,
> 1009 [1st Cir 1988, Selya, J].)

This opinion goes on to make the reader's job difficult, and to make the reader feel dumb,
by using "conflagration" (for "fire"), "utilize" (for "use"), "coterie" (for "group"), and
"quadripartite," "tenebrous," and "transmogrification." Pretentiously, the judge even used the
phrase "abecedarian verity"—meaning "basic truth"—to make his readers' comprehension as
unabecedarian as possible.

Using obscure diction is an attempt to show off. A judge should not have an insecure
need to show off.

27. **Inhibit Innuendo**

Litigants are defenseless against the opinion writer who imputes impure motives. An
eexample of moralistic assumption-making:

> "At the time of the trial plaintiff was 66, and the defendant 42,
> years of age. Defendant had been twice married, once widowed
> and once divorced. Plaintiff had been twice married and twice
> divorced—each time at the suit of his wife. He had subsequently
> been defendant in an action for breach of promise, and had sought
> the graces of other women with a fervor not altogether Platonic.
The parties did not drift into love unconsciously, as sometimes
happens with younger and less experienced couples. Both knew
from the start exactly what they wanted. She wanted a husband
with money—or money with a husband. He wanted a wife to
28. Admonish Against Advocacy

Write persuasively but not as an advocate. As the Supreme Court of California wrote long ago, “An opinion is not a controversial tract, much less a brief in reply to the counsel against whose views we decide. It is merely a statement of conclusions, and the principal reasons which have led us to them.” (Holmes v Rogers, 13 Cal 191, 202 [1859, Baldwin, J.] [petition for rehearing].) Some opinions “read[] like a lawyer’s brief, the worst possible style for a judicial opinion. It discloses this kind of judge for what he is and ought not to be, an advocate.” (Moses Lasky, A Return to the Observatory Below the Bench, 19 Sw L J 679, 688-689 [1965].) A judicial polestar: “An ethical judge cannot be a polemicist.” (David McGowan, Judicial Writing and the Ethics of the Judicial Office, 14 Geo J Legal Eth 509, 515 [2001].)

29. Throw Animal References Into the Litter Box

For some reason, cases about animals seem to inspire opinion writers to write cutesy decisions with literary pretensions. Here is some judicial dogma.

The judge who wrote Miles v City Council of Augusta (551 F Supp 349 [SD Ga 1982, Bowen, J.]), about whether Blackie the Talking Cat was exempt from paying taxes, pretended, while discussing Blackie’s free-speech rights, that he actually spoke to Blackie. To the Fifth Circuit that opinion was the cat’s meow, not a cat-o-nine-tails. The District Court’s catastrophic opinion was the catastrophic catalyst that catapulted the catatonic reviewing court to use every categorical “cat” catechism known to felinekind. No one can tell whether you will purr or hiss if you read 710 F2d 1542 (5th Cir 1983). Read it anyway. It has nine lives—and you should have Miles to go before you sleep.

The Miles opinions are the most famous ones about animals. The West Group even published a book in their honor. (See Blackie the Talking Cat and Other Favorite Judicial Opinions [1996].) But my favorite opinion about animals is Koplin v Quade (145 Wis 454, 130 NW 511, 511-512 [1911, Barnes, J.].) Below is the introduction to the Wisconsin Supreme Court’s bullish opinion:

“On September 14, 1907, the plaintiff was the owner of a thoroughbred Holstein-Friesian heifer, which was born on January 8, 1906, and had been thereafter duly christened ‘Martha Pietertje Pauline.’ The name is neither euphonious nor musical, but there is not much in a name anyway. Notwithstanding any handicap she may have had in the way of a cognomen, Martha Pietertje Pauline
was a genuine ‘highbrow,’ having a pedigree as long and at least as well authenticated as that of the ordinary scion of effete European nobility who breaks into this land of democracy and equality, and offers his title to the highest bidder at the matrimonial bargain counter. The defendant was the owner of a bull about one year old, lowly born and nameless as far as the record discloses. This plebeian, having aspirations beyond his humble station in life, wandered beyond the confines of his own pastures, and sought the society of the adolescent and unsophisticated Martha, contrary to the provisions of section 1482, St. 1898, as amended by chapter 14, Laws 1903. As a result of this somewhat morganatic mesalliance, a calf was born July 5, 1908. Plaintiff brought this action to recover resulting damages and secured a verdict for $75, upon which judgment was entered, and defendant appeals therefrom.

For more light-hearted opinions in which the judicial tail wags the doggerel, see the following from the snake-pit of judicial literature:

**Bears:** *Starry v Horace Mann Ins. Co.* (649 P2d 937 [Alaska, 1982, Compton, J.]) [using unbearable headings “Bear Facts” and “Bear Coverage,” court found insurer liable to indemnify for theft of bear hide mounted on wall, noting that “[a] burglar, as it were, left the wall bare, as it wasn’t.”].

**Bees and wasps:** *Lussan v Grain Dealers Mut. Ins. Co.* (280 F2d 491, 492 [5th Cir 1960, Brown, J.] [“What brings this all about was a wasp—or a bee—it really doesn’t matter for bees and wasps are both of the order hymenoptera, and while a wasp, unlike the bee, is predacious in habit, both sting human beings, or humans fear they will.”]).

**Birds:** *Sabine River Auth. v U.S. Dept. of Interior* (951 F2d 669, 671 [5th Cir 1992, Goldberg, J.] [“This case is for the birds—thousands of them. And we mean that in no facetious sense.”] [opening line], cert denied 506 US 823 [1992]); *United States v Angueira* (744 F Supp 36, 36 [D PR 1990, Perez-Gimenez, Ch. J.] [ruling, as to fourteen defendants charged in concert with taking migratory birds, that “[b]irds of a feather flock together, or at least they did so in this case”] [opening line], affd 951 F2d 12 [1st Cir 1991]).

**Bulls:** *Georgia Southern & Fla. R Co. v Thompson* (111 Ga 731, 36 SE 945, 945 [1900, Lumpkin, P.J.] [“There was a head-end collision between a moving locomotive and a stationary bull, the latter showing flight, and manifesting total ignorance of the doctrine of impenetrability.”] [unbeat-a-bull opening line].)

**Butterflies:** *United States v Sproed* (628 F Supp 1234 [MD Ga 1986, Burns, J.] [“Judges rarely get a chance to wax lyrical. Rarer still does a judge have an opportunity to see a case centered around a butterfly.”] [footnote omitted] [appending Bloom County cartoon]).
Cats: Polaroid Corp. v Commr. Internal Rev. (278 F2d 148, 153 [1st Cir 1960, Aldrich, J.]) ["If there is a big hole in the fence for the big cat, need there be a small hole for the small one?"]; Caleja v Wileyn (290 So 2d 123, 124 [Fla 2d DCA 1974, Mann, Ch. J.]) ["Tony (formerly Toni) is a cat, and the focal point of this dogfight between three utterly human beings."] [opening line]; Columbus v Becher (173 Ohio St 197, 200, 180 NE2d 836, 838 [1962] [Zimmerman, J.]):

"Dogs will howl and cats will yowl
When placed in congregation.
These grating sounds may oft result
In human aggravation.
Laws passed to curb such pesky noise
Should fit the situation
And be so phrased in artful ways
To cause no obfuscation.
In other words, the laws so passed
Must plainly be effective.
Inapty framed, they lack the force
To meet their planned objective."

Deer: United States v Dowden (139 F Supp 781, 781–782 [WD La 1956, Dawkins, Ch. J.] ["A tiny tempest in a tinier teapot has brought forth here all the ponderous powers of the Federal Government, mounted on Clydesdale in hot pursuit of a private citizen who shot a full-grown deer in a National Forest. Not content with embarrassing defendant by this prosecution, and putting him to the not inconsiderable expense of employing counsel, the Government has compounded calumny by calling the poor dead creature a ‘fawn’. Otherwise fully equipped with all the accouterments of virile masculinity, the deceased, alas, was a ‘muley’. Unlike other young bucks, who could proudly preen their points in the forest glades or the open meadows, this poor fellow was foredoomed to hide his head in shame: by some queer quirk of Nature’s caprice, he had no horns, only ‘nubbins’, less than an inch in length."] [opening paragraph]).

Dogs: Kirchoff v Flynn (786 F2d 320, 321 [7th Cir 1986, Easterbrook, J.]) ["The penalty for allowing dogs to run unleashed in the park is time in the pound (for the dogs only), see Section 30-7.10. The prosecutor asked for 30 days, but the judge apparently sentenced these dogs to time served.”]; Aetna Ins. Co. v Sachs (186 F Supp 105 [ED Mo 1960, Weber, J.] [dismissing claim against kennel’s insurance company after André the French poodle returned from the kennel and, in plaintiff’s chateau, committed “misfeasance” “with his leg hoisted in masculine canine fashion”: “[A]nd to the beloved French poodle, the proximate cause of this litigation and discourse, I say, “Paix a toi aussi, André.”]”; Montroméry v Maryland Casualty Co. (169 Ga 746, 151 SE 363 [1929, Gilbert, J.] [containing page after page of irrelevant doggerel: "From the dawn of primal history the dog has loomed large in art and literature of the world, including judicial literature. So it doubtless will be until the ‘crack of doom.’"]); Wiley v Slater (22 Barb 506 [NY Sup Ct, Gen Term, NY County 1856, Allen, J.] [explaining the code duello:
"Let dogs delight to bark and bite/ For God hath made them so/ Let bears and lions growl and fight/ For 'tis their nature to.").

The most notable remarks in legal literature about dogs came from a philosopher, not a court opinion:

"It is the judges (as we have seen) that make the common law:—Do you know how they make it? Just as a man makes laws for his dog. When your dog does anything you want to break him of, you wait until he does it, and then beat him of it. That is the way you make laws for your dog: and that is the way the Judges make laws for you and me." (Jeremy Bentham, Truth Versus Ashurst 11 [1823], in 5 Bentham's Works 235, quoted in Stephen H. Philbin, Judge Learned Hand and the Law of Patents and Copyrights, 60 Harv L Rev 394, 403 [1947].)

Dogs and llamas: Bowlin v Deschutes County (712 F Supp 803, 804 [D Or 1988, Burns, J.] [explaining that "[t]hanks to the expansion of civil rights jurisprudence, this is now a 'doggie' court. Indeed this case is an animal 'doubleheader' since it involves both dogs and llamas!" and that "[t]he three judicial bites at the llamas are enough"] [footnotes omitted]).

Ducks: Hopwood v Texas (78 F3d 932, 967 [5th Cir 1996, Wiener, J., concurring] ["To me, if 'it' has feathers, swims, waddles, and quacks like a duck, it is a duck."]], cert denied 518 US 1016 [1996]).

Elephants: Muirhead v Zucker (726 F Supp 613, 614 [WD Pa 1989] [Cohill, Ch. J.] ["We stand here like the proverbial blind man holding the tail of an elephant. This is the third lawsuit between these parties, each suit pending in a different court, and each succeeding one farther removed from the core of the dispute. Holding only the tail, it is difficult for us to divine what shape the rest of this beast takes. Nevertheless we endeavor to hold up our end, so to speak."] [opening paragraph]).

Fish: For an example of an opinion that contains much unnecessary information and jargon, read Hampton v North Carolina Pulp Co. (49 F Supp 625, 625–626 [ED NC 1943, Meekins, J.] [footnotes omitted], revd 139 F2d 840 [4th Cir 1944, per curiam]), known as the "fish case." The introduction tells the reader that something fishy is going on:

"Well, Fish is the subject of this story. From the fifth day of the Creation . . . fish have been a substantial factor in the affairs of men. After giving man dominion over all the Earth, God gave him dominion over the fish in particular, . . . reserving unto Himself only one certain fruit tree in the midst of the Garden, and Satan smeared that—the wretch! Whatever else we may think of the
Devil, as a business man he is working success. He sat in the original game, not with one fruit tree, but with the cash capital of one snake, and now he has half the world grabbed and a diamond hitch on the other half.”

Another case that sank rather than swam is United States v Hartley (678 F2d 961 [11th Cir 1982, Fay, J.], cert denied 459 US 1170 [1983]). On the sole basis that the Government prosecuted defendants for fraud in selling breaded shrimp, the court used fishey headings and subheadings that had no connection with the text that followed: “The Octopus” (subdivided into “Tentacle I,” “Tentacle II,” and “Tentacle III”), “The Grunt,” “The Red Herrings,” “The Blowfish,” “The Swordfish,” and other sea creatures. From the court’s first paragraph:

“The defendants . . . baited their appellate hooks with a large assortment of tempting issues—fourteen by their count—in an attempt to land the prize catch—a reversal. We found only two deserving of a judicial nibble, but none worthy of setting the hook. Upon reeling through this opinion, the appellants will unfortunately find their catch should be mounted as ‘the one that got away.” (Id. at 965 [footnote omitted].)

Horses: Arabian Score v Lasma Arabian Ltd. (814 F2d 529, 530 [8th Cir 1987, Wollman, J.] [“Beating dead horses is the sport of appellate judges, a generally harmless pastime painful only to the readers of appellate opinions. Paying for the promotion of dead horses can be an expensive proposition, however, as the facts of this case make abundantly clear.”] [opening sentences]).

Mice: Jackson Coca-Cola Bottling Co. v Chapman, 106 Miss 864, 64 So 791, 791 [1914, Reed, J.] [“A ’sma’ mousie’ caused the trouble in this case. The ‘wee sleekit, cow’rin,’ tim’rous beastie’ drowned in a bottle of coca-cola.”] [opening sentences]).

Mules: Hayes v Luckey (33 F Supp 2d 987, 995 n 16 [ND Ala 1997, Smith, J.] [“[T]he work of the Alabama Legislature in the area of medical liability is a mule—the bastard offspring of intercourse among lawyers, legislators, and lobbyists, having no pride of ancestry and no hope of posterity.”]); Gill v State (488 So 2d 801, 808 n 2 [Miss 1986, Hawkins, J., dissenting] [“There was an old saying in Chickasaw County where I grew up, ‘You ain’t learned nothing the second time a mule kicks you.’”]); State v Jackson, 5 Kan App 2d 170, 170, 613 P2d 398, 398 [1980, Foth, Ch. J.] [“The animal involved here was named Frieda. Frieda’s mother apparently had an impeccable equine pedigree. Indeed, the events of the case suggest origins in the hunt country of Maryland or Virginia, with strains of hunter, Morgan, or perhaps saddle-bred in her background. Unfortunately, like many young ladies of breeding she made a love match far below her station. Her mate may have had charm, and clearly had animal magnetism, but he was also indisputably a jackass. Frieda, the product of this unhappy union, was a mule.”]); Lyman v Dale (262 Mo 353, 171 SW 352, 355 [1914, Lamm, J., concurring] [“Witness the German proverb: Mules make a great fuss about their ancestors having been asses.”]); Mincey v Bradburn (103 Tenn 407, 414, 56
SW 273, 274–275 [1899, Wilkes, J.] ["[W]e do not desire to say anything disrespectful of or
derogatory to the mule. He has no posterity to protect and keep alive his memory."]).

Pigs: *Texas Pig Stands, Inc. v Hard Rock Café Int'l, Inc.* (951 F2d 684, 691–692 [5th Cir
1992, Brown, J.]) [using references like "kosher" and headings like "This Little Piggy Went to
Market" and "A Pig is a Pig is a Pig—Or is it?" the court wrote, "Undaunted by these setbacks,
Hard Rock now charges full-boar into the fundamental issue of whether sufficient evidence exists
to support the jury's finding that the term 'pig sandwich,' standing alone, is a protectable
mark."]); *United States v Dunkel, 927 F2d 955, 956 [7th Cir 1991, per curiam]* ["Judges are not
like pigs, hunting for truffles buried in briefs."]; *Bradshaw v Unity Marine Corp.* (147 F Supp 2d
268, 271 [SD Tex 2001, Kent, J.] ["But at the end of the day, even if you put a calico dress on it
and call it Florence, a pig is still a pig."]).

Swans: *Save Our Cumberland Mountains, Inc. v Hodel* (857 F2d 1516, 1528 [DC Cir 1988,
Starr, J., dissenting] ["What some have been tormenting as an ugly duckling has turned out to be
a swan."]); *United States v Byrnes* (644 F2d 107, 112 [2d Cir 1981, Mulligan, J.] ["The judgment
of conviction is affirmed, justice has triumphed and this is my swan song."] [Judge Mulligan's
closing line in a case about swans—in his last opinion before he retired]).

Three opinions about fictional animals mix dry wit with serious scholarship in the context
of intellectual property.

The first, *Lyons Partnership v Giannoulas* (179 F3d 384 [5th Cir 1999, Jolly, J.]), is an ode
to a song my son somehow learned when he was four: "I hate you; you hate me; let's hang
Barney from a tree. A shot rings out; Barney falls to the floor; no more purple dinosaur." In
*Lyons*, the "Barney" company, owner of the trademark for that loveable six-foot tyrannosaurus
rex, sued Giannoulas, owner of "The Famous Chicken," for trademark infringement. Giannoulas
produced shows in which his chicken beat Barney up. The Fifth Circuit affirmed the dismissal of
the claim on the ground of parody because Giannoulas "was engaged in a sophisticated critique of
society's acceptance of this ubiquitous and insipid creature." *(Id. at 387.)* According to the
court,

"Barney, depicted with his large, rounded body, never changing
grin, giddy chuckles, and exclamations like 'Super-dee-Doooper!,'
may represent a simplistic ideal of goodness. [But] Giannoulas
... considers Barney to be a symbol of what is wrong with our
society—an homage, if you will, to all the inane, banal platitudes
that we readily accept and thrust unthinkingly upon our children.
Apparently, he is not alone in criticizing society's acceptance of a
children's icon with such insipid and corny qualities. Quoting from
an article in The New Yorker, he argues that at least some perceive
Barney as a 'potbellied,' 'sloppily fat' dinosaur who 'giggle[s]
compulsively in a tone of unequaled feeblemindedness' and 'jiggles his lumpish body like an overripe eggplant.'" (Id. at 386.)

The second opinion brings new meaning to that e-mail catch-phrase, "You've Got Spam." In *Hormel Foods Corp. v Jim Henson Prds., Inc.* (73 F3d 497 [2d Cir 1996, Van Graafeiland, J.]), the "SPAM" company sued the late Jim Henson in trademark over Spa'am, a character in the then-forthcoming movie "Muppet Treasure Island." Damages? Not in a pig's eye, said the court:

"In Henson's film, Spa'am is the high priest of a tribe of wild boars that worships Miss Piggy as its Queen Sha Ka La Ka La. Although the name 'Spa'am' is mentioned only once in the entire movie, Henson hopes to poke a little fun at Hormel's famous luncheon meat by associating its processed, gelatinous block with a humorously wild beast ... [T]he executives at Hormel ... worry that sales of SPAM will drop off if it is linked with 'evil in porcine form.'" Complaint at ¶ 16. Spa'am, however, is not the boarish Beelzebub that Hormel seems to fear.

"Hormel also expresses concern that even comic association with an unclean 'grotesque' boar will call into question the purity and high quality of its meat product ... [But] one might think Hormel would welcome the association with a genuine source of pork." (Id. at 501.)

The third, *Jordache Enterp., Inc. v Hogg Wyld, Ltd.* (828 F2d 1482, 1483 [10th Cir 1987, Tacha, J.], quoting Jonathan Swift), lards it over the reader this way:

"This case, a trademark infringement action brought against a manufacturer that identifies its blue jeans for larger women with a smiling pig and the word 'Lardashe' on the seat of the pants, reminds us that 'you can't make a silk purse out of a sow's ear.'"

Some opinion writers have a nose for attributing animal characteristics to humans. Does this opinion smell funny?

"The ubiquitous DEA Agent Paul Markonni once again sticks his nose into the drug trade. This time he is on the scent of appellant Mitchell Sentovich's drug courier activities. We now learn that among Markonni's many talents is an olfactory sense we in the past attributed only to canines. Sentovich argues that he should have been able to test, at a magistrate's hearing on issuance of a search warrant, whether Markonni really is the human bloodhound he claims to be. Sentovich's claims, however, have more bark than
bite. In fact, they have not a dog’s chance of success. Zeke, Rocky, Bodger and Nebuchadnezzar, and the drug dogs of the southeast had best beware. Markoni’s sensitive proboscis may soon put them in the dog pound.” (United States v Sentovich, 677 F2d 834, 835–836 [11th Cir 1986, Johnson, J.] [footnotes omitted].)

30. Cherish Collegiality

Write temperately, recognizing that opinions last forever, even if later disavowed. The then-Chief Justice of Utah, who penned Salt Lake City v Pietsenburg (571 P2d 1299, 1299–1300 [Utah 1977, Ellett, Ch. J.], disavowed by State v Taylor, 664 P2d 439, 448 n 4 [Utah 1983, Durham, J.]), did not follow this suggestion:

“The motion picture exhibited revealed an entirely naked man and women in various acts of sodomy . . . and adultery—all shown with closeup camera photography.

“A more sickening, disgusting, depraved showing cannot be imagined. However certain justices of the Supreme Court of the United States have said that before a matter can be held to be obscene, it must be . . .

“Some state judges, acting the part of sycophants, echo that doctrine. It would appear that such an argument ought only be advanced by depraved, mentally deficient, mind-warped queers. Judges who seek to find technical excuses to permit such pictures to be shown under the pretense of finding some intrinsic value to it are reminiscent of a dog that returns to his vomit in search of some morsel of filth which may have some redeeming value to its own taste. If those judges have not the good sense and decency to resign from their positions as judges, they should be removed either by impeachment or by the vote of the decent people of their constituency.”

Nor was there much collegiality in People v Arno (90 Cal App 3d 505, 514 n 2, 153 Cal Rptr 624, 628 n 2 [2d Dist 1979, Thompson, J.]), in which the majority of the California Court of Appeal in another obscenity case told a dissenter, in seven successively numbered sentences that “spell out a response,” that he is a “S-C-H-M-U-C-K.”

“We feel compelled by the nature of the attack in the dissenting opinion to spell out a response:
1. Some answer is required to the dissent’s charge.
2. Certainly we do not endorse “victimless crime.”
3. How that question is involved escapes us.
4. Moreover, the constitutional issue is significant.
5. Ultimately it must be addressed in light of precedent.
6. Certainly the course of precedent is clear.
7. Knowing that, our result is compelled.
(See the Funk & Wagnall's The New Cassell's German Dictionary, p. 408, in conjunction with fn. 6 of dis. opn. of Douglas, J., in Ginsberg v. New York (1967) 390 U.S. 629, 655-56 . . . . .)."

That footnote provoked the dissent to respond. (See 153 Cal Rptr at 644 n 14 [Hanson, J.].) The dissent termed "schmuck" a word that emanates "seven thousand miles to the Rhine in Germany" and "called the footnote "a personal affront to every California citizen . . . . It is no wonder that California has the odious distinction of being the porno capital of the world."

The Supreme Court in Grove Press, Inc. v Gerstein (378 US 577 [1964]) forbade state and local governments from banning The Tropic of Cancer. But Pennsylvania continued to try to ban the book. In ruling against the state, the majority of the Supreme Court of Pennsylvania relied on Grove Press. (See Commonwealth v Robin, 421 Pa 70, 218 A2d 546 [1966].) One dissenter did not:

"The decision of the Majority of the Court in this case has dealt a staggering blow to the forces of morality, decency and human dignity in the Commonwealth of Pennsylvania. If, by this decision, a thousand rattlesnakes had been let loose, they could not do as much damage to the well-being of the people of this state as the unleashing of all the scorpions and vermin of immorality swarming out of that volume of degeneracy called 'The Tropic of Cancer.' Policemen, hunters, constables and foresters could easily and quickly kill a thousand rattlesnakes but the lice, lizards, maggots and gangrenous roaches scurrying out from beneath the covers of 'The Tropic of Cancer' will enter into the playground, the study desks, the cloistered confines of children and immature minds to eat away moral resistance and wreak damage and harm which may blight countless lives for years and decades to come." (Id. at 73–74, 218 A2d at 548 [Musmanno, J., dissenting].)

Justice Musmanno's colleagues were often unhappy with his spirited dissents. They once refused to allow him to publish a dissent in the Pennsylvania official reports. He brought a mandamus action against his colleagues and lost in his own court. (See Musmanno v Eldredge, 382 Pa 167, 114 A2d 511 [1955].) For Justice Musmanno's defense of his separate writings, see Michael A. Musmanno, Dissenting Opinions, 6 Kans L Rev 407 (1958).
For more of Justice Musmanno’s opinion-writing craft, see Steven B. Spector, Judicial Activism in Prose: A Librarian’s Guide to the Opinions of Justice Michael A. Musmanno, 86 Law Libr J 311 (1994). According to Justice Douglas, Justice Musmanno, who regularly dissented during the 50s to suppress Jewish organizations he thought were sympathetic to communism, “was a notorious example of [an] official” who was a “mere mouthpiece of the most intolerant members of the community.” (William O. Douglas, The Court Years: 1937–1975, at 92 [1980].)

Judges may disagree with one another but still do so respectfully. Did the court do that here?

“To the extent that [People v] Cohen [131 Misc 2d 898 [Yonkers City Ct 1986]] may be construed as authority for the contrary view, we decline to follow it because it is oxymoronic . . . .” (People v Jeck-Tisch, 133 Misc 2d 1090, 1091 [White Plains City Ct 1986, Reap, J].)

Contrast two opinions on abortion, Webster and Roe v Wade. In Webster v Reproductive Health Svrs. (492 US 490 [1989]), Justice Scalia called Justice O’Connor’s position “irrational,” one that “cannot be taken seriously.” (ld. at 536 n. 531.) And the Justices were on the same side of the plurality. In dissent, Justice Blackmun called the plurality “deceptive” “unadulterated nonsense” that showed “cowardice and illegitimacy.” (ld. at 538, 556 n 11, 559–560.) Yet the ad hominem attack is unnecessary. Judges can disagree without being disagreeable. This is how one Justice began his dissent in Roe v Wade (410 US 113, 171 [Rehnquist, J., dissenting]): “The Court’s opinion brings to the decision of this troubling question both extensive historical fact and a wealth of legal scholarship. While the opinion thus commands my respect, I find myself nonetheless in fundamental disagreement with those parts of it that invalidate the Texas statute in question, and therefore dissent.”

For an example of how the Seventh Circuit handled the delicate affair of reversing the trial judgment of its chief judge, who sat in District Court by designation to resolve a complicated case, see Bankcard Am., Inc. v Universal Bancard Sys., Inc. (203 F3d 477, 479 n 1 [7th Cir 2000, Evans, J.], cert denied 531 US 877 [2000]):

“It is a testament to the dedication of Chief Judge Posner that he volunteered to sit in the district court and hear this case which, at the time, needed the guiding hand of a new judge. Judge Posner, of course, carries a full load of cases on this court. He also discharges a multitude of administrative duties as the circuit’s chief judge. But that’s only part of what he does. He has written more books than many people read in a lifetime. On top of all this, in his spare time he is working as a court-appointed special mediator in the government’s blockbuster antitrust suit against Microsoft. Obviously, Judge Posner has more on his plate than a long-haul
trucker working an 'all you can eat' buffet line. It is a tribute to Judge Posner's talent that he handles his many roles with such vigor, brilliance, and panache."

Judicial politics makes strange bench fellows. How a majority opinion treats a dissenter often depends on whether the judges are allies or enemies. (See e.g. Philip A. Lacovara, *Uncourtly Manners: Quarrelsome Justices are no Longer a Model of Civility for Lawyers*, 80 ABA J 50 [Dec. 1994] [citing numerous, astonishing examples of judicial derision].) Is the dissenter called “the dissent” or “our dissenting colleague,” or is the dissenter repeatedly identified by name or title? Will a dissenter vent frustration or invective toward the majority? Does the dissenter write, “I dissent” or “I respectfully dissent”? Are precedents relied on, distinguished, or overturned identified by the judge who authored them? Will a judge pull an old law-journal article to catch a judicial contradiction? Will colleagues do battle in footnotes? How will an appellate court treat a trial judge? Will a respected trial judge be called “the learned justice” if the judge is upheld—and remain relatively incognito if reversed? Will a trial judge, if thought ill of, be identified repeatedly by name? Will an appellate court cite the trial judge’s old, similar mistakes? Will judges who like or dislike counsel immortalize them in the Official Reports? Legal realism: Personality plays a childish but strong role in opinion writing.

Second Circuit Judge Magruder had some collegial thoughts on how appellate judges should treat trial judges: “We should approach our task of judicial review with a certain genuine humility. We should never unnecessarily try to make a monkey of the judge in the court below, or to trespass on his feelings or dignity and self-respect.” (Calvert Magruder, *The Trials and Tribulations of an Intermediate Appellate Court*, 44 Cornell LQ 1, 3 [1959].) One example: In *Akers v Sellers* (54 NE2d 779 [Ind App 1944, Crumpacker, Ch. J., en banc]), the court made a monkey of the trial judge in a dog of a case. Each divorcing spouse wanted to keep the family Boston bull terrier. The Appellate Court of Indiana suggested that the trial judge should have cut the dog in two, and concluded: “The fact, however, that we may possibly have more confidence in the wisdom of Solomon than we do in the trial court hardly justifies us in disturbing its judgment.” (Id. at 780.)

A trend has developed in the federal courts of appeals in which judges butcher their colleagues by revealing internal court workings. The following two examples show how high the stakes are when judges cut one another to pieces in public.

In *Thompson v Calderon* (120 F3d 1045 [9th Cir 1998]), the Ninth Circuit, en banc, vacated its earlier death-penalty opinion after the court’s en banc majority found that the state trial of Thomas Thompson, a possibly innocent man, was egregiously unfair and that the Ninth Circuit’s earlier habeas ruling was incorrect. Much of the en banc opinion concerns whether, as the dissent argued, the majority cheated in allowing en banc reconsideration. Especially remarkable are Judge Reinhardt’s concurrence and Judge Kozinski’s dissent. They rank among the most vicious writings in American jurisprudence. The case went to the Supreme Court, which held that the Ninth Circuit had no power en banc to correct a miscarriage of justice. (See
The Court found, 5–4, that the Ninth Circuit majority had indeed cheated in taking the case en banc, and Thompson was executed. Judge Reinhardt, who was in Thompson's en banc majority, later dedicated his Madison Lecture at New York University School of Law to accusing his dissenting colleagues and the Supreme Court's five reversing Justices of committing judicial abuses of the gravest sort. (See Stephen Reinhardt, The Anatomy of an Execution: Fairness vs. "Process," 74 NYU L Rev 313 [1999].) Thompson tore the Ninth Circuit apart. It will take a generation for the wounds to heal.

In Grutter v Bollinger (288 F3d 732 [6th Cir 2002, en banc, 5–4]), the important University of Michigan Law School affirmative-action case, Judge Boggs, in a detailed separate procedural appendix, accused the majority of tampering with judge selection. (See id. at 810, Boggs, J., dissenting in Procedural Appendix.)

Judge Moore, concurring with the majority, wrote separately to object to Judge Boggs's dissent:

"In publishing their 'Procedural Appendix,' I believe that Judge Boggs and those joining his opinion have done a grave harm not only to themselves, but to this court and even to the Nation as a whole.

"....

"Our ability to perform these crucial tasks is imperiled when members of this court take it upon themselves to 'expose to public view' disagreements over procedure. The damage done by such exposés is, at least in part, the responsibility of those who report them, despite the efforts of Judge Boggs and those joining his opinion to disclaim responsibility for their own conduct. It is understandable, however, that they do so, as their conduct in the present case is nothing short of shameful." (Id. at 752, 753, Moore, J., concurring.)

Judge Batchelder, however, took Judge Boggs's side:

"In her separate concurrence, Judge Moore expresses her belief that by revealing that history, Judge Boggs—and I, by concurring—undermine the legitimacy of the court and do harm to ourselves, this court and the nation. I believe that exactly the opposite is true. Public confidence in this court or any other is premised on the certainty that the court follows the rules in every case, regardless of the question that a particular case presents. Unless we expose to public view our failures to follow the court's
established procedures, our claim to legitimacy is illegitimate.” (Id. at 815, Batchelder, J., dissenting.)

Judge Siler took a different approach:

“I concur in the dissent by Judge Boggs on the merits. I write separately for the reason that I do not concur in the addition of the procedural appendix, not because I question its accuracy, but because I feel that it is unnecessary for the resolution of this case. If the procedural appendix were not filed, then the responses filed in the concurrences by Judges Moore and Clay would also have been unnecessary.” (Id. at 815, Siler, J., dissenting.)

Of interest is that each side in Grutter cited Judge Batchelder’s writing in Memphis Planned Parenthood, Inc. v Sundquist (184 F3d 600 [6th Cir 1999, Batchelder, J., separate statement on denial of rehearing en banc]): “Our dissenting colleague’s own purposes may be furthered by publicly impugning the integrity of his colleagues. Collegiality, cooperation and the court’s decision-making process clearly are not. And public confidence in the judicial system and in this court clearly are not.” (Id. at 608.)


31. Murder Mystery-Novel Writing

Mystery-novel opinion writing does not get to the point until the end. This ineffective style fails to lay facts in a compelling, readable way.

Mystery-novel writing is different from telling a readable story. Dashiell Hammett has nothing on Judge Donald Burnett’s persuasive writing in murder cases. (See e.g. State v Baker, 103 Idaho 43, 644 P2d 365 [Ct App 1982].) For compelling storytelling, read something by New York City Court Justice Carlin, a captivating writer of an earlier era. Justice Carlin honed his métier in such cases as Cordas v Peerless Transp. Co. (27 NYS2d 198, 199 [City Ct, NY County 1941]), in which he famously wrote, in melodramatic nineteenth-century English, that an individual is held to a relaxed standard of care when faced with an “emergency, not of his own making, in which he suddenly is faced with a patent danger with a moment left to adopt a means of extrication.” (Id. at 202.) Cordas begins by detailing a taxicab robbery in progress:

“This case presents the ordinary man—that problem child of the law—in a most bizarre setting. As a lowly chauffeur in defendant’s employ he became in a trice the protagonist in a breach-bating drama with a denouement almost tragic. It appears that a man, whose identity it would be indelicate to divulge was feloniously
relieved of his portable goods by two nondescript highwaymen in
an alley near 26th Street and Third Avenue, Manhattan; they
induced him to relinquish his possessions by a strong argument ad
hominem couched in the convincing cant of the criminal and
pressed at the point of a most persuasive pistol. Laden with their
loot, but not thereby impeded, they took an abrupt departure and
he, shuffling off the coil of that discretion which enmeshed him in
the alley, quickly gave chase through 26th Street toward 2d
Avenue, whither they were resorting 'with expedition swift as
thought' for most obvious reasons.” (Id. at 199.)

32. Mark my Words: It is Best Not to Be Folksy

For a folksy style, read the anthology of Judge Anthony Nugent, a Mark Twain imitator.
(See e.g. State v Knowles, 739 SW2d 753, 754 [Mo Ct App 1987] (“Old Dave Baird, the
prosecuting attorney up in Nodaway County, thought he had a case against Les Knowles for
receiving stolen property, to-wit, a chain saw, so he ups and files on Les.”).)

33. Accuse Accurately

Accuse someone of an impropriety only if you have a strong reason to do so, if there is a
clear basis in the record, and if you give a nonconclusory explanation. It is often best to let the
facts you articulate speak for themselves, the “just the facts, ma’am” or the take-the-readers-to-
edge-of-the-cliff-but-let-them-jump-off-themselves approaches.

Avoid attaching motives to people. Just write what they said and did. If you write well,
your reader will draw the conclusion you intend.

Try to resolve relevant conflicts in testimony before finding a witness incredible.

Depending on the circumstances, you can gently find people not credible by not
discussing their testimony.

Consider whether your ruling will needlessly humiliate:

- “Counsel’s papers are replete with typographical errors. Not surprisingly, he
  misconstrues basic concepts flowing from the rule against perpetuities.”

This dissent, from Commonwealth v Robin, 421 Pa 70, 91, 218 A2d 546, 556 [1966,
Musmanno, J., dissenting]), intended to humiliate, but it said more about the dissenter than
about the author of The Tropic of Cancer:
“One wonders how the human species could have produced so lecherous, blasphemous, disgusting and amoral a human being as Henry Miller. One wonders why he is received in polite society. I would prefer to have as a visitor in my home the most impeccious tramp that ever walked railroad ties, a tramp whose raggedy clothes are held together by faith and a safety pin, a tramp who, throughout his entire life, always moved at a lazy pace, running only to avoid work, a tramp who rides the rods of freight cars with the aplomb of a railroad president in his private train, a tramp who knows as much about Emily Post’s etiquette as a chattering chimpanzee, and who couldn’t care less; I would prefer to invite that lazy, bewhiskered cavalier of the road to my residence for a short visit, than even to see on the highway that hobo of the mind, that licentious nomad called Henry Miller, whose literary clothes are plastered with filth, whose language is dirtier than any broken sewer that pollutes and contaminates a whole community;—Henry Miller who shuns a bath of clean words, as the devil avoids holy water, who reduces human beings to animals, home standards to the pigsty, and dwells in a land of his own fit only for lice, bedbugs, cockroaches and tapeworms.” (Id. at 91, 218 A2d at 556 [Musmanno, J., dissenting].)

34. Suppress Spoofs

J. R. Poisson v Etienne d’Avril (244 Ark 478–A [1968], reprinted in McClodd and Pepe Le Pue, Note, Legislative and Judicial Dynamism in Arkansas: Poisson v d’Avril, 22 Ark L Rev 724, 741 [1969]), an unreported but widely disseminated opinion that repealed all legislation in Arkansas, is an April Fool’s joke, in questionable taste, from the Arkansas Supreme Court. One reported opinion, also from Arkansas, Catt v State (691 SW2d 120 [Ark 1985]), is a hoax, but it got by West’s National Reporter editorial board, which no longer Key Cites it. The author of both opinions was Arkansas Supreme Court Justice Smith, who once wrote that “[j]udicial humor is neither judicial nor humorous.” (George Rose Smith, A Primer of Opinion Writing, for Four New Judges, 21 Ark L Rev 197, 210 [1967].) Justice Smith evidently changed his mind before he wrote J. R. Poisson and Catt. (See George Rose Smith, A Critique of Judicial Humor, 43 Ark L Rev 1, 25 n 60 [1990] [declaring that “that part of the Primer disapproving judicial humor is hereby overruled, set aside, held for naught, and stomped on!”].)

The most famous, and best, fictitious opinion in judicial literature comes from our kidding Canadian colleagues. (See Regina v Ojiheway, 8 Crim LQ [Can] 137 [Sup Ct 1965, Blue, J.] [finding that a pony is a bird]; see generally Jerry Buchmeyer, Judicial Logic: Birds and Ponies, 45 Tex BJ 1345 [1982].)

35. Write Reasonably

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Use language literally, not figuratively, to avoid embellishment, exaggeration, or unfair, inapt metaphor.

Be careful with intensive adverbs and common and indefinite adjectives. They exaggerate. Adverbs modify verbs (“She wrote carefully”), adjectives (“He has an amazing large vocabulary”), and other adverbs (“They wrote so clearly”) and usually, but not always, end in “ly.” (“Often,” “seldom,” “very,” and “well” are adverbs.) Adjectives describe or modify nouns or noun phrases: persons, animals, places, or things. (Modifiers are words, phrases, or clauses that limit or qualify meaning.) Adjectives can be common (“strong writer”), proper (“Chinese food”), articles (“a,” “an,” “the”), compound (“well-written opinion”), or indefinite when they describe general qualities (“any,” “most,” “some”).

Write about emotional themes, but do not write emotionally:

“Four witnesses were subpoenaed to testify about the plaintiff’s soft-tissue injury following his fall on the sidewalk; they were credible” rather than “Many witnesses took the stand because they were duty bound as good citizens to come forward; they honestly and vividly painted a panoramic view of the painful and tragic disaster that befell plaintiff.”

36. **Punt Purple Prose**

Err on the side of subtlety, not on the side of royal purple. Purple prose diverts attention by calling attention to itself. As Professor Younger explained, legal writing should be “modest and quiet, confident that its merit lies partly in the art by which the author has concealed his art . . . [L]egal writing should be like a triple-dry martini—colorless but powerful.” (Irving Younger, Persuasive Writing 32–33 [1990].) Stated another way, “in legal writing, unlike much other writing, your personalities should remain in the background. Creativity and discursiveness, which perhaps earned you kudos as undergraduates, should give way to clarity and logical analysis.” (Gertrude Block, Effective Legal Writing 74 [4th ed 1992].)

Purple-prose writers overuse adjectives and adverbs, dabble with clichés, mix and over-develop metaphors, and pound the podium with pretentious word constructions.

What could be more ostentatious than this? “A minuscule error must coalesce with gargantuan guilt, even where the accused displays an imagination of Pantagruelian dimensions.” (Chapman v United States, 547 F2d 1240, 1250 [5th Cir 1977, Goldberg, J.].)

Perhaps this, from Goldin v Artache (N.Y.L.J. Aug. 26, 1986, at 6, col 2, col 3 [Sup Ct, NY County, Wright, J.]), an action for a preliminary injunction in a property dispute between former lovers:
"As with the Trojan War, where the heroes of Homer squabbled, some of the symmetry of tragedy crept into the relationship of the parties. Ill-starred lovers have from time immemorial stumbled gloriously among the snare of their own drums. Troilus sig[n]ed f[or] the infidelity of Cressida. Pyramus and Thisbe had their midsummer night's mesalliance; Antony and Cleopatra their doomed dalliance, as did Othello and Desdemona. There are precedents aplenty for bitterness and the scathed spirit.

"Palinurus, wounded by betrayal, wept that, 'The object of loving is to end love.' Savaged by the treason of uxorial cuckoldry, he felt, in the words of a poet that 'Life goes on, but I don't remember why.'"

37. **Plan Your Platitudes**

Circumvent circular reasoning unless the point is obvious. Yogi Berra's "You can observe a lot just by watching" worked brilliantly, but only because the circularity was obvious. The Court used a platitude in the Japanese internment case: "Citizenship has its responsibilities as well as its privileges, and in time of war the burden is always heavier." *Korematsu v United States*, 323 US 214, 219 [1944, Black, J.]. What the Court did not explain is why some citizens bear a heavier burden than others. Had the Court confronted that thorny issue, *Korematsu* might have been written differently, and perhaps the result might have been different, too.

38. **Cringe at Commenting on Your Prose**

"In a manner of speaking," "if you will," "so to say," "no pun intended," "you should pardon the expression." Writing about your writing distracts the reader and, depending on the comment, shows weakness or self-congratulation.

"Appellant's argument—to avoid a cliché—mixes pears and pomegranates."

39. **Harness Humor**

and reflects reasoned judgment. Moreover, a humorous opinion can demean the losing side. And that assumes that the opinion's author really is funny, which—in the case of judges and law clerks—is rarely true. There are no funny lawyers, after all—only funny people who made career mistakes.

As a master once wrote, "Judicial humor is neither judicial nor humorous. A lawsuit is a serious matter to those concerned in it. For a judge to take advantage of his criticism-insulated, retaliation-proof position to display his wit is contemptible, like hitting a man when he's down." (George Rose Smith, A Primer of Opinion Writing, For Four New Judges, 21 Ark L Rev 197, 210 [1967].)

Judicial humor also has no place in important opinions. Would our perception of Marbury v Madison (1 US [Cranbch] 137 [1803]) be different if Chief Justice John Marshall had used a few off-color asides? What if Chief Justice Earl Warren had punned his way through Brown v Bd. of Educ. (347 US 483 [1954])?

Lightening wit, moreover, is typically unenlightening. A judicial opinion demands propriety and professionalism. Humorous opinions, written to satisfy some need to be humorous, can cross the line. Some humor offends by exclusion and false notions of superiority. Humor also deflects from accountable decision making and judicial responsibility. It is one thing to have a sense of humor and grace on the bench, or to be funny during an after-dinner speech. It is another to express humor in writing. As recited in a judicial disciplinary opinion, "Under the heading of 'Ancient Precedents' in the canons of judicial ethics adopted in 1924 by the American Bar Association this appears: 'Judges ought to be more learned than witty; more reverend than plausible; and more advised than confident. Above all things, integrity is their portion and proper virtue.'" (Matter of Rome, 218 Kan 198, 207, 542 P2d 676, 685 [1975, per curiam], quoting 1924 Canons of Judicial Ethics.)

Dean Prosser wrote that "the bench is not an appropriate place for unseemly levity. The litigant has vital interests at stake. His entire future, or even his life, may be trembling in the balance, and the robed buffoon who makes merry at his expense should be choked with his own wig." (William L. Prosser, The Judicial Humorist: A Collection of Judicial Opinions and other Frivolities vii [1952].) That, however, did not stop him from compiling opinions for a book on the subject. Dean Prosser doubtless took the title of his book The Judicial Humorist from Gilbert and Sullivan's The Mikado. Sir William Gilbert, a lawyer, had the Lord High Executioner sing about persons who could be executed and not be missed, including "that Nisi Prius nuisance, ... The Judicial humorist—I've got him on the list!"

Justice Cardozo's approach to humor was more tolerant than Dean Prosser's, but Cardozo did not recommend it. He explained that "the form of opinion which aims at humor ... is a perilous adventure, which can be justified only by success, and even then is likely to find its critics almost as many as its eulogists." (Benjamin N. Cardozo, Law and Literature, 39 Colum L Rev 119,
122, 52 Harv. L. Rev. 471, 483, 48 Yale L.J. 489, 501 [1939] [simultaneously published], reprinted from 14 Yale Review [N.S.] 699 [July 1925].)

Some New York State judges are on opposite sides of this question. (Compare David B. Saxe, Not a Time for Humor, Natl L.J., Aug. 14, 1989, at 13 [con], with Richard W. Wallach, Let's Have a Little Humor, NYLJ, Mar. 30, 1984, at 2, col 3 [pro] [explaining in margin that Justice Wallach . . . has practiced what he preaches about humor in judicial opinions].)

Effective and memorable is truly funny humor that pokes fun at the law or society, is in good taste, and does not belittle the litigants, demean the judiciary, or make future litigants apprehensive. And the humor must not dominate the opinion; the humor must be brief.

Humor may also be acceptable when it is inherent in, relevant to, or complements the subject matter. (Lord MacMillan, The Writing of Judgements, 26 Can Bar Rev 491, 493 [1948] ["[I]n all the best examples of judicial levity the lighter passages are not dragged in by the ears for the mere purpose of display but are strictly relevant to the issue and really advance the argument."].) Here are two examples of humor inherent in a case. In Peevey v Burgess (192 AD2d 1115, 1116 [4th Dept 1993, mem]), the court described how defendant, a tobacco chewer, had attached a homemade spittoon to his pickup truck's emergency brake release. The truck needed repair. When defendant's mechanic released the brake to go down a ramp, "six ounces of spit" sprayed into the mechanic's face. The mechanic, "disoriented," fell out of the pickup truck, which rolled down the ramp and struck another mechanic. With deadpan humor, the Fourth Department was unable to conclude "that it was not reasonably foreseeable that defendant's conduct . . . could . . . be a proximate cause of injury to a third party."

In the second case, United States v Prince (938 F.2d 1092 [10th Cir 1991, Brorby, J.], cert denied 502 US 961 [1991]), defendant so desperately wanted the court to relieve his public defender that he relieved himself on his defender's table in front of the jury. From the court's opening paragraph:

"While the public's perception of lawyers seems to reach new lows every day, parents—we are told—still encourage their children to enter this profession. But the parent who happens to read this opinion may not be so quick to urge a loved child to become a lawyer after learning how the defendant in this case expressed his extreme personal dislike of his lawyer. Likewise, the would-be lawyer raised on the hit television series, L.A. Law, to believe a law degree is that golden ticket to a glamorous career of big money, fast cars and intimate relationships among the beautiful people may think twice before sending in his or her law school application when word of this case gets out." (Id. at 1093 [footnotes omitted].)
For erudite humor in opinion writing, study anything by Judge Alex Kozinski. (See e.g. White v Samsung Elecs. Am., Inc., 989 F2d 1512, 1521 [9th Cir 1993, Kozinski, J., dissenting from denial of rehearing en banc] ["For better or worse, we are the Court of Appeals for the Hollywood Circuit."] [emphasis in the original], cert denied 508 US 951 [1993].) Then read David A. Golden, Humor, the Law, and Judge Kozinski's Greatest Hits, [1992] BYU L Rev 507. Few of us can write like Judge Kozinski does. Even fewer should try: It takes a lifetime of study to succeed, and a lifetime appointment to dare. Judge Kozinski, rated among the greatest American opinion writers, believes that it is not enough to be right. To Judge Kozinski, a judge must also be remembered.

Perhaps Judge Kozinski's greatest hit is United States v Syufy Enterprises (903 F2d 659 [9th Cir 1990]), an antitrust action against movie theaters in which the court's opinion, using a Rosetta-stone footnote, contains 207 movie titles on the road to El Dorado. A few readers might give this star-chambered opinion das boot, but you should read it anyway before it is gone with the wind. See how many movie titles you can spot.

To see how humor can work or fail, compare Judge Kozinski's work to the opinion in Republic of Bolivia v Philip Morris Cos. (39 F Supp 2d 1008 [SD Tex 1999, Kent, J.]). The defendant asked the Bolivia court to transfer a tobacco case from Brazoria County, Texas, to the District of Columbia. The court granted the motion for the following reasons:

"The Court seriously doubts whether Brazoria County has ever seen a live Bolivian . . . even on the Discovery Channel. Though only here by removal, this humble Court by the sea is certainly flattered by what must be the worldwide renown of rural Texas courts for dispensing justice with unparalleled fairness and alacrity, apparently in common discussion even on the mountain peaks of Bolivia!"

"[T]here isn't even a Bolivian restaurant anywhere near here! Although the jurisdiction of this Court boasts no similar foreign offices, a somewhat dated globe is within its possession. While the Court does not therefrom profess to understand all of the political subtleties of the geographical transmogrifications ongoing in Eastern Europe, the Court is virtually certain that Bolivia is not within the four counties over which this Court presides, even though the words Bolivia and Brazoria are a lot alike and caused some real, initial confusion until the Court conferred with its law clerks.

"[I]t is readily apparent, even from an outdated globe such as that possessed by this Court, that Bolivia, a hemisphere away, ain't in south-central Texas, and that, at the very least, the District of
Columbia is a more appropriate venue (though Bolivia isn’t located there either). Furthermore, as this Judicial District bears no significant relationship to any of the matters at issue, and the judge of this Court simply loves cigars, the Plaintiff can be expected to suffer neither harm nor prejudice by a transfer to Washington, D.C., a Bench better able to rise to the smoky challenges presented by this case, despite the alleged and historic presence there of countless ‘smoke-filled’ rooms.”

I close this section on humor by hanging my hat on this amusing thought:

“It is an unfortunate truism that not all of life’s moments are happy occasions; nor can one artificially impose humor where it naturally does not belong. To pretend otherwise would be akin to living in Monty Python’s ‘Happy Valley,’ where anyone found breaking the law by not being happy at all times is brought before the merriest of judges and sentenced to ‘hang by the neck until you cheer up.’” (Marshall Rudolf, Note, Judicial Humor: A Laughing Matter?, 41 Hastings LJ 175, 200 [1989] [footnotes omitted].)

For more on this subject, see Gerald Lebovits, The Legal Writer, Judicial Jesting: Judicial?, 75 NY St BJ 64 (Sept. 2003).

40. Is Poetic Justice Poetic or Just?

Some believe that opinions in rhyme can be appropriate. (See e.g. Mary Kate Kearney, Essay, The Propriety of Poetry in Judicial Opinions, 12 Widener LJ 597, 597 [2003] [arguing that “under certain circumstances, rhymed opinions are an appropriate form of judicial expression”].) But most believe that poetic opinions go from bad to verse. It is surprising that rhyming verse in opinion writing is so common, given that “humor in the form of doggerel verse...can undermine judicial opinions as sources of law.” (Susan K. Rushing, Is Judicial Humor Judicial?, 1 Scribes J Legal Writing 125, 129 [1990].) Missing from verse is the key to a reasoned judicial opinion: a clearly articulated holding supported by precedent. Also typically missing from judicial verse is equal metric footprint. The chapter and verse of most poetic justice, in other words, is bad law and bad poetry. Justice Smith agreed: “[I]f all the versifying justices were compelled to eat their words, the punishment would be poetic justice!” (George Rose Smith, A Critique of Judicial Humor, 43 Ark L Rev 1, 14 [1990].) Why are so many opinions in verse? Because some opinion writers have entirely too much time on their hands.

Several New York State opinions have been written in rhyme. For example, People v Sergio (Crim Ct, Queens County, Flug, J., reprinted in “And to All a Ball Play!,” NY Times, Dec. 20, 1986, at 1, col 2]) mimicked Clement Clarke Moore’s “A Visit from St. Nicholas”:
"Twas game six of the series when out of the sky,
Flew Sergio's parachute, a Met banner held high.
His goal was to spur our home team to success,
Burst Beantown's balloon claiming Sox were the best.
The fans and the players cheered all they did see,
But not everyone present reacted with glee.
'Reckless endangerment,' the D.A. spoke stern.
'I recommend jail. There a lesson he'd learn.'
Though the act proved harmless, on the field he didn't belong,
His trespass was sheer folly, and undeniably wrong.
But jail's not the answer in a case of this sort.
To balance the equities is the job of this court.
So a week before Christmas, here in the court,
I sentence defendant for interrupting a sport.
Community service, and a fine you will pay.
Happy holiday to all. And to all a good day."

One unreported New York opinion considered whether a pet donkey violated a residential zoning ordinance. (See People v Rothfuss, Dkt. No. 359-0-83-4 [Yorktown Town Ct, July 27, 1983], reprinted in Joyce J. George, Judicial Opinion Writing Handbook 336–337 [4th ed 2000].) The last paragraph of the opinion contains the moral:

"Though defendant is not guilty,
there is a lesson to be learned
by inconsiderate pet owners
whose neighbors' tempers burn.
When nothing else succeeds,
and as a last resort,
as in the case at hand,
they'll drag your ass to Court." (ld. at 337.)
'donkey'

Another unreported opinion, this one from Macomb County Circuit Judge Deborah Servitto (Deangelo Bailey v Marshall Mathers III, NY Post, Oct. 22, 2003, at 29, col 2), decided an Eminem case in rap:

"Mr. Bailey complains that his rep is trash
So he's seeking compensation in the form of cash.
Bailey thinks he's entitled to some monetary gain
Because Eminem used his name in vain.
Eminem says Bailey used to throw him around
Beat him up in the john, shoved his face in the ground.
Eminem contends that his rap is protected

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By the rights guaranteed by the First Amendment
Eminem maintains that the story is true.
And that Bailey beat him black and blue.
In the alternative he states that the story is phony
And a reasonable person would think it's baloney.
The court must always balance the rights
Of a defendant and one placed in a false light.
If the plaintiff presents no question of fact
To dismiss is the only acceptable act.
If the language used is anything but pleasin'
It must be highly objectionable to a person of reason.
Even if objectionable and causing offense
Self-help is the first line of defense.
Yet when Bailey actually spoke to the press
What do you think he didn't address?
Those false-light charges that so disturbed
Prompted from Bailey not a single word.
So highly objectionable, it could not be
—Bailey was happy to hear his name on a CD.
Bailey also admitted he was a bully in youth
Which makes what Marshall said substantial truth.
This doctrine is a defense well known
And renders Bailey’s case substantially blown.
The lyrics are stories no one would take as fact
They're an exaggeration of a childish act.
Any reasonable person could clearly see
That the lyrics could only be hyperbole.
It is therefore this court’s ultimate position
That Eminem is entitled to summary disposition.”

The press wrapped Her Honor’s opinion, by the way. (See e.g. Dan Aquilante, Objection! She Has No Rhyme, No Reason, NY Post, Oct. 22, 2003, at 29, col 3, at col 4 [“The judge’s attempt at rapping is not only childish, it’s as insulting to the hip-hop nation as a reading of the Brer Rabbit tales.”].)

A New York County Small Claims Part opinion (Remy v Emmis Broadcasting, NYLJ, Sept. 22, 1999, at 28, col 5, James, J.J) was written in rap because “At a Party DJ Ed Lover was a ‘No Show.’” Here are the final stanzas:

“The court can award no money to the claimant,

“Remy’s and his posse’s proof was
Insufficient

“So substantial justice requires judgment for defendant.

“(Not to worry the court will keep its day job

“This rap will probably make true Hip Hop artists take a sob.”

To read seven national classics of poetic justice, six civil, the seventh and last criminal, see In re Love (61 Bankr 558, 558 [SD Fla 1986, Cristol, J.] [rhyming to Edgar Allan Poe’s “The Raven”: “The bird himself, my only maven, strongly looked to be a raven.”] [including headnote and syllabus in rhyme]); Mackensworth v American Trading Transportation Co. (367 F Supp 373, 374 [ED Pa 1973, Becker, J.] “The motion now before us has stirred up a terrible fuss. And what is considerably worse, it has spawned some preposterous doggerel verse.”] [including headnote and syllabus in rhyme]); Fisher v Lowe (122 Mich App 418, 419, 333 NW2d 67, 67 [1983, Gillis, J.] [barking up Joyce Kilmer’s classic “Trees”: “Flora lovers though we three/We must uphold the court’s decree.”]); Jenkins v Commr. of Internal Rev. (47 TCM [CCH] 238, n 14 [1983, Irwin, J.] (“Ode to Conway Twitty”: “Twitty Burger went belly up/But Conway remained true./He repaid his investors, one and all/It was the moral thing to do.”)); Nelson v State (465 NE2d 1391, 1391 [Ind 1984, Hunter, J.] “In petition for post-conviction relief,/The petitioner herein expounds his grief.”)); Wheat v Fraker (107 Ga App 318, 318, 130 SE2d 251, 252 [1963, Eberhardt, J.] “Foul, foul play, the defendant cried,/That I by kinsman be not trammeled/Let the issue again be tried/Before another jury impanelled.”)); and my all-time favorite, Brown v State (134 Ga App 771, 216 SE2d 356 [1975, Evans, J.] [explaining that trial judge once told Judge Evans at “convivial” gathering that if Judge Evans were ever to reverse him again, the opinion should be in verse]).

Sometimes little discernable reason exists for an opinion to be set in verse. The court in Anderson Greenberg & Co. v NLRB (604 F2d 322, 323 [5th Cir 1979, Goldberg, J.] “[We hope this attempt at a rhyme, perhaps two, Has not left this audience feeling too blue.”]), for example, used verse only because two precedents—a case named “Tire” and another named “Wire”—happened to rhyme. Some judges need no special reason to set opinions in verse. It is enough that they want to. (See e.g. United States v Batson, 782 F2d 1307, 1309 [5th Cir 1986, Goldberg, J.] “Some farmers from Gaines had a plan./It amounted to quite a big scam./But the payments for cotton/began to smell rotten/Twas a mugging of poor Uncle Sam.”), cert denied 477 US 906 [1986]); United States v Ven-Fuel, Inc., 602 F2d 747, 749 [5th Cir 1979, Brown, J.] “So while the Government will no doubt be annoyed,/We declare the conviction null and void.”), cert denied 447 US 905 [1980].)

"T'was the night before Christmas and all through the prison, inmates were planning their new porno mission.

While the December issue of Penthouse was hitting the stands, the Minister of the Mandingo Warriors was warming his hands.

For you see, the publishers had promised a pleasurable view of the woman who sued the President too.

The minute his Penthouse issue arrived the minister ripped it open to see what was inside.

But what to his wondering eyes should appear not Paula Jones' promised privates but only her rear.

Life has its disappointments. Some come out of the blue. But that doesn't mean a prisoner should sue."

Joyner is not clever. Those who find it funny will laugh only because the judge was so outrageous.

As NYU ethics and law-and-literature Professor Gillers explained, "A couplet here and there is fine, and judges should strive to use poetic devices in opinions to make them more readable . . . But a judge’s opinions often cause pain. Rhyming diminishes the solemnity of the event and its seriousness to the litigants." (Adam Liptak, *Justices Call on Bench's Bard to Limit His Lyricism*, NY Times, Dec. 15, 2002, at 41, col 3, at col 6 [quoting Vice Dean Steven Gillers] [discussing criticism by two Pennsylvania Supreme Court justices of the verse of J. Michael Eakin, "the poetic justice of Pennsylvania"]). Thus, even when a poetic opinion is clever, the losing sides will probably believe that the court treated them and their arguments frivolously. And readers will probably conclude that the court spent more time scripting the verse than deciding the case correctly.

For more on this topic, see Gerald Leovits, The Legal Writer, *Poetic Justice: From Bad to Verse*, 74 NY St BJ 64 (Sept. 2002).

41. **No One is Dying to Read a Judicial Opinion**

Can a murderer and a victim be part of the same “cast of characters”? What would the decedent’s family and friends think of this?

"The cast of characters playing out the scenes that led up to the fatal shooting could have come from the pen of Bret Harte. The story began in June 1970, when one William Douglas . . . ." (Parker
42. Do Fables Foreshadow Foibles?

Read the modern-day Aesop's "An Exercise in Time and Music," a fable a chief judge appended to Hafield v Bishop Clarkson Mem. Hosp. (701 F2d 1266, 1272 [8th Cir 1983, Lay, Ch. J.] [appendix] [anticipating presciently in footnote that he will be criticized for writing child's fable and including it in appendix to judicial opinion].)

Other fables have been appended to opinions. One, from the United States Supreme Court in Memorial Hosp. v Maricopa County (415 US 250, 274 [1974, Douglas, J., concurring]), tells the story of Gourmand, a country where people loved food so much they eventually did nothing but eat and cook. Another, from the Colorado Supreme Court in Van Kleeck v Ramer (62 Col 4, 44–45, 156 P 1108, 1121 [1916, Scott, J., dissenting]), explains the problem with blindly following precedent by telling a story of a calf that carved a crooked trail "through the primeval wood"—"But still he left behind his trail, and thereby hangs my moral tale."

43. The Devil is in the Details for Delusional Claims

Many courts have considered claims from distraught litigants. How would you use the power of an opinion to adjudicate a peculiar claim? Delusional claims are, regrettably, common enough that law-review articles have been written about them. (See e.g. Sean Munger, Comment, Bill Clinton Bugged My Brain!: Delusional Claims in Federal Courts, 72 Tulane L Rev 1809 [1998].) The issue for the opinion writer—recalling that how you say it counts as much as what you decide—is how to resolve these claims. Below are some examples of how opinion writers have treated delusional claims.

After discussing Stephen Vincent Benét’s classic short story “The Devil and Daniel Webster,” the court did the Devil’s work by considering whether it has jurisdiction over the defendant, Satan. (See United States ex rel Mayo v Satan & His Staff, 54 FRD 282, 282–283 [WD Pa 1971, Weber, J.].) Satan & His Staff is the most famous case on the subject, and the most cited.

A plaintiff with a devilish name sued in I Am the Beast Six Six Six of the Lord of Hosts in Edmond Frank Macgillivray Jr Now. I Am the Beast Six Six Six of the Lord of Hosts Ifmjn. I Am the Beast Six Six Six of The Lord of Hosts. I Am the Beast Six Six Six Otlohiefmjn. I Am the Beast Ssotolohiefmjn. I Am the Beast Six Six Six. Beast Six Six Six Lord v Michigan State Police (1990 US Dist Ct LEXIS 8792 [WD Mich, July 12, 1990, Enslen, J.] [unpublished opn]). The court dismissed plaintiff’s federal § 1983 claim on Eleventh Amendment grounds, but only after discussing his religion at some length and shortening plaintiff’s name to “I am the Beast.” (See id. at *2 n 1.)
In Kent v. Reagan (95 FRD 476 [D Or 1982, Redden J.]), a man with a copyrighted name sued President Reagan for causing "civil death' without legislation" and to enjoin the "White Line Fevers from Mars," a fruit company that shipped marijuana and cocaine in fruit boxes for Mother's Day. After the court dismissed the case as frivolous, the Ninth Circuit reversed. In his second go 'round, the district judge dismissed for want of prosecution. Before dismissing, though, he recited a poem the plaintiff wrote about birds, crickets, ants, and a butterfly and then explained, somewhat sardonically, "It is possible, of course, that [plaintiff's poem] is not intended as a claim at all, but as a literary artifact. However it may be that, liberally construed, the references to the birds, crickets, ants, and butterfly could constitute a Bivens claim. See Bivens v. Six Unknown Named Agents, 403 U.S. 388, 91 S.Ct. 1999, 29 L.Ed.2d 619 (1971)." (Id. at 477.)

Petitioner in Collins v. Henman (676 F Supp 175 [SD Ill 1987, Stiehl, J.]) brought a federal habeas corpus proceeding to challenge a state conviction. He argued that his double-murder conviction and 175-year sentence were illegal because, among other things, "Petitioner is not Raymond Collins but the 'Prophet Mohammed,' and he was convicted under the wrong name." (Id.) The Prophet may have died in 632, but the court assumed that petitioner was the Prophet. As the court wrote, "it is not the place of a federal court to decide which is the true faith or who is a true prophet" (Id. at 176.) The court then dismissed the action because petitioner failed to exhaust state remedies.

A persecuted cyborg-woman sued Presidents Jimmy Carter and Bill Clinton, and others, for 5.6 billion dollars in Tyler v. Carter (151 FRD 537 [SD NY 1993, Haight, J.], aff'd 41 F3d 1500 [2d Cir 1994] [table]). She claimed that defendants reinstated slavery, played loud rock music, and used airplanes and helicopters to strafe her dorm room. In an extensive opinion, the court dismissed the suit, respectfully but firmly.

The court in Seabright v. New Jersey (412 F Supp 413 [D NJ 1976, Biunno, J.]) dismissed a claim of a prisoner who heard voices after a prison physician injected his left eye with a radium electric beam. Before dismissing, the court speculated that "taking the facts as pleaded, and assuming them to be true, they show a case of presumably unlicensed radio communication, a matter which comes within the sole jurisdiction of the Federal Communications Commission, 47 U.S.C. § 151, et seq." With sarcasm everyone but the plaintiff will detect, the court also suggested that plaintiff block the broadcast to the antenna in his brain by grounding his antenna with a paperclip chain extending from his trousers to the floor. Seabright is an example of humor at the expense of mentally ill litigant.

An intermediate appellate court in California in Lodi v. Lodi (173 Cal App 3d 628, 219 Cal Rptr 117 [3d Dist 1985, Sims, J.]) pondered the claim of a man who sued himself for raiding his own trust fund and who then represented both sides on appeal. Not surprisingly, Mr. Lodi prevailed below and on appeal. Not surprisingly, however, he also lost below and on appeal. After it affirmed the lower-court's dismissal, the court wrote, "In the circumstances, this result cannot be unfair to Mr. Lodi. Although it is true that, as plaintiff and appellant, he loses, it is
equally true that, as defendant and respondent, he wins! It is hard to imagine a more even handed application of justice. Truly, it would appear that Oreste Lodi is that rare litigant who is assured of both victory and defeat regardless of which side triumphs.” (Id. at 632, 219 Cal Rptr at 119.) The court closed with a costly assessment: “[E]ach party will bear his own costs.”

The Second Circuit in Miller v Silverstein (12 F3d 1056 [table], 1997 WL 55760, *1 [2d Cir, Sept. 9, 1997]) affirmed a 28-page order that rejected a Vietnam veteran's claim for 49 million dollars from President Clinton and others for conspiring to commit dozens of assassinations, for paying off the New York Police Department to distribute heroin, and for laundering the profits through Goldfingers International, a company that provides nude dancers for dance clubs.

In Gordon v Secretary of State of New Jersey (460 F Supp 1026 [D N J 1978, Biunno, J.]), a prisoner charged that he was denied the Presidency of the United States because of his illegal incarceration. The court wrote that “nothing prevented Gordon from seeking to gain the vote of enough electors to have been elected President of the United States. The classic example is that of Mayor Curley of Boston, who was re-elected while in jail. Eugene V. Debs ran for President four times and was a candidate while in jail. Gordon was free to do the same.” (Id. at 1027 [footnote omitted].)

Another case, Peek v Ciccone (288 F Supp 329 [WD Mo 1968, Becker, Ch. J.]), concerned a prisoner's suit to be allowed to tell the Pope that he is Christos, the spirit of the reincarnated Christ. The prisoner prevailed:

“Petitioner contends that because he is the 'messenger of love' referred to in the secret prophecy of Fatima, he is entitled to communicate his revelation and claims to the Pope for recognition of the fact that he has fulfilled the secret prophecy and is the spirit of Christ reincarnated. His beliefs are entertained in good faith . . . . Therefore, the petitioner should be allowed to communicate his religious experience and claims to the Pope.”

In Washington v Alaimo (934 F Supp 1395, 1396 [SD Ga 1996, Moore, J.]), a plaintiff in jail for life for murder sued the judges responsible for his incarceration. During the litigation, Plaintiff filed a motion “entitled 'Motion to Kiss My Ass' (Doc. 107) in which he moved 'all Americans at large and one corrupt Judge Smith [to] kiss my got [sic] damn ass sorry mother fucker you.'” The court demanded that plaintiff respond to a motion for sanctions under Rule 11, but plaintiff did not respond. The court dismissed the suit with these remarks:

“This Court is quite sure that, if the villagers who heard the boy cry 'wolf' one time too many had some form of reassurance that the boy's last cry was sincere, they would have responded appropriately and he would be alive instead of being dinner for the
ravenous canine. If anything, that story teaches that repetitious
tomfoolery can result in disaster for the knave. This Court will not
turn a deaf ear to Plaintiff's future cries. However, it will require
Plaintiff to structure his pleas for help in a more sincere manner so
that the energies of the villagers are not wasted on the repeated
runs up the grassy hill atop which the mischievous boy sits
laughing.” (Id. at 1400–1401.)

Plaintiff–appellant in Schlessinger v Salines (100 F3d 519, 523 [7th Cir 1996, Easterbrook,
J.]) was told the following: “If your meal is not tasty, you do not throw a tantrum, upset the other
diners, and then sue the mayor of the town where the restaurant is located. Perhaps the dispute
about the bill was meat for small-claims court in Wisconsin; it was nothing to make a federal case
about.”

The following is the entire opinion, other than the decretal paragraph, in Jones v God

“In what purports to be a civil rights action, the only defendants
identified by name are God and Jesus. The complaint simply states
‘Treating Inhuman Sex’. The papers were accompanied by a
petition to proceed in forma pauperis and it would appear that
plaintiff qualifies to do so. Nevertheless, the complaint must be
dismissed because quite apart from the question of service on the
principal defendants, there is no factual basis for the exercise of this

A defendant was sued for not paying tuition. He counterclaimed because he was not
taught wisdom. (See Trustees of Columbia Univ. v Jacobsen, 53 NJ Super 574, 580, 148 A2d 63,
66 [App Div 1959, Goldman, J.], appeal dismissed 31 NJ 221, 156 A2d 251 [1959, per curiam],
cert denied 363 US 808 [1960].) Defendant lost, with these words:

“We note, in passing, that he has cited no legal authority
whatsoever for his position. Instead, he has submitted a dictionary
definition of ‘wisdom’ and quotations from such works as the
Bhagavad–Gita, the Mundaka Upanishad, the Analects of
Confucius and the Koran; excerpts from Euripides, Plato and
Menander; and references to the Bible. Interesting though these
may be, they do not support defendant's indictment of Columbia.
If his pleadings, affidavit and exhibits demonstrate anything, it is
indeed the validity of what Pope said in his Moral Essays:

‘A little learning is a dangerous thing;
Drink deep, or taste not the Pierian spring . . . .”
44. Scurry from Scorn

A Kansas trial judge who sentenced a prostitute to probation wrote the following opinion. Do you like it?

"This is the saga of _____ _____ _____,
Whose ancient profession brings her before us.
On January 30th, 1974,
This lass agreed to work as a whore.
Her great mistake, as was to unfold,
Was the enticing of a cop named Harold.

"... .

"From her ancient profession she'd been busted,
And to society's rules she must be adjusted.
If from all this a moral doth unfurl,
It is that Pimps do not protect the working girl!"

If you like to write this kind of doggerel, you are in trouble. The judge who wrote it was censured for exposing the defendant to public ridicule and scorn. (See Matter of Rome, 218 Kan 198, 542 P2d 676 [1975, per curiam] [reciting Judge Rome's poem].) Make that the former judge who wrote this doggerel. (See State ex rel. Commn. on Judicial Qualifications v Rome, 229 Kan 195, 623 P2d 1307 [1981, per curiam], cert denied 454 US 830 [1981].)

45. Veto Vox Populi

A few contend that "[l]iterature, poetry, popular culture and other art forms can be worked effectively into opinion writing." (Ruggero J. Aldisert, Opinion Writing 196 [1990].) One classic example of blending literature with opinion writing is Matter of Carlos P. (78 Misc 2d 851 [Fam Ct, Kings County 1974, Gartenstein, J.]), which used themes and quotations from Invisible Man, Ralph Ellison's novel about racism in America, to justify issuing an order the court itself recognized it had no jurisdiction to issue. Another is Mileski v Locker (14 Misc 2d 252, 257 [Sup Ct, Queens County 1958, Pette, J.]), which drew from Shakespeare's King Lear to condemn two children who cheated their mother: "How sharper than a serpent's tooth it is to have a thankless child." Many U.S. Supreme Court opinions contain art forms. Sometimes the art overtakes the opinion. (See e.g. Flood v Kuhn, 407 US 258 [1972, Blackmun, J.] [listing 88 baseball greats and footnoting two baseball verses in exempting baseball from antitrust laws].)

This is how one judge of the law-and-economics school modestly blended music with theories of supply and demand:
“The Grateful Dead play rock music. Their style, often called ‘acid rock’ because it mimics the effects some persons obtain after using LSD, is attractive to acid-heads. Wherever the Dead appear, there is a demand for LSD in the audience. Demand induces supply. Vendors follow the band around the country; law enforcement officials follow the vendors.” (United States v Dumont, 936 F2d 292, 294 [7th Cir 1991, Easterbrook, J.] [opening sentences], cert denied 502 US 950 [1991].)

Another judge opened with a Bible lesson:

“Census-taking has never been easy, and has rarely received favorable press. King David learned this the hard way. In First Samuel, the King directed his Census Bureau, one Joab, to ‘go through all the tribes of Israel From Dan to Bersabee, and number ye the people that I may know the number of them.’ When Joab had reluctantly counted as far as 800,000, David realized that, in some eyes, his task might be regarded as hubris on the scale of the Tower of Babel. He repented, lamenting: ‘I have sinned very much in what I have done; But I pray thee O Lord, to take away the iniquity of thy servant because I have done exceedingly foolishly.’ The Lord turned a deaf ear for he sent David a pestilence and 70,000 died.” (City of New York v Unites States Dept. of Comm., 739 F Supp 761, 762 [ED NY 1990, McLaughlin, J.].)

Yet another judge quoted the entire theme song of the 1960s TV show Gilligan’s Island in footnote one, and began his opinion as follows:

“Just sit right back and you’ll hear a tale’ of what happened when David Reuthner, while vacationing in the Cayman Islands at the Pirates Point Resort hotel, decided to go SCUBA diving—a fateful trip that started from this tropic port, aboard this tiny ship.” (Reuthner v Southern Cross Club, Inc., 785 F Supp 1339, 1340 [SD Ind 1992, Barker, J.] )

Not just TV shows but movies, too, attract opinion writers. One court far, far away from New York joined the dark side by dwelling on Star Wars:

“The study of prisons and the pro se litigants who inhabit them is like the study of astronomy or even science fiction. The explorer of the world of prisons and pro se plaintiffs embarks upon a fantastic voyage into another world, even another galaxy, far, far away. Prisoners protect themselves with the laser-light power of their
constitutional rights. Prison officials shield themselves with administrative autonomy. Both sides have power, but both must exercise restraint, lest they give in to the dark side of the force.” (Carter v Ingalls, 576 F Supp 834, 835 [D Ga 1983, Bowen, J.])

Some opinion feature movies. One opinion opened as follows: “Like the brute Mongo in Mel Brooks’s 1974 comedy classic Blazing Saddles, Roberto Duran once knocked out a horse with a single punch.” (United States v Samaniego, 345 F3d 1280, 1281 [11th Cir 2003, Carnes, J.])

This opinion opened with a history lesson:

“Plutarch, the great biographer, recounts the battle between the foot soldiers of Pyrrhus, king of Epirus, and the Romans at Asculum in 280 B.C. Six thousand Romans were felled that day. Pyrrhus lost three thousand of his own troops. According to Plutarch, when advised that he had won the battle, Pyrrhus reportedly replied in so many words: ‘Another such victory and I am undone.’ In this case, history will recount that, like Pyrrhus, plaintiffs won a battle, but lost the war.” (O’Shea v City of San Francisco, 966 F2d 503, 504 [9th Cir 1992, Beezer, J.])

The Cinderella story is popular with opinion writers who enjoy using literary references for metaphoric comparison. The first example below might be elegant, but the second, with two similes and a metaphor, is forced:

“A judge of this state who crosses a state line instantly undergoes a transformation as dramatic as Cinderella’s midnight metamorphosis.” (People v Craig, 151 Misc 2d 442, 445 [Sup Ct, Bronx County 1992, Eggert, J.])

“The language of this statute is as clear as a glass slipper, there is no shoehorn in the legislative history, and the government, just as surely as Cinderella’s step-mother, cannot make it fit.” (Brush v Office of Personnel Mgmt., 982 F2d 1554, 1559 [F Cir 1992, Smith, J.]”

Other opinions incorporate fairy tales:

“In the end, Aoude huffs and puffs, but he fails to blow down the edifice which the district court competently constructed from the facts of record and the applicable law. Cf. The Three Little Pigs 16–18 (E. Blegvad ed. 1980) (house three).” (Aoude v Mobil Oil Corp., 862 F2d 890, 890–891 [1st Cir 1988, Selya, J.].)

For the same reasons that humor is discouraged, many believe that opinions, especially state trial-court opinions, should rarely include art forms. Using art forms might result in banalities like the opinion that irrelevantly, even flippantly, used lines from the Saturday Night Live Wayne’s World skits and the 1992 hit movie, Wayne’s World. (See Noble v Bradford Marine, 789 F Supp 395, 397 [SD Fl 1992, Paine, J.] [“In short, Prime Time’s most bogus attempt at removal is ‘not worthy’ and the Defendants must ‘party on’ in state court.”]). Or the Vanna White opinion, which wished they could all be California girls. (See White v Samsung Elect. Am., Inc., 971 F2d 1395, 1404 [9th Cir 1992, Alarcon, J., concurring & dissenting] [“The majority appears to argue that because Samsung created a robot with the physical proportions of an attractive woman, posed it gracefully, dressed it in a blond wig, an evening gown, and jewelry, and placed it on a set that resembles the Wheel of Fortune layout, it thereby appropriated Vanna White’s identity. But an attractive appearance, a graceful pose, blond hair, an evening gown, and jewelry are attributes shared by many women, especially in Southern California.”]). Or the New Jersey Supreme Court’s “born to run on” opinion:

“Fleming claims that despite the difficulty of working in a prison, she remained the kind of person who ‘[a]t the end of every hard earned day . . . [found] some reason to believe.’” (Fleming v Correctional Healthcare Solutions, Inc., 164 NJ 90, 99–100, 756 A2d 1035, 1040 [2000, per curiam] [alteration in original], quoting Bruce Springsteen, Reason to Believe, on Nebraska [Sony/Columbia 1982].)

Bruce Springsteen is not the only musician lionized in the judicial reports. In United States v Youts (229 F3d 1312 [12th Cir 2000]), Chief Judge Seymour used four footnotes to venerate John Denver and the Grateful Dead, all in bad taste, given the seriousness of the litigation:

“Abner Youts appeals from an adverse jury verdict. As the parties’ oral arguments showed, the events leading up to his criminal conviction under 18 U.S.C. § 1992 for wrecking a train are unusual and give rise to a number of interesting parallels in modern folk music. We begin with the facts.

“‘He made that freight train boogie, as he rolled down the line.’ [FN1] FN1. John Denver, Choo Choo Ch’Boogie, on ALL ABOARD (Sony/Wonder 1997).

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“Mr. Youts remarked to Mr. Nesbitt that, as a boy, he had always loved trains and wanted to be an engineer. [FN2] Mr. Youts then decided to drive the train home. FN2. ‘All the things I did when I was just a kid
How far away those memories appear.
I guess its plain to see they still mean a lot to me
‘Cause my ambition was to be an engineer.’
John Denver, *Daddy What’s A Train?, on ALL ABOARD* (Sony/Wonder 1997).

“FN3. ‘Nine hundred thousand tons of steel, out of control
She’s more a roller coaster than the train I used to know . . .
She wasn’t built to travel at the speed a rumour flies
These wheels are bound to jump the tracks before they burn the ties.’
The Grateful Dead, *Tons of Steel, on IN THE DARK* (Arista 1987); see also The Grateful Dead, *They Love Each Other, on REFLECTIONS* (Round Records 1976)
(‘It’s nothing they explain. It’s like a diesel train—you better not be there when it rolls over.’).

“‘Never had such a good time in my life before. I’d like to have it one time more.
One good ride from start to end. I’d like to take that ride again.’ [FN4]

To decide cases well, judges should know something about the classics, not merely about popular culture. Here is why, from Judge Hand:

“I venture to believe that it is as important to a judge called upon to pass on a question of constitutional law, to have a bowling acquaintance with Acton and Maitland, with Thucydides, Gibbon and Carlyle, with Homer, Dante, Shakespeare and Milton, with Machiavelli, Montaigne and Rabelais, with Plato, Bacon, Hume and Kant as with books which have been specifically written on the subject. For in such matters everything turns upon the spirit in which he approaches the questions before him. The words he must construe are empty vessels into which he can pour nearly everything he will. Men do not gather figs or thistles, nor supply institutions from judges whose outlook is limited by parish or class. They must be aware that there are before them more than verbal problems; more than final solutions cast in generalizations of universal applicability. They must be aware of the changing social tensions in every society which make it an organism; which demand new schemata of adaptation; which will disrupt it, if rigidly confined.” (Learned Hand, quoted in NY Times, Nov. 18, 1954,
Mores and culture affect decision making. Judge Hand was right: The more learned the judge, the better the written opinion. But judges should be wary of airing their erudition in their opinions. Knowing about pop culture or the classics is different from including them in a judicial opinion.

46. Prance on Parodies

Several opinions have even been written in parody, such as Allied Chemical Corp. v Hess Tankship Co. of Delaware (661 F2d 1044, 1046 [5th Cir 1981, Brown, J.]), which begins with “It was a dark and stormy night,” mimicking the opening-line literary cliche from Edward George Earle Bulwer-Lytton’s 1830 novel Paul Clifford.

Another opinion, from the court that wrote Allied Chemical, parodied Ecclesiastes 3:1:

“To everything there is a season, and a time to every purpose under the heaven: A time to be born, and a time to die; a time to plant, and a time to pluck up that which is planted; a time to purchase fertilizer, and a time to take a deduction for that which is purchased. In this appeal from the Tax Court decision, we are asked to determine when the time for taking a fertilizer deduction should be.” (Schenk v Commr. of Internal Rev., 686 F2d 315, 316 [5th Cir 1982, Goldberg, J.] [footnote omitted].)

For more on this topic, see Gerald Lebovits, The Legal Writer, A Pox on Vox Pop, 76 NY St BJ 64 (July/Aug. 2004).

47. Clean Up Your Act

One chief judge, deciding whether federal law preempted a local ordinance on detergent labeling, worked into his concurrence as many references to soap as he could. (See Chemical Specialties Manuf. Assn., Inc. v Clark, 482 F2d 325 [5th Cir 1973, Brown, Ch. J., concurring].) Some argue that his concurrence, known as the “soap opinion,” is all washed up and should be cleansed from the federal reporter series:

“Clearly, the decision represents a Gamble since we risk a Cascade of criticism from an increasing Tide of ecology-minded citizens. Yet, a contrary decision would most likely have precipitated a Niagara of complaints from an industry which justifiably seeks uniformity in the laws with which it must comply. Inspired by the legendary valor of Ajax, who withstood Hector’s lance, we have
Boldly chosen the course of uniformity in reversing the lower Court’s decision . . . . And, having done so, we are Cheered by the thought that striking down the regulation by the local jurisdiction does not create a void . . . .” (Id. at 328.)

And talking about cleaning, what about cleaning up the environment? Read the dissent in Sierra Club v Morton (405 US 727, 741 [1972, Douglas, J.]). The issue was whether the Sierra Club had standing to prohibit development in Mineral King Valley, an expanse in California adjacent to the Sequoia National Park. Unlike the other dissenters, Justice Douglas conceded that the Sierra Club had no standing. He argued, instead, that “priceless bits of Americana (such as a valley, an alpine meadow, a river, or a lake)” are akin to persons and should have standing to sue on their own to protect themselves.

48. Shakespeare in Love? Or “What Foods These Morsels Be”?


Why Shakespeare is so popular, from Levitan’s sardonic pen:

“[F]abricating fine distinctions . . . . is foolproof: all the court need say is that an opinion written fifty years ago indubitably had the present controversy in mind and had reached the correct solution—and who can prove otherwise? Shakespeare would have made the world’s greatest appellate judge, because of his genius for using words susceptive to never-ending pumping with new meanings by never-ending generations. That is why Shakespeare may safely be quoted as an authority on most subjects even today!” (Mortimer Levitan, Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?, 43 ABA J 628, 667 [July 1957].)

Here is one pointed reference to The Bard, from People v Gleghorn (193 Cal App 3d 196, 198–199, 238 Cal Rptr 82, 83 [2d Dist 1987, Stone, P.J.]):

“May a person who enters the habitat of another at 3 o’clock in the morning for the announced purpose of killing him, and who commences to beat the startled sleeper’s bed with a stick and set
fires under him, be entitled to use deadly force in self defense after
the intended victim shoots him in the back with an arrow? Upon
the basis of these bizarre facts, we hold that he may not, and
instead, must suffer the slings and arrows of outrageous fortune
(with apologies to William Shakespeare and Hamlet, Act III, sc.
1).”

Countless legal-writing experts have recommended that “lawyers should read Shakespeare
. . . . Shakespeare can make lawyers better writers.” (John M. Lindsey, Some Thoughts about Legal
Writing, NYLJ, Oct. 27, 1992, at 2, col 3.) Because the experts are right—lawyers should love
Shakespeare’s thoughts and style—it is worth asking an important question about unrequited
love: Did Shakespeare really suggest that lawyers be killed?

As Chief Judge Breitel noted for the Court of Appeals in People v Hobson (39 NY2d 479,
485 [1976]), “If Dick the Butcher said, ‘The first thing we do, let’s kill all the lawyers’, the more
zealous policeman in the station or jailhouse may well say, ‘The first thing we do, let’s get rid of
all the lawyers’ (Shakespeare, Henry VI, pt II, act IV, sc ii).”

Fortunately, Shakespeare’s advice was clarified in Walters v National Assn. of Radiation
Survivors (473 US 305, 371 n 24 [1985, Stevens, J., dissenting]): “Dick’s statement (‘The first
thing we do, let’s kill all the lawyers’) was spoken by a rebel, not a friend of liberty. See W.
Shakespeare, King Henry VI, pt. II, Act IV, scene 2, line 72. As a careful reading of that text will
reveal, Shakespeare insightfully realized that disposing of lawyers is a step in the direction of a
totalitarian form of government.” Thanks to Justice Stevens, lawyers can now sleep the sleep of
the just.

Even the Court’s observation in Browning-Ferris Indus. of Vermont v Kelco Disposal, Inc.
(492 US 257, 264 n 7 [1989, Blackmun, J.]) could not stop Justice Sandra Day O’Connor from
citing Shakespeare:

“As to the partial dissent’s reliance on the Bard, . . . we can only observe

“Though Shakespeare, of course,
Knew the Law of his time,
He was foremost a poet,
In search of a rhyme.”

49. Insider Trading

Why did the Court of Appeals give the informer’s initials four times in one paragraph in
People v Warren (66 NY2d 831, 832 [1985, mem])? A reliable rumor: The informer, JWB,
shared initials with Judge, now Dean, Joseph W. Bellacosa, the then-Clerk of the Court.

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Think twice before you begin an opinion with a quotation, proverb, adage, or figure of speech. Doing so tells the reader that bad things await. Opinions that begin that way are sophomoric. Justice Cardozo had this to say about a practice he erroneously believed was interred: "In days not far remote, judges were not unwilling to embellish their deliverances with quotations from the poets. I shall observe towards such a practice the tone of decent civility that is due to those departed." (Benjamin N. Cardozo, Law and Literature, 39 Colum L Rev 119, 132, 52 Harv L Rev 471, 484, 48 Yale L J 489, 502 [1939] [simultaneously published], reprinted from 14 Yale Review [N.S.] 699 [July 1925].)

One example illustrates Justice Cardozo's point. Read the first paragraph of People v Tatum (NYLJ, Apr. 30, 2001, at 28, col 5 [County Ct, Westchester County]). See whether you can figure out what the case is about. I must confess that I cannot.

"Habemus Optimum Testem, Confidentem Reum (1 Phil. Ev. 397). The matter sub judice illustrates the timelessness of this ancient maxim. Since the days when prosecutors held the title of tribune and tried their cases before the Comitia Centuriata, a confession has often been considered the most valued weapon in a prosecutor's arsenal. Like the legendary sword of Brennus, once it has been thrown onto the scales all but the most obdurate of juries will generally yield. Because in times past, as in the present day, this created an understandable impulse (in less than scrupulous minds) to obtain a less than genuine admission of guilt, learned authorities of the common law came to question the fairness of its use at trial. In his commentaries on the treason statute of King William III, Sir Michael Foster noted the restrictions on the use of out of court admissions and finally declared that the most favored form of admission was one taken before a magistrate, '... when the Party may be presumed to be properly upon his Guard, and apprized of the Danger he standeth in.' (Sir Michael Foster, Discourse on High Treason, Article 3, Section 3, Clauses 1 and 2 [1762])."
XI
OPINION LENGTH, SCOPE, AND CONCISION

1. Opinion Length

The length—as opposed to the scope—of an opinion is unimportant to the litigants. As the ABA explained, “where the lawyer’s own case is involved, the winner is rarely critical of the length, and the loser often feels that his points were not adequately discussed.” (American Bar Association, Section on Judicial Administration, Committee Report, Internal Operating Procedures of Appellate Courts 37 [1961].) But opinion length matters to everyone else, including the opinion writer.

Brief opinions are better than lengthy opinions. That is so even if the lengthy opinion is written concisely. Brief opinions hold the reader’s attention, allow busy readers to move on to other things, and distill clearly the opinion’s essence. Lengthy, thick opinions always lend new meaning to the phrase “weight of authority.” Get right to the point in an instant, er, instantly. For some general advice on how to shorten a judicial opinion, see J. Allen Crockett, Decision Writing, 48 ABA J 864 (Sept. 1962); Charles G. Douglas, III, How to Write a Concise Opinion, 4-7 Judges’ J 47 (1983); Robert Gardner, Toward Shorter Opinions, 55 Cal St B J 240 (1980); Herbert B. Gregory, Shorter Judicial Opinions, 34 Va L Rev 362 (1948); Marshall F. McComb, A Mandate from the Bar: Shorter and More Lucid Opinions, 35 ABA J 382 (May 1949).

Opinion readers “expect a certain level of ‘scholarliness.’” (Judith S. Kaye, Judges as Wordsmiths, 69 NY St B J 10, 11 [Nov. 1997].) But “readers lament today’s long, heavily footnoted, subsegmented, law review encrusted opinions . . . .” (Id.) And “as the length of writings grows, the number of people who actually read them dwindles.” (Id.)

The length of opinions and the number of citations have increased over time. In the New York Court of Appeals, for example, “between 1880 and 1970 . . . [o]pinions . . . range from 3.6 to 4.4 pages with no discernible trend. Accordingly, those years with the largest number of citations per opinion are also the years with high numbers of citations per page. After 1980, the average length of a majority opinion rose to 5.7 pages and, in both 1990 and 1993, it rose again to approximately six pages. At the same time, the number of citations per opinion reached a new high of 12.4 in 1980 and fell off only slightly, to 12.3 in 1990 and 11.5 in 1993.” (William H. Manz, The Citation Practices of the New York Court of Appeals, 1850-1993, 43 Buff L Rev 121, 125–126 [1995] [footnotes omitted].) It frustrates the bar that opinions from most courts have grown longer. In 1940, when opinions were much shorter than they are today, “well over 80 per cent of the lawyers [surveyed by the American Bar Association] were dissatisfied with the then length of the opinions and preferred shorter opinions.” (Marshall F. McComb, The Writing and Preparation of Opinions, 10 FRD 1, 1 [1951].) Good news might be on the horizon, however. In 2000, the average Court of Appeals opinion dropped to 5.2 pages and 10.9 case citations. (William H. Manz, The Citation Practices of the New York Court of Appeals: A Millennium Update,
Federal opinions are even longer than New York opinions. The average opinion issued by
the federal courts of appeals increased between 1960 and 1980 from 2863 words to 4020 words.
The average number of footnotes soared from 3.8 to 7.0. The average number of citations rose

Judge Aldisert cautioned against writing in overly great depth: “When I see an opinion
heavily overwritten, it is a signal to me that it is the product not of a judge, but of a law clerk, a
person who is generally not sophisticated or perhaps confident enough to separate that which is
important from what is merely interesting.” (Ruggiero J. Aldisert, Opinion Writing 86 [1990].)
Judge Vann used this classic putdown in discussing another Court of Appeals opinion: “The
discussion outran the decision.” (Wells v Garbutt, 132 NY 430, 435 [1892].) Overwritten
opinions can cause readers to say to themselves, “I understood this area of law until I read this
opinion.”

As The Bard’s aphorism goes, “brevity is the soul of wit,” meaning wisdom. (William
Shakespeare, The Tragedy of Hamlet, Prince of Denmark, act II, sc II [Polonius].) Before he
attacked a majority opinion on other grounds, Judge Posner once paid homage to brevity and
conciseness:

“Judge Dumbauld’s opinion for this court is concise—one might say
summary—and not without wit. I admire witty and concise
opinions, remembering Holmes’ adage that a judge doesn’t have to
be heavy in order to be weighty.” (Alliance to End Repression v City
of Chicago, 733 F2d 1187, 1193 [7th Cir 1984, Posner, J.,
concurring & dissenting].)

We remember the short. We forget the long. The Golden Rule has 11 words, the Ten
Commandments 75, the Gettysburg Address 267, the Declaration of Independence 1321.
Current New York Law Journal Outside Counsel articles typically have 2000 words, endnotes
included. This handbook exceeds 150,000 words. Enough said.

Wake up! It’s time to take your sleeping pill. Horace warned against writing too much:
“When a work is long, a drowsy mood may well creep over it.” (John M. Lindsey, The Legal
Writing Malady, NYLJ, Dec. 12, 1990, at 2, col 3, quoting Horace, Ars Poetica, lines 335–338
[H.R. Fairclough trans] [Loeb Classical Library rev ed 1929].)

For examples of how to combine brevity with clarity, see Francis Bergan, Opinions and
Briefs: Lessons from Loughran (NYS B Assn Found [1970]), in which Court of Appeals Judge
Bergan analyzed Chief Judge Loughran’s opinion writing, and Charles A. Beardsley, Judicial

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Craftsmanship, 24 Wash L Rev 146 (1949), in which a former ABA president cut a Washington Supreme Court opinion from 17 pages to one.

Justice Holmes often wrote his opinions while standing uncomfortably at a high desk. He explained why: "If I sit down, I write a long opinion and don't come to the point as quickly as I could." (Peter Hay, The Book of Legal Anecdotes 172 [1989], quoting Oliver Wendell Holmes.) Justice Holmes's solution led to brevity and speed: "Holmes wrote his opinions quickly, usually within a day or two of getting the assignment . . . ." (William Domnariski, In the Opinion of the Court 35 [1996].) Hemingway also wrote "some of his fiction while standing up." (Kent Haruf, Writers on Writing: To See Your Story Clearly, Start by Pulling the Wool over Your Own Eyes, NY Times, Nov. 20, 2000, at E1, col 1.)

Consider this classic 70-word opinion:

"The court below erred in giving the third, fourth, and fifth instructions. If the defendants were at fault in leaving an uncovered hole in the sidewalk of a public street, the intoxication of the plaintiff cannot excuse such gross negligence. A drunken man is as much entitled to a safe street as a sober one, and much more in need of it.

"The judgment is reversed and the cause remanded." (Robinson v Pioche, Bayerque & Co., 5 Cal 460, 461 [1855, Heydenfeldt, J].)

One scientific study has concluded that wordiness, not complexity, leads to long judicial opinions. (See Joseph W. Little, The Workload of the United States Supreme Court: Ruling the Pen with the Tongue, 6 J Legal Profess 51 [1981].)

Critics have long urged that opinions be shortened: "[F]or the ordinary run of cases, it behooves a judge to begin where his predecessors left off and go on from that point. Only by following this method can the appalling increase of volume of the reports be kept down. Too many long opinions are merely padded for pedantic display, or represent the result of the judge's study of principles that are really trite, but happened to be unfamiliar to him." (Editorial, 60 Albany LJ 76 [1899], reprinted in Robert A. Leflar, Appellate Judicial Opinions 200, 200–201 [1974].)

Writing fewer long opinions might also lead to writing more thoughtful ones. First Circuit Judge Selya offered this good advice in two law-review articles:

"Two centuries ago, Lord Mansfield lived by the following heroic maxim: 'I never give a judicial opinion upon any point, until I think I am master of every material argument and authority relative to it.' In these more hectic times, judges are faced with the
choice of either reducing the number of full-dress opinions or lowering the level of mastery to which they aspire. The better choice is clear. Unless we are to defenestrate the ideal of Lord Mansfield—and I think we all agree that we should cling to it—judges must begin to think more and write less.” (Bruce M. Selya, Judges on Judging: Publish and Perish: The Fate of the Federal Appeals Judge in the Information Age, 55 Ohio St LJ 405, 414 [1994] [footnote omitted], quoting Rex v Wilkes, 98 Eng Rep 327, 339 [KB 1770].)

“I do not pretend that it will be a walk in the park. Despite all the bromides, judges have fierce pride of authorship—and this pride is, on balance, a good thing. It is the pride of the craftsman, sticking to his last. To complicate matters, using fewer citations will make some judges uneasy, worried that either their devotion or their scholarship will be called into question. Finally, eschewing routine citations will drive some law clerks to tears. But I think that, if judges can steel themselves to abjure rote recitations of established legal principles, forgo superfluous citations, and work consciously toward economies of phrase, the game will prove to be well worth the candle. With apologies to Robert Browning, the reality is that ‘less is more.’ If appellate judges do not come to accept and act upon this reality, we will simply spend our days writing more and more about less and less for audiences that are increasingly alienated, or bored, or both.” (Bruce M. Selya, Favorite Case Symposium: In Search of Less, 74 Tex L Rev 1277, 1279 [1996] [footnote omitted].)

But brevity is a vice if it leads to an inadequate explanation. Writing should be economical, not clipped, casual, and abrupt. Here is the entire opinion in Denny v Radar Indus., Inc. (28 Mich App 294, 184 NW2d 289 [1970]):

“The appellant has attempted to distinguish the factual situation in this case from that in Renfroe v. Higgins Rack Coating & Manuf., Inc. (1969), 17 Mich. App. 259. He didn’t. We couldn’t.

“Affirmed. Costs to appellee.”

Nor is brevity a virtue when a court addresses new, complex, important, and special problems. The opinion “will be longer, it may have to be historic, and it will have to be learned. If done well, it will be judicial operation at its finest” (Moses Lasky, A Return to the Observatory Below the Bench, 19 SW LJ 679, 682 [1965] [emphasis in the original].)
For more on writing short opinions, see Gerald Lebovits, The Legal Writer, Short Judicial Opinions: The Weight of Authority, 76 NY St BJ 64 (Sept. 2004).

2. Opinion Scope

Ultimately, “[t]hree factors influence the scope . . . of an opinion: the complexity of the facts and the nature of the issues, the intended audience, and whether the opinion will be published.” (Federal Judicial Center, Judicial Writing Manual 4 [1991].) The scope of the opinion is important to the litigants, especially to losing litigants, who must be assured that the court considered their contentions fairly.

3. Concision Generally

a. The Meaning of “Concision”

To be “concise” is to have only necessary words. To be “succinct” is to have only necessary content.

b. When Not to be Concise

Precision is more important than concision:

- “The ball was thrown by me to her.” Becomes: “I threw her the ball.” Becomes: “I threw the ball to her.” (The first example is passive. The second, with a miscue, suggests that “I threw her.” In the second example, the reader does not know until the end that a ball was thrown.)

Persuasion is more important than concision. Which words can you cut?

- “Fresh fish sold here today.” Answer: Every word. But then you would sell no fish.

Lincoln could have cut a few words by saying, “We cannot dedicate, consecrate, or hallow this ground.” But that would not have been as effective as what he said: “We cannot dedicate, we cannot consecrate, we cannot hallow this ground.” (Abraham Lincoln, Gettysburg Address.)

Articulation is better than concision: “Shorter is usually better, but not if it hides rather than exposes meaning.” (Robert E. Keeton, Judging 142 [1990].)

c. The Goal of Concision

The goal of concision and succinctness is to get the most thoughts in the shortest space—to make every word tell. Write as if you will be paid more if you use fewer words.
Ecclesiastes 32:8 put it perfectly: "Let thy speech be short, comprehending much in few words." Do not write "2/8" when you can write "1/4." Brevity is not simply about the number of pages in an opinion. Brevity is about everything, down to the size of the word and the number of syllables.

Why brevity? Everyone knows that writing must tell. Not everyone knows why. If you internalize the reasons, you will learn the techniques to make every word tell. First, brevity makes the written product easier to read and more likely to be read. Second, brevity adds power. Third, brevity reduces ambiguity and inconsistency. Fourth, extra words mean extra mistakes. Fifth, extra words make both reader and writer forget what came before. Sixth, verbosity is impolite: The opinion reader "should not be addressed at undue length, in paragraphs wordy and windy, for the tone should imply busy men, writer and reader, both perfectly capable of following an argument that is succinct, and efficiently composed." (Walker Gibson, Literary Minds and Judicial Style, 36 NYU L Rev 915, 923 [1961].)

Which words should be cut? Lots of 'em: "A discussion of some words that don't belong in briefs could probably be condensed into this concise statement: about fifty percent of them. This comment could not accurately be made in regard to judicial opinions; it would be necessary to omit 'fifty percent' and substitute 'sixty-five percent.'" (Mortimer Levitan, Some Words That Don't Belong in Briefs, [1960] Wis L Rev 421, 421.)

4. Succinctness in Law

Do not waste time and space giving obiter dictum. This is what Levitan advised lawyers to tell nonlawyers about dicta:

"Any lawyer who soberly—or otherwise—suggests to a nonlawyer that a single word in a court opinion is unimportant could imperil the entire judicial system. The non-lawyers might naively ask, 'Why did the court write such a fantastically elongated opinion if all of it wasn't important?' Taking a hint from the courts, the lawyer should neither hear nor answer the question; but if an answer is coerced, it should be that courts are frequently so overburdened that they haven't time to write concise opinions. It takes more time to take off excess weight than it does to put it on . . . ." (Mortimer Levitan, Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?, 43 ABA J 628, 666 [July 1957].)

Define terms substantively, not procedurally. Incorrect procedural definition:

- "According to the courts, the statute of limitations applies when [use when or, much better, if] a court determines that a litigant proves to a preponderance that five years passed since a contract is signed." (In defining the concept "statute of limitations," it is insignificant whether a court holds it to apply, how a court
determines its application, and what is the standard of proof to which a litigant must prove it.)

Use only legally significant and emotional facts.

Cut facts from your opinion’s facts section if they are not discussed in your CRARC’s application section.

Kill irrelevant details. They waste space, burn brain cells, and emphasize the wrong issues. Some writers include extra details because they are afraid to be accused of leaving something out. They should be more afraid that their readers might stop reading or, worse, misconstrue their point.

Make your citations speak to save words in your text.

Use appropriate amounts of authority with appropriate amounts of explanation. Predict how much authority a busy but skeptical reader needs. Then use the most authoritative citations: the highest court, the clearest statement of law. Avoid string citing except to give your readers research necessary to understanding the outcome or the controversy, such as if there is split in authority.

Do not regurgitate or even summarize the entire procedural history.

Do not list the litigants' papers.

Exception: CPLR 2219 (a) requires that orders that determine motions made upon supporting papers “recite the papers used on the motion.”

Do not analyze cases in depth or give their facts unless you want to analogize your case to or distinguish your case from the case to which you are citing.

For a way to make a judge’s opinion short, see Irvin Long, Practical Advice Concerning Opinion Writing, 26 J Amer Judicature Soc 22, 23 (June 1942):

“Perhaps it would be helpful if one of the judge’s clerks were assigned the duty of examining all opinions to be issued, with a view to condensing them to a point where they contained the minimum verbiage necessary to explain the court’s views . . . .”

5. Concision Techniques
a. Trash Tautologies
Tautologies repeat the same thought in different words. Do not be wordy, verbose, prolix, loquacious, long-winded, repetitive, chatterbox-like, and so on and so forth, etc.

b. Quibble Over Quoting

Limit the length of your quotations by quoting only the most pungent words and what you cannot say better yourself. Do not use blocked quotations unless the blocked quotation of 50 words or more contains a critical test from a seminal case or quotes an important statutory or contractual provision—and even then try to break up the quotation into manageable bits. Be careful not to quote unessential statutory or contractual provisions.

c. Obliterate the Obvious

- “If respondent is evicted, he will be forced to leave his apartment.”

- “When a great number of people cannot find work, unemployment results.” (President Calvin Coolidge.)

d. Circumnavigate Circular Platitudes

Circular platitudes are logically fallacious, waste space, and stop the reader from reading further. Only the most obvious circular platitudes succeed, such as Yogi Berra’s home run: “It ain’t over till it’s over.”

e. Say it in One Place

Avoid repeating ideas already expressed.

f. Sometimes Use Gerunds

A gerund is a verb form used as a noun. Gerunds end in “-ing.”

- “The act of eviction will make respondent homeless.” Becomes: “Evicting respondent will make her homeless.”

g. Coordinating Conjunctions

Replace coordinating conjunctions (“and,” “but,” “or,” “for,” “nor,” “so,” “yet”) with a period. Then start a new sentence:

- “I was walking down the street one day, and a man came up to me to ask me what time it was.” Becomes: “I was walking down the street one day. A man came up
to me to ask me what time it was.” (From the Chicago Transit Authority, later Chicago, song.)

h. Embedded Clauses

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 sentences and thus is concise, even though it might add text:

- “The judge’s chambers, which has a hunter-green carpet, is at 100 Centre Street in Manhattan.” Becomes: “The judge’s chambers is at 100 Centre Street. Her carpet is hunter green.”

But compress childish writing:

- “The man was tall. He was fat. He had yellow teeth. He wore a green tie.” Becomes: “The tall, fat man with yellow teeth wore a green tie.”

i. Live for Line Editing.

Experiment with cutting words from every paragraph that has only a few words on the last line. The cutting will make your writing tighter. This is one of the most successful techniques for lawyers who fear exceeding a page limit specified in a court rule.

j. Defy Defining and Quit Qualifying

Lawyers add much unnecessary text by defining and qualifying whenever they can. Here is White’s satirical advice: “Do not stop with hundreds of useless definitions and qualifications. Go through it again and again, expanding clauses and inserting redundancies. This will enable you to avoid the perils of certain forms of punctuation—such as the period.” (D. Robert White, The Official Lawyer’s Handbook 186 [1983].)

k. Expunge Expletives

The word “expletive” comes from the Latin expletus, meaning “filled out.” Expletives, which should be deleted, include the phrases “there are,” “there is,” “there were,” “there was,” “there to be,” “it is,” “it was.” Some jargonomongers call expletives “dummy subjects.”

- “There are two things wrong with almost all legal writing. One is its style. The other is its content.” (Fred Rodell, Goodbye to Law Reviews, 23 Va L Rev 38, 38 [1936].) Becomes: “Two things are wrong . . . .”

- “There is no rule that is more important.” Becomes: “No rule is more important.”
- "There is no case law that addresses the question." Becomes: "No case addresses the question."

- "The court found there to be a discovery violation." Becomes: "The court found a discovery violation."

- "It is the theory that lends itself." Becomes: "The theory lends itself."

A double expletive is double trouble. It is clear that it will cause problems.

Exceptions:

(i) Expletives may be used for emphasis. (See e.g. State v Baker, 103 Idaho 43, 43, 644 P2d 365, 365 [Idaho Ct App 1982, Burnett, J.] ["It was a shotgun blast in the early morning that killed Merardo Rodriguez."] [italics supplied].) It is more concise to write, "Judge Jones wrote the opinion" than to write, "It was Judge Jones who wrote the opinion." But if the writer has a strong reason to emphasize Judge Jones's authorship—to correct a mistaken impression that Judge Smith wrote the opinion, for example—the expletive "it was . . . who" will serve that function. Like all techniques of emphasis, expletives should be used sparingly.

(ii) Expletives may also be used for rhythm. Ecclesiastes 3:1 would be different if, instead of writing, "To everything there is a season," the author wrote, "To everything is a season." Different, too, would be Robert Service's opening line in The Cremation of Sam McGee: "There are strange things done in the midnight sun" rather than the more concise "Strange things are done in the midnight sun."

(iii) Expletives may further be used to climax or to go from short to long or from old to new. Thus, the uninverted form, "There is a prejudice against sentences that begin with expletives," is better than the inverted form, "A prejudice against sentences that begin with expletives exists." The climax should not be on "exists." The writer could, however, have avoided the issue: "People are prejudiced against sentences that begin with expletives."

1. Prune the Passive Voice

Passives are wordy, not merely hard to read:

- "The passive voice is avoided by good lawyers." Becomes: "Good lawyers avoid the passive voice." Voila! The sentence, with two fewer words, is now easier to read.
m. As You Like It

Delete “as,” if possible:

- “Some consider drinking as a defense to murder.” Becomes: “Some consider drinking a defense to murder.”

- “He was appointed as a court attorney.” Becomes: “He was appointed a court attorney.”

- Note: The direct object of “regard” should always be followed by “as.” Correct: “She regards it as a heinous crime.”

n. To Be or Not to Be

Delete “to be,” if possible:

- “Some consider drinking to be a defense to murder.” Becomes: “Some consider drinking a defense to murder.”

- “The opinion needs to be lengthened.” Becomes: “The opinion needs lengthening.”

o. Do Not Let It Come Into Being

Banish “being,” if possible:

- “The attorney was regarded as being a persuasive advocate.” Becomes: “The attorney was regarded as a persuasive advocate.”

And being that we are on the subject, do not substitute “being that” for “because”

- “The court reporter types quickly being that he has magic fingers.” Becomes: “The court reporter types quickly because he has magic fingers.”

p. In the Nick of Time
Toss "time," if you have the time to do so:

- "The opinion will be rendered in two weeks' time." Becomes: "The opinion will be rendered in two weeks."

q. In That

Do not begin sentences with "in that" or use "in that" in an internal clause.

- "In that the judge's mother was a litigant, the judge recused herself." Becomes: "The judge recused herself because her mother was a litigant."

r. Of

The "of" is a big part of the wordiness problem. Deleting the "of" is a big part of the solution.

- Play with possessives:

  - "The foregoing constitutes the order and decision of the court." Becomes: "This (or The above or This opinion) is the court's order and decision."

  - Exception: Use the periphrastic possessive if the possessive looks awkward:

  - "St. Gertrude's's brief." Becomes: "The brief of St. Gertrude's."

  - "Subdivision A's remedies." Becomes: "The remedies of Subdivision A."

  - "The New York City Police Department's (NYPD) policies." Becomes: "The policies of the New York City Police Department (NYPD)."

- Invert or rearrange sentence:

  - "I am a fan of the Beatles." Becomes: "I am a Beatles fan."

  - "Because of Judge B's status as a judge . . . ." Becomes: "Because Judge B is a judge . . . ."

  - "You're not the boss of me." Becomes: "You're not my boss."

  - "Joint Committee to Preserve the Independence of the Judiciary." Becomes: "Joint Committee to Preserve Judicial Independence [or an Independent Judiciary]."
"Supreme Court of the State of New York." *Becomes:* "New York State Supreme Court."

"Family Court of the State of New York in the City of New York." *Becomes:* "New York State Family Court in the City of New York."

"Civil Court of the City of New York." *Becomes:* "New York City Civil Court."

Normalize nominalizations:

"Criminal possession of stolen property." *Becomes:* "Criminally possessing stolen property."

Note: Some would retain nominalizations as terms of art. The Penal Law, for example, uses "Criminal possession of stolen property," not "criminally possessing stolen property." But retaining the nominalization perpetuates the drafting error.

"The forensic expert carried out an analysis of the blood sample." *Becomes:* "The forensic expert analyzed the blood sample."

"The solution was the result of the court attorney's careful inspection of the papers." *Becomes:* "The court attorney solved the problem by inspecting the papers carefully."

"He committed forgery by the writing of a bad check." *Becomes:* "He committed forgery by writing a bad check."

"Of" with their heads!

Try this test, from the Internet. Count the number of Fs in the following text:

FINISHED FILES ARE THE RESULT OF YEARS OF SCIENTIFIC STUDY COMBINED WITH THE EXPERIENCE OF YEARS

You counted three, right? Try again. The correct answer is six. You missed the "f" in the three "of's." People do not see the word "of." That is why the "of" is verbiage, to be cut whenever you can.

The TV soap that never aired: "All of My Children." (It is *All My Children.*)

"Too high of a price." *Becomes:* "Too high a price."
Delete "of" after "all" ("All New York loves baseball") and "both" except when a pronoun follows ("all of us studied legal writing"; "both of us studied legal writing").

This is not off the wall: Delete "of" after "alongside," "inside" (unless you mean "in less than"), "off," and "outside."

Note: Use "except for" to replace "outside of": "Except for Judge X, who was appointed, all the judges in the county were elected."

Delete "as of":

"The attorney has not filed the motion as of yet." Becomes: "The attorney has not filed the motion yet." Or "The attorney has not yet filed the motion."

Off "of" prepositional phrases:

"Along the line of" becomes "like."

"As a result of" becomes "because."

"At the rear of" becomes "behind."

"By means of" becomes "by."

"By reason of" becomes "because of."

"By virtue of" becomes "because of."

"Concerning the matter of" becomes "about."

"During the course of" becomes "during."

"First of all" becomes "first."

"For the duration of" becomes "during."

"For the period of" becomes "for."

"For the purpose of" becomes "for," "to."

"Has the option of" becomes "may."

"Have a need of" becomes "need."
"In advance of" becomes "before."

"In back of" becomes "behind."

"In case of" becomes "if."

"In excess of" becomes "more than," "over."

"In front of" becomes "before."

"In furtherance of" becomes "to further."

"In hopes of" becomes "to."

"In lieu of" becomes "instead of."

"In receipt of" becomes "have received."

"In terms of" becomes "at," "by," "for," "in," "with."

"In the absence of" becomes "absent."

"In the amount of" becomes "for."

"In the course of" becomes "during."

"In the direction of" becomes "toward."

"In the event of" becomes "if."

"In the immediate vicinity of" becomes "near."

"In the interests of" becomes "for."

"In the midst of" becomes "amid."

"In the nature of" becomes "like."

"In the neighborhood of" becomes "about," "near."

"In the process of," "the process of" (delete entirely).

"Is comprised of" becomes "consists of," "is composed of"
- "On the basis of" becomes "after," "because of," "by," "on."

- "On the grounds of" becomes "because" (and note that if you give one ground, do not use "grounds").

- "On the part of" becomes "among," "by."

- "Regardless of whether or not" becomes "regardless whether."

- "The act of" (delete entirely).

- "The issue of (or as to) whether" becomes "whether."

- "The occurrence of" (delete entirely).

- "The question of whether or not" becomes "whether."

- "With the exception of" becomes "except."


- "He is the kind of [sort of, type of] person who would . . . ." Becomes "He would . . . ."

A type of suggestion when you type out an opinion: Do not convert nouns into adjectives by using "type" as a suffix:

- "A judicious-type person." Becomes: "A judicious person."

A negative phrase using an "of" becomes, with a prefix, a "dis-," "in-," "non-," or "un-.

- "The lack of consistency" or a "negative" anything becomes (depending on your meaning) "The inconsistency" or "dis-X," "non-X," or "un-X," depending on the word.

Delete "of" in dates and years:

- "Four years of prison." Becomes: "Four years' imprisonment." Or "Four years in jail."

- "Ten days of notice." Becomes: "Ten days' notice."
“Forty-four years of age.” Becomes: “Forty-four years old.”


Lose “of which” legalisms:

“Small Claims Court, the jurisdiction of which is often in doubt, is . . . .” Becomes: “Small Claims Court, whose jurisdiction is often in doubt, is . . . .”

Note an idea whose time has come: Only pedants would use “whose” to refer to people but not things. Our national anthem—idolizing a flag “whose broad stripes and bright stars . . . were so gallantly streaming”—need not be rewritten.

“The contract Jones signed, which contract provided that . . . .” Becomes: “The contract Jones signed provided that . . . .” Or “Jones signed a contract that provided that . . . .”

“After negotiating, Jones and Smith signed their stipulation, which stipulation resolved their differences.” Becomes: “After negotiating, Jones and Smith signed their stipulation, which resolved their differences.” Or “After negotiating, Jones and Smith signed a stipulation that resolved their differences.”

For more on this topic, see Gerald Lebovits, The Legal Writer, “Of” With Their Heads: Concision, 73 NY St BJ 64 (Nov./Dec. 2001).

s. Relative Pronouns

Best not begin sentences or subordinate clauses with relative pronouns: “who,” “whose,” “whoever,” “whichever,” “whatever,” and “which.” Beginning that way adds unnecessary fat and is unnecessarily complex.

t. Rally Against Relative Clauses

Strike the nonstructural “who,” “who are,” “who is,” “whoever,” “whom,” “whomever,” “which,” “which is,” “which are,” “which were,” “that,” “that is,” “that are,” and “that were.”

Excise nonstructural relative clauses in an appositive. Appositives rename or ascribe new qualities to a noun.

“The judge, who is 44 years old, is a strong editor.” Becomes: “The judge, 44 years old, is a strong editor.”
- "Law clerks [remove who are] not averse to writing might find their words quoted and remembered."

- "Albany, [remove which is] a large city, is the state capital."

u. -Er & -Est

Add "-er" to one- or, depending on your ear, two-syllable words after "more": "More close" becomes "Closer." What do you think of the two syllable "often"? Massachusetts Supreme Judicial Court Justice Holmes added the "er" in *Ryalls v Mechanics' Mills* (150 Mass 190, 194 [1899] ["General maxims are oftener an excuse for the want of accurate analysis than a help . . . ."].) This rule does not apply to words that have three syllables or more. Lewis Carroll's poetic "curiouser and curiouser" in Alice's Adventures in Wonderland is remembered because "curious" has three syllables and thus should not have had the "-er" suffix.

Add "-est" to one- or two-syllable suffixes: "Most close" becomes "Closest." This rule does not apply to words that have three syllables or more.

v. Reduce "Fact" Phrases

Delete "in fact" (a trite formula that, if ever used, should be restricted to facts, not opinions), "in point of fact," "as a matter of fact," "the fact is that," "given the fact that," "the fact that," "as a matter of fact," "of the fact that" (e.g. "in spite of the fact that" (meaning "although")), and "the court was unaware of the fact that."

"The fact that" can almost always be deleted. Other "fact" expressions should be replaced by something more concise, such as "actually."

A good rule: Do not confuse facts with rules.

- *Incorrect:* "The opinion relies on the fact [should be on the rule] that involuntary confessions are inadmissible at trial."

w. Vitiate Verbosity

Needless to say, of course, anything that is wordy or need not be written should not be written. (*Should be:* "Anything that need not be written should not be written.")

- "There can be no doubt but that [delete throat clearer] you should not use empty phrases [write in affirmative] despite the fact that [although] many writers would appear to [delete qualifier] register disagreement [fix nominalization—disagree]."
“Plaintiff, Ms. A, filed a lawsuit against defendant, Mr. B, alleging that Mr. B. committed a breach of their contract of employment.” Becomes: “Ms. A sued Ms. B for breaching their employment contract.”

x. “To” Can Be Too Much

Trim “to” stilts:

- “Cite to the record” becomes “cite the record.”
- “Help to prepare” becomes “help prepare.”
- “In a position to” becomes “can.”
- “In addition to” becomes “and,” “besides.”
- “In an attempt to” becomes “to.”
- “In an effort to” becomes “to.”
- “In order to” becomes “to.”
- “In order for” becomes “for.”
- “In regard to” becomes “in.”
- “In relation to” becomes “about,” “concerning,” “with.”
- “Is able to” becomes “can.”
- “Is applicable to” becomes “applies to.”
- “Is authorized to” becomes “may.”
- “Is binding upon” becomes “binds.”
- “Is unable to” becomes “cannot.”
- “Make application to” becomes “apply to.”
- “Similar to,” “in a manner similar to” become “like.”
- “So as to” becomes “to.”

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- "Where is he going to?" becomes "Where is he going?"
- "With reference to" becomes "about."
- "With regard to" becomes "about."
- "With respect to" becomes "about," "on."
  
Lessen "to" legalisms
  
- "Had occasion to" (rephrase or delete).
  
- "In relation to" becomes "with."
- "Is required to" becomes "must."
- "Is unable to" becomes "cannot."
- "Previous to" becomes "before."
  
  Note that what "precedes" comes immediately beforehand. Anything earlier is "previous."
  
- "Prior to" becomes "before."
- "Proceeded to" becomes "went" (or delete).
- "Pursuant to" becomes "under."
- "Subsequent to" becomes "after," "later."
  
  Note: "Consequently" means "therefore." It does not mean "subsequently."
  
- "To the effect that" becomes "that."
- "Unto" becomes "to."
- "With a view to" becomes "to."
- "With the object being to" becomes "to."

y. Crush Compound Prepositions

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Replace compound prepositions with a more concise expression or word: “in connection with,” “in relation to,” “in case of,” in the instance of,” “on the basis of.”

z. **Prohibit Pleonasm**

Pleonasm are unnecessarily full expressions. Pleonasms are double subjects, or pronominal appositions:

- “The court, it held that . . . .” Becomes: “The court held that . . . .”

- “The law clerk, who e-mailed me, she likes me.” Becomes: “The law clerk, who e-mailed me, likes me.”

**aa. Use Ellipticisms**

Ellipticsms prevent word repetition:

- “At the estate sale the judge’s robes brought $100, the judge’s books brought $1000, and the judge’s gavel brought $10.” Becomes: “At the estate sale the judge’s robes brought $100, the judge’s books, $1000, and the judge’s gavel, $10.”

  Note: Worse than not using ellipticisms is elegant variation: using different words for “brought,” such as “sold for,” “fetched,” “obtained.”

**bb. Mind Your “Manner” Phrases**

- “He appeared in court in a disheveled manner.” Becomes: “He appeared in court disheveled.”

- “She dresses in a grotesque [hasty] manner.” Becomes: “She dresses grotesquely [hastily].”

- “He acted in a negligent manner.” Becomes: “He acted negligently” or “He was negligent.”

**cc. The Nature of Character**

Excise “nature” and “character” if you can.

- “Acts of a hostile nature [or character]” becomes “hostile acts.”

**dd. Factor Out Degrees**

Excise “factor” and “degree” if you can.
ee. **Mortgage Your Modifiers**

If you use vigorous verbs and concrete nouns, you will not need to bolster lifeless verbs and vague nouns with wordy modifiers.

ff. **Liquidate Legalisms Forthwith**

Whereas some believe that legalisms add content, as noted hereinabove, supra, legalisms are amateurish substitutes for clear exposition. You are now forewarned: Res ipsa loquitur. As Judge Rosenblatt explained, “The shift in the language of the law has, I submit, taken a healthy turn toward economy and exactitude, with no loss of color. The turgid phrases of yesteryear have undergone some down-sizing.” (Albert M. Rosenblatt, *Lawyers as Wordsmiths*, 69 NY St B 12, 13 [Nov. 1997].)

In addition to being pretentious, legalisms are unnecessary. Which word can you cut in the following sentences? The empty legalism:

- “I enclose herewith a copy of the court’s opinion.” (Delete “herewith.”)
- “You are advised herein not to use ‘herein.’” (Delete the first “herein.”)
- Richard Nixon’s resignation letter of August 9, 1974, to Secretary of State Henry Kissinger: “I hereby resign the Office of President of the United States.” (President Nixon could have deleted the “hereby.”)
- “Defendant has a prior conviction.” (Delete “prior.” The “has” already suggests that defendant does not have a future conviction.)

How do you make legal jargon shorter and more concrete? By eliminating legal jargon:

- “In the instant case” becomes “here” or “in this case.” Or, even better, go right to the facts of your case with a thematic transition.
- “In the case at bar” becomes “here” or “in this case.” Or, even better, go right to the facts of your case with a thematic transition.
- “The court below” (name the court, especially if more than one “court below” heard the case).
"The lower court" (name the court, especially if more than one "lower court" heard the case).

gg. **Abjure Unnecessary Adjectives and Adverbs**


Consider: The sentence "The man is very large" is trivial and verbose. "The man is huge" is memorable and concise. Most descriptive, though, is, "The man is six-feet five-inches tall and weighs 394 pounds." If you give the man’s height and weight, you need not say that he is "very large" or "huge." Your readers will figure it out for themselves.

Which is stronger: "The allegations are completely untrue" or "The allegations are false"? The latter.

hh. **Do Not Lead With Lead**

- "The books the judge owned were the Official Reports." *Becomes:* "The judge owned the Official Reports."

- "The OCA's new policy resulted in increased morale among nonjudicial employees." *Becomes:* "The OCA's new policy increased morale among nonjudicial employees."

ii. **Throttle Throat Clearers**

Do not introduce what you plan to write. Just get to the point. Throat clearers to exclude include "The court recognizes that . . . ." and "It appears to be the case that . . . ." Anyway, if you use preambles like "speaking as a lawyer," your reader will not know whether you are bragging or offering a disclaimer.

jj. **Rebut Redundancies**

Trim fat, even though a waist is a terrible thing to mind, especially for the nutritional overachiever. A favorite: America must develop "a capacity to provide for future contingencies as they may happen." (Alexander Hamilton, Federalist 33.) Take stock. As Judge Rosenblatt observed, "a lawyer's stock in trade [is] the lawyer's use of words." (Albert M. Rosenblatt, *Brief Writing and Oral Argument in Appellate Practice* 24 Trial Lawyers Q 22, 22 [1994].) If words are a lawyer's stock-in-trade, lawyers have an excessive inventory. Talk is cheap. Supply exceeds demand.
Redundancy is the unnecessary repetition of words or ideas. Some redundancies cannot be avoided. One example from the language of the law is “self-incrimination.” “Self-” already means “in.” But try to get legal writers to change the expression to “self-crimination.” Other redundancies are silly. “Excess verbiage,” for example, is redundant because verbiage is excessive by definition.

Here are some wordy phrases that can best be called repetitive redundancies, all from the Department of Redundancy Department:

- “A period of two years” becomes “two years.”
- “Accidental slip” becomes “slip.”
- “Advance planning” becomes “planning.”
- “Adequate enough” becomes “adequate.”
- “Afford an opportunity” becomes “allow,” “let.”
- “Aggregate total” (either, not both).
- “All-time record” becomes “record.”
- “Am (is, are) going to” becomes “will.”
- “Any and all” becomes “any.”
- “Appreciate in value” becomes “appreciate.”
- “As of this date” becomes “today.”
- “As yet,” “as of yet” become “yet.”
- “At about” becomes “about.”
- “At an early date” becomes “soon.”
- “At approximately” becomes “about.”
- “At the present time” becomes “now.”
- “At the present writing” becomes “at present,” “currently,” “now.”
“At this particular point in time” becomes “now.”

“At the time when” becomes “when.”

“Audible to the ear” becomes “audible.”

“Basic fundamentals” becomes “basics.”

“Because of the fact that” becomes “because.”

“Both . . . as well as” becomes “both . . . and” or “as well as,” without the “both.”

“By and through” becomes “by.”

“By the time” becomes “when.”

“Class-action lawsuit” becomes “class action.”

“Close proximity” becomes “close,” “near.”

“Collide together” becomes “collide.”

“Combine together” becomes “combine.”

“Come in contact with” becomes “meet,” “touch.”

“Completely finished” becomes “finished.”

“Complete stop” becomes “stop.”

“Consensus of opinion” becomes “consensus.”

“Consequences that would (or will) result from” becomes “consequences of.”

“Cooperate together” becomes “cooperate.”

“Current incumbent” becomes “incumbent.”

“Deliberate lie” becomes “lie.”

“Divide up” becomes “divide.”

“Due to the fact that” becomes “because” (or, if possible, delete entirely).
- "Duly noted" becomes "noted."
- "During the time that" becomes "during."
- "During such time as" becomes "during."
- "Each and every" (either, not both, or "us all").
- "Eight in number" becomes "eight."
- "Enclosed herewith is" becomes "enclosed is."
- "Endorse on the back" becomes "endorse."
- "Estimated to be about" becomes "about," "estimate to be," or "estimated at."
- "Every single" becomes "every."
- "Equally as" becomes "as... as," "equally."
- "Exactly analogous" becomes "analogous."
- "Exact same" becomes "same."
- "Excessive number of" becomes "too many."
- "False illusion" becomes "illusion."
- "False misrepresentation" becomes "false representation" or "misrepresentation."
- "Few in number" becomes "few."
- "Filled to capacity" becomes "filled."
- "Final result" becomes "result."
- "First and foremost" (either, not both; even when "foremost" adds something to "first,
"first and foremost" is a cliché).
- "Final outcome" becomes "outcome," "result."
- "Final destination" becomes "destination."
"For the amount of" becomes "for."

"For the reason that" becomes "because."

"Foreign import" becomes "import."

"Forward progress" becomes "progress."

"Free gift" becomes "gift."

"From and after" (either, not both).

"Fused together" becomes "fused."

"Future plans" becomes "plans."

"General public" becomes "public."

"Good and ready" becomes "ready."

"Green in color" becomes "green."

"He left on Monday" becomes "He left Monday."

"Honest truth" becomes "truth."

"I would appreciate it if" becomes "please."

"If and only if" becomes "if" or "only if" (except to emphasize or if you mean "if, among other things").

"If and when" (either, not both).

"If that is the case" becomes "if so."

"In addition to . . . also" (either, not both).

"In many cases" becomes "often."

"In the event that" becomes "if."

"In the month of May" becomes "in May."
“In the near future” becomes “soon.”

“In rare instances” becomes “rarely.”

“In routine fashion” becomes “routinely.”

“Insofar as” becomes “so far as.”

“Interpersonal relationship” becomes “relationship.”

“Inveigh in strong terms” becomes “inveigh.”

“Is currently in progress” becomes “in progress.”

“Join together” becomes “join.”

“Kills bugs dead” becomes “kills bugs.”

“Large in size” becomes “large.”

“Large number of” becomes “many.”

“Last but not least” becomes “last.”

“Logical corollary” becomes “corollary.”

“Live audience” becomes “audience.”

“Lucrative profits” becomes “profits.”

“Mass exodus” becomes “exodus.”

“Mix together” becomes “mix.”

“More better” becomes “better.”

“Most unkindest” becomes “most unkind,” “unkindest.”

“Mutual cooperation” becomes “cooperation.”

“Necessary essentials” becomes “essentials.”

“Necessary requirements” becomes “requirements.”
“Never before in the past” becomes “never before.”

“New innovation” becomes “innovation.”

“No doubt but that” becomes “no doubt that,” “doubtless,” “undoubtedly.”

“Nothing whatsoever” becomes “nothing.”

“On a daily basis” becomes “daily.”

“On a timely basis” becomes “timely.”

“On the condition that” becomes “if.”

“On the ground that” becomes “because.”

“One and the same” becomes “the same.”

“One of the purposes” becomes “one purpose.”

“One of the reasons” becomes “one reason.”

“Ongoing process” becomes “process.”

“Old adage” becomes “adage.”

“Old proverb” becomes “proverb.”

“Over again” becomes “over.”

“Overall total” becomes “total.”

“Overexaggerate” becomes “exaggerate.”

“Over with” becomes “over.”

“Passing phase” becomes “phase.”

“Past experience” becomes “experience.”

“Past history” becomes “history.”

“Period of time” becomes “period,” “time.”
- "Personal belongings" becomes "belongings."
- "Personal opinion" becomes "my opinion," "his opinion."
- "Personal friend" becomes "friend."
- "Plan ahead" becomes "plan."
- "Please be good enough to forward" becomes "please send."
- "Point of view" becomes "opinion," "perspective."
- "Postponed until later" becomes "postponed."
- "Proceed ahead" becomes "proceed"
- "Provided that" becomes "if."
- "Qualified expert" becomes "expert."
- "Quite a few" becomes "many."
- "Raise the question" becomes "ask."
- "Rational reason" becomes "reason."
- "Reason why" becomes "reason" or "why" (not both).
- "Recur again" becomes "recur."
- "Remaining balance" becomes "balance."
- "Repeat again" becomes "repeat."
- "Refer back to" becomes "refer to."
- "Regard as being" becomes "regard."
- "Remand back to" becomes "remand to."
- "Repeat again" becomes "repeat."
- "Revert back to" becomes "revert to."
“Round in shape,” “form” becomes “round.”

“Rise up” becomes “rise.”

“Sad tragedy” becomes “tragedy.”

“Set a new record” becomes “set a record.”

“Several in number” becomes “several.”

“Shoddy in appearance” becomes “shoddy” (or “appeared shoddy,” if you later explain that it really was not shoddy).

“Similar to” becomes “like.”

“Something else besides” becomes “something else,” “besides.”

“Small in size” becomes “small.”

“Small number of” becomes “small.”

“Standard cliché” becomes “cliché”

“Still goes on” becomes “continues,” “goes on.”

“Still remains” (either, not both, unless you mean that the corpse is not moving).

“Strictly forbidden” becomes “forbidden.”

“Suffered the loss of” becomes “lost.”

“Sufficient number of” becomes “enough.”

“Sum total” (either, not both).

“Surrounded on all sides” becomes “surrounded.”

“Surviving widow” becomes “widow.”

“Sworn affidavit” becomes “affidavit.”

“Telling revelation” becomes “revelation.”
- "Temporary respite" becomes "respite."
- "Temporary suspension" becomes "suspension."
- "Terrible tragedy" becomes "tragedy."
- "That we have at hand" becomes "that we have."
- "The fact that" becomes "that" (almost all the time).
- "The reason why" becomes "the reason."
- "This morning at 7:15 a.m." becomes "this morning at 7:15," "7:15 a.m.," or "7:15 this morning."
- "To all intents and purposes" (replace or delete).
- "Totally devoid" becomes "devoid."
- "True and correct" (either, not both).
- "True facts" becomes "facts."
- "Trusting that this suggestion will" becomes "I hope that."
- "Unexpected surprise" becomes "surprise."
- "Unsolved problem" becomes "problem."
- "Unless and until" (either, not both, or rephrase).
- "Until such time as" becomes "until."
- "Usual custom" becomes "custom."
- "Utterly false" becomes "false."
- "Visible to the eye" becomes "visible."
- "Whether or not" becomes "whether" (except to emphasize or to give equal weight: "The case will be tried whether it rains or not").

kk. Prepositional Phrases
Convert prepositional phrases to adverbs or adjectives.

- "Are in need of" becomes "need."
- "At that point in time" becomes "then."
- "At this point in time" becomes "now."
- "At your earliest convenience" becomes "as soon as possible" "at once," "immediately," "now," "soon."
- "Of extreme importance" becomes "extremely important."
- "Of great complexity" becomes "complex."
- "On a regular basis" becomes "regularly."
- "On many occasions" becomes "often."
- "One of the things" becomes "one thing."

II. Parallel Language

French was England's official language from the Norman conquest in 1066 until 1385. But the populace continued to speak English. Thus, lawyers began a parallel language. (For a remarkable history of the language of the law, from "Before the Normans" to "Law Language in America," see David Mellinkoff, The Language of the Law 33-282 [1963].) We have the luxury in modern America to return to our roots by speaking one tongue—English—not both English and French and sometimes Latin, too. Just because something is good enough to say once does not mean it is good enough to say twice. Cease and desist in any way, shape, manner, or form from using doublets, triplets, and quadruplets for the rest, residue, and remainder of your careers. This rule is part and parcel of good legal writing.

- "Acknowledge and confess" (either, not both).
- "Act and deed" becomes "contract," "deed."
- "Agree and covenant" becomes "agree."
- "Aid and abet" becomes "aid."
- "All and singular" becomes "all."
- "Assuming, arguendo, that" becomes "assuming that."
- "Bind and obligate" becomes "require."
- "Cancel, annul, and set aside" becomes "annul," "cancel."
- "Capable and able" (either, not both).
- "Cease and desist" becomes "stop."
- "Deem and consider" becomes "believe," "find."
- "Do and perform" becomes "do."
- "Duty and obligation" becomes "duty."
- "Fit and proper" becomes "fit."
- "Force and effect" becomes "force."
- "Fraud and deceit" (either, not both, depending on the context).
- "Free and clear" becomes "free."
- "Give and grant" becomes "give."
- "Give, devise, and bequeath" becomes "give."
- "In any way, manner, shape, or form" (delete).
- "Keep and maintain" becomes "keep."
- "Last will and testament" becomes "will."
- "Made and entered into" becomes "made."
- "Null, void, and of no effect" becomes "null" or "void."
- "Order, adjudge, and decree" becomes "order" for a legal motion; "adjudge" for a legal judgment; "decree" for equity.
- "Pardon and forgive" (either, depending on the context, but not both).
“Rest, residue, and remainder” becomes “balance,” “rest,” “all other property”).

“Save and except” becomes “except.”

“Separate and apart” (either, not both).

“Shun and avoid” becomes “avoid.”

“Et cetera, et cetera, et cetera” (unless you are a “King and I” aficionado).
XIII
PUBLISHING THE OPINION

All opinions of the Court of Appeals and the Appellate Division are officially published in, respectively, the NY2d and the AD2d reporters. The office of the State Reporter, the Law Reporting Bureau, an arm of the Court of Appeals, will edit, cite-and-substance check, and read the appellate briefs to assure factual accuracy (dates, figures, spelling of names, and so on). In that sense, the State Reporter's office acts as an important resource to the Court of Appeals and the Appellate Division's four departments. If the State Reporter's office catches an error, it will notify the court, which has the final say on whether to accept the State Reporter's suggestions.

Opinions of the Appellate Term and the trial courts are eligible to be published in the Official Reports. The State Reporter may accept an Appellate or Trial Term opinion for online publication only. These opinions are published on the Law Reporting Bureau's Web site (<https://www.courts.state.ny.us/reporter/decisions.htm>) and are listed, abstracted, and digested in the Advance Sheets. The State Reporter's office will edit and cite-and-substance check an opinion it accepts for official print publication. The State Reporter's office, however, does not have the attorneys' briefs and thus cannot assure factual accuracy. The State Reporter will not edit or cite-and-substance check opinions it accepts for online publication.

Privately published collections of New York cases might or might not include text corrections approved by the courts and included in the Official Reports. Thus, the Official Reports should be consulted to verify any quotation obtained from other sources.

The Official Reports are printed and distributed under a competitively-bid five-year publishing contract. (Judiciary Law § 434). The current (2001-2005) contract was awarded to West Group. Under the contract, West publishes the Official Reports in print, online (NY-ORCS and NY-ORCSU databases on Westlaw), CD-ROM, and microfiche formats.

Private print and electronic publishers, including the West Group, also publish their proprietary collections of New York cases. For example, West Group publishes New York cases in the Northeastern Reporter and New York Supplement and in proprietary files on Westlaw. Lexis, Loislaw.com, and Versuslaw, and others publish New York cases in their online services.

All these services contain the same collection of cases found in the Official Reports. The Law Reporting Bureau makes all appellate opinions contained in the Official Reports available on a computer server that can be accessed by any interested publisher. Private publishers also may obtain opinions directly from the courts.

Appellate Term and trial-court opinions not selected for publication in the Miscellaneous Reports or for online only publication may not be published, except in the New York Law Journal. (22 NYCRR 7300.1). The Law Reporting Bureau gives all interested publishers copies of opinions so selected.

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A. Submission to the Official Reporter:

Use the Official New York Law Reports Style Manual, which is available free to judges and their law clerks by calling the Law Reporting Bureau (518-474-8211), by e-mailing (reporter@courts.state.ny.us), or by sending a request in writing to the Law Reporting Bureau at the address listed below. The newest edition of the Style Manual, supplemented in 2004, which the Court of Appeals enacted for opinions submitted for publication after March 1, 2002, is also available for free in PDF format at <http://www.courts.state.ny.us/reporter/styman_menu.htm>. The Internet version has a helpful search function.

The Manual is sometimes called the Tanbook because its cover is tan. This handbook uses “Tanbook” and “Manual” interchangeably.

For an article about the new Tanbook, see Gerald Lebovits, New Edition of State’s “Tanbook” Implements Extensive Revisions in Quest for Greater Clarity, 74 NY St BJ 8 (Mar./Apr. 2002). The article explores the differences between the old Tanbook and the new Tanbook; distinguishes between the Tanbook and other citation guides; and gives examples of 2002 Tanbook usage.

The Tanbook’s raison d’etre, from the Law Reporting Bureau’s Web site: “New York Law Reports Style Manual is published by the Law Reporting Bureau with the approval of the Court of Appeals as a guide for New York judges and their clerks in the preparation of uniformly styled court decisions. It reflects the style currently applied by the Law Reporting Bureau in the styling of decisions for publication in the Official Reports.”

Except as explained below, do not use the Bluebook (The Bluebook: A Uniform System of Citation [17th ed 2000]), formerly know as the Whitebook, which most law-journal and Moot Court editors follow.

Do not use the Maroon Book (University of Chicago Manual of Legal Citation [1989]), which is similar to New York’s Tanbook but not identical.

Do not use the ALWD, formally known as Association of Legal Directors (ALWD, pronounced “All Wid”) and Darby Dickerson, Citation Manual: A Professional System of Citation (2000), which many expect will replace the Bluebook at law schools in the next few years. In its first year of issuance—the 2000–2001 academic year—86 law schools’ first-year legal-writing programs adopted ALWD over the Bluebook.

Opinion writers would do well to include, in brackets following citations, the names of the courts and years of the opinions to which they cite. Unlike all the other leading citation manuals, the Tanbook does not require opinion writers to do so. That is why the courts and years are added in brackets. Adding courts (including the department of the Appellate Division) and years helps the reader know whether the cited case is binding or persuasive and, if persuasive, how
persuasive. Adding that information also forces the writer to read the case. One sees courts and
years in brackets in Court of Appeals opinions published since 2002 in the NY2d reporter and, for
several years, in trial opinions published in the Miscellaneous Reporter; this commendable usage
has not yet caught on in Appellate Division or Appellate Term opinions. Similarly, opinion
writers should add in brackets information about the authoritative weight of a cited case:
whether the case is a memorandum opinion, a per curiam opinion, or an en banc opinion. To
date, adding weight-of-authority information is uncommon in the New York State court system,
although it is becoming almost standard practice in federal court.

Use the Bluebook when the Tanbook directs you to do so. The previous edition of the
Tanbook provided at page 22 that “periodicals, works, textbooks, newspapers, legislative
documents . . . and loose-leaf services should follow the abbreviations and form stated in A
Uniform System of Citations [sic—The Bluebook: A Uniform System of Citation], Fifteenth Edition,
except that periods should not be used with the periodical and loose-leaf-service abbreviations.”

But opinion writers could not comply with the previous Tanbook’s directive at page 22 to
First, the previous Tanbook, published in 1998, required that opinion writers follow the
1991 Fifteenth Edition of the Bluebook, which is no longer available. The 1998 Tanbook
pre-dated the Seventeenth Edition of the Bluebook, published in 2000, but post-dates the
Tanbook provided as “illustrative” contradict even the out-of-print 1991 Fifteenth
Edition of the Bluebook. Third, the Bluebook itself is inconsistent in recommending how
to cite some New York secondary authority.

For example, the Bluebook gives two contradictory ways to cite the New York Law
Journal. And both ways are wrong. The way at page 55 of the Fifteenth Edition (page 55
of the Sixteenth Edition and page 56 of the Seventeenth Edition) is incorrect. The
Bluebook’s example—a Federal District Court opinion from Massachusetts with the date
of the decision, not merely the date of publication—is nonsensical (the Law Journal does
not publish Federal District Court opinions from Massachusetts) and nearly impossible to
comply with (the Law Journal does not give the date decisions are rendered). Moreover,
the way at page 113 of the Fifteenth Edition (page 115 of the Sixteenth Edition and page
120 of the Seventeenth Edition) is incorrect because the recommended consecutively
paginated citation (“124 N.Y. L.J. 1221 (1950)”) is nearly impossible to find.

Regarding secondary authority, the new Tanbook, enacted effective March 1, 2002, and
supplemented in 2004, gives opinion writers the option to follow the Bluebook and include book
and article authors’ first and middle (full or initial) names. It is only polite to do so. The
previous Tanbook let opinion writers include only last names.

New York State judges should cite only the Official Reports, if the official citation is
available. (Opinion writers should always check Westlaw or LEXIS to determine whether a New

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York Law Journal opinion is officially reported.) The State Reporter will not use parallel citations for New York State cases published officially. (Cf. Disenhouse Assocs. v Mazzaferrro, 135 Misc 2d 1135, 1137 n. [Civ Ct, NY County 1987, Friedman, J.] [urging all attorneys to cite "the official reports only"], citing CPLR 5529 [e] [providing that in their appellate briefs, attorneys who cite New York cases must cite the Official Reports, if available, and providing nothing about "the official reports only"]; accord Matter of Bernstein v Luloff, 34 AD2d 965, 965 [2d Dept 1970, mem] [admonishing counsel to cite official reports]; La Manna Concrete, Inc. v Friedman, 34 AD2d 576, 576 [2d Dept 1970, mem] [same].)

The previous Tanbook began as follows:

"CPLR 5529 (e)
New York decisions shall be cited from the official reports"

The previous Tanbook gave good advice. Judges should cite the Official Reports, and only the Official Reports, if available. (See People v Matera, 52 Misc 2d 674, 687 [Sup Ct, Queens County 1967] ["[W]e are required, in the rendition of our opinions, to cite New York decisions from the official reports, if any, as the counsel themselves are bound to do in their briefs on appeal."]], citing CPLR 5529 [2].) But CPLR 5529 (e) does not support the previous Tanbook's rule that judges cite the Official Reports. The new Tanbook remedies this error by beginning with quotations from all the CPLR and 22 NYCRR references to how New York authorities should be cited.

Opinions published in the New York Law Journal need not follow the Tanbook or the Bluebook. Indeed, the Law Journal will modify an opinion written in the Tanbook citation style to add a period after "v" in case styles. Opinions submitted to the New York Law Journal need not be submitted to or approved by the State Reporter. (22 NYCRR 7300.1.)

B. Trial Courts (Misc 2d):

Do not discuss known legal principles at length or repetitiously. Avoid detailing the litigants' contentions and discussing facts and procedure only the litigants care about.

Be concise. For ways to shorten opinions for publication in the New York Official Reports, see James M. Flavin, Decisions and Opinions for Publication, 12 Syracuse L Rev 137 (1960). Flavin, the then-State Reporter, offers illustrations from published New York cases of material that have no value to lawyers and judges not involved in the litigation. (Id. at 140-141.) After an opinion is issued, the opinion writer may edit it for publication. The State Reporter will add a footnote to the Official Reports to tell the reader that the opinion was edited for publication. The best option for the opinion writer who writes for publication is to avoid irrelevant detail and verbose language rather than to edit the opinion later.
Opinions of interest only to the litigants, or opinions that contain primarily factual or discretionary matters or dicta, are ineligible for publication. Judiciary Law § 431 limits publication to an opinion “worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest.”

A cover letter and one paper copy of the opinion should go to:

The Honorable Gary D. Spivey  
State Reporter  
One Commerce Plaza  
17th Floor, Suite 1750  
Albany, New York 12210  
(518) 474-8211  
(518) 463-6869 - Fax  
E-mail: reporter@courts.state.ny.us

Adhere to the following format when submitting opinions for publication:

- Minimum one-inch margins.
- Double-spaced.
- Note appearances of counsel.
- 12-point type (including footnotes).
- Type on one side of 8½ x 11 paper.

An opinion and cover letter may also be sent electronically in WordPerfect (or, if in Word, in rich text format) to reporter@courts.state.ny.us. This is the format, from the Law Reporting Bureau:

Submit each opinion as a separate e-mail attachment to reporter@courts.state.ny.us. If the authoring judge is not the person sending the opinion, he or she must be included as a recipient or carbon copy (CC:) recipient of the e-mail message. The regarding (Re:) line of the message should state: “Opinions Submitted Electronically.” The body of the message should read as follows: “Attached hereto is the following opinion: [title of opinion], [court], [decision date], [full name of authoring Judge/Justice/Surrogate], saved as: [name of file].” For example: “Microsoft Corp. V Dell Computer Corp., Supreme Court, New York County, September 4, 2001, Judge Jane Doe, saved as: Microsoft 123.wpd.” The opinion must be in WordPerfect or Microsoft Word format. We are unable to accept Microsoft Word 2002 files (contained in Microsoft Office
XP) at this time. All e-mail correspondence from the Law Reporting Bureau will be to the original sender of the submission message. If the sender would like multiple parties to be included in any e-mail correspondence, the additional parties should be addressed as recipients or carbon copy recipients (CC:) in the initial correspondence.

Judiciary Law § 432 requires that all trial-court opinions be submitted to the State Reporter. This is one law every judge and court administrator honors in the breach. In practice, only opinions judges hope to publish are, or should be, submitted to the State Reporter.

For the Rules Concerning Publication of Opinions in the Miscellaneous Reporter, see the Uniform Rules for Trial Courts (22 NYCRR part 7300).

For two good discussions about the State Reporter’s publication policies, see Antonio I. Brandveen, Opinion Writing for Publication: Hearing and Trial Judges 1–4 (OCA monograph for 1999 Judicial Seminar), and Gary Spencer, Behind the Books: Reporter Selects, Cuts Official Opinions, NYLJ, Feb. 28, 1991, at 1, col 3.

Untangle the Web. Judges who wish to post their opinions on the Web should call the OCA’s Chief Technology Officer to learn about the OCA’s electronic format requirement protocol: (212) 428-2900. The protocol is also posted at <www.courts.state.ny.us>. The protocol requires that opinions posted on a court Internet or Intranet site, or on Westlaw or LEXIS, be submitted to the State Reporter in an e-mail attachment addressed to <reporter@courts.state.ny.us>. Each posted opinion must contain the following: (1) “This opinion is not available for publication in any official or unofficial reports, except the New York Law Journal, without the approval of the State Reporter or the Committee on Opinions (22 NYCRR 7300.1).” (2) “This opinion is uncorrected and subject to revision in the Official Reports.”

The court system’s electronic protocol is site impaired. The court system electronically publishes non-State Reporter-approved opinions on its own Web site: <www.courts.state.ny.us/decisionstc.htm>. The far-superior site is <www.courts.state.ny.us/reporter/decisions.htm>, where readers can find State Reporter-approved (but not cite-checked) opinions available only online.

For an account of a conflict between the Federal Justice Department and a publisher, see Stuart Taylor Jr., U.S. Obtains Curb on Judge’s Attack on Justice Dept., NY Times, Jan. 22, 1984, at A1, which describes how the Justice Department obtained a temporary order restraining West Publishing from printing a controversial opinion in the Federal Supplement. The opinion was eventually published. (See United States v Kilpatrick, 575 F Supp 325 [D Colo 1983, Winner, J.], appeal dismissed & mandamus denied sub nom. Blondin v Winner, 822 F2d 969 [10th Cir 1987], cert denied 484 US 1006 [1988].)

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For a case in which a state supreme court justice once brought a mandamus proceeding to compel his colleagues to allow his dissent to be published, see Musmanno v Eldredge, 382 Pa 167, 114 A2d 511 (1955). The justice lost—in his own court.

For an excellent history of how judicial opinions have been reported and published, see William Domnarski, In the Opinion of the Court 5–29 (1996).

For New York decisions that discuss the Law Reporting Bureau's history, operations, and rules, see Matter of Williams Press v Flavin, 35 NY2d 499 (1974); Murray v Brancato, 290 NY 52 (1943); Little v Banks, 85 NY 258 (1881); Matter of Lenz & Riecker, Inc. v Fitzpatrick, 129 Misc 2d 1068 (Sup Ct, Albany County 1986); Matter of Lawyers Co-op. Publ. Co. v Flavin, 69 Misc 2d 493 (Sup Ct, Albany County 1971), affd 39AD2d 616 (3d Dept), lv denied 30 NY2d 488 (1972); People v Carr, 5 Silvernail 302 (Sup Ct, Gen Term, 3d Dept 1884); Little v Banks, 22 NYS 512 (Sup Ct, Gen Term, 3d Dept 1884).

The following pages are helpful excerpts from the Law Reporting Bureau's Web site.
"New York decisions shall be cited from the official reports" (CPLR 5529 [e]).

The New York State Law Reporting Bureau, under the direction of a State Reporter appointed by the New York State Court of Appeals, edits and prepares for publication all of the decisions of the Court of Appeals and the Appellate Division as well as selected decisions of the trial-level courts. The decisions are contained in the Official Reports, which include the New York Reports, the Appellate Division Reports, and the Miscellaneous Reports.

The New York State Law Reporting Bureau is the largest official reporter of court decisions in the United States. It was established under article 14 of the Judiciary Law and seeks to provide the legal community with timely and affordable access to accurate New York State court decisions.

This site offers information about our office and its operations, our print, CD-ROM, and on-line publications, and our criteria for publication of trial-level court decisions. It also contains an on-line copy of the Official Reports Style Manual, a number of helpful links to court and agency sites, and links to the on-line edition of the Official Reports and our New York Slip Opinion Service.

New Official Reports Style Manual

The Official Reports Style Manual has been updated and revised. It is effective as of March 1, 2002. This new edition is available on line in either HTML or Adobe PDF format.
The New York Official Reports are professionally edited and prepared for publication by the New York State Law Reporting Bureau, which performs the most comprehensive and meticulous editing of any Reporter in the Nation.

An experienced staff of attorney-editors, selected for their attention to detail, edits every opinion for spelling, punctuation, grammar and conformity to the Official Reports Style Manual prepared by the Law Reporting Bureau and approved by the Court of Appeals.

The Manual covers such matters as forms of citation, abbreviations, capitalization, various miscellaneous rules, and word styles. It is given free of charge to Judges, court staffs, attorneys, and libraries.

Guided by this Manual, our attorney-editors verify every citation—cases, statutes, legislative history, administrative regulations, periodicals, treatises, etc., and every quotation, by comparing it to the original source. Our attorneys verify not only that the cited material exists, but also determine that the citation supports the proposition for which it is cited, i.e., that it is substantively correct and has not been repealed, amended or otherwise rendered inappropriate in the context in which it is cited.

In performing this editing function, we consult the Records and Briefs from the Court of Appeals and the Appellate Divisions. Each year we examine more than 13,000 sets of Records and Briefs and several thousand sets of motion papers. Our attorneys examine every opinion and memorandum for factual errors, discrepancies between the opinion and the Record, and irregularities in the votes, decrétal paragraph and entry. They verify the parties' names and status and put the case titles in the proper form.

Our comprehensive and meticulous editorial work corrects approximately 16,000 substantive errors each year, and we make many more stylistic and technical corrections.

An experienced staff of attorney-editors, selected for their writing abilities, headnotes every significant point of law decided in opinions. To facilitate legal research, we endeavor to give a concise and specific statement of the court's holding in the first sentence of each headnote. This is followed by a concise statement of the elements of the court's reasoning in support of the holding. All headnotes are preceded by main and secondary subject headings and catchlines which classify the legal issue summarized in the headnote.

Our attorneys prepare Summaries for Court of Appeals opinions which summarize the procedural history of the appeal insofar as it is material to the matters discussed.
in the opinion. All of the information contained in these Summaries is taken from the Record on Appeal. We prepare more extensive Summaries for Court of Appeals memoranda in order to explain the essential facts and proceedings below based upon our examination of the Record, the contentions of the parties contained in the Briefs, and internal reports which the Court has made available to us. These Summaries assist the legal community in understanding brief memorandum decisions, some of which may be only one or two sentences in length.

Court of Appeals motions for leave to appeal and criminal leave applications are edited into tabular lists. We use motion papers and internal reports, which permit us to correct titles and other mistakes occurring on the decision lists released by the courts and to determine the court, decision date and official citation of the order or judgment sought to be appealed from. Because we have access to the Record on Appeal and Briefs, we are able to identify authoritatively the correct lower court citation affected by each appellate court decision. This is particularly difficult where there are multiple decisions in the lower courts with the same title, most of which are unpublished, or a particular case has been back and forth through the appellate and lower courts several times.

Additionally, we consult the Briefs and Records to prepare Appearances of Counsel, listing the attorneys who appeared in the case, and, for Court of Appeals decisions, Points of Counsel, summarizing their arguments and listing the authorities which they cited.

At the completion of each stage of our editorial work, experienced paralegals proofread the work.

The Law Reporting Bureau obtains approval from Court of Appeals Judges and Appellate Division Justices for all of our editorial work—Headnotes, Summaries, Points and Appearances of Counsel, citations and grammar corrections, stylistic changes, etc., before the opinions are published in the Official Advance Sheets. We obtain the approval of Trial Judges for significant editorial revisions of their opinions, and we send them a postcard with the Advance Sheet citation of their opinions in the Miscellaneous Reports. This gives authoring judges an opportunity to review their opinions in the Advance Sheets and notify us of any revisions which they desire to make for the bound volume.

Considerable additional work must be performed to create a bound volume after the initial work for that volume has been completed in the Official Advance Sheets. Revisions made by the authoring Judge after the opinion has been printed in the Advance Sheets must be applied; corrected pages received from the publisher must be proofread; the Table of Cases, Table of Statutes and Rules, and Digest-Index must be prepared for that bound volume; missing citations in the Advance Sheets must be filled in if then available; and the title page, copyright information and list of Judges must be prepared. For some volumes, we also prepare historic court proceedings such as Swearing-In Ceremonies, Tributes to retiring Judges and In Memoriam Ceremonies for deceased Judges. While this is occurring, computer printouts and page proofs are passing back and forth between the Law Reporting Bureau and publisher as we review and proofread the publisher's typesetting and page composition work to ensure that the bound volume, which will be the permanent official text of all the decisions contained therein, will be absolutely accurate.
The CD-ROM and On-line Data Base versions of the Official Reports likewise are reviewed to detect and correct any errors which may arise in the conversion of the Official Reports to those formats.

Monday, November 8, 2004
The New York Slip Opinion Service provides access to recently released State court decisions that have not yet been edited for publication in the Official Reports, together with an electronic citation for each decision. Opinions selected for on-line publication only and a table of recently released decisions are also available. (There is no access charge: click here for details.)

Enter the Official Reports volume and page number in the appropriate form at right, e.g., 52 NY2d 291.
I. How Do I Contact the Law Reporting Bureau?

- Address: One Commerce Plaza Suite 1750 Albany, NY 12210
- Phone: (518) 474-8211
- Fax: (518) 463-6869
- E-mail: webmaster at LRB

II. What is the Law Reporting Bureau?

- The Law Reporting Bureau is an agency of the State of New York and is under the direction and control of the State Reporter, who is appointed by the Court of Appeals. The Bureau publishes in the Official Reports of the State of New York every cause determined in the Court of Appeals and in the four Appellate Divisions of the Supreme Court, unless otherwise directed by the deciding court. In addition, any cause determined in any other court which the State Reporter, with the approval of the Court of Appeals, considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest may also be published: About the Law Reporting Bureau
- We do not offer legal advice, recommend or discipline attorneys, or perform legal research. We neither draft nor formulate legislation for the State of New York.

III. Is there a fee for accessing decisions?

- The New York Law Reporting Bureau Web site offers a link to the Westlaw service, where the Official Reports are offered on a subscription or credit card payment basis. For further information, see the Westlaw page.
- There is no charge for access to the New York Slip Opinion service. If you link out of the Slip Opinion service to access Westlaw's fee-based services (e.g., by clicking on a blue-underlined hypertext link in the body of a slip opinion), a subscription or credit card payment is required.

IV. Besides the Authoring Judge, Who May Submit a Trial Court Decision for Publication in the Official Reports?
- Any interested party or counsel may bring a decision to the attention of the State Reporter by forwarding him a copy.
- If, in the opinion of the State Reporter, the decision meets the criteria for selection, permission to publish the decision will be requested from the Judge who wrote the opinion.

V. How Is a Trial Court Decision Published in the Official Reports?

- The criteria regarding selection of New York State trial level decisions for publication are listed in Selection of Opinions.
- Decisions submitted for publication should be sent directly to the Law Reporting Bureau.

VI. Are Decisions Edited for Publication?

- All decisions published in the Official Reports are edited: Editing the Official Reports.
- Editorial guidance is provided by the New York Law Reports Style Manual, whose purpose is to guide New York Judges and their clerks in the preparation of court decisions, in order to provide uniformity for key elements of all New York decisions, resulting in a more cohesive, easier to understand body of decisional law to be used by the Bench, the Bar and the public at large.
- Selected cases in the Miscellaneous Reports may be followed by the language "Portions of opinion omitted for purposes of publication." When a decision is edited for publication pursuant to our partial publication rule, it is the Trial Judge — not the State Reporter — who determines which portions are omitted for purposes of publication, and it is the Trial Judge who approves the decision for publication in its edited form.
- Under a program approved by the Court of Appeals, a limited number of opinions are being selected exclusively for publication in the New York Slip Opinion Service (www.courts.state.ny.us/reporter/Decisions.htm) and the New York Official Reports (NY-ORCSU) on Westlaw. These opinions are not edited for publication, and no headnotes are provided, but the opinions are classified by subject to the Official Reports Digest-Index classification scheme. Each opinion is assigned a unique Slip Opinion citation and pagination to permit point-page citations. An abstract of each opinion — providing the case name, authoring judge or justice name, jurisdiction, decision date, and Slip Opinion citation — will be published in the Advance Sheets.

VII. How Are Decisions Cited?

- The Official Reports are divided into three levels: the New York Reports [e.g., 74 NY2d 201], containing the decisions of the State's highest court, the Court of Appeals; the Appellate Division Reports [e.g., 252 AD2d 641]...
Frequently Asked Questions

156], containing the decisions of the State's four intermediate appellate level departments; and the Miscellaneous Reports [e.g., 178 Misc 2d
185], containing the decisions of trial level courts and the Appellate Term of the Supreme Court.

- All decisions published in the Official Reports are also assigned an official electronic citation number, in the form, e.g., 2001 NY Slip Op 00001. The initial number denotes the year that a decision is published. The second is a unique serial number assigned to each decision for that particular year. Citations for Unreported opinions have a "(U)" suffix, e.g., 2001 NY Slip Op 40001(U). Use this electronic citation for officially published cases which have not been assigned a permanent citation in the traditional "volume-report-page" form. To determine the electronic citation for a case, use the New York Slip Opinion Service.

VIII. Who Do I Contact Regarding a Subscription to the Official Reports?

- For Judges, correspondence regarding subscriptions should be addressed to:

  Law Reporting Bureau
  Attn: Sally Barker
  One Commerce Plaza
  Suite 1750
  Albany, NY 12210

- For everyone else, correspondence regarding subscriptions should be addressed to:

  West Group™
  610 Opperman Drive
  Eagan, MN 55123

IX. How Do I Get a Certified Copy of an Opinion?

- Provide the Official Reports citation for the opinion to the address listed in question I, above.
- You will be invoiced for a photocopying fee of 50 cents per page and a certification fee of 25 cents per opinion.
- Since certification requires coordination among several officials, please allow as much time as possible. For expedited delivery, provide your Federal Express or similar delivery service billing number with your request.
- If you intend to use the certified opinions in a foreign country, you may need an apostille from the Department of State. See www.dos.state.ny.us. We can obtain the apostille for you if you send us a check payable to the Department of State for the applicable fee.

http://www.courts.state.ny.us/reporter/FAQ.htm

11/8/2004
X. How Do I Get Permission to Copy an Opinion?

- Judiciary Law § 438 (Copyright of notes prepared by law reporting bureau) provides:

  "The copyright of the statement of facts, of the head notes and of all other notes or references prepared by the law reporting bureau must be taken by and shall be vested in the secretary of state for the benefit of the people of the state. The secretary of state is authorized by a writing filed in his office to grant to any person, firm or corporation, under such terms and conditions as he and the chief judge of the state of New York may determine to be for the best interests of the state, the right to publish the above mentioned copyrighted matter."

- Provide the Official Reports citation for the opinion to the address listed in question I, above.

- Your request should include the following information:
  - The purpose for which the copies will be used.
  - The number of copies to be made.
  - The time period in which the copies will be used.

- This office will coordinate with the Department of State on the processing of your request. If your request is approved, you will receive a license agreement that you will be asked to sign and return to the Department of State.

- Since permissions require coordination among several officials, please allow as much time as possible.

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New York State Law Reporting Bureau
One Commerce Plaza, Suite 1750, Albany NY 12210
phone: (518) 474-8211
fax: (518) 463-6869

Monday, November 8, 2004

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http://www.courts.state.ny.us/reporter/FAQ.htm

PA6E 186-5
Gary D. Spivey has presided over the New York State Law Reporting Bureau since his appointment as the 25th State Reporter on March 1, 1999. Mr. Spivey has been employed in the legal publishing industry for 30 years in a variety of editorial and executive management roles. He started his legal publishing career in 1970 as a legal editor with the Lawyers Cooperative Publishing Company (LCP) in Rochester, N.Y. and rose through the ranks to become Editor-in-Chief of the organization. In 1988, he became a director of LCP and the first President and CEO of LCP's electronic publishing subsidiary, Veralex Inc., which developed and distributed on-line, diskette and videodisc products. He came to the State Reporter position from the Shepard's Citations company in Colorado Springs, Colorado, where he served as Vice President, Electronic Product Development.

Mr. Spivey is a member of the New York and Federal bars and is chair of the ABA Intellectual Property Law Section's Committee on University Intellectual Property Law. He also is a Past President of the American Society of Writers on Legal Subjects. He is the author of numerous articles on a variety of legal subjects and has testified on a number of legal publishing industry issues before the U.S. Department of Justice, the Administrative Office of U.S. Courts, and the American Bar Association.

A native of Indiana, Mr. Spivey is a graduate of Indiana University and its School of Law, where he served as Managing Editor of the Indiana Law Journal. He is an Army veteran of the Vietnam War. He is a past President of the West Irondequoit, New York Board of Education and a former chair of the St. Margaret Mary Parish Council in Irondequoit. He and his wife, Miriam, a former special education teacher, are parents of three adult sons.

Mr. and Mrs. Spivey reside in Guilderland, N.Y.
Charles A. Ashe is a graduate of Cornell University (1969) and Syracuse University Law School (1972). He has served on the staff of the State Reporter as Senior Legal Editor since 1972. He was appointed Assistant State Reporter in 1982 and Deputy State Reporter in 1990. He was named as Interim State Reporter in December 1998 until the appointment of Gary D. Spivey as State Reporter in March 1999.

Mr. Ashe is a past President of the Association of Reporters of Judicial Decisions (ARJD), an international association of Reporters of officially published Court decisions, and has served on the Honors and Education Committees of that organization. He currently chairs the ARJD's Web site committee.
William J. Hooks is a graduate of LeMoyne College (1976) and Albany Law School (1979). Mr. Hooks began his employment with the Law Reporting Bureau as a Legal Editor in 1981. He was appointed Assistant State Reporter in 1990.

Mr. Hooks was admitted to the New York State Bar in 1980. He is a member of the New York State Bar Association and that organization's Intellectual Property section.
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Monday, November 8, 2004

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Selection of Opinions for Publication

Criteria for Selection of Opinions

A discussion of the rules and statutory criteria we follow in determining which cases are accepted for publication.

Format for Submission of Opinions

An explanation of the format in which opinions should be submitted to us for publication.

While the Law Reporting Bureau by statute is required to publish every opinion, memorandum and motion transmitted to it by the Court of Appeals and the Appellate Divisions, the State Reporter is authorized by statute to selectively publish Appellate Term and Trial Court opinions in the Miscellaneous Reports. Judiciary Law § 431 provides that the Law Reporting Bureau may report any lower court opinion which the "state reporter, with the approval of the court of appeals, considers worthy of being reported because of its usefulness as a precedent or its importance as a matter of public interest."

Judges transmit as many as 3,600 opinions each year to the Law Reporting Bureau for publication in the Miscellaneous Reports. Attorneys often submit Trial Court opinions for publication, and we will solicit from the authoring Judge interesting opinions which we read in the New York Law Journal and other legal publications. However, most of the lower court opinions which we receive each year are submitted by the Judges themselves.

We publish about 650 Appellate Term and Trial Court opinions in the Miscellaneous Reports each year. This constitutes approximately 20% of the opinions submitted for publication. In other words, only 1 in 5 opinions received is accepted for publication. That's not a high percentage, but it is a much greater number of trial court opinions than published in any other state. We understand that only two other States officially publish any trial court opinions — in a recent year Ohio published 89 opinions and Connecticut published fewer than 30 opinions.

Despite the fact that the Miscellaneous Reports cover lower courts, we take the selection process very seriously, recognizing the unique importance of the Miscellaneous Reports to our jurisprudence.

The Miscellaneous Reports are at the cutting edge of the judicial decision-making process.
process where the law concerning new issues entering the court system for the first
time is developed, exceptions to the broad rules established by the appellate courts
are devised, and practice issues unique to the Trial Courts are decided.

The Rules Concerning Publication of Opinions in the Miscellaneous Reports,
which are published at 22 NYCRR part 7300, elaborate on the statutory criteria —
precedential usefulness and public importance — for selection of opinions for the
Miscellaneous Reports.

These are:

- **Precedential significance.** We select all true "landmark" opinions which make a
  significant contribution to the law; and any which hold a statute
  unconstitutional or invalidate administrative regulations. We measure
  precedential significance by the holdings and matters necessarily decided —
  discussions constituting dicta do not meet our criteria. Some weight is given to
  the level of court in applying this criterion.

- **Novelty.** This includes opinions which deal with issues of first impression that
  are likely to be recurrent; which discuss developing areas of the law on which
  little has been written; which create exceptions to broad rules established at
  the appellate level, or which extend or clarify appellate case law.

- **Public importance.** We seek to select opinions of broad interest to the bar or to
  the public at large. These include significant attorney fee, disciplinary or ethics
  cases, as well as general interest cases such as the recent legislative pay
  decision.

- **Practical significance.** Includes opinions which address issues unique to trial
  court practice — discovery, evidence, spoliation, etc. As a further example, we
  have been selecting a high percentage of death penalty cases in order to build a
  more significant body of published case law for the guidance of trial courts on
  that important issue.

- **Subject matter diversity.** An attempt is made to publish opinions on a broad
  spectrum of legal issues.

- **Geographical diversity.** We try to publish opinions by courts from all regions
  of the State.

- **Author diversity.** An attempt is made to publish opinions by as many different
  judges as possible. In a recent year, of the 464 Judges who submitted opinions,
  331 had their opinions published. Some had multiple opinions published: 43
  had three or more; and 28 had five or more. However, in the interest of
  publishing worthy opinions from as many judges as possible, we must limit the
  number of otherwise worthy opinions selected from frequently-published
  judges.

- **Literary quality.** Preference is given to short (no more than 10 typewritten
  pages), concisely written opinions which focus on the issue or issues worthy of
  publication without recitation of nonessential facts or collateral issues or
  lengthy dissertations on well-known legal principles. In general, opinions

http://www.courts.state.ny.us/reporter/Selection.htm
longer than 15 typewritten pages will be accepted for publication only on condition that the authoring judge eliminates or summarizes discussion of collateral issues, well-known legal principles, and long quotations or statements of fact.

The Format Guides for submission of opinions are reproduced elsewhere on this Home Page. It is very helpful if a cover letter is provided to explain why the authoring judge believes the opinion to be worthy of publication. This helps us to zero in on the critical issues and to avoid overlooking significant points.

We invoke our partial publication rule (22 NYCRR 7300.5) to request Judges to delete portions of otherwise worthy opinions which do not meet our size criteria. This significantly tightens up the structure of the opinion, improves readability, and saves researchers considerable time by limiting the published version of the opinion to its precedentially significant portions.

By substantially reducing the length of published opinions, the partial publication rule allows us to publish greater numbers of lower court opinions within our budgetary ceiling of four Miscellaneous volumes per year. This enables us to publish the greatest possible number of Miscellaneous opinions containing the greatest variety of legal issues from the greatest possible number of Judges. The partial publication rule is invoked to shorten roughly ¾ of the lower court opinions which exceed 15 pages in length, resulting in an average length for partial publication cases of 4 to 8 pages.

When an opinion is edited for publication pursuant to our partial publication rule, it is the Trial Judge—not the State Reporter—who determines which portions of the opinion are omitted for purposes of publication and it is the Trial Judge who approves the opinion for publication in its edited form.

Generally, we are able to work with Trial Judges to suggest ways in which worthy, but excessively lengthy, opinions can be condensed for publication.

Despite our best efforts, we are not infallible in applying our selection criteria. Therefore, Judges may request reconsideration of any opinion not selected for publication. Additionally, the State Reporter’s Rules Concerning Publication of Opinions in the Miscellaneous Reports permit Trial Judges to appeal the rejection of an opinion to a Committee on Opinions, consisting of four Appellate Division Justices. This procedure has been invoked rarely, probably because we exercise our discretion reasonably and usually are able to publish occasional cases from most Judges who regularly submit opinions to us.

Under a program approved by the Court of Appeals, a limited number of opinions are being selected exclusively for publication in the New York Slip Opinion Service (www.courts.state.ny.us/reporter/Decisions.htm) and the New York Official Reports (NY-ORCSU) on Westlaw. These opinions are classified by subject to the Official Reports Digest-Index and are assigned a unique Slip Opinion citation and pagination to permit point-page citations. An abstract of each opinion—providing the case name, authoring judge or justice name, jurisdiction, decision date, and Slip Opinion citation—will be published in the Advance Sheets.
Format Guides for Submitting Lower Court Opinions in Electronic Format

- Submit each opinion as a separate e-mail attachment to reporter@courts.state.ny.us. If the authoring judge is not the person sending the opinion, he or she must be included as a recipient or carbon copy (CC:) recipient of the e-mail message.

- The regarding (Re:) line of the message should state: "Opinions Submitted Electronically."

- The body of the message should read as follows: "Attached hereto is the following opinion: [title of opinion], [court], [decision date], [full name of authoring Judge/Justice/Surrogate], saved as: [name of file]."

  For example: "Microsoft Corp. v Dell Computer Corp., Supreme Court, New York County, September 4, 2001, Judge Jane Doe, saved as: Microsoft123.wpd."

- The opinion must be in WordPerfect or Microsoft Word format. We are unable to accept Microsoft Word 2002 files (contained in Microsoft Office XP) at this time.

- All e-mail correspondence from the Law Reporting Bureau will be to the original sender of the submission message. If the sender would like multiple parties to be included in any e-mail correspondence, the additional parties should be addressed as recipients or carbon copy recipients (CC:) in the initial correspondence.

Return to Selection of Opinions page
STYLE I: OPINION WRITING STYLE

A. Writing Style

1. Clarity

The most challenging and enjoyable part of opinion writing is the prewriting phase, when the writer sorts out which side is right on which issues. The most boring part is the editing phase, when the writer clarifies sentences, paragraphs, and sections. The boring editing phase explains why clear opinion writing is not the norm. As important as clarity is to the reader, writing clearly is tedious to the writer. Justice Holmes noted this problem in a letter to diplomat Lewis Einstein: “One cannot be perfectly clear until the struggle with thought is over and you have got so far past the idea that it is almost a bore to state it.” (Correspondence of Mr. Justice Holmes and Lewis Einstein, 1903–1935, at 21 [James Bishop Peabody ed 1964].) Although writing clearly is painful, doing so is critical, especially in a judicial opinion, for “[t]he best opinion disdains high-falutin language, skips esoteric asides, avoids analytical meandering, discards marginally helpful research products and side themes, and hopes only to be understood.” (Richard B. Cappalli, Viewpoint, Improving Appellate Opinions, 83 Judicature 286, 321 [2000].) This subsection discusses a tedious but essential part of writing an opinion to be understood: clarity.

- Simplify the opinion by omitting unnecessary law, facts, and procedure. Cut clutter, redundancies, and extraneous words, thoughts, and points.

- Put essential things first, whether in sentences, paragraphs, or sections.

- Assume that your reader knows nothing about your case.

- Go from general to specific.

- Then be specific, more or less:

  - “Plaintiff made a sufficient showing for relief to be granted.” (What is “sufficient”?)

  - “The police had enough probable cause to arrest.” (What is “enough”? The police either had probable cause or they did not.)

- In general, do not generalize. To generalize is to omit. To generalize is to be lazy. To generalize is to be cowardly.

- Give the rule before you give the exception.
Give the rule and the exception in separate sentences.

Explain any exception you give. Do not simply write that exceptions exist. If you do not want to devote space to explaining exceptions, state your rules so precisely that they admit no exceptions.

Introduce before you explain.

Novices often discuss something before they lay a foundation for it. Your reader will not understand you if you discuss the written terms of a contract before you establish that the parties created a contract.

Prefer defined references to unattributed references. Prefer unattributed references to allusions.

A reference points to someone by name (George W. Bush) or by a principal claim to fame (President of the United States). An allusion is an indirect reference (the successor of the husband of the U.S. Senator from New York). Allusions flatter those who understand them. To promote clarity, opinion writers should define references: “George W. Bush, the President of the United States.” Unattributed references and allusions should be used only if the opinion writer is certain that the reader will comprehend them immediately.

But allusions done well can be brilliant. Alluding to President Lincoln’s Gettysburg Address, the Reverend King said, “Fivescore years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation.” (Reverend Dr. Martin Luther King Jr., I Have a Dream, August 28, 1963.)

Dovetail (a type of segue) to connect one sentence or paragraph to the next:

Move from old to new.

Move from short to long.

Move from simple to complex.

State the point before you give the details.

Raise the issue before you answer it.

Answer before you justify.
- Decide threshold issues before you decide the merits.
- Recite the facts; state the law; then apply the law to the facts.
- Stress issues, not legal authority.
  - Novices devote one paragraph after another to cases. Good writers organize by issues, not case law. Authority should be used to support conclusions within issues, not as an end in itself. Thus, cite authority as a separate sentence, after the stated proposition, to de-emphasize authority and to emphasize issues.
- Familiarize the reader with the person or entity before discussing what that person or entity did or did not do.
- Give the full names of people and entities the first time you mention them. Use a shorthand variant thereafter.
- Familiarize the reader with the concept before you discuss it.
- Familiarize the reader with the case before you draw an analogy or distinguish it.
- Define technical terms as you use them.
- Keep related matters together.
- Say it once, all in one place.
- Write only if you have something to say, so write first and talk second.
- Use small-scale transitions—concepts and words.
- Begin with an effective introduction that summarizes your case and the legal principles. That will give a roadmap to the rest of the opinion and help lawyers research better and faster.
- Use topic sentences and thesis paragraphs.
- Assure paragraph coherence by topic and person.
- If you must use acronyms, define acronyms before you use them.
- Give a full citation before you give a short-form citation.
- Put the parts of each sentence in logical order.
Move logically from one paragraph to the next.

Avoid, as if your writing depends on it, and often it does, intrusive phrases or clauses—like the two in this sentence.

Untangle complex conditionals and negative statements by writing in the affirmative:

- Actual sign at the judges' elevator bank at the Criminal Courts Building at 100 Centre Street in Manhattan: "NOTICE: USE OF THIS ELEVATOR IS RESTRICTED TO JUDGES ONLY." The sign means that anyone but a judge may use the judges' elevator.

- Overheard at the summer 2000 judicial conference: "All the judges are not here yet." The remark meant that no judge had arrived, although the speaker intended to say, "Some judges are still absent."

Make comparisons complete and logical.

Write for the ear, not for the eye.

Make your presentation pleasing to the eye.

Resolve ambiguity in words and sentences:

- "Come in. The door is open." (Is the door open or unlocked?)

- The legal profession is filled with readers in bad faith. Pharmacists who read ambiguously written prescriptions will telephone the prescribing physician to get clarification. But attorneys in adversary settings will read a judge's order or opinion to benefit their clients and not how the judge intended the order or opinion to read. Judges who write ambiguously invite readers to misinterpret them. In the end, "[g]ood legal writing should never leave the reader puzzled or guessing." (Irving Younger, Persuasive Writing 82 [1990].)

State whose position is being asserted.

- "Plaintiff moves for summary judgment because the facts are not in dispute."

  Becomes: "Plaintiff moves for summary judgment because, he argues, the facts are not in dispute."

Punctuate for clarity. Periods, commas, colons, semicolons, and hyphens have many uses. They divide text for readability and provide elegance and variety. They also promote clarity.
Hyphens: "Ten inch thick briefs" becomes, depending on what you mean, "Ten-inch-thick briefs" or "Ten inch-thick briefs." Consider the song about "purple people eaters." Without the hyphen between "purple" and "people," the song is about purple creatures that eat people. With the hyphen between "purple" and "people," the song is about creatures that eat purple people.

Commas: Judge: "I want to see Ms. X and her client and I will be in court all morning." Without a comma between "Ms. X" and "and" or between "client" and "and," the reader does not know whether the judge wants to see Ms. X and her client or whether the client and the judge will be in court all morning."

Serial commas: "The court clerk must file the stipulation, the court papers and the order and decision." Becomes: "The court clerk must file the stipulation, the court papers, and the order and decision."

Shun overspecificity. Overspecificity prevents the reader from distinguishing between the important, the less important, and the unimportant. Overspecificity also bores the reader.

Write directly, not indirectly:

Experts debate the effectiveness of indirect discourse. Loyal, disciplined soldiers close the windows when their commanding officer says, "This room is drafty." They do not wait for their commander to tell them to close the windows. Nor need a good commander issue a direct order. Conversely, polite children will say, "I'm hungry," not "Feed me now!" Solicitous parents feed a child who says, "I'm hungry." They do not wait for their child to say "Feed me now!" On the other hand, a child who gets no reaction from saying, "I'm hungry" will quickly learn to say "Feed me now!"

Whatever the merits of indirect speech among thoughtful, attentive people, opinion writers must prefer directness and clarity to politesse. Opinion readers should debate as little as possible the meaning of an order or a decision. Example: "Defendant is entitled to a fair trial." Becomes: "The People must turn over exculpatory material by 3:00 p.m. today."

Be not breezy. To be breezy is to digress. As Judge (and later Attorney General) Bell explained, "We must avoid the breezy manner; it reflects an absence of mental discipline." (Griffin B. Bell, Style in Judicial Writing, 15 J Pub L 214, 215 [1966].)

Use headings and subheadings to break up the text of a pure opinion that exceeds a few pages. Divide sections by procedure or issue or both. Make your headings brief and descriptive, or at least use figures or roman numerals if you use no text. If you use textual headings, make them bold. Do not all-capitalize, initial-capitalize, or underline headings. Simple trial opinions
written in the pure style may be divided into introductions, findings of fact, and conclusions of law. All pure opinions can profit from topical headings and journalistically styled informative phrases that break up the text.

One caveat: Headings and subheadings should relate to the text and not be invented simply to amuse. In *Young v Lymaugh* (821 F2d 1133, 1134 [5th Cir 1987, Goldberg, J.], cert denied 484 US 986 [1987]), the court opined that “the state has played procedural football” in a case in which defendant sought to set aside his guilty plea. On that premise the court’s headings included “The Players and the Background,” “Jurisdiction on the § 225(a) Playing Field,” “Illegal Motion,” and “The Final Score.” And in *City of Marshall v Bryant Air Conditioning Co.* (650 F2d 724 [5th Cir 1981, Goldberg, J.]), the court invented a reason to drum up musical headings like John Sebastian’s “Summer in the City,” The Beatles’ “We Can Work it Out,” and Burt Bacharach’s “Promises, Promises.”

Use concrete nouns, not abstract nouns, unless, as a persuasive-writing device, you wish to de-emphasize a point.

Abstract nouns convey intangibles: ideas and concepts (“justice,” “transportation,” “contact”). Concrete nouns describe tangibles (“Court Part 27,” not “justice”; “automobile,” not “transportation”; “wrote a letter,” not “contacted”).

Except in a memorandum opinion, in which the goal is be conclusory, the more concrete the opinion the better (“1966 souped-up Corvette,” not “automobile”).

Phrases should also be concrete: “After the accident, plaintiffs sought justice” becomes, if relevant, “Johnny Smith’s parents sued Jones after Jones’s 1966 souped-up Corvette struck five-year-old Johnny, who was riding his tricycle on a sidewalk in Central Park.”

Advocates may use abstract nouns to de-emphasize negative facts in persuasive writing. But good opinion writers are professionally fair, neutral, and impartial. They should write concretely as often as possible to prove impartiality—and to be clear, concise, and subtle.

Feature the subject. Every sentence has two parts: a subject and a predicate. A subject tells who or what the sentence is about. A predicate tells what the subject is or does. Failing to feature the subject in the first part of a sentence is a leading cause of incoherence and ambiguity in every form of writing.

“The books were returned when the trial was finished.” Becomes: “Judge Smith returned the books when she finished her trial.”
Exception: The subject need not be featured when the reader knows who the subject is and when the writer must write a memorable slogan. Example: “The King should not be allowed to tax us unless we can vote for our own representatives.” Becomes: “No taxation without representation.”

Use concrete, active, specific, and vigorous verbs. Verbs express action, condition, or state of being. Active verbs tell what the subject does. Prefer verbs to nouns. Express actions as verbs. Express agents of actions as the subjects of those verbs.

Study anything Ernest Hemingway wrote. See how many adjectives, adverbs, or conclusions he used. You will find few. He wrote to the bone. His writing is made up almost entirely of descriptions, concrete and specific nouns, and concrete, active, and vigorous verbs—all in simple, short sentences with familiar words. Hemingway’s illuminating and lean style led to the 1954 Nobel Prize for Literature. Opinions need not tell stories like Hemingway did, although many opinions can benefit from good storytelling. But opinion writers should copy Hemingway’s spare style.

Let there be no misunderstanding, and make no mistake: An occasional, well-placed adverb is necessary for style and effect. Article II, Section I, of the United States Constitution would be different without its adverbs: “I do solemnly swear (or affirm) that I will faithfully execute the office of President of the United States. . . .”

Some writers use complicated language, intentionally or not, to mask their lack of understanding of the subject. Others write turgidly because they want to impress, because they believe that people are supposed to write that way, or because they do not know better. They err. As Webster stated in 1849, “The power of a clear statement is the great power at the bar.” (Quote It! Memorable Legal Quotations 18 [Eugene C. Gerhart ed 1987, quoting Daniel Webster].)

Lavery explained it nearly 80 years ago: “[T]here is no man to whom that famous French proverb applies with so much truth and force as the lawyer—‘La clarté est la politesse.’” (Urban A. Lavery, The Language of the Law, 8 ABA J 169, 269 [May 1923] (“Clarity is polite.”).) Of course, he did not explain it well enough for the unilingual American lawyer. And his editor did not correct his misspelling of the French “clarté.” But Lavery’s article and its predecessor, The Language of the Law, 7 ABA J 277 (June 1921), are literary classics every student of the law should read.

Please don’t let me be misunderstood. Wilde was kidding when he wrote, “Remain, as I do, incomprehensible: to be great is to be misunderstood.” (Erik P. Belt, Concerned Readers v. Judicial Opinion Writers, 23 U Mich J Ref 463, 463 [1990], quoting Oscar Wilde.) President and later Chief Justice Taft wrote it right, though in the negative: “Don’t write so that you can be
understood; write so that you can’t be misunderstood.” (Harry Steinberg, Be a Better Lawyer by Being a Better Writer, NYLJ, Oct. 13, 2000, at 1, col 1, at 6, col 6, quoting William H. Taft.) If a smart high-school student gets your point, others will, too. One authoritative source put it comprehensibly: “The mark of a well-written opinion . . . is that it is comprehensible to an intelligent lay person.” (Federal Judicial Center, Judicial Writing Manual 6 [1991].) Recall the classics. They articulate complicated concepts in plain, simple language. That is why they became classics.

Cooper’s formulation can be made simple by featuring the subject, eliminating a throat clearer, cutting an expletive, trimming unnecessary punctuation, adhering to gender neutrality, and writing in the positive:

“One of the most certain evidences of a man of high breeding, is his simplicity of speech: a simplicity that is equally removed from vulgarity and exaggeration.” (James Fenimore Cooper, The American Democrat [1838].) Becomes: “Well-bred people speak simply, without vulgarity or exaggeration.” (Example inspired by Joseph M. Williams, Style: Ten Lessons in Clarity and Grace 6–7 [5th ed 1997].)

Orwell wrote the most influential essay on English style. (See George Orwell, Politics and the English Language in 4 The Collected Essays, Journalism and Letters of George Orwell [1968].) He argued that we can identify dishonest politicians and bureaucrats by their blank passives and nominalizations, which make language unclear. But in describing that unclear writing, Orwell used the same blank passives and nominalizations he condemned in others:

Orwell: “In addition, the passive voice is wherever possible used in preference to the active, and noun constructions are used instead of gerunds (by examination of instead of by examining).” Orwell rewritten: “In addition, dishonest and pretentious writers prefer the passive voice to the active and noun constructions to gerunds (by examination of instead of by examining).” (Example inspired by Joseph M. Williams, Style: Ten Lessons in Clarity and Grace 7–8 [5th ed 1997].)

Take the “plain English” movement seriously. Why write “a means of egress” and then define the phrase as “a way to get out” when you can write “a way to get out” or “exit”?

Note the power of earthiness, without foreign or polysyllabic words:

“A sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.” (City of Cleburne v Cleburne Living Ctr., 473 US 432, 468–469 [1985, Marshall, J., concurring in part & dissenting in part].)

Some plain-English advice written in plain English, from Justice Jackson: “The advocate . . . will master the short Saxon word that pierces the mind like a spear and the simple figure [of
speech] that lights the understanding. He will never drive the judge to his dictionary.” (Robert Jackson, *Advocacy Before the Supreme Court: Suggestions for Effective Case Presentations*, 37 ABA J 801, 863–864 [Nov. 1951].) One reason Justice Jackson wrote so well was that law school never tainted him: He never graduated from law school.

- For the power of plain English in opinion writing, read anything by Judge Richard Posner of the Seventh Circuit and Judge Alex Kozinski of the Ninth Circuit. Compare their work with this impenetrable, pathological legal esoterica: "Parens patriae cannot be ad fundandum jurisdictionem. The zoning question is res inter alias acta." (Mississippi Bluff Motel, Inc. v County of Rock Island, 96 Ill App 3d 31, 34, 420 NE2d 748, 751 [1981, Heiple, J.].) Then compare your writing to this memorable and clear distinction between intentional and negligent wrongs: "[E]ven a dog distinguishes between being stumbled over and being kicked." (Oliver Wendell Holmes, *The Common Law* 3 [1881].)

- Make your writing clear by counting words and syllables. On WordPerfect, go to “file,” then “properties,” and then “information” to see your “average word length” and “average words per sentence.” Word choice, simplicity of syntax (arrangement of words in a sentence), and word and syllable length determine whether your opinion is readable under the “readability scale” of Rudolf Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* 20–25 (1979). Under Flesch’s formula, comic books score a 92, the Harvard Law Review a 32, the Internal Revenue Code a minus 6. For a good study of semiotics, or communication effectiveness, in opinion writing, see S. Sidney Ulmer, *Supreme Court Opinions: Getting the Message*, 3 Law & Policy Q 263 (1981) (applying readability measurement for judicial opinions).

- Once you have counted syllables, how many should you have? From Harvard Law Professor Warren: “See to it that not less than sixty-six per cent of your words are words of one syllable, and that not less than eighty-three per cent are words of one or two syllables.” (Edward H. Warren, *Spartan Education* 31 [1942].)

- One result of lack of clarity: “[W]hen a dispute breaks out and the contract is susceptible of two interpretations, it will be construed against the author’s side (Evelyn Building Corp. v City of New York, 257 NY 501, 513 [1931]). This is an apt, legal punishment designed to fit the crime of Writing with Lack of Clarity in the First Degree.” (Albert M. Rosenblatt, *Lawyers as Wordsmiths*, 69 NY St B J 12, 12 [Nov. 1997].)

For more on this topic, see Gerald Lebovits, *The Legal Writer, Free at Last from Obscurity: Clarity—Part One*, 76 NY St B J 64 (Nov./Dec. 2003); Gerald Lebovits, *The Legal Writer, Free at Last from Obscurity: Clarity—Part Two*, 76 NY St B J 64 (Jan. 2004).

2. Plagiarism

The rules that prohibit plagiarism apply to everyone, including opinion writers, even though judges are immune under the Copyright Act for copying the work of others. Some would
amend the Federal Code of Judicial Conduct to make plagiarism in opinions an ethical offense. (See e.g. Jaime S. Dursht, Judicial Plagiarism: It May Be Fair Use but Is It Ethical?, 18 Cardozo L Rev 1253 [1996].)

Imitation is not the sincerest form of flattery. The difference between scholarship and plagiarism is a citation and quotation marks if you are quoting. Some avoid quoting because they fear plagiarizing. But quoting enhances opinion writing, so long as the quotations are limited to the germane and the authoritative and so long as the quotations are properly linked to text. And quoting avoids plagiarism; it does not cause it.

If you quote from or cite a source you did not find on your own and if you cannot verify the original, note both the original source and the source from which you found the material. Doing so vitiates any possible charge of plagiarism and puts the onus of error on the second source. Example: Referring to lawyers' writing, Sir Thomas More wrote that "its style is strange, and it cannot be understood." (Nancy A. Wanderer, Writing Better Opinions: Communicating with Candor, Clarity, and Style, 54 Maine L Rev 47, 62 [2002], citing Robert W. Benson, The End of Legalese: The Game is Over, 13 NYU Rev L & Soc Change 519, 520 [1984], quoting Thomas More, Utopia 106 [P. Turner trans, 1965, 1st ed Louvain 1516].) Many academics note the source from which they found material regardless whether they can verify the original. They do so to allow readers to trace material and to give credit where original research credit is due; sometimes they do so simply to bulk up footnotes, to engage in mutual self-citation, or to avoid being accused of plagiarism.

Few opinion writers go to such lengths. It is rare, for example, for an opinion writer to cite the secondary source for accessible primary authority like cases they discover through secondary authority like a law-review article. The only time that might be done is if the secondary authority adds weight to the primary authority, such as a Chief Judge Cardozo law-review article that cites a lower-court opinion. The decision in that circumstance to cite the Chief Judge's article is not suggested by ethics but instead by enhancing the force of the lower-court opinion by associating it with the Chief Judge. Example: (X v Y, 21 Misc 21, 22 [Mun Ct, NY County 1921], cited with approval in Benjamin N. Cardozo, Growth of the Law 21 [1924].)

Opinion writers also have the discretion to quote or cite, or not, primary authority that led them to other primary authority. Again, the reason to do so is not to be ethical but rather to add weight to a case to which a second, more authoritative case quotes or cites. Imagine that an old lower-court decision appears on point, but the holding is debatable. Imagine further that a high-court opinion supports your interpretation of the lower-court decision but that the high-court opinion is not on point. If the high-court case were on point, the opinion writer would cite only the high-court case. Because the high-court opinion is not on point, the opinion writer will want to cite both cases—the lower-court case because it is on point, the high-court case because it supports the writer's interpretation of the lower-court decision. This citation may take either of two forms, depending on how the pre-citation sentence is written: (X v Y, 21 Misc 21, 22 [Mun
Different rules apply to copying litigants' papers. Use the litigants' research but not their language or, if possible, their organization when drafting an opinion. Attorneys whose briefs are plagiarized will proudly tell their colleagues that "Judge X copied my brief verbatim," and the judge's reputation will suffer.

Exception: Quote the litigants' contentions to assure that their positions are recited accurately. Then make certain that the reader knows that the contentions are the litigants', not the court's.

Finally, shun chameleon writing, which adopts the winning litigant's style and changes from case to case. Lasky said it best:

"Then there is the opinion manufactured in what Judge Cardozo, I believe, called the 'style agglutinative,' by scissors and paste pot. In consequence, there are notable judges whose opinions vary both in style and legal attainment according to the brief of the party for whom they have decided to decide; the opinion consists of reassembled segments clipped from the prevailing briefs." (Moses Lasky, *Observing Appellate Opinions from Below the Bench*, 49 Cal L Rev 831, 831–832 [1961].)

3. I/We/The Court

Most trial and appellate (majority) judges (as opposed to concurring or dissenting appellate judges) prefer not to personalize opinions by using "I" or "this writer." Readers who see "me" in an opinion exclaim "Oh my!" The "I" sets one judge apart from other judges, appears to some readers to fulfill a need for self-gratification rather than to decide a case, puts the judge on the same level as the winning side, and becomes just one person's opinion—an opinion no better than the reader's. Instead of an "I," write "this court." It is wise, though, to use an occasional blank passive to avoid repeating "this court." Blank passive: "The hearing was held this morning." Active voice: "This court held the hearing this morning."

Trial opinions should not use the pompous, royal "we" or "us." Doing so is also inaccurate because a trial judge is singular. Appellate majority opinions written by one judge may use "we" or "us." Appellate concurrences and dissents, even when joined by others, should use "I," not "we" or "us." Appellate concurring and dissenting judges should not use "I" at every turn. Immature and self-absorbed writers write that way. But an "I" is better than circumlocutions that avoid it, such as "the present writer" and "the author." On the other hand, many "I" statements are unnecessary metadiscourse. It is obvious that many statements are opinion. Thus, the
instant stylist would strike the "I believe that" in "I believe that valid contracts require offer and acceptance."

"The court" is an "it," not a "he," "she," or "they."

The new New York Style Manual (Tanbook) requires that the "c" in "court" be capitalized only when the writer refers to the Appellate Division, the Court of Appeals, or the United States Supreme Court. To avoid confusion, distinguish between another court and the opinion’s author by writing "the court" when you mean another court, "the Court" when you mean the Court of Appeals or the Supreme Court, and "this court" when you mean yourself.

4. Reference to Litigants

Identify litigants by their names, by their legal relationship (landlord, tenant), or, on appeal, by their party-designation in first instance. The nature of some New York proceedings causes some confusion. Additional confusion results from New York’s peculiar way of referring to litigants. Assume, for example, that a landlord is a petitioner in the first go-round. If the landlord wins, the landlord becomes the respondent on appeal. After an appeal from Housing Court to the Appellate Term and then to the Appellate Division, a landlord can become a petitioner–respondent–petitioner. Unless a cross–appeal ensues. Then the landlord will be called "petitioner–respondent/cross–petitioner–petitioner/cross–respondent."

What can be more confusing than that? This: Before the New York Court of Appeals, the landlord becomes an “appellant” or “respondent.” The Judges of the Court of Appeals have the misfortune to call litigants “appellants” and “respondents.” Most appellate courts designate litigants “appellants” and “appellees” or, as in the U.S. Supreme Court, “petitioner” or “respondent.” But, then, most other American jurisdictions call their highest appellate court “Supreme Court” and their highest judge “Justice.” New Yorkers like to do things differently. In our example, a landlord who goes from Housing Court to the U.S. Supreme Court, cross–appealing at each step, will be called “petitioner–respondent/cross–petitioner–petitioner/cross–respondent–respondent/cross–appellant–petitioner/cross–respondent.” The moral? Call a “landlord” a “landlord.”

Write, “defendant argues,” not “counsel for defendant argues”; “defendant,” not "the defendant" or “Defendant.” But write “the People,” “the complaining witness.”

You should think twice before you use “you” in an opinion. Using the second-person pronoun “you” to refer to your reader is an excellent style in every form of writing but opinion writing. Y'all should know that using “you” is reader-directed. It keeps up a conversation with the reader. “You” is superior to “one,” which is impersonal and often pretentious. But in opinion writing, “you” constructions can personalize the opinion and lead to lecturing.

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Use a human litigant’s name only if the litigant is a child (then you may use a first name, unless principles of confidentiality apply) or if several litigants have the same name, lest your opinion become personalized. You may use witnesses’ names in your opinion.

Be careful about relatively similar labels, such as calling one litigant “the Corporation” and another “the Company.” If you label, use the same label throughout the opinion.

To the extent you can, and assuming you will not sacrifice clarity for tone, explain issues and resolve them without excessively identifying the litigants. If you identify the litigants too often, your reader will perceive your opinion as sarcastic or angry and thus not objective. Consider:

- “Equity requires that this court consider the facts.” (Active voice.) Or “Equity requires that the facts be considered.” (Double passive voice.) Rather than: “Given the equities, you [Mr. Smith, plaintiff, counsel for respondent] must consider the facts.”

- “The pleadings show no dispute over the material facts.” Rather than: “Mr. Smith incorrectly argues that the pleadings show a dispute over the material facts.”

5. Acronyms

An acronym is an abbreviation formed from the first letter of each word of a title.

Define terms and nouns you frequently use in your opinion: the New York City Police Department (NYPD).

Common acronyms do not need periods: (FBI).

Acronyms hang by a chad. Most, but not all, acronyms are capitalized. “Chad,” which is lowercased, stands for Card Hole Aggregate Debris.

Letters added to acronyms to form a word are not capitalized. For example, the “e” and “a” in “LeGaL” are lowercased because they are absent from the title from which the acronym LeGaL derives: Lesbian and Gay Law Association of Greater New York.

Do not turn a person’s name into an acronym. Thus, Cathy Glaser (Glaser) is unnecessary. Refer to “Glaser” as Glaser.

Quotation marks are not needed to set out the acronym. The New York Official Reports does not set out acronyms with quotation marks. Alpha Beta Company (“ABC”) becomes Alpha Beta Company (ABC).
A “the” need not precede an acronym enclosed by a parenthetical.

If you insist that quotation marks set out the acronym in the parenthetical and that a “the” precede the acronym, at least do not surrounded the “the” with quotation marks:

- The Office of Court Administration (“the OCA”). Becomes: The Office of Court Administration (the “OCA”).


Do not use “hereinafter referred to as” to describe the acronym.

Assure that the first reference fully identifies persons, statutes, cases, or things. Pay attention to that in your final edit.

Any article before an acronym must suit the acronym, not the original term: “A New York University student,” but “an NYU student.”

Use articles before an acronym in your text only when the acronym, if written in full in a sentence, calls for an article:

- Add “the”: “The OCA’s policy,” not “OCA’s policy.” (It is the Office of Court Administration.)

- Exception: Widespread usage sometimes requires you to delete the article before an acronym. Thus, “NASA’s space program,” not “The NASA’s space program.”

- Add “the”: “I work for the FBI,” not “I work for FBI.” (It is the Federal Bureau of Investigation.)

- Delete “the”: “I went to NYU,” not “I went to the NYU.” (It is New York University, not the New York University.)

- Delete “the”: “Gender neutrality in judicial-opinion writing is official OCA policy,” not “Gender neutrality in judicial-opinion writing is official the OCA policy.” (If the acronym “OCA” were written in full in the text, it would not take an article in this sentence.)

Well-known acronyms common in legal language need not be defined: “CPLR,” not “Civil Practice Law & Rules (CPLR).” When used as adjectives, acronyms need not be defined in your text: “U.S. Constitution.” Legal abbreviations need not be defined in citations.
6. Affirmative Writing

Clarity and honesty require that opinion writers write in the positive. As Second Department Justice Hopkins explained, "An affirmative statement is preferable to a negative one. The reader may doubt the scope of the negative." (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].) Consider this: Which is the better Golden Rule? "Do not do unto others what you would not want them to do unto you" or "Do unto others what you want them to do unto you"?

Getting to yes: Thou shalt not never use no double negatives.

Negative vibrations: The emphatic negative is a not-infrequent usage among legal writers:

- "Totally null and void and of no further force or effect." Becomes: "Void."

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."

Witkin calls this "[t]he double negative directive: Reversed for proceedings 'not inconsistent with this opinion.' Is this useful? Is this necessary? Is it a cliche which merely describes what happens anyway? Is it an excuse for not articulating the precise scope and effect of the decision?" (Bernard E. Witkin, Appellate Court Opinions: A Syllabus for Discussion at the Appellate Judges' Conference, 63 FRD 515, 561 [1974] [emphasis in the original]; accord 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."].)

A tip: Write the appellate opinion so clearly that the trial court will know how to comply with the appellate directive.

- "Do not appear in court before 9:30 a.m." Becomes: "Appear in court at 9:30 a.m. or later."
"The nonmonied spouse must not be prevented from . . .” Becomes: “The nonmonied spouse must be allowed to . . .”

"The judge displayed no reluctance in awarding substantial damages.” Becomes: “The judge readily awarded substantial damages.”

Prefer negational antonyms to negatives: “not true” becomes “false”; “not false” becomes “true.”

"Respondent was not present.” Becomes: “Respondent was absent.”

Watch out for negative words: “barely,” “denial,” “disapprove,” “except,” “hardly,” “neglect to,” “neither,” “never,” “nor,” “not,” “not unlike,” “other than,” “prohibit,” “provided that” “scarcely,” “terminate,” “unless,” “void.”

Watch out for negative prefixes and suffixes: “dis-,” “ex-,” “il-,” “im-,” “ir-,” “-less,” “mis-,” “non-,” “-out,” “un-.”

An affirmative tip. Orwell recommends memorizing this sentence: “A not unblack dog was chasing a not unsmall rabbit across a not ungreen field.” (George Orwell, Politics and the English Language in 4 The Collected Essays, Journalism and Letters of George Orwell 127, 138 [1968].)

Exceptions:

(i) Use litotes (ill-tow-tease) for quiet, negative emphasis:

X: “How are you?” Y: “Not bad.”

Note, however, that double negatives should be avoided unless they serve a strong purpose:

“Not unkind” becomes “kind.” “Not disinterested” becomes “interested.”

“I knew Jack Kennedy. Jack Kennedy was a friend of mine. And, Senator, you’re no Jack Kennedy.” (Lloyd Bentson to Dan Quayle, Vice Presidential Debate, 1988.)

“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.” (West Virginia Bd. of Educ. v Barnette, 319 US 624, 646 [1943, Frankfurter, J., dissenting] [opening line].)
"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." (Bondarchuk v Barber, 135 NJ Eq 334, 334, 38 A2d 872, 872 [1944, Jayne, V.C.] [opening line].)

(ii) Use meiosis, not to deceive, but to understate:

- "She is some trial judge."

- "Counsel was not wholly successful at trial. After a three-minute deliberation, the jury found her client guilty of all 106 counts in the indictment, and her client received the maximum jail term the law allows."

- "Justice Brandeis wrote a dissent or two in his lifetime."

(iii) Use hidden legal negatives, but do not overuse them:

- A "testimonial privilege" is a right not to testify.

- "Negligence" is the absence of due care.

- "Constructive," as in "eviction," "notice," or "possession," is not real but may be treated as real.

There can be doubt about this, and no one would suggest otherwise: Eliminate negative combinations: "never unless," "none unless," "not ever," "not otherwise," "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."

"But" in a negative sense. Is it "No one but she" or "No one but her"? When "but" is a preposition ("except"), it is "her" or "him." When "but" is a conjunction, it is "she" or "he."

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."
"I do not own but one CPLR." Becomes: "I own but one CPLR." Or "I own only one CPLR." Or "I own one CPLR."

Use "not" as a negative, not as a positive.

"Counselor, I need to know whether you cannot go to trial." Becomes: "Counselor, I need to know whether you can go to trial."

Do you care about this?

"The court officer could care less who her sergeant would be." Becomes: "The court officer could not care less who her sergeant would be."

Negative measurements do not add up:

"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." And "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 $10.00. Borrower: "I do not owe you $10.00." This suggests that the borrower admits owing some money, though less than $10.00. The borrower should have said, "I do not owe you anything."

Media: "Have you ever committed a crime?" Answer by a candidate during the 1999 Republican Primaries: "I have not committed a felony in 25 years." With that answer the candidate allowed for the possibility that he committed either a felony over 25 years ago or a misdemeanor some other time in his life.

Affirmative pregnant. An "affirmative pregnant" is a deadly negative:

Lender: "You owe me $10.00. Borrower: "I paid you $5.00." This suggests that the borrower admits owing $5.00. The borrower should have said, "I owed you only $5.00, which I paid."

Never-never land. "Never" means "not ever."
- "I never made that argument last July." *Becomes:* "I did not make that argument last July."

Not only . . . but also. Profit from parallel structure:

- "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? Sue me! Most (but not all) experts advise using "so . . . as" in negative combinations: "The prosecutor is not so clever as the defendant." All experts advise using "as . . . as" in positive combinations: "The prosecutor is as clever as the defendant."

No news is not good news. Be careful where you place "not" in a sentence:

- "Not everyone is a good writer." *Means:* "Some write well and some do not write well."

Every and all negatives. The sentence "Everyone does not write well" is ambiguous. It means *either* "Some write well and some do not write well" or "No one writes well." This sentence is also ambiguous: "All these cases are not applicable." It means that "Not a single case is applicable," but the writer meant, "One or more of these cases is inapplicable."

Not/because. Do not place a "not" before a "because." Doing so allows for the possibility that you mean the opposite of what you say or that a different explanation is possible.

- "I will *not* write this opinion *because* I am tired." *May mean:* "I will not write this opinion, 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.

- "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 might be critical” or that “the factor is not critical”? This “if not” construction should be stricken. If not, your writing will be ambiguous.

Drop double positives, not just double negatives:

- “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 . . .”

- Rule: Do not use two imperatives in one sentence. Use only one “requires,” “must,” or “should.”

Many legal expressions are ambiguously framed in the negative. Use them and you will be found guilty as charged. For example, “Not guilty beyond a reasonable doubt” becomes “Not found guilty beyond a reasonable doubt.”

Another requirement. Watch out for “requirement.” Novices 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 novice does not complete the sentence. Consider this oft-seen sentence: “The Penal Law requires that the People prove defendant’s guilt.” The Penal Law does not impose that obligation. Were the Penal Law 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.

Writers should write for the ear, not the eye. But apply the smell test on the subject of negatives. That is, when it comes to “no’s,” the nose knows best.

For more on this topic, see Gerald Lebovits, The Legal Writer, Getting to Yes: Affirmative Writing, 73 NY St BJ 64 (Oct. 2001).

7. Tense

State current rules in the present tense.

State past rules and past facts in the past tense.
State permanent, immutable truths (truths that never change) in dependent clauses in the present tense.

State permanent truths in independent clauses in the past tense.

Examples:

- Past fact, present rule: “The court held in X. v Y. that the rule against perpetuities is still alive.”

- Past fact, past rule: “Until A. v B. was reversed, the rule in New York was that . . . .”

- Past fact: “The suspect ran [not runs] from the police.”

- Past and still-valid rule: “This court has held that . . . .”

- Past but no-longer-valid rule: “This court had held that . . . .”

- Past fact, permanent truth in dependant clause: “Albert Einstein proved that $E = mc^2$.”

- Past fact, permanent truth not in dependent clause: “Albany was where Chief Judge Cooke presided.”

When quoting indirectly, the quotation goes in the past tense.

- Direct quotation: “Judge X said, ‘I am deciding the case today.’”

- Indirect quotation: “Judge X said that he was deciding the case today.”

Tense shifts lead to incoherence: “Last year the majority applied the Fourteenth Amendment, but the dissent argued that the majority was [not is] wrong.”

Discard the double past.

- “I was a former prosecutor.” Becomes: “I am a former prosecutor.” Or “I was a prosecutor.”

Has, had:

- The retrospective present (present perfect) refers to a past action that extends to the present.
“He had died.” No. Unless he was reborn. Correct: “He died.”

“We have finished the opinion” refers to something begun in the past but which recently concluded. Use “We finished the opinion” to refer to something concluded in the remote past.

“If Judge X would have been more patient, she would not have been reversed.” Becomes: “If Judge X had been more patient, she would not have been reversed.” Or, better, “If Judge X had been more patient, she would have been affirmed.”

You had better get this right. In “You Better, You Bet,” the Who conversationally sang “You better, you better, you bet.” Formally sung, it is “You had better, you had better, you bet.”

You have got to get this right. The Beatles sang conversationally using the lyrics “I got to get you into my life.” Formally sung, it is “I have got to get you into my life” or, better, “I have to get you into my life.”

Note, however, that “I have got no memory for case law” becomes “I have no memory for case law.”

Correct use of “having done”: “Someone must have traduced Joseph K., for without having done anything wrong he was arrested one fine morning.” (Franz Kafka, The Trial 3 [Willa and Edwin Muir trans, 1937] [opening line].)

Was, were:

The subjunctive “were.” “If he were” introduces a falsity. Do you recall Tim Hardin’s song, “If I were a carpenter, and you were a lady”?

“If the law clerk were a good writer [read: he is a poor writer], he would leave his ego at the door and let me edit his work.”

“If I were a rich man . . . [read: I am a poor man].” (From Fiddler on the Roof [Tevye].)

Simon & Garfunkel used poetic license but erred in their hit, “Homeward Bound.” They should not have sung, “I wish I was homeward bound.”

Use “was” in an “if” clause not contrary to fact:

“If the witness were lying, the judge did not see it.” Becomes: “If the witness was lying, the judge did not see it.”
When a clause introduced by “if” is a condition, whether true or not, use the indicative mood, which takes things as fact. Correct: “If the law clerk was [not were] not at her desk, she was probably in the library.”

-Ed:

-“Teenage boy” becomes “Teenaged boy.”

-“Middle-age referee” becomes “Middle-aged referee.”

-“Ice tea” becomes “Iced tea.” (The rapper is “Ice-T,” but the drink has a “d.”)

-But: “Ice cream.” (Written correctly it should be “iced cream,” not “ice cream.” People eat the ice of the cream, not the cream of the ice. But the mispronunciation has now become standard. You will get the cold shoulder and icy stares if you write “iced cream.”)

Shall, will, should, would in the first, second, and third persons:

- Affected Americans and the educated British distinguish between “shall” and “will” and between “should” and “would.” Think of Her Royal Majesty’s Naval Commander Bond, James Bond: “I should like my martini shaken, not stirred.”

-In the first person, “shall” is used to express a prediction or intention: “I [or we] shall write the opinion tomorrow.” In all other persons, “will” is used to express a prediction or intention: “They will write their opinion tomorrow.”

-Similarly, “should” is used in the first person to express a preference: “I [or we] should like to write the opinion tomorrow.” “Would” is used in all other persons to express a preference: “They would like to write their opinion tomorrow.”

-In America today, the distinctions by person between “shall” and “will” and between “should” and “would” sound pretentious. “Will” and “would” are used for all persons—and by all but the affected. In opinion writing, “will” will do and “would” should suffice.

For more on this subject, see Gerald Lebovits, The Legal Writer, If I Were a Lawyer: Tense in Legal Writing, 74 NY St BJ 64 (Nov./Dec. 2002).
B. Literary Style

1. Attic Style vs. Asiatic Style

According to Bryan A. Garner, The Elements of Legal Style 3-15 (1991), the florid, oratorical, intricate style, best exemplified in recent American opinion writing by Justice Benjamin Cardozo, is called Asiatic prose. Attic prose, seen in Justice Oliver Wendell Holmes's opinions, is concise, simple, and plain—but as memorable as Justice Cardozo's Asiatic prose.

Nearly all modern opinion and legal writers use Attic prose. Professor (and, later, Second Circuit Judge) Jerome Frank led the modern trend against Asiatic writing. He contended, anonymously, that Justice Cardozo wrote "of 20th-century America not in the idiom of today but in a style that employed the obsolescent 'King's English' of two hundred years ago." (Anon Y. Mous, The Speech of Judges: A Dissenting Opinion, 29 Va L Rev 625, 630 [1943].) Judge Frank minced no words: "Of Cardozo one might say this: He admitted that, at times, he wrote with his tongue in his cheek. And, frequently, it was not even in his native tongue." (Id. at 641.) Finishing off Justice Cardozo's showy style was Professor Llewellyn, who argued that Cardozo's "creaking ornament and oversubtle phrasing chiefly flourish" where Cardozo is "off-base." (Karl N. Llewellyn, The Common Law Tradition: Deciding Appeals 37 [1960].)

Chief Judge Cardozo penned a memorable line about the obligations of trustees: "Not honesty alone, but the punctilio of an honor the most sensitive . . . ." (Meinhard v Salmon, 249 NY 458, 464 [1928].) But what did he mean? The three Judges who dissented in Meinhard did not know either. Neither did the great Professor (and Acting New York State Supreme Court Justice) Younger, who wrote that "Cardozo had a unique and impressive style, but all too often he was unclear, and clarity is perhaps the chief virtue legal prose should possess." (Irving Younger, Persuasive Writing 82 [1990].) Quoting at length the almost impenetrable analysis in Palsgraf v LIRR Co. (248 NY 339 [1928]), Justice George agreed with Younger: "Justice Cardozo's writing had a tendency to overestimate the reader's grasp of the subject . . . ., and his concepts often required two or three readings before the reader could digest the meaning." (Joyce J. George, Judicial Opinion Writing Handbook 330 [3d ed 1993].)

Most modern opinion writers, including those on the New York State Court of Appeals and those on most Appellate Division departments, now attempt a plain-writing style consistent with the neoformalist, legal process school "pure style" of organization and analysis. Cardozo is still quoted and cited, however. His style is passé but not forgotten. In a Millennium survey, 60 law-school deans ranked Cardozo the twentieth century's second best judicial writer, behind Justice Holmes. (Today's News Update, NYLJ, Dec. 28, 1999, at 1, col 1.) Part of Cardozo's reputation as a writer comes from his extra-judicial writings. His Nature of the Judicial Process (1921) and Growth of the Law (1924) should be required reading for all judges. They, with his 1925 Law and Literature article from the Yale Review, The Paradoxes of Legal Science (1928), and an address, Jurisprudence (1932), can be found in Selected Writings of Benjamin Nathan
Cardozo: The Choice of Tycho Brahe (Margaret E. Hall ed 1947). Chief Judge Kaye had this to say about Chief Judge Cardozo’s writing:

“People differ about the ‘architectonics’ (Cardozo’s word) of his opinions—there is a hearty band on both sides of this issue. But whether one’s literary taste runs to the florid or the frugal, Cardozo is without doubt among America’s most quotable judges.

“. . . .

“Today’s judges need not copy Cardozo’s ornate style flourish for flourish. What tripped off the tongue seventy years ago sometimes sticks in the throat today. Yet appellate judges must struggle to find the elusive phrase, the expression that will capture and fix the principle that controls the case. To make a rule and make it memorable: this occurs only at the intersection of law and literature, a juncture Cardozo—but few other judges—frequented.” (Judith S. Kaye, Cardozo: A Law Classic, 112 Harv L Rev 1026, 1036, 1045 [1999] [footnote omitted], reviewing Andrew L. Kaufman, Cardozo [1998].)

Master the art of lucid, clear writing before you experiment as a stylist. You cannot err if you are matter-of-fact, businesslike, and professional. Many will appreciate the workaday qualities Witkin extolls:

“Some judges feel they lack the skills; they assume that since they are not professionally trained editors they cannot edit. This would be true enough if the subject matter were a Cardozo-Holmes-Marshall blend of profound legal philosophy and superlative rhetoric. Luckily such opinions hit us infrequently; lawyers could not stomach a consistent stream of such stuff and could scarcely practice law by it. What we need is workmanlike writing—clear, concise, and readable. And it takes no literary genius or years of experience as a professional editor to produce this.” (Bernard E. Witkin, Manual on Appellate Court Opinions § 51, at 83 [1977].)

Students of legal writing may debate the virtues of stylistics, but judicial writing style matters. (See Richard A. Posner, Judges’ Writing Styles (And Do They Matter?), 62 U Chi L Rev 1421 [1995] [recommending “impure” style]; Patricia Wald, A Reply to Judge Posner, 62 U Chi L Rev 1451 [1995].) Style is one of the factors that govern the frequency with which your opinion will be cited, remembered, and followed.
Develop your own style. No one style represents the ideal. Your style will command attention if you do not bore the reader. No longer does the legal profession prefer solemn, stuffy, ponderous judicial writing. Be serious, but interest your reader. Then press your reader forward, with restraint focused on substance. As one commentator explained, an opinion “can afford to be literary if done with restraint, but I dare add the assertion that more often than not its length will add nothing at all to its substance.” (Moses Lasky, A Return to the Observatory Below the Bench, 19 Sw LJ 679, 685 [1965].)

Not all agree that judicial opinions should be “objects of aesthetic pleasure.” (Frederick Schauer, Opinions as Rules, 62 U Chi L Rev 1455, 1456 [1995].) Some, like Professor Schauer, see no “profound difference between statutes and judicial opinions.” (Id. at 1455.) To Schauer, an opinion is just fine if it resembles the Internal Revenue Code: “[I]n law, as in life, dull may sometimes have its uses.” (Id. at 1475.) And others, like Professor Cappalli, favor pedestrian virtues:

“Rhetoric need not be utilized for its power of persuasion because, right or wrong, the precedent binds. The appellate court’s primary duty is to reason and write clearly and succinctly, with constant vigilance against future misreadings and distortions. This duty can be executed quite well with pedestrian English and only mildly sophisticated reasoning.” (Richard B. Cappalli, Viewpoint, Improving Appellate Opinions, 83 Judicature 286, 286 [2000].)

But Schauer and Cappalli are decidedly in the minority. Nearly all the commentators believe that opinions should be more than pedestrian and that they should never resemble the Tax Code, for “aesthetics are important.” (William L. Reynolds, Judicial Process in a Nutshell 12 [2d ed 1991].) To do justice, “[c]raftsmanship—the manner in which the court goes about its decision-making process—matters. Sloppy procedures and sloppy methods of making decisions lead to sloppy decisions.” (Id.) The author of a boring opinion is not a stylist. Boring writers will not be read; their opinions will be forgotten.

Avoiding errors will not alone make an opinion writer a stylist. It is not enough to use good grammar and proper punctuation and to be clear and concise. What makes an opinion writer a stylist is an effective, engaging, entertaining style that combines variety and force and elegance in simple, readable, error-free prose. New Jersey Supreme Court Justice Handler explained it well:

“[T]he judicial opinion, as one of the most prominent manifestations of judicial authority, must do double duty. It must both resolve the case at hand correctly and, beyond, be an exemplar of judicial responsibility and fulfillment. Judicial writing cannot shoulder this weight unless it possesses that suppleness of
art and strength of rhetoric found in all great writing.” (Alan B.
Handler, A Matter of Opinion, 15 Rutgers LJ 1 [1983].)

2. **Ineffective Devices**

A figure of speech is an ornamental use of language. In a large sense, most rhetorical
devices are figures of speech. A figure may be a scheme, which emphasizes the figure’s
appearance in the page. An example of a scheme is James Joyce’s chalice in “Portrait of the
Artist as a Young Man.” Schemes are unknown in opinion writing except when the writer uses
an artificial device like italics. A figure may also be a trope, which emphasizes the meaning of the
figure to suggest something different from what is said. Some figures work; some fail; most work
only if done well. The next two sections explore figures of speech and rhetorical devices.

Shun oxymorons, mixed metaphors, clichés, rhyme, annoying alliteration, cacophony
(harsh and discordant language; the opposite of pleasing euphony), puns, rhetorical questions,
hyperbole, exaggeration, adages and proverbs, and repetitive lilts.

a. **Oxymorons**

It is a sure bet, say some amateur experts, that an oxymoron will combine two
contradictory words.

- “The sweet sadness of Petitioner’s silent oxymoron thundered.”

Some would-be oxymorons are not oxymorons at all. There is “military intelligence.”
Large shrimp are “jumbo shrimp.”

Prefer the plural “oxymorons” to “oxymora.”

b. **Mixed Metaphors**

Do not mix your drinks or your metaphors. Mixed metaphors are a pain in the neck.
Throw them out the window! Even a mixed metaphor that sings should be derailed. Mixed
metaphors are like not letting your right hand know that it is lucky to break a leg.

Mixed metaphors result from stringing clichés. If you do not use clichés, you will not mix
metaphors.

c. **Clichés**

Clichés come in two forms: rhetorical and proverbial. Rhetorical clichés are popular
because of their short-hand wisdom and catchy sounds. Proverbial clichés are metaphorical
(“apple of his eye,” “apple does not fall far from the tree”).

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As a general rule, last, but certainly not least, knock off clichés. Avoid them like the plague. They are so beyond the pale that they are old hat. Clichés go unread and mark the writer as a copier with limited independent thought. The word “cliché” comes from the French “clicher,” to stereotype. But sometimes, as explained below, clichés are just the ticket—if you twist them, if they are not stale, if the metaphor is not dead, or if they work rhetorically. After all, clichés are not carved in shale.

The law has more clichés than you can shake a stick at. Avoidable, banal legal clichés include “all things considered,” “at first blush,” “between Scylla and Charybdis,” “blissful ignorance,” “by the same token,” “clean slate,” “clear as mud,” “cold light of reason,” “day of reckoning,” “distinction without a difference,” “exercise in futility,” “eminently qualified,” “exception that proves the rule,” “fall on deaf ears,” “follow in footsteps,” “foregone conclusion,” “frame of reference,” “from the sublime to the ridiculous,” “garden-variety case,” “grievous error,” “height of absurdity,” “in the same boat,” “it goes without saying,” “just deserts,” “keep one’s options open,” “landmark case,” “last-ditch effort,” “leave no stone unturned,” “left up in the air,” “lock, stock, and barrel,” “making a mountain out of a molehill,” “matter of life and death,” “mind set,” “moment of truth,” “momentous decision,” “nip in the bud,” “none the wiser,” “in no uncertain terms,” “no-win situation,” “one and the same,” “open and shut,” “painting with a broad brush,” “paramount importance,” “part and parcel,” “powers that be,” “pros and cons,” “pull no punches,” “pure and simple,” “remedy the situation,” “search far and wide,” “seat of justice,” “six of one, half dozen of the other,” “sum and substance,” “sweeping changes,” “the rub,” “tip of the iceberg,” “trials and tribulations,” “unimpeachable authority,” “viable alternative,” “wait and see,” “wheels of justice,” “woefully inadequate,” “wreak havoc,” “writing on a clean slate.”

As one ABA committee advised, “Avoid trite and hackneyed phrases such as ‘well-settled’ and ‘constrained to hold.’” (American Bar Association, Section on Judicial Administration, Committee Report, *Internal Operating Procedures of Appellate Courts* 37 [1961].) The phrases “well-settled” and “well settled” are especially hackneyed. A Westlaw check of May 31, 2002, disclosed exactly 10,000 times—the maximum number of hits possible for a Westlaw search—that New York courts have used them in officially published opinions. (There would have been more, but a Westlaw search stops at 10,000.) Chief Justice David J. Dixon of the Missouri Court of Appeals, Kansas City District, in *Lexicon for Appellate Judges* (NYU Appellate Judges Seminar 1973), reprinted in Robert A. Leflar, *Appellate Judicial Opinions* 193, 193–195 (1974), explained what goes through judges’ minds when they use phrases like “well settled,” “no citation of authority is necessary,” and “we need not dwell on the contention of counsel”:

“I am about to apply stare decisis and although the result in this case may seem absurd, it is unnecessary to give any reason.”

“I have an appointment at the Rotary Club to speak on the ‘Integrity of Judicial Opinions’ and my law clerk has been so busy getting my wife’s anniversary present, he has not had time to find any analogous authority.”
"The lawyer has skewered you and you need to get off the hook."

But Chief Justice Dixon also noted that using these expressions will not cause much trouble: "You can rest assured that if you utilize these expressions, your opinions will look like most opinions. Never mind the carping of law professors and their stooges on the Law Review." (Id. at 195.)

Exceptions:

- Twisting a cliché is effective:
  - "To add insult to perjury . . . ."
  - "An unwritten law isn’t worth the paper it isn’t written on."
  - Note that the adage "A verbal contract isn’t worth the paper it’s written on" is illogical. "Verbal" relates to words, oral or written.
  - "No truer words were ever silenced."
  - "Tried and untrue."
  - "Bankruptcy is a fate worse than debt."

Clichés are effective as rhetorical devices when used as word-play to argue the truth:

- Atticus Finch closing to the jury, arguing that whites falsely accused his African–American client of rape: "This case is as simple as black and white." (Harper Lee, To Kill a Mockingbird 205 [1960].)

For more on this subject, see Gerald Lebovits, The Legal Writer, Writing on a Clean Slate: Clichés and Puns, 75 NY St BJ 64 (Mar./Apr. 2003).

d. Rhyming

Rhyme, however clever, wastes time. Rhyming is juvenile and almost always fails. With few exceptions, opinions in rhyme contain little reason. Words that come this close to rhyming are just as bad:

- "President Washington set a two-term precedent."

e. Comparisons
Comparisons are as bad as clichés, except, in legal writing, when comparing the facts in case-law authority to the facts of your case.

f. Alliteration & Assonance

Always avoid annoying alliteration—lest you become a nattering nabob of negativism.

Alliteration is the repetition of consonant sounds. Assonance is the repetition of vowel sounds.

Is the following effective? No. It proves that “[a]lliteration . . . is a novice’s toy.” (H.W. Fowler and F.G. Fowler, The King’s English 292 [3d ed 1930].)

“A man to match the momentous need . . . [who has] demonstrated courage in crisis from Caracas to the Kremlin, . . . a fighter for freedom, a pilgrim for peace.” (Governor Mark Hatfield nominating Richard Nixon for President.)

“No Room At The Inn.’ Titled thusly, this tristful tale takes this tribunal into deciding if the alleged failure of the Hilton Hotels Corp. to provide plaintiffs with a hotel room pursuant to a guaranteed reservation constitutes a breach of contract or a tort arising out of a contract.” (Brown v Hilton Hotels Corp., 133 Ga App 286, 286, 211 SE2d 125, 126 [Ga Ct App 1974, Clark, J.] [footnote omitted].)

“Personal prefatory pensive ponderings, such as the foregoing, recognizably play partial part in this court’s eventual decision.” (Kingston Dev. Co., Inc. v Kenerly, 132 Ga App 346, 346, 208 SE2d 118, 119 [Ga Ct App 1974, Clark, J.] [footnote omitted].)

But subtle alliteration, if used sparingly, can be effective:

“The life of the law has not been logic; it has been experience.” (Oliver Wendell Holmes, The Common Law 5 [1881].) Notice the “l” sounds: “life,” “law,” and “logic.”

“Full and free discussion has indeed been the first article of our faith.” (Dennis v United States, 341 US 494, 584 [Douglas, J., dissenting].) Notice the “f” sounds: “full,” “free,” “first,” and “faith.”

“Silence is precious because it creates the possibility of privacy within public occasions.” (Amicus Brief of the United States in Wallace v Jaffree, 472 US 38 [1985].) Notice the “p” sounds: “precious,” “possibility,” “privacy,” and “public.”
Notice the soft “s” sounds: “silence,” “precious,” “creates,” “possibility,” “privacy,” and “occasions.” But especially notice the “sh” sound, which—even more than the author’s soft “s” sounds—plays on the theme of “silence”: “precious” and “occasions.”

- “[E]very bequest is but a bounty, and a bounty must be taken as it is given.” (Hunter v Bryant, 15 US 32, 37 [1817, Johnson, J.].)

- “Moral turpitude is not a touchstone of taxability.” (Commr. of Internal Rev. v Wilcox, 327 US 404, 408 [1946, Murphy, J.].)

**g. Rhetorical Questions**

Who needs rhetorical questions?

May you use this device occasionally if you are certain that a skeptical reader will not supply an unanticipated answer; if your entire goal is to make the reader think and you do not care about convincing anyone of anything; or if you enjoy befuddling? Yes, if you are Clarence Darrow.

The reason that rhetorical questions are ineffective is that opinion writers should answer questions, not pose them except as issues. Rhetorical questions allow for miscommunication. Opinion writers should state their points confidently and directly, without ambiguity.

Some writers believe that a good way to involve their readers is to ask them questions. Do you agree?

**h. Puns**

Is it funny to be punny? Puns are for children, not groan readers. If you inflict cruel and unusual pun-ishment, you might be sent to jail until you end your sentence with a preposition.

- “A good pun is its own reward.”

- “This is a case without appeal.”

- “Old lawyers never die. They just lose their appeal.” (Saying on countless coffee mugs and T-shirts.)

- “There is no justice on the New York State Court of Appeals. Only Judges preside there.”

Only exceptionally clever and original puns, used rarely, are acceptable in opinions:
“Ticonic’s cloth cannot be cut to fit InterFirst’s suit.” (InterFirst Bank Abilene, N.A. v FDIC, 777 F2d 1092, 1097 [5th Cir 1985, Jones, J.], citing Ticonic Natl. Bank v Sprague, 303 US 406 [1938].)

“Defendant, charged with petit larceny, suffers from kleptomania. When it gets bad, he takes something for it.”

“Defendant, charged with forging U.S. currency, has proven yet again that imitation is the sincerest form of flattery.”

Do you like these puns? The first is funny and insults no one. The second proves that over-used and obvious puns are the lowest form of humor. The third is childish and mean.

“And the bizarre element is the facially implausible—some might say unappetizing—contention that the man whose chicken is ‘finger-lickin' good’ has unclean hands ... We find a kernel of truth in all Kentucky Fried’s contentions and therefore affirm.” (Kentucky Fried Chicken Corp. v Diversified Packaging Corp., 549 F2d 368, 372, 374 [5th Cir 1977, Goldberg, J.].)


“Is a girdle a burglar’s tool or is that stretching the plain meaning of section 140.35 of the Penal Law? This elastic issue of first impression arises out of a charge that the respondent shoplifted certain items from Macy’s Department Store by dropping them into her girdle.

“Basically, Corporation Counsel argues that respondent used her girdle as a kangaroo does her pouch, thus adapting it beyond its maiden form.

“The Law Guardian snaps back charging that with this artificial expansion of section 140.35’s meaning, the foundation of Corporation Counsel’s argument plainly sags.

“The court has decided this issue mindful of the heavy burden that a contrary decision would place upon retail merchants. Thus is avoided the real bind of having customers check not only their packages, but their girdles too, at the department store’s door.
"The court must also wonder whether such a contrary decision would not create a spate of unreasonable bulges that would let loose the floodgates of stop and frisk cases, with the result of putting the squeeze on court resources already overextended in this era of trim governmental budgets."

A grocery worker claimed sex discrimination. The First Circuit's conclusion: "Having taken stock of plaintiff's case, we find the shelves to be bare." (Mack v Great Atl. & Pac. Tea Co., 871 F2d 179, 187 [1st Cir 1989, Selya, J.].)

How do you spell R-O-L-A-I-D-S? In an opinion that considered whether the U.S. Department of Agriculture’s Food and Nutrition Service properly fined the Commonwealth of Massachusetts, the First Circuit used the following puns:

"Finding the penalty hard to swallow, the Commonwealth serves up a gallimaufry of issues for appellate mastication. Although these issues contain some food for thought, they lack true nutritive value." (Massachusetts, Dept. of Public Welfare v Sec. of Agriculture, 984 F2d 514, 518 [1st Cir 1993, Selya, J.], cert denied 510 US 822 [1993].)

Some opinion writers cannot resist being humorous when they encounter an interesting combination of names in the style of a case. In Plough v Fields (422 F2d 824, 824 [9th Cir 1970, Duniway, J.]), the court opened with this: "In spite of its title, this case does not involve the age old struggle of mankind to wrest a living from the soil . . . ." In Silver v Gold (211 Cal App 3d 17, 19, 259 Cal Rptr 185, 185 [2d Dist 1989, George, J.]), the court began by noting that "[d]espite its title, the case before us does not involve the relative merits of precious metals in the commodities market . . . ." Sometimes the opinion writer will even pun. In Short v Long (197 Va 104, 111, 87 SE2d 776, 780 [1955, Miller, J.]), the court ended thus: "The judgment of the trial court is affirmed, and that is the 'long' and 'short' of it." In Limerick Auto Body, Inc. v Limerick Collision Ctr., Inc. (769 A2d 1175, 1182 [Pa Super 2001, Eakin, J., concurring], appeal denied 567 Pa 751, 788 A2d 381 [2001]), a concurring limerick played on the litigants' names:

"'Limerick Auto' and 'Limerick Collision'  
Are so close one may clearly envision  
That the two were the same,  
So a limerick I frame,  
And join in my colleagues' decision."

Judges need not pun when it comes to case names. It is too easy, like shooting fish in a barrel, and too obvious. Often the best humor is coincidental. Consider United States v Van Boom (961 F2d 145, 145 [9th Cir 1992, Noonan, J.]), an explosive opinion about a fellow who threatened to detonate a bomb. United States v Hash (956 F2d 63, 64 [4th Cir 1992, Phillips, J.]) hashes out a case of a cannabis cultivator. United States v Funmaker (10 F3d 1327 [7th Cir 1993,
Wood, J.) merrily details the exploits of a defendant who had fun making fires. In *Worm v American Cyanamid Co.* (5 F3d 744 [4th Cir 1993, Niemeyer, J.]), a family of Worms sued a herbicide producer. And in *State v Limberhand* (117 Idaho 456, 457, 788 P2d 857, 858 [1990, Walters, Ch. J.]), defendant was prosecuted for “masturbating in a public toilet stall.”

If you must pun, at least do not get carried away. In *Oregon Natural Resources Council v March* (677 F Supp 1072 [D Or 1987, Burns, J.]), the district court’s first decision, about a contract to build a dam, was reversed and remanded. On remand, the court should have left well enough alone after its first sentence:

>“The dam case is back. When the case was here before, there was only a dam plan. Now there is half a dam. The chore assigned on remand by the Court of Appeals requires me to determine what sort of half dam is a good (i.e., safe) half dam and which is a bad (i.e., unsafe) half dam. This assignment might seem strange, since my efforts earlier to determine whether the dam plan was good were not even half as good as those of the Court of Appeals.” (Id. at 1073.)

For more on this subject, see Gerald Lebovits, The Legal Writer, *Writing on a Clean Slate: Clichés and Puns*, 75 NY St BJ 64 (Mar/Apr. 2003).

i. Analogies

Analogies in writing are like feathers on a fish. But use analogies in legal writing if no binding or persuasive authority is on point.

j. Hyperbole

Hyperbole lies without fooling. Your reader will be eternally grateful for this infinite wisdom: Resist hyperbole. Not one in a trillion writers uses it correctly:

>“[T]he awful fact is . . . that 90 percent of American scholars and at least 99.44 percent of American legal scholars not only do not know how to write simply; they do not know how to write.” (Fred Rodell, *Goodbye to Law Reviews—Revisited*, 48 Va L Rev 279, 288 [1962].)

k. Exaggeration

Exaggeration is ludicrous. It is a billion times worse than understatement. If I have told you once I have told you a million times: Never exaggerate.

l. Understatement
Understatement is always the absolute best way to illustrate earth-shaking ideas.

m. Adages and Proverbs

Annihilate adages and pontificate against proverbs: “A rule of law should not be drawn from a figure of speech.” (McCollum v Bd. of Educ., 333 US 203, 247 [1948, Reed, J., dissenting].)

Every rule of statutory construction has a thrust and a parry. (See Karl N. Llewellyn, Symposium on Statutory Construction, Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Interpreted, 3 Vand L Rev 395, 401 [1950] [classic article reprinted dozens of times].) Similarly, every adage has a counter-adage:

- Is it “Birds of a feather flock together” or “Opposites attract”?
- Is it “Great minds think alike” or “It takes a fool to know a fool”?
- Is it “A stitch in time saves nine” or “Haste makes waste”?
- Is it “Justice delayed is justice denied” or “Act in haste, repent at leisure”?
- Is it “Too many cooks spoil the broth” or “Many hands make light work”?

But twisting adages into something original will draw smiles, if not guffaws:

- “A fool and his money are soon partying.”

n. Lilts

Limit repetitive lilts: “The opinion was written adequately, generally.” A tip: Separate two adverbs that end in “ly” and which do not modify the same verb. Then recast the sentence: “In general, the opinion was written adequately.”

For more on this subject, see Gerald Lebovits, The Legal Writer, Ineffective Devices: Rhetoric that Fails, 75 NY St BJ 64 (Feb. 2003).

3. Effective Devices

Opinion writers will make their opinions better by studying rhetorical strategies. Justice Cardozo expressed the sentiment best: “The opinion will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of proverb and maxim. Neglect of these allies, and it may never win its way.” (Benjamin N. Cardozo, Law and Literature, 39 Colum L Rev 119, 122–123, 52 Harv L Rev 471, 221
The word "rhetoric," properly used, does not connote "mere rhetoric," or empty verbiage. Rhetoric is the art of finding, fashioning, marshaling, and expressing persuasive argument: Rhetoric is an essential part of legal writing. (See e.g. Craig D. Tindall, Rhetorical Style, 50 Federal Lawyer 24, 25 [June 2003] ["Legal writing is rhetoric in the classical sense—it seeks to persuade by argument."]). Successful rhetoric depends on artfully using the tropes of figures of speech.


a. Rhythm

Rhythm in prose is magical and always works. Consider Justice Louis Brandeis's metaphor: "Our Government is the potent, the omnipresent teacher." (Olmstead v United States, 277 US 438, 485 [1928, Brandeis, J., dissenting].) To create cadence, meaning poetic rhythm, he wrote "the potent, the omnipresent," not "the potent and omnipresent" or "the potent, omnipresent."

For more rhythm in opinion writing, read Justice Brandeis's concurring opinion in Whitney v California (274 US 357, 372 [1927, Brandeis, J., concurring]), which some consider the greatest piece of legal writing.

Labor leader John L. Lewis combined rhythm, parallel structure, and climax to scald John Nance Garner, President Franklin D. Roosevelt's Vice President. Said Lewis: Garner is "a poker-playing, whisky-drinking, labor-baiting, evil old man."

The rhythm is found three times: (1) in the repeated pattern of stressed syllables followed by unstressed syllables (po-ker//play-ing//whis-ky//drink-ing//la-bor//bait-ing//e-vil); (2) in the three four-syllable participial modifying phrases; and (3) in the two-word one-syllable-each word-ending ("old man"). (The parallelism is the noun phrase of five matched premodifiers. The
climax is the ascent, with “poker-playing” the least important and “evil old man” the most important.)

b. Metaphors

Experienced writers embrace metaphors, which implicitly compare unlike things that have something in common. The law is filled with effective, memorable metaphors that make abstract concepts concrete.

Metaphors have their place in legal writing: “ambits,” “four corners of the record,” “market-place of ideas,” “on its face,” “penumbras” “safe harbors,” “sliding scales,” “slippery slopes,” “streams of commerce,” “zones of privacy.”


Metaphors make legal readers sit down and take judicial notice: Covenants “run with the land,” litigants have “standing,” lawyers “move” and “advance” arguments. Not surprisingly, judges “sit,” whether on a “high” court or a “lower” court. With all that movement, thank goodness lawyers have long-arm statutes to help them stay within the reach of the law and to cite cases on all fours without going on fishing expeditions or opening the floodgates.

Perhaps the most famous metaphor in a judicial opinion comes from Palsgraf v LIRR Co. (248 NY 339, 352 [1928, Andrews, J., dissenting]), which analogized flowing water to the doctrine of proximate cause:

“The spring, starting on its journey, is joined by tributary after tributary. The river, reaching the ocean, comes from a hundred sources. No man may say whence any drop of water is derived. Yet for a time distinction may be possible. Into the clear creek, brown swamp water flows from the left. Later, from the right comes water stained by its clay bed. The three may remain for a space, sharply divided. But at last inevitably no trace of separation remains. They are so commingled that all distinction is lost.”

Metaphors are richest when they come unexpectedly. Metaphors are poorest when they are corny, vague, intricate, lengthy, unoriginal, arcane, forced, trivialized, overused, or mixed. Aristotle, the master of metaphors, explained that “metaphors . . . must not be far-fetched; rather, we must draw them from kindred and similar things; the kinship must be seen the moment the words are uttered.” (Aristotle, The Rhetoric of Aristotle 188 [Lane Cooper trans, 1932]; accord James D. Hopkins, Notes on Style in Judicial Opinions, 8 Trial Judges J 49, 50 [1969], reprinted in Robert A. Leflar, Quality in Judicial Opinions, 3 Pace L Rev 579, 585 [1983]
["Metaphors illuminate, yet may also be delusive. Be sure that they truly fit the pattern illustrated, and are not so remote in their bearing that the reader loses his way in underbrush."]

(For a tribute to New York State Justice Hopkins’s opinion-writing style, see Margaret Mary Fitzpatrick and John J. Sherlock, Portrait of a Judge as an Artist (with Apologies to James Joyce), 3 Pace L Rev 495 [1983].)

Do not rely on metaphors to substitute for independent thought: “Metaphors in the law must be narrowly watched, for starting out as devices to liberate thought, they end up often by enslaving it.” (Berkey v Third Ave. Ry. Co., 244 NY 84, 94 [1926, Cardozo, J.].) For some independent thoughts about metaphors in opinion writing, see Haig Bosmajian, Metaphors and Reason in Judicial Opinions (1992); Bernard J. Hibbitts, Making Sense of Metaphors: Visuality, Aurality, and the Reconfiguration of American Legal Discourse, 16 Cardozo L Rev 229, 235 (1994).

Do not use inappropriate tone in metaphors. Consider this extended, self-indulgent metaphor:

“A gift given by a man to a woman on condition that she embark on the sea of matrimony with him is no different from a gift based on the condition that the donee sail on any other sea. If, after receiving the provisional gift, the donee refuses to leave the harbor,—if the anchor of contractual performance sticks in the sands of irresolution and procrastination—the gift must be restored to the donor. A fortiori would this be true when the donee not only refuses to sail with the donor, but, on the contrary, walks up the gangplank of another ship arm in arm with the donor’s rival.” (Pavlicic v Vogtsberger, 390 Pa 502, 507, 136 A2d 127, 130 [1957, Musmanno, J.].)

How ‘bout them Yankees? If you want to hit a home run—and avoid striking out—use metaphors accurately. (See e.g. Maureen Archer and Ronnie Cohen, Sidelined on the (Judicial) Bench: Sports Metaphors in Judicial Opinions, 35 Am Bus L J 225 [1998] [urging opinion writers to keep their metaphorical eye on the ball lest an umpire cry “foul!”]; Chad M. Oldfather, The Hidden Ball: A Substantive Critique of Baseball Metaphors in Judicial Opinions, 27 Conn L Rev 17 [1994] [same]; Michael J. Yelnosky, If You Write it (S)he Will Come: Judicial Opinions, Metaphors, Baseball, and “The Sex Stuff,” 28 Conn L Rev 813 [1996] [same].) A favorite baseball metaphor comes from Oregon Natural Resources Council v March (677 F Supp 1072, 1073 n 2 [D Or 1987, Burns, J.]):

“As I read the June 23 opinion of the Court of Appeals, the plaintiffs assert eight claims of error in my ruling. The Court found reversible error in five, but affirmed on three. In baseball, a batting
average of .375 is envious indeed. Judiciary wise, such an average sends one to the showers in a hurry."

Football fans take heart: Sports metaphors in opinion writing do not come only from baseball. In its final sentence, the dissenting opinion in Gore v Harris (772 So 2d 1243, 1273 [Fla 2000, Harding, J., dissenting], revd sub nom. Bush v Gore, 532 US 98 [2000]) quoted football coaching legend Vince Lombardi's touchdown: "We didn't lose the game, we just ran out of time." The Seventh Circuit in Bankcard Am., Inc. v Universal Bancard Sys., Inc. (203 F3d 477, 479 [7th Cir 2000, Evans, J.] [footnote omitted]), also relied on a football metaphor to reverse its chief judge' judgment:

"Football fans know the sickening feeling: your team scores a big touchdown but then a penalty flag is tossed, wiping out the play. Universal Bancard Systems, Inc. knows that feeling firsthand after seeing not one, but two big touchdowns called back. The referee who waved off the first—a $7.8 million verdict—and then the second—a $4.1 million jury verdict after a second trial—was the Honorable Richard A. Posner, the circuit’s chief judge who in this case was wearing, by designation, the robe of a district judge. Like the instant replay official, we now review the decisions of our colleague—using the voluminous record rather than a television monitor and recognizing that our review in 1999 of a case that began in 1993 is a far cry from instant."

A beautiful metaphor, from Judge B. Learned Hand: "Juries are not leaves swayed by every breath." (United States v Garson, 291 F 646, 649 [SD NY 1923].)

A metaphor on the cutting edge: "Language is the lawyer's scalpel. If he cannot use it skillfully, he is apt to butcher his suffering client's case." (Irving Kaufman, Appellate Advocacy in the Federal Courts, 79 FRD 165, 170 [1978].)

A galloping metaphor: "Public policy is a very unruly horse, and when you once get astride it you never know where it will carry you." (Richardson v Mellish, 2 Bing 229, 252, 130 Eng Rep 294, 303 [1824, Burrough, J.].)

A musical metaphor: "A minor participant in the orchestra of a conspiracy is as much a part of it as is the concert master." (United States v Armedo-Sarmiento, 545 F2d 785, 794 [2d Cir 1976, Van Graafeiland, J.].), cert denied 430 US 917 [1977].)

A metaphoric clause that will drive you to drink: "After you have brushed the foam off the beer, the plaintiff's argument concerns only one item—money." (Horton v Meskill, 172 Conn 615, 658, 376 A2d 359, 378 [1977, Loiselle, J., dissenting].)
A metaphor that contains some real nuggets: "In the case of inexperienced pro se litigants, it is better to err on the side of admitting an ore-heap of evidence in the belief that nuggets of truth may be found amidst the dross, rather than to confine the parties to presenting assayed and refined matter which qualifies as pure gold under the rules of evidence." (Houghtaling v Superior Ct., 17 Cal App 4th 1128, 1136–1137, 21 Cal Rptr 2d 855, 860 [4th Dist 1993, Debney, J.].)

An allegory, or symbolic story, resembles an extended metaphor. Allegories are rare in opinion writing, but here is one:

"I liken the area of law to the allegory of the woodcutter who attempted to cut firewood in uniform lengths. Instead of measuring each successive log to the original, he measured it to the log cut immediately before. At the end of the cord, he discovered that the last log bore no resemblance in length to the first." (Coyle v Texas, 693 SW2d 743, 745 [Tex App 1985, Sparling, J., concurring].)

For more on metaphors, see Gerald Lebovits, The Legal Writer, Not Mere Rhetoric: Metaphors and Similes, 74 NY St B 64 (June 2002).

c. Similes

A simile is an explicit comparison, comparing dissimilar things, using "like," "as," "as if," or "as though." Similes are useful but distracting when repetitious:

- Referring to Chief Justice Charles Evans Hughes: "To see him preside was like witnessing Toscanini lead an orchestra." (Felix Frankfurter, Chief Justices I Have Known, 39 Va L Rev 883, 901 [1953].)

- "After all, advocates, including advocates for States, are like managers of pugilistic and election contestants, in that they have a propensity for claiming everything." (First Iowa Hydro-Elec. Co-op. v Federal Power Commn., 328 US 152, 187 [1946, Frankfurter, J., dissenting].)

- "The bar is still dominated by shortsightedness and self-interest. Spotting change there is like watching a glacier move." (Vernon Countryman, quoted in Bruce Nash et al., Lawyer's Wit and Wisdom 50 [1995].)

- "Lawyers use the law as shoemakers use leather: rubbing it, pressing it, and stretching it with their teeth, all to the end of making it fit for their purposes." (King Louis XII of France, quoted in Bruce Nash et al., Lawyer's Wit and Wisdom 46 [1995].)
"Don’t write like a lawyer. Write as a person unspoiled by the law." (Daniel J. Kornstein, Surviving Your First Year in the Law: Improve Your Writing, Gain a Potent Weapon, NYLJ, Sept. 5, 2000, at S9, col 1 [italics supplied].)

To use similes correctly, you need to know the difference between “as” and “like.”

"As" is a conjunction when followed by a verb: Correct: "As Rome burned, Nero fiddled." Correct: "She felt as if [or as though] she won the Nobel Prize." “As” is a preposition when followed by a comparison and no verb. Correct: "As [not like] a New York State court attorney, I follow the Tanbook, not the Bluebook."

“Like” is a preposition that governs nouns and noun phrases. “Like" is not a conjunction. Correct: “Like his father, Samuel Hand, and his grandfather, Augustus C. Hand, B. Learned Hand was a famous judge.” Incorrect: “Like I said, don’t use no double negatives.” (Should be “As I said . . . ”)

The greatest opinion writers combine metaphors with similes in a single sentence. See whether you can spot which is the metaphor and which is the simile:

"Being free to engage in unlimited political expression subject to a ceiling on expenditures is like being free to drive an automobile as far and as often as one desires on a single tank of gasoline." (Buckley v Valeo, 424 US 1, 19 n 18 [1976, per curiam].)

"The reason for my concern is that the instant decision, overruling that announced about nine years ago, tends to bring adjudications of this tribunal into the same class as a restricted railroad ticket, good for this day and train only." (Smith v Allwright, 321 US 649, 669 [1944, Roberts, J., dissenting].)

"Unless this Court is willing to say that citizenship of the United States means at least this much to the citizen, then our heritage of constitutional privileges and immunities is only a promise to the ear to be broken to the hope, a teasing illusion like a munificent bequest in a pauper’s will." (Edwards v California, 314 US 160, 186 [1941, Jackson, J., concurring].)

"[T]he use of legislative history [is] the equivalent of entering a crowded cocktail party and looking over the heads of the guests for one’s friends . . . . The legislative history of Section 205 of the Soldiers’ and Sailors’ Civil Relief Act contains a variety of diverse personages, a selected few of whom—its ‘friends’—the Court has introduced to us in support of its result. But there are many other faces in the crowd, most of which, I
think, are set against today's result.”  (Conroy v Anisoff, 507 US 511, 519 [1993, Scalia, J., concurring].)

For more on similes, see Gerald Lebovits, The Legal Writer, Not Mere Rhetoric: Metaphors and Similes—Part 2, 74 NY St BJ 64 (July/Aug. 2002).

d.  Personification

Personifications come in two forms, pure and fallacious.

A pure personification is a metaphor that gives a human attribute to an abstraction:

- “The law says A about B but is silent about C.”

- “The law is a jealous mistress.”

- “A petitioner whose hands are unclean may not prevail in equity.”

- “[J]ustice is not to be taken by storm. She is to be wooed by slow advances.” (Benjamin N. Cardozo, The Growth of the Law 133 [1924].)

- “Our constitution is color-blind . . . .” (Plessy v Ferguson, 163 US 537, 559 [1896, Harlan, J., dissenting].)

- “[T]he whole society is the male-parent of new common law, and the judiciary is the mother. The semen that fathers the child is the felt need for new and better rules of law in any given area, and conception occurs when the felt need becomes urgent. The child is delivered in the form of judicial opinions.” (Robert A. Leflar, Sources of Judge-Made Law, 24 Okla L Rev 319, 327 [1971].)

A fallacious personification is called a pathetic fallacy, which attributes human feelings to matter:

- The way the United States Court of Appeals for the Second Circuit describes itself: “The Mother Court.”

- “The cruel sea.”

e.  Onomatopoeia

Words that sound like what they mean are onomatopoeic. Think of “snap, crackle, pop.” Other words have an onomatopoeic quality even though they sound different from what they
mean. Think of “weird,” which sounds weird and is spelled weird. “Grotesque” looks and sounds grotesque. “Sensual” suggests sensuality.

- “Defendant, charged with driving while intoxicated, napped at the wheel.”
  
  *Becomes:* “Defendant, charged with driving while intoxicated, dozed at the wheel.” (“Doze” has the “zzz” snoozing sound.)

- “Defendant was charged with escape after he suddenly took the correction officer’s keys.”
  
  *Becomes:* “Defendant was charged with escape after he snatched the correction officer’s keys.” (“Snatched,” a one-syllable word, is more descriptive than the two-word, four-syllable “suddenly took.”)

### f. Metonymy

A clever way to substitute one name or word for another closely associated name or word. This device is typically used in writing other than opinion writing:

- “It is a bull market, says Wall Street.” (Read: “Wall Street” is financiers who have some connection with New York City.)

- “The White House announced that the nation is grateful.” (Read: People at the White House announced that the nation’s people are grateful.)

- “The pen is mightier than the sword.” (Edward George Earle Bulwer-Lytton, Richelieu, act II, sc ii.)

- “[T]he First Amendment . . . presupposes that right conclusions are more likely to be gathered out of a multitude of tongues, than through any kind of authoritative selection.” (United States v Associated Press, 52 F Supp 362, 372 [SD NY 1943, Hand, J].)

Metonymy can lead to illogic. The phrase “warm temperature,” for example, is illogical. Only a day, not the temperature, can be warm.

**Transferred epithets:** A metonymic device also known as hypallage in which an adjective modifies an associated noun not in the sentence:

- “An unsubstantiated crime.” (The allegations, not the crime, are unsubstantiated.)

- “Drunken party.” (The partygoers are drunk, not the party.)

- “English-speaking countries.” (The people, not the countries, speak English.)

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“Unfair criticism.” (The person who criticizes, not the criticism itself, is unfair.)

g. Synecdoche

A substituted name of a part to represent the whole or a whole to represent a part:

- Part to represent the whole:
  - “Mouths to feed” for children.
  - “Wheels” for a car.

Whole to represent a part: “The judiciary is here” to note one judge’s arrival.

h. Irony

“Irony may be an effective tool of expression, when sparingly used . . . .” (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, 586 [1983].)

Verbal irony: A device in which what is said is different from what is meant. Said: “He is a great judge. Meant: “He is a terrible judge.”

Most attempts at verbal irony fail. Most readers have an irony deficiency. But verbal irony used well is memorable:

- “[W]e hold that the first amendment does not clothe these plaintiffs with a right to sunbathe in the nude . . . . They remain able to advocate the benefits of nude sunbathing, albeit while fully dressed.” (South Florida Free Beaches, Inc. v City of Miami, 734 F2d 608, 610 [11th Cir 1984, Henderson, J].)

Situational irony: A disparity between what is expected and what happens, between what one deserves and what one gets, and between policy and execution.

Situational irony is never intended in opinion writing.

An example of situational irony, according to Judge Titone:

“‘The most tragic aspect of this sorry chapter in the Supreme Court’s history is the irony inherent in the Court’s use of the Equal Protection Clause to effectively disenfranchise . . . . minorities and elderly citizens.’ (Vito J.
Titone, Perspective, First, Do No Harm, NYLJ, Feb. 1, 2001, at 2, col 3, col 4 [critiquing majority opinion in Bush v Gore, 531 US 98 [2000, per curiam] [presidential election case]].

i. Periodic Sentences

A “postponed prediction” is a series of dependant clauses that hold suspense until they climax at the end:

- “An ancient clerk, skilful[l] in precedents, wary in proceeding, and understanding in the business of the court, is an excellent finger of the court; and doth many times point the way to the judge himself.” (Francis Bacon, “Essays: Of Judicature,” quoted in M. Frances McNamara, 2,000 Famous Legal Quotations 89 [1967].)

A “suspended prediction” begins with the main clause and—through intervening words like these—separates subject from verb before reaching the crescendo.

j. Paronomasia

Double entendres are acceptable in law-journal articles but not in opinions:


k. Anastrophes (Hyperbaton)

Use for emphasis to invert the natural order of words and phrases. Awkward are many, but not all, inversions:

- “Ungenerous and unwise such discrimination may be. It is not for that reason unlawful.” (People v Crane, 214 NY 154, 161 [1915, Cardozo, J.].)

- “The thin disguise of ‘equal’ protection accommodations for passengers in railroad coaches will not mislead anyone, or atone for the wrong this day done.” (Plessy v Ferguson, 163 US 537, 562 [1896, Harlan, J., dissenting] [italics supplied].)

- “On the words you use, your client’s future may depend.” (Lord Denning, The Discipline of Law 5 [1979].)

- “MovieFone. Complicated it isn’t.” (Mr. MovieFone, copyright 1998.)

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Note: Legal writing, unlike advertising, is not designed to grab your attention at all costs. Advertising must be brash to be effective. Legal writing is most effective when it is subtle.

"Astrology and fortune telling in all its forms, gambling games, such as Gee Far, Policy, and the casting of dice, do not long remain mysteries to men who sit on the bench. *Worldly we soon become.*" (Unpublished speech by Chief Judge Stanley H. Fuld, quoted in Walker Gibson, *Literary Minds and Judicial Style*, 36 NYU L Rev 915, 924 n 22 [1961] [italics supplied].)

I. **Antithesis**

Emphasizes contrast. Antithesis is a remarkably successful technique when the writer contrasts ideas of the same order and does so concisely. It is unsuccessful when it results in a mixed metaphor or wordiness:

- "Freedom itself was attacked this morning. And I assure you: Freedom will be defended." (President George W. Bush, September 11, 2001.)

- "Those who did this are murderers, not martyrs. They cannot go to heaven by unleashing hell." (House Democratic Leader Richard Gephardt, September 22, 2001.)

- "Injustice anywhere threatens justice everywhere." (Rev. Dr. Martin Luther King Jr.)

- "No one is free until everyone is free." (Rev. Dr. Martin Luther King Jr.)

- "That's one small step for man, one giant leap for mankind." (Neil Armstrong, 1969, taking the first step on the moon.)

- "Justice delayed is justice denied." (Prime Minister William Gladstone, quoted in Laurence J. Peter, *Peter's Quotations: Ideas for Our Time* 276 [1977].)

- "Never in the field of human conflict was so much owed by so many to so few." (Sir Winston S. Churchill, 1940, on the debt due the Royal Air Force pilots during World War II.)

- "Winning isn't everything. It's the only thing." (Vince Lombardi.)

- "We must all hang together or we will all hang separately." (Benjamin Franklin.)

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"Law must be stable and yet it cannot stand still." (Roscoe Pound, Interpretations of Legal History 1 [1923].)

"To err is human; to forgive, divine." (Alexander Pope, Essay on Criticism in Collected Poems 71 [1924].)

"Not that I loved Caesar less, but that I loved Rome more." (William Shakespeare, Julius Caesar, act III, sc II.)

"Ask not what your country can do for you. Ask what you can do for your country." (President John F. Kennedy, Inaugural Address, January 1961.)

"The law does all that it is needed when it does all that it can." (Buck v Bell, 274 US 200, 208 [1927, Holmes, J.].)

"It's smarter to be lucky than it's lucky to be smart." (Stephen Schwartz, "War is a Science," Pippin [Charlemagne] [1972].)

"If marriage is outlawed, only outlaws will have in-laws." (Kurt Keller to his son-in-law, circa 1978.)

"If your outgo exceeds your income then your upkeep will bring your downfall." (Eugene Lebovits to his then-spendthrift son, circa 1972.)

m. Climax

Climax is the powerful arrangement of words in ascending order of importance: Caesar's asyndeton: "Veni, vidi, vici [I came, I saw, I conquered]." The arrangement fails when a sentence ends in weak words, or in anticlimax. This arrangement also fails if the structure of the sentence is nonparallel. Caesar's asyndeton would be in the ash-heap of history if he had said, "After I came, I looked, and then I conquered."

n. Asyndetons

Omitting conjunctions to join related words or clauses:

- "Without the concrete instances the general proposition is baggage, impedimenta, stuff about the feet." (Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study 12 [1930].)

- "Private citizens, private clubs, private groups may make such deductions and reach such conclusions as they choose from the failure of a citizen to disclose his beliefs, his philosophy, his associates. But government has no business penalizing a citizen
merely for his beliefs or associations." (Lerner v Casey, 357 US 399, 414 [1958, Douglas, J., dissenting] [italics supplied].)

o. Syllepsis and Zeugma

Syllepsis: Using a verb with two subjects, modifiers, or objects, or an adjective with two nouns, one appropriate or both appropriate in different ways, with one word doing double duty:

- "Judge X kept the court date and her temper."
- "The school's track-and-field coach let her star sprinter and the statute of limitations run."
- "Time flies like an arrow. Fruit flies like a banana." (Grouch Marx.)

Zeugma: A syllepsis in which the word doing double duty is grammatically incorrect; the reader must supply the correct word:

- "Years ago her eyes were gray, her hair red. Now it is the other way around." (Read: "Years ago her eyes were gray [and] her hair [was] red.")

p. Satire

Satire uses irony or ridicule to expose folly or vice. Satire is effective when used sparingly and when it is directed against the legal system or a doctrine and not against a particular person. Some satire from New York judges:

- "A statute which is ultimately declared unconstitutional is presumed to have been known by all to be a nullity from the time of its enactment, even though the fact of its nullity is not known until declared a long time afterwards by a five to four decision." (Holland v Atlantic Stevedoring Co., 210 App Div 129, 130 [2d Dept 1924, per curiam], quoting Spec Term opn below, Carswell, J., affd 239 NY 605 [1925].)

- "No two cases are exactly alike. A young attorney found two opinions in the New York Reports where the facts seemed identical although the law was in conflict, but an older and more experienced attorney pointed out to him that the names of the parties were different." (Cuthbert W. Pound, American Law Institute Speech of Judge Pound, 5 NY St Bar Assn Bull 265, 267 [June 1933].)

q. Antonomasia
Occurs when a person's name is used instead of a common word. If you are familiar with this device, you are a regular Einstein:

- "Unless [the suspect] were an acrobat or a Houdini, we cannot conceive how the closet could have fallen within the area of her immediate control." (United States v Mapp, 476 F2d 67, 80 [2d Cir, 1973, Kaufman, J.] [citation omitted].)

r. Aporia

Occurs when a writer, in a rhetorical flourish, states that it is difficult to know where to begin or end:

- "It is difficult to know where to begin to analyze such a truly extraordinary assertion respecting the judicial process." (United States v White, 401 US 745, 793 [Harlan, J., dissenting].)

s. Apostrophe

Apostrophes are used to turn from a discussion to address an absent person or personification:

- "Equity, oh Equity, the fairest flower in the judicial garden, where art thou?" (Elliot v Denton & Denton, 109 Nev 979, 983, 860 P2d 725, 728 [1993, Steffen, J., dissenting].)

- "Send well to this Court, in all good time, the courage and the wisdom with which to confess the error of today's myopic majority . . . ." (Fritts v Krugh, 604 Mich 970, 134, 92 NW2d 604, 618 [1958, Black, J., dissenting].)

t. Correction

This device emphasizes a statement be replacing it with another:

- "I view with dismay the action—or should I say the inaction—of my respected colleagues in the matter before us." (Simpson v Pulaski County Cir. Ct., 300 Ark 468, 472, 899 SW2d 50, 52 [1995, Corbin, J., dissenting].)

u. Ellipses

Ellipses intentionally omit necessary words:

- "Laws too gentle are seldom obeyed; too severe, seldom executed." (Benjamin Franklin, Poor Richard's Almanac.)
"[T]he drink characterizes the name as much as the name the drink." (Coca-Cola Co. v Koke Co. of Am., 254 US 143, 146 [1920, Holmes, J.].)

v. Paralepsis

Emphasizes by pretending to pass over it:

"Needless to say, such a rule would place considerable constraint upon religious speech, not to mention that it would be ridiculous." (Capitol Square Review & Advisory Bd. v Pinette, 515 US 753, 769 [1995, Scalia, J.] [emphasis added].)

w. Parallelism

Using a similarity of structure in a pair or series of words, phrases, or thoughts is the easiest and, with antithesis, the most effective way to achieve power in writing.

Every opinion writer is a professional writer and hopeful stylist. We must all study Sir Winston S. Churchill’s speech to the House of Commons of May 13, 1940. The entire portion—of which only a part is quoted below—is parallel. The more obvious parallel structure is italicized.

“You ask, ‘What is our policy?’ I will say: It is to wage war, by sea, land, and air, with all our might and with all the strength that God can give us; to wage war against a monstrous tyranny, never surpassed in the dark, lamentable catalogue of human crime. That is our policy. You ask, ‘What is our aim?’ I can answer in one word: Victory—victory at all costs, victory in spite of all terror; victory, however long and hard the road may be; for without victory, there is no survival. Let that be realized; no survival for the British Empire; no survival for all that the British Empire has stood for; no survival for the urge and impulse of the ages, that mankind will move forward towards its goal. But I take up my task with buoyancy and hope. I feel sure that our cause will not be suffered to fail among men. At this time I feel entitled to claim the aid of all. And I say, ‘Come, then, let us go forward together with our united strength.’"

Abraham Lincoln could have written “a people’s government,” but no one would have remembered that phrase. Instead he wrote: “A government of the people, by the people, and for the people.” (Gettysburg Address, likely improving on a similar phrase from Chief Justice Marshall’s opinion in McCulloch v Maryland, 17 US [4 Wheat] 316, 402 [1819].) President George W. Bush also used parallelism that evoked Sir Winston Churchill’s alliterative 1940 House of Commons speech “We shall not flag or fail”: “We will not tire, we will not falter, and we will not fail.” (Address Before Joint Meeting of Congress, September 20, 2001.) The
President could have let it go with "We will not tire, falter, or fail," but that, too, would have been forgotten.

We celebrate Dr. King, not only because of what he stood for and what he said, but also because of his artful use of parallelism to say it:

- "[S]ay that I was a drum major for justice. Say that I was a drum major for peace. I was a drum major for righteousness. And all of the shallow things will not matter." (Rev. Dr. Martin Luther King Jr., sermon at the Ebenezer Baptist Church, February 1968.)

- "I have a dream that one day every valley shall be exalted, every hill and mountain shall be made low, the rough places will be made plains, and the crooked places will be made straight, and the glory of the Lord will be revealed, and all flesh shall see it together." (Rev. Dr. Martin Luther King Jr., I Have a Dream, August 28, 1963, on the steps of the Lincoln Memorial.) (Notice also King's blend of asyndetons and polysyndetons.)

- "I have a dream that someday my four little children will live in a nation where they will not be judged by the color of their skin but by the content of their character." (Rev. Dr. Martin Luther King Jr., I Have a Dream, August 28, 1963, on the steps of the Lincoln Memorial.)

Kennedy used parallel structure to call us to battle:

- "Let every nation know, whether it wishes us well or ill, that we shall pay any price, bear any burden, meet any hardship, support any friend, oppose any foe to assure the survival and success of liberty." (President John F. Kennedy, Inaugural Address, January 1961.)

Varieties of parallelism (rhetorical repetition) include the following rhetorical devices:

i. **Anaphora**

   (a) Repeating the same word or group of words at the beginning of successive clauses:

   - "The act was courageous, though prohibited by law at the time. The act was courageous, though condemned at the time by public opinion."

   - "It matters how judges decide cases. It matters most to people unlucky or litigious or wicked or saintly enough to find themselves in court." (Ronald Dworkin, Law’s Empire 1 [1986] [opening two sentences].)
"We are today one people, with one flag, one political creed, one loyalty." (William O. Douglas, We the Judges 17 [1956].)

"Freedom to publish means freedom for all and not for some. Freedom to publish is guaranteed by the Constitution, but freedom to combine to keep others from publishing is not." (Associated Press v United States, 326 US 1, 20 [1945, Black, J.].)

(b) Using a word to substitute for another word:

- "Judge X writes better than Judge Y does" (as opposed to "better than Judge Y writes").

- "The law clerk hates himself" (as opposed to "The law clerk hates the law clerk").

ii. Epistrophe

Repeating the same word or group of words at the end of successive clauses:

- "To us the First Amendment is sacred. Our right to assemble peaceably is sacred. Our right to speak freely is sacred."

- "Reading maketh a full man, conference a ready man, and writing an exact man." (Francis Bacon, 1597.)

- "With this faith we will be able to work together, to pray together, to struggle together, to go to jail together, to stand up for freedom together, knowing that we will be free one day." (Rev. Dr. Martin Luther King Jr., I Have a Dream, August 28, 1963.)

iii. Epanalepsis

Repeating at the end of a sentence or clause the word that began the sentence or clause:

- "American common law, with its emphasis on stability and fairness, brings freedom and prosperity to all that is American."

iv. Anadiplosis

Repeating the last word of one clause at the beginning of the following clause:
v. **Antimetabole**

Repeating words in successive clauses in reverse order:

- "She worked to live. She did not live to work."
- "Let us never negotiate out of fear, but let us never fear to negotiate." (President John F. Kennedy, Inaugural Address, January 1961.)

vi. **Chiasmus**

Repeating words in successive clauses in reverse grammatical order:

- "Jurisdiction exists that rights may be maintained. Rights are not maintained that jurisdiction may exist." (*Matter of Berkovit v Arbib & Houlberg, Inc.*, 230 NY 261, 274 [1921, Cardozo, J.].)

vii. **Antanaclasis**

Repeating a word that has different meanings but without punning paronomasia:

- "It is the justice’s clerk that makes the justice." (Fuller, "Proverbs" [1732], in M. Frances McNamara, 2,000 Famous Legal Quotations 90 [1967].)

viii. **Epizeuxis**

Repeating the same word emphatically and without interruption:

- "Justice, justice shall you pursue . . . ." (Deuteronomy 16:20.)

ix. **Polysyndeton**

Repeating conjunctions in close succession:

- "[O]ur dead brother [William Allen d. 1891] would have preferred not to be celebrated with guns and bells and pealing requiems, the flutter of flags and the gleam of steel in our streets . . . ." (Oliver Wendell Holmes, Speeches 52, 54 [1934].)
- "And God said, ‘Let there be light,’ and there was light. And God saw that the light was good, and He separated the light from the darkness.
God called the light ‘day,’ and the darkness He called ‘night.’ And there was evening, and there was morning—the first day.” (Genesis 1:3–5)

“Neither snow, nor rain, nor heat, nor gloom of night stays these couriers from the swift completion of their appointed rounds.” (The Postal Pledge.)
C. Legal Method

1. Obiter Dictum

Dicta in an opinion are statements not necessary to the court’s resolution of the problem. Dicta answer questions not asked. The opposite of dictum is the ratio decidendi of a case: the essential facts, the essential law, the key holding, and the disposition.

By definition, courts may not “hold” or “find” in dicta. A court merely “states” in dicta.

“Dictum” is singular. “Dicta” is plural. The expression “pure dicta” is a cliche.

Dicta are “disapproved,” not “overruled.”

The expression “by way of obiter dictum” is redundant. “Obiter” means “by way of.” Objectionable, too, is the phrase “binding dicta.” Dicta can be persuasive, but they are never binding.

Use and rely on dicta sparingly in trial-court opinions. One principle of judicial restraint is that “[w]hether opinion authors are writing to display their erudition, to fashion under other facts an exception that will comfort the losing party, or for whatever reason, dictum is rarely of value.” (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual 14 [1991]; accord Joyce J. George, Judicial Opinion Writing Handbook 242 [4th ed 2000] [“[D]icta in opinions . . . are not encouraged.”].)

Six reasons to avoid dicta. First, your reader might conclude that the real reason for your ruling is in your dicta, not in your holding. Second, dicta might obscure your holding. Third, the less you write, the fewer mistakes you will make. Fourth, writing dicta diverts attention from other responsibilities. Fifth, it is difficult enough to decide what is before the court without deciding what is not before the court. Sixth, “obiter dicta, like the proverbial chickens of destiny, come home to roost sooner or later in a very uncomfortable way to the Judges who have uttered them, and are a great source of embarrassment in future cases.” (Cook v New River Co., [1888] LR 38, 70–71 [Ch Div, Bowen, L.J.].)

Avoid citing dicta: “Courts do not weary of cautioning counsel to distinguish dictum from decision. They must heed their own warnings.” (Smith v Hedges, 223 NY 176, 184 [1918, Cardozo, J., dissenting].)

Leave didactic, or teaching, opinions to appellate courts of last resort. Didactic opinions are filled with dicta. Condemned are “opinion writers [who] recite all the related rules of law, whether or not they apply, as though they were writing a treatise.” (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual 8 [1991].)
Save "lecturing" opinions for issues that significantly affect the administration of justice, such as when an administrative agency under court oversight acts lawlessly, when law enforcement destroys exculpatory evidence, or when attorneys engage in unethical practices. Even then, refrain from preaching. And do not engage in "[c]ommentaries on broader political and social policies that give rise to problems such as drug use, homelessness, or welfare dependency." (Patricia M. Wald, The Rhetoric of Results and the Results of Rhetoric: Judicial Writings, 62 U Chi L Rev 1371, 1409 [1995].) Your reader will believe that your decision was politically motivated.

Dicta might arise when an opinion writer tries to resolve too many contentions. According to Nebraska Chief Justice Simmons, "often dicta occurs in an opinion because of an effort of a court to answer all contentions of an appellant or appellee. Propositions discussed and vigorously urged upon a court by both parties are often decided and then it is later discovered that the question determined was not in issue." (Robert G. Simmons, Better Opinions—How?, 27 ABA J 109, 111 [Feb. 1941].)

Advocates must argue in the alternative. Judges, who know how the opinion will turn out before it is rendered, are wise not to reach issues unless they must. A separate, independent ground that supports a decision is not dictum. (Woods v Interstate Realty Co., 337 US 535, 537-538 [1949].) But adding a ground preceded by "even if," "assuming," "alternatively," "but whether we," and the like renders the second ground equivocal and might be dictum. Reaching issues unnecessarily, moreover, diminishes the precedential value of the opinion, takes longer to write, sows uncertainty about the primary issue, leads to an adversary tone, and undermines the reader's confidence. What do you think of this extreme example?

"The statute of limitations forecloses this action. Moreover, the contract is invalid. There was no offer or acceptance. But if there were, there was no consideration. In the alternative, the contract is voidable because of fraud at the inception. Assuming that the law were otherwise, this court has no personal jurisdiction over the litigants. And if this court had not so concluded, this action would be dismissed because the facts show a lack of subject-matter jurisdiction: The complaint was filed in the wrong court. In any event, the contract violates public policy."

Exceptions: (1) If no ground is given precedence over the other, the opinion writer, to add power to decision making, may present separate and independent grounds for the result. To give both grounds value, the writer should explain that each is an independent ground and avoid an "even if" clause." (2) In special circumstances a trial-opinion writer may also decide a case on separate grounds to foreclose an appellate court from remanding to consider that separate ground. (3) To gather votes, an appellate writer may use an "even if" clause when all else fails.

Do not discuss an issue only to resolve the case on a different issue, regardless how much research you must discard after a false start:
"The justification defense raised here poses several important questions. They include . . . . The answer to these questions is that . . . . Nevertheless, the petition is dismissed because it was filed in the wrong county."

Exceptions arise to assist appellate courts, to prevent cases from being remanded, and to promote confidence in the judicial system in specific cases if an argument is denied on procedural grounds:

- Appellate Division: "The argument is unpreserved, and we decline to reach it in our interest-of-justice discretion. Were we to reach it, we would nevertheless affirm on the merits because . . . ."

- Trial Court: "The application is denied as untimely. Had it been made on time, it would still be denied because . . . ."

2. Public Policy

As Chief Judge Parker of the Fourth Circuit wrote, "The court is neither a law school nor a debating society, and the opinion is no place for a legal monograph or the airing of personal views on general matters." (John J. Parker, Improving Appellate Methods, 25 NYU L Rev 1, 12 [1950].) That said, opinion writers should invoke public policy to promote an opinion's law-announcing function, so long as policy principles are evenhanded, nonpartisan, neutral, and widely accepted.

Express policy in a way that will avoid accusations of supplanting the legislative branch or of favoring one interest group over another. An opinion writer must not only "persuade his colleagues, make sense to the bar, pass muster with scholars, [but also] if possible allay the suspicion of any man in the street who regards knowledge of the law as no excuse for making it." (Roger J. Traynor, Badlands in an Appellate Judge's Realm of Reason, 7 Utah L Rev 157, 166 [1960].)

Judges of every political persuasion make law—and they do so because of policy. (See e.g. Benjamin N. Cardozo, The Nature of the Judicial Process 10 [1921] ["I take judge-made law as one of the existing realities of life."]; Sol Wachtler, Electing Justice, 89 Mich L Rev 1545, 1546 [1991] [book review] ["Do judges make law? Most modern scholars—former Attorney General Meese notwithstanding—agree that the judiciary has a legitimate lawmaking function."]; Sol Wachtler, Judicial Lawmaking, 65 NYU L Rev 1 [1990].) It is a "half-truth that policy is a matter for [only] the legislators to decide." (Roger J. Traynor, Reasoning in a Circle of Law, 56 Va L Rev 739, 749 [1970].) One "should not be misled by the cliché that policy is a matter for the legislature and not for the courts." (Roger J. Traynor, Some Open Questions on the Work of State Appellate Courts, 24 U Chi L Rev 211, 219 [1957].) Some judge-made policies serve judicial ends: standing, ripeness, mootness, justiciability, jurisdiction. Others serve societal ends.
Not merely activist judges but every judge does more than interpret, give evidence of, or announce, declare, or discover the law in the strictest sense. By definition, every opinion makes new law because every opinion has some binding or persuasive value that another court must or may follow. Each decision controls other cases under stare decisis, in which like cases are treated alike. Judges may overrule their precedent. (See e.g. Charles R. Calleros, Legal Method and Legal Writing 61-65 [4th ed 2002] [offering a succinct, excellent discussion of when courts may depart from stare decisis].) But judges cannot escape law-making. (See generally John Dawson, The Oracles of the Law [1961].) Judge-made law is the common law. (Judith S. Kaye, State Courts at the Dawn of a New Century: Common Law Courts Reading Statutes and Constitutions, 70 NYU L Rev 1, 20 [1995] ["The common law is, of course, lawmaking and policymaking by judges."]).

The debate over judicial activism is unhelpful because "no appellate judge in America... is not an 'activist' in one realistic definition of the term. This is in the sense that the judge believes in improving the law according to his lights, and affirmatively tries to do so." (Robert A. Leflar, Taught Law is Tough Law, 8 Wayne L Rev 465, 479 [1962].) The real issues center not on activism but on where improvement lies, at what speed improvement may take place, and the extent to which public policy may play a role in improving the law.

Most agree that advances in the law based on policy may be made only incrementally. Justice Holmes explained that "judges do and must legislate, but they can do so only interstitially; they are confined from molar to molecular motions." (Southern Pacific Co. v Jensen, 244 US 205, 221 [1917, Holmes, J., dissenting].) Movement must be slow because opinion writers must not allow the law to become unpredictable or subjective. Then-First Department Justice and later Chief Judge Breitel said it well: "[S]elf-restraint by the courts in lawmaking must be their greatest contribution to the democratic society." (Charles D. Breitel, The Lawmakers, 65 Colum L Rev 749, 777 [1965].)

Most also agree that policy must supplement, not substitute for, precedent. Second Department Justice Hopkins explained the problem: "[T]o use public policy as a cover for cogent legal reasoning not only avoids the judicial process, but also impedes acceptance of the result." (James D. Hopkins, Public Policy and the Formation of a Rule of Law, 37 Brooklyn L Rev 323, 334 [1971].)

Why, then, consider policy? Because if you do not, law and justice will not long coincide: "The history of the common law records the names of only a few truly great judges, and it is notable that all of them were men who saw their cases, even routine ones, as opportunities to examine the relation of the law to the needs and practices of the society which they served." (Robert A. Leflar, Roger J. Traynor—Exemplar of the Judicial Process, [1971] Utah L Rev 1, 8.) Blackstone believed that all law preexists; it simply awaits discovery. (1 William Blackstone, Commentaries on the Laws of England .69 [1775].) But "[f]or true believers of th[at] school, opinion writing was inescapably grounded in the past, the further back the better." (Robert A.
Leflar, *Honest Judicial Opinions*, 74 Nw UL Rev 721, 739 [1979]. Sometimes opinion writers are afraid to discuss policy. They should fear not:

"Perhaps one of the reasons why judges do not like to discuss questions of policy, or to put a decision in terms upon their views as lawmakers, is that the moment you leave the path of merely logical deduction you lose the illusion of certainty which makes legal reasoning seem like mathematics. But the certainty is only an illusion, nevertheless." (Oliver W. Holmes, Jr., *Privilege, Malice and Intent*, 8 Harv L Rev 1, 7 [1894].)

Policy discussions are especially suitable when a court (1) decides a highly technical subject, (2) considers the meaning of a statutory scheme, (3) extends the law to new ground, or (4) resolves inconsistent law. Consider the famous development of the cause of action for invading privacy. The idea that victims of privacy invasions should be allowed to sue in tort began with Samuel D. Warren and Louis B. Brandeis, *The Right to Privacy*, 4 Harv L Rev 193 (1890). Stimulated by the policy concerns raised in that article, the courts incrementally established the right to sue for privacy invasions and later the contours of that action.

Show why your rule is better than a contrary rule. Explain that an evildoer will elude justice or that a different rule will obscure a bright line, offer too much discretion, be difficult to enforce, or open the floodgates of litigation. A resort to policy must be articulated: "[I]f public policy is ever to be used as a ground for judicial decision, then it must be justified by recourse to an analysis of the reasons which are the foundation for the policy. (Hopkins, *supra*, at 336.)

In a highly contested case it is not enough for an opinion to articulate that such-and-such rule exists and therefore that it will be followed mindlessly. That some dead judges or a few long-since-retired legislators enunciated some law does not mean that they did so wisely or that the rule should be applied in all cases. As Justice Holmes explained, "It is revolting to have no better reason for a rule of law than so it was laid down in the time of Henry IV. It is still more revolting if the grounds upon which it was laid down have vanished long since, and the rule simply persists from blind imitation of the past." (Oliver Wendell Holmes, *The Path of the Law*, 10 Harv L Rev 457, 469 [1897], reprinted in 110 Harv L Rev 991, 1001 [1997], quoted in *Bowers v Hardwick*, 478 US 186, 199 [1986, Blackmun, J., dissenting].)

Readers and writers both benefit from knowing the rationale for the law. Competent opinion writers do not slavishly follow precedent that allows for distinctions. Rather, they find appropriate distinctions that meet the merits, justice, and equities of every case. Not being a sycophant to the first precedent the researcher lazily finds is part of being open minded. Spending the time in every case to consider anew the meaning behind the law prevents boilerplate opinion writing.
Policy is better taken from legislative preambles, legislative history, case law, and secondary authority than from your own unsupported creativity. Moreover, policy discussions are better left in the background. As Professor Leflar explained, "The law-making aspect of the common law appellate judicial process does not outweigh the dispute-deciding aspect of it, even though the latter is sometimes overshadowed." (Robert A. Leflar, Some Observations Concerning Judicial Opinions, 61 Colum L Rev 810, 811 [1961].)

A court constrained by the terms of a statute to apply bad policy or render injustice may appeal for legislative reform. The reporters are filled with these appeals. (See e.g. Burley v Stein, 40 Cal App 3d 752, 756 n 4, 115 Cal Rptr 279, 281 n 4 [2d Dist 1974, Hanson, J.] [urging California’s Judicial Council to adopt New York’s small-claims procedures].) Courts not of last resort are bound by precedent, but they are not gagged. They may argue policy to criticize higher-court doctrine and suggest reversal. Courts may even suggest that the law be changed. In People v Graham (55 NY2d 144, 151 [1982, Fuchsberg, J.]), for example, the Court wrote,

"So, if they are unhappy with the statutory status quo, if the submission of issues which now go to the jury 'seems unwise, unreasonable or undesirable, the argument for change is to be addressed to the Legislature, not to the courts' (People v Kupprat, 6 NY2d 88, 90). And, to this end, it well may be meat for those who subscribe to these criticisms to invite consideration of the subject by the Advisory Committee on Criminal Law and Procedure of the Chief Administrator of the Courts."

One caution: Courts should not urge statutory change or appellate reversal too often, lest they be perceived as crying wolf.

3. Ordering Authority

Cite cases from the highest court first. Among equal authorities, cite in reverse chronological order.

Which goes first: the Constitution or a U.S. Supreme Court opinion that interprets the Constitution? The Constitution, which is higher authority than a case that interprets it.

Until this century, statutes were considered "warts on the body of the common law." (Karl N. Llewellyn, The Bramble Bush: On Our Law and Its Study 89 [1930].) But "most American jurisdictions are now Code states." (Stanley Mosk, The Common Law and the Judicial Decision-Making Process, 11 Harv JL & Pub Pol'y 35, 35 [1988].) Statutes must therefore be cited before cases. Unless a statute is unconstitutional or beyond the rule-making body’s authority to enact, statutes are more authoritative than cases that interpret them.

4. Headnotes & Syllabuses
Never cite headnotes or syllabuses or, worse, quote from them. But skim them to save research time.

For a case in which a court quotes a headnote, see People v O'Brien (111 NY 1, 56 [1888, Ruger, Ch. J.]), an example of opinion writing from a by-gone era.

Because of United States v Detroit Lumber Co. (200 US 321, 337 [1905]), every syllabus to a United States Supreme Court opinion includes a footnote stating that the syllabus has been prepared for the reader's convenience but is not part of the opinion.

5. Signals

The previous Tanbook, page 24, provided that the Bluebook's format on signal usage governs in New York. But without saying so, the examples in the previous Tanbook suggested two key differences in signal usage between the Tanbook and the Bluebook. First, the previous Tanbook, unlike the Bluebook, required commas after all signals. Under the current Tanbook (2002, supplemented 2004), a comma after or between any signal, even "See e.g." and E.g., is "not preferred." Second, the previous Tanbook permitted "supra" for primary and secondary authority; the Bluebook allows "supra" for secondary authority only. (The previous Tanbook usage for short-form, second-time citations: Shah v Eastern Silk Indus., 67 NY2d 632, supra, or Shah, 67 NY2d, at 632.) Under the new Tanbook, "supra" and "infra" (and the comma before "at") are optional but disfavored. Bluebook usage for short-form, second-time citations in which "Id." does not apply: Shah, 67 NY2d at 633–34. New Tanbook usage for short-form, second time citations in which "Id." does not apply: Shah, 67 NY2d at 633–634. Thus, the previous Tanbook differed from the Bluebook for short-form case-law citations, and the new Tanbook differs from the Bluebook because the new Tanbook has no commas after any signals.

Here are the Bluebook's rules about signals, as modified by the new Tanbook:

- No signal precedes a citation if your citation supports your proposition directly. (Thus, no signal after a quotation.)

- "Contra" if your citation contradicts your proposition directly.

- "See" if your citation supports your proposition indirectly or by inference. When using "see," explain the citation in your text or in a parenthetical or bracket following your citation.

Example: If you discuss the facts of your case and then cite a case, "see" must precede your citation at the end of your sentence because your cited case did not discuss the facts of your case.
“See also” before a second citation if the first citation supports the proposition directly but the second supports the proposition only indirectly. This signal is always lowercased (“see also”) and preceded by a semicolon.

“But see” if your citation contradicts your proposition indirectly.

“E.g.” if your citation gives one or more examples to support your proposition directly.

Do not write that “courts have held” or that “at least one court has held” and then cite one case only. Use “e.g.,” or write “one court has held.” Your reader might suspect that your research disclosed but one case and that you are exaggerating.

“See e.g.” if your citation gives one or more examples to support your proposition indirectly.

“Cf.” if your citation supports your proposition by analogy.

“Accord” is different from “see also” and is used in two situations. First, use “accord” when a citation from another jurisdiction supports your proposition. Second, use “accord” to cite a second authority after quoting a first authority if the second authority supports the original proposition. Example: The Court of Appeals has noted that “the appropriate date for measuring the value of marital property has been left to the sound discretion of the trial courts . . . ” (McSparron v. McSparron, 87 NY2d 275, 287 [1995]; accord Domestic Relations Law § 236 [B] [4] [b].)

“But cf.” if your citation contradicts your proposition by analogy.

“Compare . . . with” to compare one proposition and citation with another proposition and citation.

“Id.” and “see id.” as short-form citations that refer unambiguously to a single, immediately preceding citation.

Note: If you underline signals, be careful not to underline commas not italicized in the two signals that traditionally end with commas. Correct: “See, e.g.,” and “e.g.,” or “See, e.g.,” and “e.g.” Incorrect: “See, e.g.,” and “e.g.,” or “See, e.g.,” and “e.g.” (But note that the under the new Tanbook, commas after any signal, including see e.g. and e.g., are disfavored.) The same rule applies when you italicize a case. Do not italicize too much. Correct: (McSparron v. McSparron, 87 NY2d 275 [1995]), or McSparron v. McSparron (87 NY2d 275 [1995]). Incorrect:

6. Citing

Cite according to the 2002 Tanbook (as supplemented in 2004), New York’s Official Style Manual. (See Gerald Lebovits, New Edition of State’s “Tanbook” Implements Extensive Revisions in Quest for Greater Clarity, 74 NY St BJ 8 [Mar./Apr. 2002].) Do not use the Bluebook, ALWD, or some hybrid citation system.

It is not graceful to put a citation at the beginning or in the middle of sentences. Doing so is the sign of an insecure scholar. Issues, not authority, should be emphasized. To emphasize authority, cite the source at the end of your sentence or in a separate sentence that consists only of the citation.

Not citing at the beginning of a sentences will also eliminate monstrosities like “In In re Smith, . . . .”

Use parentheses—or a bracket in New York State style—when citing, but do not let a parenthetical throw you a curve.

Use a parenthetical if the citation reference is unclear, such as where the reference supports the proposition inferentially or indirectly and you do not explain the reference in the text. Use a parenthetical to explain the preceding sentence. Do not use a parenthetical to add information that does not explain the preceding sentence. Correct: “Defendant committed a tort. (See X v Y, 1 NY3d 1, 11 [2011] [explaining elements of tortuous wrongs].)” Incorrect: “Defendant committed a tort. (X v Y, 1 NY3d 1, 11 [2011] [observing tartly that ‘tort’ means ‘pie’ in French].)”

Use a parenthetical following a case or statute if a fact from your case precedes the citation. For example, it is bad form to compose the following sentence and then append the following citation: “Petitioner is not yet entitled to attorney fees. (Solow v Wellner, 86 NY2d 582, 589 [1995].)” The citation needs a “see” and a parenthetical to explain why the author cited Solow v Wellner. The sentence and the citation should read, “Petitioner is not yet entitled to attorney fees. (See Solow v Wellner, 86 NY2d 582, 589 [1995] [holding it premature to review award for attorney fees when case is remitted to recalculate abatement award].)”

Remember, however, to “[u]se an explanatory parenthetical only for information that is simple and not part of the argument. And resist the temptation to use explanatory parentheticals to avoid the hard work of explaining complicated and important authority.” (Richard K. Neumann, Jr., Legal Reasoning and Legal Writing: Structure, Strategy, and Style § 17.4, at 244 [4th ed 2001].)
Avoid using articles in your citation parentheticals, but use an article if the parenthetical reads poorly without one.

The Bluebook (but not the Tanbook) recommends that if the entire parenthetical is a quotation, (1) the parenthetical should begin with a capitalized first letter, even if a bracketed alteration is required; (2) a period or four ellipses (asterisks in pre-2004 Tanbook style) should go at the end of the parenthetical before closing the quotation if the quotation is an independent clause; and (3) a final period should follow the closing parenthetical.

Begin citation (explanatory) parentheticals or brackets with a lowercase present participle or gerund (“finding,” “holding,” “noting,” “stating,” “ruling”). This technique is harder than writing whatever comes to mind, but introductory present participles or gerunds focus citation parentheticals. Parenthetical present participles or gerunds are rare in New York but are now standard in federal court. Key present participles or gerunds for citation parentheticals:

- “Finding” (fact or law that leads to a holding).
- “Holding” (essential factual and legal findings that lead to the final determination and the conclusion itself).
- “Stating” (dictum or concurrence). Contracts “provide” and statutes “create,” “abolish,” “prohibit,” “define,” and “provide.” Neither contracts nor statutes state or “say.”
- “Ruling” (non-case-specific announcement of legal standard)
- “Arguing” (concurrence or dissent; neither majority appellate opinions nor trial judges “argue”).
- “Contending” (judges, including dissenters, never “contend”).

Note: Do not use the vague “indicating” in a citation parenthetical.

Limit string citing to three cases except when you must document the sources necessary to understand authority or a split in authority. When you string cite, separate authorities by semicolons. The order of a string cite: constitutional provision before statute before rule and regulation before case; federal before state; highest court first; within co-equal courts, reverse chronological order; and secondary authority, in alphabetical order.

Ordering authority by weight in your text:

- Prefer a higher court to a lower court.

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- Prefer Court of Appeals most of all. If you cite a Court of Appeals or Appellate Division opinion on point, you will rarely need to cite a trial-court opinion.

- Prefer a New York State court to a federal court (unless your issue raises a federal constitutional question and the federal courts have set a threshold).

- Prefer the Second Circuit to another federal circuit.

- Prefer any federal court to any non-New York State state-court.

- Prefer your Appellate Division Department or Appellate Term District to another Appellate Division Department or Appellate Term District.

- Prefer a court of coordinate jurisdiction in your appellate jurisdiction to a court of coordinate jurisdiction in another appellate jurisdiction.

- Prefer fully affirmed opinions to those modified on other grounds.

- Prefer unanimous opinions to majority opinions.

- Prefer majority opinions to plurality opinions.

- Prefer plurality opinions to concurring opinions.

- Prefer concurring opinions to dissenting opinions.

- Prefer a case on all fours to a case with distinctions.

- Prefer most cases to most secondary authority.

- Prefer signed opinions to memorandum opinions.

- Prefer memorandum opinions to per curiam opinions, except when the per curiam opinion allows no reservations and contains no wriggle room.

- Prefer unanimous authority to split authority.

- Prefer newer cases to older cases (unless the older case is seminal authority).

- Prefer a case that goes your way to a case that goes the other way, even when citing black-letter law.
Prefer a famous, highly regarded judge or author to a less highly regarded judge or author.

Prefer a holding to a finding.

Prefer ratio decidendi to obiter dictum.

Prefer a published opinion to an unpublished opinion.

Prefer an officially reported opinion to an unofficially reported opinion, such as a New York Law Journal opinion. (When you cite a Law Journal opinion, always verify whether the opinion has been reported officially and whether the decision has been reversed.)

Prefer a constitution to a statute.

Prefer a statute to a rule or regulation.

Prefer a statute to a case, but cite both (citing the statute first) if the case explains how to apply the statute.

Prefer a reference in the text of a case or secondary authority to a reference in a footnote of a case or secondary authority.

Never cite as binding or persuasive an out-of-jurisdiction opinion that interprets a statute or rule different from the one you are interpreting.

Be careful when citing a case affected by later statutory changes.

Never cite unpublishable opinions (those to which a court, typically a Federal Court of Appeals, explicitly forbids, under penalty of contempt, anyone from citing) except for res judicata or collateral estoppel purposes.

Always alert the reader if the citation comes from a concurrence or a dissent (Wesley, J., concurring; Ciparick, J., dissenting; Graffeo, J., concurring in part & dissenting in part; or just “dissenting opn”).

Although it is uncommon to do so in New York State style, and the Tanbook states that this information is optional, the best practice is to use the federal practice of alerting the reader to the weight of authority: memorandum opinion, per curiam opinion, or en banc opinion, as follows: (A v B, 100 NY 100 [1935, per curiam]); C v D, 101 App Div 101 [4th Dept 1936, mem]); (E v F, 102 Misc 102 [App Term 1st Dept 1937, per curiam]); (G v H, 103 F 103 [2d Cir 1938, en banc]).
Do not discuss a citation if you have mentioned it for the first time only in the preceding parenthetical citation, whether as a sentence citation or as a citational footnote. Not: “To be valid, a contract requires offer and acceptance. (A v B, 99 NY 99 [1899].) In A v B, the court . . .” Rather, introduce your citation in your text before you discuss it in your text. Anticipate that your citation will not be read—that your reader will read only your text. You must lay a foundation in the text, not in the citation, for anything you later discuss in the text.

Never rely on another source, even a published opinion, for your citation. Always verify independently the accuracy of your citation’s numbers and propositions.

Pinpoint (jump) citations:

- Use pinpoint citations, even to the footnotes: X v Y (16 NY2d 61, 62 n 3 [1981]); A v B (91 AD2d 19, 19 & n 9 [1st Dept 1991, mem] [noting that rule against perpetuities is still alive], rev'd on dissenting opn below 91 NY2d 19 [1991]). New York trial-court opinions often omit pinpoint citations. Most appellate opinions in New York, and all federal opinions, include pinpoint citations.

- Use pinpoint citations even if your proposition is on the first page, and even if your case has only one page: X v Y (16 NY2d 61, 61 [1961, per curiam]).

The same rules about pinpoint citations apply to secondary authority:


Using pinpoint citations will assure your readers that you did not simply forget to use a pinpoint citation or that you did not know that you should always use a pinpoint citation. Your readers will know that you read the cited authority and that your proposition is accurate. Most important, your reader will be able to find quickly the exact proposition for which you cited your authority. Using pinpoint citations forces you to read the case. That will control your citation and make it accurate. That will further lead you to other authorities, and perhaps better ones. Pinpoint citing also inhibits boilerplate. (See generally Bryan A. Garner, The Redbook: A Manual on Legal Style 108–109 [2002].)

If several pages of your case support a proposition, do not pinpoint cite a broad spectrum of pages, such as 61–68. Use passim instead: X v Y (16 NY2d 61 passim [1981]). Note that “passim” usage is rare in New York, likely because opinion writers are unfamiliar with it.
Do not give parallel citations, according to the Tanbook (but not the Bluebook). The West Group, which publishes the NE2d and NYS2d reporters, will add them if the opinion is published unofficially.

If the official citation is unavailable, give the unofficial citation, such as “S Ct” and, if unavailable there, “L Ed 2d” instead of “US” (the only official federal reporter).

Do not write “__Misc 2d__,” “__AD2d__,” or “__NY2d__” if your cited case is not yet officially reported, even if you expect it to be reported officially. All Appellate Division opinions will be reported in the AD2d reporter, and all Court of Appeals opinions will be reported in the NY2d reporter. It is unnecessary to use the “__AD2d__” or the “__NY2d__” format (“—NY2d—” is not Tanbook style) to tell a reader that these opinions will be published officially. Conversely, most trial term and Appellate Term opinions published in the New York Law Journal or elsewhere will not be reported in the Misc 2d reporter. It is misleading to use the “__Misc 2d__” format unless the opinion has been accepted for publication.

Two exceptions, according to the new Tanbook. An opinion scheduled for publication is published initially in the New York Slip Opinion service at <www.courts.state.ny.us/reporter/decisions.htm>. Cite these slip opinions as follows: (Pitari v Pirro, __Misc 2d__, 1999 NY Slip Op 99006 [Sup Ct, Westchester County, Sept. 15, 1998].) Also, cite unofficially reported United States Supreme Court Opinions as follows: Bush v Gore, __US __, 121 S Ct 525 [2000].)

Let your citation speak for you:

“After the Appellate Term, Second Department, decided Smith v Jones in 1997 in a per curiam opinion that reversed in part and affirmed in part a 1996 judgment of the New York City Civil Court, Queens County, the Appellate Division, Second Department, granted leave and reversed in 1998 in a memorandum opinion, and then the Court of Appeals granted leave in 1999 but dismissed the appeal in 2000.” Becomes: “(See Smith v Jones, NYLJ, Apr. 1, 1996, at 9, col 1 [Civ Ct, Queens County], aff'd in part & rev'd in part 199 Misc 2d 911 [App Term, 2d Dept 1997, per curiam], revd 191 AD2d 919 [2d Dept 1998, mem], app dismissed 191 NY2d 191 [2000].)”

The 2002 Tanbook improves on the old Tanbook. Among the changes:

- *Id.* is permitted.
- A shortened form of a case name is permitted both in running text and parentheses for any later reference.
Supra is disfavored for primary authority.

Commas and periods must be placed inside closing quotation marks. Colons and semicolons must go outside closing quotation marks.

The use of alternating double and single quotation marks to indicate quotations within quotations (or a parenthetical noting that internal quotation marks have been omitted) is permitted but no longer required.

Using the first names of the authors of treatises, law-review articles, and other authorities is permitted but not required.

Commas are disfavored after signals (see 82 NY2d 57), in pinpoint (jump) pages for later, short-form references (142 AD2d at 483), before note numbers (20 n 2), after id. (id. at 234), or after encyclopedic article titles (79 Am Jur 2d, Names § 38).

Capitalization rules are modernized to eliminate excessive capitalization. Among the changes:

- “Court” must be capitalized only when naming a court in full (City Court of Rochester) or when referring to the United States Supreme Court, the New York Court of Appeals, or the Appellate Division;

- “Judge” or “Justice” must be capitalized only when part of a personal name (Judge Maria Ressos) or when referring to a Justice of the United States Supreme Court or a Judge of the New York Court of Appeals;

- “State” must be capitalized only when naming a state in full (“State of New York,” “New York State”), when the word it modifies is capitalized, or when referring to a state as a litigant;

- “Federal” must be capitalized only when the word it modifies is capitalized;

- Names of statutes must be capitalized (Child Support Standards Act), but general references like “statute of limitations” or “statute of frauds” are no longer capitalized; and

- When citing a statute in running text, writers may use the full or the abbreviated name.

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For more on citing, see Gerald Lebovits, The Legal Writer, *Write the Cites Right—Part One*, 76 NY St BJ 64 (Oct. 2004); Gerald Lebovits, The Legal Writer, *Write the Cites Right—Part Two*, 76 NY St BJ 64 (Nov.-Dec. 2004).
XV
STYLE II: FOR ALL LEGAL WRITING, WITH AN EMPHASIS ON OPINION WRITING

1. Be Formal But Not Inflated

No contractions or ampersands. They aren't formal & shouldn't be used in opinions. Ampersands in names of businesses or professional associations should be retained. The law firm: "Howe & Hummel." Note that contractions work well in informal writing. They are friendly, warm, and sincere.

No slang (you betcha bottom dollar!). In legal writing, "[s]lang often deformalizes, thereby deemphasizing the seriousness of a situation." (George D. Gopen, Writing from a Legal Perspective 56 [1981].)

No recent back-formations. They enthuse no one. It is hard to orientate people to new back-formations. A back-formation is a word formed by subtracting an affix from a longer word: "administer" becomes "administrate," "converse" (or, better, "talk") becomes "conversate," "remedy" becomes "remediate." Older back-formations like "diagnose" from "diagnosis" are acceptable. They cohabit (cohabit?) well with the rest of your writing. Most readers find newer back-formations grating. A friendlier relative of the back-formation is the functional shift. A functional shift is an acceptable language change. Through shifts in parts of speech, a verb may become a noun ("to run" may shift to "a run") and a noun may become a verb ("to blacklist" may shift to "blacklists").

No implied intransitives. In an implied intransitive, the object is indeterminate. For example, what do waiters mean what they serve food and tell you to "enjoy"? To enjoy the food? To enjoy yourself while you digest? Implied intransitives are acceptable in conversation but not in formal writing.

No de-transitivizing. A verb may be transitive ("I need you") or intransitive ("I need"). A de-transitivized verb is neither. Safire's examples of what not to write: "[P]lease wait while your credit card is authorizing" and "[T]his book usually ships in three days." (William Safire, On Language, NY Times Magazine, Oct. 22, 2000, at 38 [emphasis in the original].) The problem with de-transitivized verbs is lack of clarity, not merely informality. What subjects of Safire's sentences are authorizing and shipping? What objects are the verbs' action being done to?

Do not "verb" nonverbs. Parts of speech evolve over time into verbs called "changelings" and can function as nouns and verbs: "calendar," "chair," "film." But you should not overnight nonverbs overnight.

No colloquialisms. Go 'round the barn at high noon to avoid 'em. But find room in a forthright, impure opinion to include an occasional colloquial word or phrase for effect.
No abbrev. in your text unless nec. OK? Eliminate in your text:

- "i.e." (id est—"in other words," "that is").
- "e.g." (exempli gratia—"for example"—except to introduce a citation).
- "et al." (et alii—"and others"—except in styling a case).
- "etc." (et cetera—"and so forth," "and so on," and the like, all referring to things, not people).
- "N.B. (nota bene—"note well").
- "q.v." (quod vide—"which see." "See also" has replaced q.v.).
- "viz." (videlicet—"namely").

Exceptions:

- Commonly abbreviated titles like Mr., Ms., and Dr. are permitted in your text. Do not abbreviate less common titles. Prefer "Officer A" to "P.O. A," "Detective B" to "Det. B," "Lieutenant C" to "Lt. C," "Professor X" to Prof. Y," "President Bush" to "Pres. Bush."

- Acronyms you have already defined are also allowed in your text: FBI.

- Abbreviations also lead to errors. For example, an "ATM machine" is redundant because the "M" in "ATM" already means "machine."

Murder the morphs. Workaholic lawyers should avoid newfangled suffixes and nonce words. These lawyers should get a life—and become footballaholics.

No parenthetical remarks. (However relevant, they are (usually) easily avoided.)

No strong interjections. Oh! Wow! Interjections express emotion too strong for opinion writing. Interjections are also too often self-congratulatory.

(Note: Use a comma or a period after a mild interjection, an exclamation point after a strong interjection (for informal writing), and no comma after an exclamation point when quoting: "Good grief!" said Charlie Brown.")
No shortened words. Whether you write on a P.C. in your auto or whether you dictate over your phone on a plane, go the max: Write words in full.


No quotation marks except when actually quoting, defining a term of art, or referencing a word or phrase. Violating this rule marks you a “paranoid” or an “egocentric.”

Prefer words to figures when itemizing in text, for 1 (one) reason: (1) Words are more formal than figures. This advice applies 24/7.

As it shall be written, so shall it be done. No pontificating or highfalutin language. Write like a person, not a personage. People who use inflated language are, well, full of hot air.

Never use a gargantuan, humongous, or capacious (big) word when an infinitesimal, lilliputian, or diminutive (small) one will suffice, be adequate, and satisfy your requirements (do). Big words impress no one. Perhaps Miss Thistlebottom taught you in sixth grade to use $10 words. Perhaps you learned big words when you prepared for the SAT exam. Perhaps big words earned you high grades from some college teachers. Perhaps you even paid big money for a big thesaurus to learn big words. If so, you learned the wrong lesson—and your writing needs a big adjustment: “[A]cademic writing is all-too-often verbose and didactic for the sake of mere pedantry. After you graduate and enter the business world, your task shifts from writing to impress to writing to communicate . . . . Much of the time . . . big words just set up barriers between you and your audience.” (Laurie E. Rozakis, The Complete Idiot’s Guide to Grammar and Style 233 [1997].) Besides, big words can mean big mistakes. Incorrectly using a big word turns pretense into buffoonery—a perception the opinion writer can ill afford to create. Recall the times you have heard people confuse “subsequently” with “consequently.” These people would have been better off if they had said “later” instead of “subsequently.”

Strive for balance in formality. Be neither impenetrable nor casual. (That would be a tummy-wrenching experience.) Be neither inhibited nor egocentrically breezy. (Which reminds me of an interesting story . . . .) Be neither gratuitously judgmental nor opinionated. (Nobody asked me, but . . . .). The goal in legal writing is not to be conversational, as one would be in a natural, informal, relaxed setting. The goal, however, is to use words you would use in polite conversation. Legal writing is planned, formal speech.

For more on this topic, see Gerald Lebovits, The Legal Writer, Dress for Success: Be Formal But Not Inflated, 73 NY St B] 8 (July/Aug. 2001).

2. Jargon

No jargon.
No fad or vogue words. (Unless they're groovy—not!)

No cop-talk ("subject, male Caucasian, proceeded to go left at a high rate of speed when an unidentified male hit him about the face").

No consultant-speak ("actualization parameters").

No trendy locutions. They sound flaky. The bottom line on trendy locutions is that they are not cutting edge. Here is a non-user-friendly locution offered on a need-to-know basis:

"Let's interface to finalize the decision."

The "ize" sometimes have it. No one objects to old "-ize" suffixes that turn a noun or an adjective into a verb: "criticize," rationalize." But all formal writers object to the more recent "ize" formations: "concretize," "maximize," "optimize," "prioritize," "strategize."

Portmanteau words. You might not find "portmanteau" in the pictionary, but if you combine sounds and words you, too, can form new words. Legal writers regularly blend words. For example, "palimony" comes from "pal" and "alimony." "Breathalyzer" comes from "breath" and "analyzer." Many portmanteau words are entirely acceptable. But legal writers should use only accepted blends—unless you want your readers to chortle ("chuckle" and "snort") over brunch ("breakfast" and "lunch") while they stay in a motel ("motor" and "hotel").

Judge Duniway, in United States v Marshall (288 F2d 1169, 1171 n 1 [9th Cir 1973]), described jargon acquired at the police academy:

"The agents involved speak in an almost impenetrable jargon. They do not get into their cars; they enter official government vehicles. They do not get out of or leave their cars; they exit them. They do not go somewhere; they proceed. They do not go to a particular place; they proceed to its vicinity. They do not watch or look; they surveille. They never see anything; they observe it. No one tells them anything; they are advised. A person does not tell them his name; he identifies himself. A person does not say something; he indicates. They do not listen to a telephone conversation; they monitor it. People telephoning each other do not say 'hello'; they exchange greetings."

Jargon is stereotyped and annoying, but worse it is imprecise. As a noun, for example, "impact" means a collision. "Impact" should not be used figuratively to mean "effect" or "influence." A tip to be taken literally: Always use words literally, not figuratively.
Opinion writers who use jargon in opinion writing also use jargon in letter writing. Do not use the following: "beg to advise," "enclosed herewith," "enclosed please find," "further to yours of," "pending receipt of," "pleased be advised that," please return same," "pleasure of a reply," "pursuant to your request," "regarding the matter of," "regret to inform," "thanking you in advance," "the undersigned," "this acknowledges your letter," "we are pleased to note," "yours of even date."

3. Legalisms and Plain English

From one legal-writing guru: "Ask the public: The first thing they associate with professors is tweed; the first with doctors (a tie here) is lots of money and bad handwriting; and the first with lawyers, written language that is impossible to understand." (George D. Gopen, The State of Legal Writing: Res Ipsa Loquitur, 86 Mich L Rev 333, 333 [1987].) Comprehensible English is plain English. The keys to plain English include clear large and small-scale organization; the active voice; affirmative writing; parallel structure; and short, simple, and familiar words, sentences, and paragraphs. Legalese is the antithesis of plain English.

In most jurisdictions, consumer contracts must be written in plain English. (See e.g. General Obligations Law § 5–702[a][1] [requiring that writing be "clear and coherent . . . using words with common and everyday meanings"]). So must attorneys' papers. (See e.g. CPLR 2101[b] [requiring that papers be written in English "of ordinary usage"]). Judicial opinions should also be written in plain English, not legalese. Plain English reduces unclarity, saves readers' time, and fosters intellectual attainment. Nothing is "plain" about plain English. Recall Sidney Greenstreet's toast to Humphrey Bogart in The Maltese Falcon: "Here's to plain speaking and clear understanding."

Legalese is turgid, pompous, annoying, adds nothing of substance, gives a false sense of precision, and obscures gaps in analysis. From Judge Rosenblatt: "There is still a lot of 'legalese' in current usage, but the best writers have come to regard it as pretentious or bad writing." (Albert M. Rosenblatt, Lawyers as Wordsmiths, 69 NY St BJ 12, 12 [Nov. 1997].) Here is some current legal writing:

"I enclose herewith such aforementioned original copy of my decision, to wit my order, in connection with the said above-entitled action with reference to same below-captioned docket number for one Mr. Smith to witnesseth."

Never use these old-English words: "aforementioned," "aforesaid," "by these presents," "foregoing," "forthwith," "hereinafter," "henceforth," "herein," "hereinabove," "hereinbefore," "heretobefore," "hitherto," "herewith," "inasmuch," "one" (before a person's name), "per" (or, worse, "as per"), "said" (instead of "the"), "same" (as a pronoun), "such" (instead of "the," "this," or "that"), "therein," "therto," "thereat," "thenceforth," "thereof," "thereby," "thereunto," "thereafter," "therefor" (which is different from "therefore" and means "for that," as in "I need a
receipt therefor”), “therefrom,” “to wit,” “whatsoever,” “whensoever,” “whosoever,” “whilst,” “whereas,” “wherein,” “whereby,” “wherewith,” and all verbs ending in “eth.”

Justice Smith of the Arkansas Supreme Court gave this advice in his classic lecture on opinion writing: “I absolutely and unconditionally guarantee that the use of legalisms in your opinions will destroy whatever freshness and spontaneity you might otherwise attain.” (George Rose Smith, A Primer of Opinion Writing, for Four New Judges, 21 Ark L Rev 197, 209 [1967].) Judges’ writing should be planned and formal, not conversational. Writing cannot reproduce conversation. When people speak, they use inflection, modulation, and body language to convey meaning. Nor should writers write like they speak, unless memorializing such pretties as “umm,” “ah,” “I mean,” “like,” “well,” and “you know” appeals to you. But Justice Smith explained that judges should not write words they “would not use in conversation.” (Id.)

About “said,” as in “aforesaid.” Justice Smith asked whether one would say, “I can do with another piece of that pie, dear. Said pie is the best you’ve ever made.” (Id.)

About “same,” Justice Smith asked whether one would say, “I’ve mislaid my car keys. Have you seen same?” (Id.)

About the illiterate “such,” Justice Smith asked whether one would say, “Sharon Kay stubbed her toe this afternoon, but such toe is all right now.” (Id. at 210.)

About “hereinafter called,” Justice Smith asked whether one would say, “You’ll get a kick out of what happened today to my secretary, hereinafter called Cuddles.” (Id.)

About “inter alia,” Justice Smith asked, “Why not say, ‘Among other things’? But, more important, in most instances inter alia is wholly unnecessary in that it supplies information needed only by fools . . . . So you not only insult your reader’s intelligence but go out of your way to do it in Latin yet!” (Id.)

From the beginning of the world until the end of time we are strangers to the blood. Think of it this way, among other things: If you go on a date and your date asks you what you do for a living, would you answer, “I am, inter alia, a J.D.”? If you would, plan to spend the next Saturday night in a law library—by yourself—studying Rudolf Flesch, How to Write Plain English: A Book for Lawyers and Consumers (1979), and Richard C. Wydick, Plain English for Lawyers (4th ed 1998). If you somehow secure a second date, the only tokens of affection your date will expect from you will be an English–Latin/Latin–English dictionary and plenty of heavily caffeinated coffee to help your date stay awake during your effervescent conversation. And instead of an affectionate “hello,” your date will expect you to say: “To All To Whom These Presents May Come, Greetings.”
If—despite everything you heard and read since the first hour of your first-year legal-writing course in law school—you still distrust every professional’s advice to cut legalese, read Robert W. Benson and Joan B. Kessler, Legalese v. Plain English: An Empirical Study of Persuasion and Credibility in Appellate Brief Writing, 20 Loyola LA L. Rev 301 (1987); see also Robert W. Benson, The End of Legalese: The Game Is Over, 13 NYU Rev L & Soc Change 519 (1985). It turns out that nonlawyers, practicing lawyers, law professors, and judges believe that authors who compose legalese are lousy lawyers—the more the legalese, the lousier the lawyer. Benson & Kessler also proved the reverse: Everyone believes that the less the lawyer uses legalese, the better the lawyer is.

One way to eliminate legalese: “When legalese threatens to strangle your thought process, pretend you’re saying it to a friend. Then write it down. Then clean it up.” (Hollis T. Hurd, Writing for Lawyers 34 [1982].)


What happens when a law clerk works for a judge who shuns plain English? Perhaps the judge believes that lawyers expect to see legalese. Perhaps the judge suffers from inertia, fear, or does not know better. It is not worth losing your job over the issue. Write the way your judge tells you to. The solution is to “take a stand occasionally. If your relationship with your boss is a good one, then you’ll sometimes be able to persuade him or her that your way—the contemporary way—is better. But don’t take a stand without back-up. Be sure that recognized experts on legal writing support your point of view.” (Wayne Scheiss, When Your Boss Wants it the Old Way, 64 Tex BJ 124, 127 [Feb. 2001].)

Some will tell you that legal writing in plain English is oversimplified or lacks precision. You cannot reason with these folks, though many have tried. Michigan State Law Professor Kimble, the Scribes’ editor-in-chief, has made a career of trying. (See e.g. Joseph Kimble, Answering the Critics of Plain Language, 5 Scribes J Legal Writing 51 [1994–1995]; Joseph Kimble, The Great Myth That Plain Language Is Not Precise, 7 Scribes J Legal Writing 109 [2000].) So has Professor Garner. (See e.g. Bryan A. Garner, Judges on Effective Writing: The Importance of Plain Language, 73 Mich BJ 326 [1994].) You can read and hear about the virtues of plain English until you are blue in the face, but “legalese is worse than smoking cigarettes. To kick the habit is extremely hard.” (Rudolf Flesh, How to Write Plain English: A Book for Lawyers and Consumers 2 [1979].) Your writing will stay the same until an angel appears in a dream and shows you the promised land: “Proficiency in using Plain English . . . will not come about by reading this article nor by reading all of the books and articles on the subject. It begins with a sincere, almost religious conviction of its value . . . . Eventually it will develop into a habit . . . .” (Solomon Bienenfeld, Plain English in Administrative Law, 63 Mich BJ 856, 857 [1984].)
For more on this topic, see Gerald Lebovits, The Legal Writer, On Terra Firma with English, 73 NY St BJ 64 (Sept. 2001).

4. Passive Voice vs. Active Voice

The active voice tells readers who did what to whom, in that order. It follows the subject/verb/direct-object formation.

From Professor Francis, a regular lecturer at the National Judicial College in Reno, Nevada: “Where traditional legal style values abstract nouns, indirect phrasing, elongated sentences, and imprecise but time-honored codes, I instead espouse agent/action style, which values exact expression, intellectual efficiency, and dispositive sentences.” (Elizabeth Ahlgren Francis, The Elements of Ordered Opinion Writing, 38 Judges’ J 8, 8 [Spring 1999].) By stressing agent/action, the active voice “orients us to complex ideas by telling us immediately who is responsible for what and by constructing sentences to move from familiar to unfamiliar material, from the relatively simple to the complex.” (Id.) Unless an opinion writer has a reason to use the passive voice—the reasons are noted below—the opinion writer should compose active-voice agent/action sentences, which “assign responsibility, define action, establish the circumstances of the action, and state its consequences.” (Id.) The active voice promotes “the core task of the ‘finder of fact.’” (Id.) The active voice prevents the opinion writer from hiding in legalistic bureaucratese.

The advantages of the active to the passive are three-fold: (1) People think in the active voice, not in the passive; (2) the active voice is concise whereas the passive is wordy; and (3) the active voice is always honest, while the passive is sometimes dishonest.

Below are four sentences that show the difference between the active and the passive:

- “The dog ate the cat.” (Active voice.)

- “The cat was eaten by the dog.” (Single passive.)

- “The cat was eaten.” (Blank, hidden, or double passive.)

- “The passive voice is to be ignored.” (Nonagentive passive, which hides the actor and inverts the order of the sentence.) (Who should ignore this blank passive?)

Use blank passives only (1) if you do not know who the subject (actor) is; (2) to de-emphasize the actor if the actor is irrelevant or obvious; (3) to avoid writing “this court” repeatedly; or (4) to avoid non-gender-neutral language and you cannot figure out another way to do so.

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Invert the subject/verb/direct-object formation for rhetorical style using anastrophe
(hyperbaton):

- “The judge walked in. The court officer walked out.” Becomes: “In walked the
  judge. Out walked the court officer.”

Use single passives only to dovetail or to end a sentence with climax. To dovetail is to
connect sentences together. To climax is to end a sentence with the greatest emphasis. Use
single passives only when you cannot think of a better way to dovetail or climax—and even then,
do not overuse this device.

- One dovetailing technique is to move from old to new. In the following sentence, “The
  contract” is old and “X” and “Y” is new: “The contract was signed by X and Y.” In the
  next sentence, “X” and “Y” is old and “are law partners” is new: “X and Y are law
  partners.” To move from old to new in the above example, the first sentence had to have
  a single passive, “was signed by X and Y.” The sentence would not have dovetailed from
  old to new if it had been active: “X and Y signed the contract.”

- Consider the following example: “The ground was shaken by an earthquake.” The word
  “earthquake” brings about the climax; the words “the ground” are not that important.
  Without the passive, the sentence would read, “An earthquake shook the ground.” That
  active version is less interesting than the passive version.

Be aware of blank passives when listening to witnesses or reading submissions: Attorney:
“Did you read my client his Miranda rights?” Police Officer: “He was read his rights.” A poor
cross-examiner will move on. A smart one will repeat the question. Advocates sometimes use
blank passives to obscure what is important but harmful to their case. In the above example, an
attorney representing a dog charged with eating a cat and arguing that the police violated the
dog’s Miranda rights may write that “the cat was eaten” to divert the reader from thinking that
the dog ate the cat.

Ethics and the passive voice. “Perhaps most damaging,” explained a leading student of
legal style, “is lawyers’ frequent use of language as an instrument of deception.” (Steven Stark,
Why Lawyers Can’t Write, 97 Harv L Rev 1389, 1392 [1984].) It is unethical to use a blank or
nonagentive passive to hide an important actor or to misdirect the reader.

5. **Parallel Structure**

Sentence structure is parallel when nouns match nouns, verbs match verbs, gerunds
match gerunds, and so on. Be especially careful to be parallel when creating lists, whether or not
you number them. A tip: Put the elements of the list at the end of the sentence.
“A rule that is both intelligent and a necessity.” Becomes: “A rule both intelligent and necessary.”

“The rule is found in the cases, statutes, and in the contracts.” Becomes: “The rule is found in the cases, statutes, and contracts.” Or “The rule is found in the cases, in the statutes, and in the contracts.”

Actual notice at the Fordham Law School Library, recently removed: “No drinking, smoking or food.” “Fooding” is not a legitimate gerund, even though it parallels “drinking” and “smoking.” So it becomes “No drinking, smoking, or eating” or “No drinking. No smoking. No food.”

“He was walking to court, whistling a tune, and was carrying a briefcase.”
Becomes: “He was walking to court, whistling a tune, and carrying a briefcase.”

“First, secondly . . . .” Becomes: “First, second,” which is preferred to the lengthier “firstly, secondly,” to the informal “1, 2,” and to the weak “one, two.”

“The court attorney was not responsive, nor was she helpful.” Becomes: “The court attorney was not responsive or helpful.” Or “The court attorney was neither responsive nor helpful.” Or “The court attorney did not respond or help.”

“Not only was The Legal Aid Society attorney afraid of the judge, but also his client.” Becomes, depending on what you mean: “The Legal Aid Society attorney was afraid not only of the judge but also of his client.” Or “Not only The Legal Aid Society attorney but also his client were afraid of the judge.”

Parallelism requires that parallel coordinates, also known as correlative conjunctions, form matching pairs: “although/nevertheless,” “although/yet,” “as/as,” “both/and,” “either/or,” “if/then,” “just as/so,” “neither/nor,” “not/not,” “not only/but also” (or “as well”), “when/then,” “where/there,” “whether/or.”

My favorite neither/nor construction in a judicial opinion: “Our Constitution is colorblind, and neither knows nor tolerates classes among citizens. In respect of civil rights, all citizens are equal before the law.” (Plessy v Ferguson, 163 US 537, 559 [1896, Harlan, J., dissenting].)

Exceptions for “neither/nor”: Use “neither . . . , or,” “not . . . , or,” or “not . . . , nor” if the first negative does not carry over to the second or for dramatic emphasis.

Parallelism is also a powerful—and with antithesis the most powerful—literary device. Recall the Declaration of Independence: “For taking away our Charters, abolishing our laws, and altering the Forms of Government . . . .”

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Parallelism works best in a series of three, all in ascending order of importance. Note the three parallel clauses, the third of which uses three more, all of which end in climax:

- "The Constitution of the United States is a law for rulers and people, equally in war and peace, and covers with the shield of its protection all classes of men, at all times, and under all circumstances." (Ex Parte Milligan, 71 US [4 Wall] 2, 120–121 [1866, Davis, J.].)

- "[T]here is much to do, . . . the hour is late, and . . . we must find a President this year who has the will to work, the heart to inspire us, and the wisdom to show us the way." (Eleanor Roosevelt, quoted in Ruggero J. Aldisert, Opinion Writing 251 [1990].)

Parallel groupings are called "triplets" for three words, "triads" for three phrases, and "threes" for three sentences.

**Triplets:**

- "Blood, sweat, and tears." (An improvement over Churchill's original quadruplet "blood, toil, tears, and sweat.")

- "Duty, honor, country." (General Douglas MacArthur.)

- "Wine, women, and song."

**Triads:**

- "A Jug of Wine, a Loaf of Bread—and thou."

**Threes:**

- "Free at last! Free at last! Thank God Almighty, we are free at last." (Rev. Dr. Martin Luther King Jr., I Have a Dream, August 28, 1963.)

- Every joke about different types of people or different events uses "threes": The first sets up the joke, the second builds anticipation, the third delivers the punch line.

6. **Euphemisms**

Avoid euphemisms, from the Greek "euphemos," meaning "sounding good." "Tax increase" is better than "revenue enhancement." "Underwear" is better than "unmentionables." Euphemisms can be double-speak, and they can also steal good words from us. Who, nowadays,
are exceptional children? The gifted or the retarded? A series of euphemisms: “Not only was he drunk, he also was sloshed, impaired, stoned, and suffering from hyperingesting ethanol.”

Perhaps the most infamous series of euphemisms in an American judicial opinion comes from the Japanese internment case: “Regardless of the true nature of the assembly and relocation centers—and we deem it unjustifiable to call them concentration camps with all the ugly connotations that term implies—we are dealing specifically with nothing but an exclusion order.” (United States v Korematsu, 323 US 214, 223 [1944, Black, J.]).

While euphemisms praise positive qualities and ignore faults, dysphemisms accentuate negative qualities. A defendant found guilty in state court of four murders goes to federal court claiming a constitutional violation. Euphemistically, the defendant is a “habeas petitioner.” Dysphemistically the defendant is a “serial killer.” Euphemistically, lawyers are “counsel.” Dysphemistically they are “shysters” and “mouthpieces.”

Euphemisms fall into three categories.

- The euphemisms that conceal. Recall the Nazis’ euphemism for genocide: “The Final Solution.” Recall Orwellian double-talk: “War is Peace.”

- The euphemisms that pretentiously exalt the disagreeable or humble. When these euphemisms fail—as they will, for there are no immortal euphemisms—new euphemisms will be invented. Think of undertaker, mortician, and, now, funeral director. Think of janitor, custodian, and, now, superintendent.

- The euphemisms that offend by assigning value judgments, often immoral value judgments. Thus, “extramarital” is better than “adulterous,” which is better than “criminal conversation,” an act that may harm “conjugal relations.” “Nonmarital children,” “natural children,” or “children out of wedlock” are better than “illegitimate children,” which, fortunately, has displaced “bastard.”

Use euphemisms only if the common word offends (“paraplegic” rather than “cripple”) or if the writer must be compassionate (“passed away” rather than “died”).

This might challenge your sense of what is correct. People deserve to be treated with dignity and respect. They do not want to be called “differently abled” or “challenged.” They want no attention drawn to themselves. A prediction: If, today, you write “sex worker” instead of “prostitute” in your judicial opinion, your show of sensitivity will be taken as an insult in a few years.

A plague on parrhesia, using words and phrases calculated to offend: “whore” rather than “prostitute,” “kicked the bucket” rather than “died.” Parrhesia is a double dysphemism.
7. Balance & Rhythm

- Faulty parallelism: “He decides cases well, plays soccer and the drums.”

- “The judge wanted to both adjourn and to deliberate.” Becomes, by omitting the often unnecessary “both”: “The judge wanted to adjourn and deliberate.” Or, by adding the “to,” which should be added for emphasis or between lengthy clauses but is unnecessary to separate short clauses: “The judge wanted to adjourn and to deliberate.” Or, with an avoidable split infinitive: “The judge wanted to both adjourn and deliberate.” Or, without splitting the infinitive: “The judge wanted both to adjourn and to deliberate.”

- Note: “Both” requires “and,” not “as well as.” And in the “both . . . and” construction, simply delete the entire construction.

- “A time not for words but action.” Becomes: “A time not for words but for action.”

8. Because

Not (or synonym)/because (or synonym) errors: Use “because” before “not,” but never use “not” before “because” unless you add a second clause or sentence:

- “BAR/BRI isn’t the best because it’s the biggest. BAR/BRI is the biggest because it’s the best.” (Without the second sentence, the sentence would suggest the opposite of what the author intended.)

- “We are not final because we are infallible, but we are infallible only because we are final.” (Brown v Allen, 344 US 443, 540 [1953, Jackson, J concurring].) (Without the second clause, the sentence would suggest the opposite of what the author intended.)

A sentence in which “not” precedes “because” is ambiguous. Does 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”?

Lawyers love to split heirs: “That the testator made no mention of X in his will does not mean that X may inherit because she is a legal heir.” (Does this sentence mean that because X is an heir, it is irrelevant that she was not mentioned in the will? Or does it mean that X is precluded from inheriting, not because she is an heir, but because she was not mentioned in the will?)

Here are four solutions to fix the “not/because” error in the preceding example. Each solution depends on what you mean:
Delete the “because” and begin a new sentence: “That the testator made no mention of X in his will does not mean that X will not inherit. She is a legal heir.”

Invert the sentence so that the “because” goes before the “not”: “Because X is a legal heir, she will inherit even though the testator did not mention her in the will.”

Invert the sentence, delete the “because,” write the first sentence or clause in the positive, and add a “therefore”: “X is a legal heir. Therefore, she will inherit even though the testator did not mention her in his will.”

Write entirely in the positive: “The testator omitted X in his will. But X will inherit because she is a legal heir.”

To what does the “because” refer? Make certain that your “because” refers to one thing only:

“The law clerk stopped researching and started to write because the pen is mightier than the word.” (“Stopped researching because,” “started to write because,” or both?)

A tip: If your “because” can refer to more than one thing, start a new sentence.

Use “because” instead of the following:

“As a result of . . . .”

“Because of the fact that . . . .”

“Being as . . . .”

“Being that . . . .”

“By virtue of . . . .”

“Due to the fact that . . . .”

“For,” as a causal connector.

“For the reason that . . . .”

“Inasmuch as . . . .”

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"On account of . . . ."

"On the ground that . . . ."

"Owing to the fact that . . . ."

"Seeing as . . . ."

"Since" and "as." These two are comparative time concepts and should be substituted as synonyms for "because" only in colloquial speech, especially if since" and "as" appear somewhere other than the beginning of a sentence.

"So" when used as a conjunction. Subordinate a clause and replace "so" with "because." "Respondent requested an adjournment, so the court granted one." "Becomes," among many other possibilities: "Because respondent requested an adjournment, the court granted one."

"The reason being that . . . ."

"The reason is because" and "The reason is due to" become, in formal writing, "The reason is that."

You may begin sentences with "because." From the expert: One superstition is "Never Begin a Sentence with Because." So novel and absurd is this superstition that seemingly no authority on writing has countered it in print." (Bryan A. Garner, The Oxford Dictionary of American Usage and Style 322 [2000].) Because variety is a virtue, however, avoid beginning sentences too often with "because."

9. **That vs. Which**

Learn the difference between "that," a demonstrative pronoun ("that book"), and "which," an interrogative pronoun ("which book?"). Learning the difference will also help you use the following correctly: "who," "whom," "whose," "whoever," "whichever," and "whatever."

Go which hunting. "That" is restrictive (or defining). "Which" is not restrictive (or nondefining).

**A tip:** If the word or concept before the "that" or the "which" is one of several, use "that." If the word or concept before the "that" or the "which" expresses a totality, use "which."

**Question:** That or which? “Judge X must impose a sentence which [or that] she does not want to impose.” **Answer:** If Judge X, who has several sentences to impose, does not want to
impose only one of them, the correct word is “that.” If Judge X has but one sentence and she
does not want to impose it, use “, which,” placing a comma before the “which.”

For more on “that” and “which” issues, see Gerald Lebovits, The Legal Writer, That’s the
Way It Is: That and Which in Legal Writing, 76 NY St BJ 64 (Mar.-Apr. 2004).

10. That

That’s the way it is. Use “that” as a structural device to aid understanding; otherwise
delete. Consider this ambiguous sentence: “The judge said on Monday he will write the
opinion.” Is it “The judge said that on Monday he will write the opinion” or “The judge said on
Monday that he will write the opinion”?

Structural “that”:

  alleged that . . . .” (The People cannot allege a defendant.)

- “The court held the 500-pound man was in contempt.” Becomes: “The court held
  that the 500-pound man was in contempt.” Becomes: “The court held the 500-
  pound man in contempt.” (The judge did not hold a 500-pound man.)

- The Gotham Writers’ Workshop Mission (Copyright Gotham Writers’ Workshop,
  Inc 2000): “We believe anyone can write.” Becomes: “We believe that anyone
  can write.” (The Workshop does not believe anyone or everyone. Try promising
  the company that you will pay when the course is over.)

- “The court decided the question did not need to be decided.” Becomes: “The
  court decided that the question did not need to be decided.” (The court did not
decide the question.)

Nonstructural “that”:

- “The point that is [that are, that were] being made here is not to be wordy.”
  Becomes: “The point being made here is not to be wordy.”

- “The point that he made is not to be wordy.” Becomes: “The point he made is not
to be wordy.”

Another time to use “that”: Use “that” to distinguish between direct and indirect
discourse.

- Direct discourse: “The law clerk said, ‘Bill researched the issues.’”

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Indirect discourse: "The law clerk said that Bill researched the issues." Not: "The law clerk said Bill researched the issues."

Differentiate between "that" (or "which") and "who": "Who" refers to people and to named animals ("Sox the ex-First Cat") and animals that have special qualities ("Mighty Mouse"). "That," "which," and "it" refer to things, entities, concepts, and animals.

- "He is a man that always does the right thing." Becomes: "He is a man who always does the right thing." Becomes: "He always does the right thing."

- "Snidely & Whiplash is the law firm that [not who] represents objectant in Surrogate's Court."

If the clause contains a human and a nonhuman, use a gerund:

- "The man who and the truck that crossed the street . . . ." Becomes: "The man and the truck crossing the street . . . ."

"That that" becomes "that this" or "that the."

"That which" becomes "what":

- "That which does not kill us makes us strong." Becomes: "What does not kill us makes us strong."

Question: Can you string eight "thats" together in one sentence? Answer: "The legal-writing teacher said that that 'that,' that 'that' that that 'that' referred to, is a triply vague referent." (Written differently, the sentence might read: "Said the legal-writing teacher: 'The "that," which is the "that" to which the "that" refers, is a triply vague referent.")

That's not all, folks: Avoid losing parallel structure by adding an unnecessary "that" in a string of clauses:

- "The law clerk explained that although she will draft the opinion, that no one will read it." Becomes: "The law clerk explained that although she will draft the opinion, no one will read it." The extra "that" is called a sentence extra.

11. Which

Keep modifiers next to the words and thoughts they modify:

- "Family Court rendered judgment for respondent which the Second Department reversed." Becomes: "Family Court rendered for respondent a judgment that the
Second Department reversed.” Or “The Second Department reversed Family Court’s judgment for respondent.”

Do not make your “whiches” work too hard. The antecedent becomes vague as the relative becomes remote:

“Respondent stared wildly around the room, which was noticeable to everyone.”
(What was noticeable? Respondent’s staring wildly? The room?) One solution is to divide the sentence into two: “Respondent stared wildly around the room. Everyone noticed his wild stares.” A better solution is to rearrange the sentence: “Everyone noticed that respondent stared wildly around the room.”

Use the “elegant which” to replace the second “that”: “This is the format [delete nonstructural that] the law clerk uses and which [not that] his judge adopted.”

Excise your “which” after an appositive:

“This opinion, which was written for publication, is a masterpiece.” Becomes:
“This opinion, written for publication, is a masterpiece.”

Withdraw your legal “whiches”:

“The parties entered into a contract in March 1955, which contract is binding.”
Becomes: “The parties entered into a binding contract in March 1955.”

12. Vague Referents

The following referents should always be clear: “It,” “that,” “this,” “such,” “which” (and vague pronoun referents: “he,” “his,” “him,” “she,” “her,” “they,” “them”). Possible references may cover more than one word or a word implied but not explicitly stated. Novices prefer vague referents to using more words. Novices should prefer being understood to being concise.

Never use a vague referent: “They won’t understand you as such.” (Who will not understand you? To what does “as such” refer?)

Reference to more than one word: “He told Judge John Smith that he should do some research.” (To whom does the second “he” refer? Judge John Smith or the person who spoke to Judge Smith?)

Reference to a word implied but not stated: “Plaintiff failed to deliver the widgets after defendant failed to pay for them. That started the lawsuit.” (What started the lawsuit? Plaintiff’s failure to deliver? Defendant’s failure to pay? Both?)
If the referent can refer to more than one thing, make the referent clear. Only if the referent can refer to one thing may you use a referent like “they” or “it.”

Referents can be clarified by using different nouns; by repeating the same nouns; by making one antecedent singular and another antecedent plural; or by rewriting the sentence entirely to sharpen the antecedent. Make referents refer to a single and definite antecedent. Then, under the doctrine of the last antecedent, place referents as close as possible to their antecedents.

Do not use “it,” “they,” or “you” as an indefinite pronoun, a word that gets its meaning from an antecedent and which, in its indefinite form, refers to people, places, objects, or things without identifying a specific one:

- “It says in the legal-writing handbook that you should avoid vague referents.”
  *Becomes:* “The legal-writing handbook says that you should avoid vague referents.”

13. **With/Within/Without**

Avoid “with,” “within,” and “without” in the final position of a clause or sentence:

- “Defendant robbed a bank *with* money.” (Did defendant use money—rather than a gun—to rob the bank? Or did defendant rob a bank that had money?)

- “My client has discussed your proposal to fill the drainage ditch *with* his partners.” *(From David S. Levine’s article by the same name in The State of the Language 400 [Leonard Michaels and Christopher Ricks eds, 1980].) (Did the client conspire to put his partners in a drainage ditch? Rewrite: “My client has discussed *with his partners* your proposal to fill the drainage ditch.”)*

- “Do not sit on the bench *without* being fully assembled.” *(Dangling modifier.)* *(The bench, not you (we hope), needs assembly.)*

14. **“A,” “An” & “The”**

“A” and “an” are indefinite articles that refer to someone or something general.

- “A” and “an” begin a noun phrase to open discourse (“A lawyer began summations in the medical-malpractice case yesterday”) or as a subject complement (“The law clerk is a good writer”).

“The” is a definite article that refers to someone or something specific.
"The" begins a noun phrase to refer to something already known to listeners ("The courthouse is across the street") or to assert the existence of something ("The tallest judge in Erie County wore the shortest black robes").

Correct: "I heard that a Judge of the Court of Appeals wrote an opinion yesterday. The opinion is the definitive statement on an important issue: how to construe a statute. A student of the law will learn much from reading an opinion as well-written as the one the Judge wrote."

"A" vs. "an." "A" precedes a word that begins with the sound of a consonant, even if the word begins with a vowel, such as "eulogy." "An" precedes a word that begins with a vowel sound, even if the word begins with a consonant. Use "an" before a silent "h": "an heir." Use "a" before an aspirated, or pronounced, "h": "a historic occasion," "a history book."

Some say that Dickens made but one mistake—confusing "a" with "an"—in his famous line, "[T]he law is a ass, a idiot." (Charles Dickens, Oliver Twist 354 [Kathleen Tillotson ed 1966], quoting Mr. Brumble on learning that the law presumes that "husband and wife are one.")

Always prefer "a" or "an" to "per."

"Sixty-five miles per hour." Becomes: "Sixty-five miles an hour."

Accept this article of faith: The fastest way to prove that English is not your native language is to make an article error. Use an article before a count noun, a noun that names something that can be counted. Do not use an article before a noncount, or mass, noun, a noun that cannot be counted.

Correct: The court reporter celebrated a birthday yesterday. " ("Birthday" is a count noun because, unfortunately, birthdays can be counted.)

Correct: "Court Officer Captain William 'Harry' Thompson showed great valor in going to the World Trade Center on September 11, 2001." ("Valor" is a mass noun. An article may not precede "valor," which cannot be counted.)

Incorrect: "I want to sit on chair in house." (Use articles here. The chairs and the house can be counted.)

Incorrect: "Defendant has a mens rea." (Do not use an article here. The concept "mens rea" cannot be counted.)

Avoid articles in citation (explanatory) parentheticals unless the citation parenthetical reads better with the article:
“(A v B, 9 AD3d 9, 19 [4th Dept 2001] [applying the rule against perpetuities].)
Becomes: “(A v B, 9 AD3d 9, 19 [4th Dept 2001] [applying rule against perpetuities].)”

15. Use Ordinary English

Even courts note the problems with court-speak: “A famous playwright once said that judges’ instructions are ‘grand conglomerations of garbled verbiage and verbal garbage.’” (State Highway Dept. v Price, 123 Ga App 655, 657, 182 SE2d 175, 177 [1971, Hall, P.J.] [declining, however, to identify playwright].)

a. Eschew Archaic Expressions

Something archaic is antiquated and rarely used. Words can become archaic quickly. Think of “facsimile transmission.” The current unpretentious word is “fax.”

Methinks I’m verily right about this: Legal writers are nigh entreated to eschew archaic words and expressions. As to archaic words and expressions, it behooves you beyond peradventure to quoth the maven anon: “Nevermore.”

Withal thou goest, store archaic words and expressions in a file cabinet marked “Nice to Know” and forget about them.

One reason, perchance, not to beget archaics is that to show (shew?) off, you will, mayhap, use them incorrectly. Shakespeare correctly wrote, in Hamlet, that “the lady doth protest too much.” But in the second person, it is “You (thou) doest protest too much,” not “You (thou) doth protest too much.” Similarly, Eugene O’Neill correctly titled his play “The Ice Man Cometh.” “Cometh,” and all “-eth” suffixes, is singular. Only “he” or “she,” not “they,” can giveth and taketh away. Thus, “The lawyers cometh” or “The judges giveth and taketh away” are not merely pretentious but dysfunctional Old English to boot.

b. Flay Foreign Words

What’s the good word? If available, use Anglo-Saxon (English) words, not foreign, fancy, or, whilst we are on the subject, Old English words. Using English words when writing in English is not jingoistic; it is, mirabile dictu, common sense. Rarely is the foreign word le mot juste. A foreign word, rather, is usually an enfant terrible, a veritable bête noire.

Professor Gopen has explained why some lawyers use romance words—and why they should stop:

“Romance vocabulary brands one as either upper class intelligencia or as simply pretentious . . . . Professionals who tend to fear
sounding too simple gravitate towards the Romance vocabulary, and most frequently today, towards professional jargon. A return to a greater percentage of Teutonic words will not debase writing; it will allow us to get to the point more quickly and to clear up some shockingly fuzzy thinking.” (George D. Gopen, Writing from a Legal Perspective 15 [1981].)

Foreign words and phrases are not apropos. Foreswear foreign words and phrases, mutatis mutandis, if you have an English quid pro quo—except for short-hand Latin words commonly used in legal English.

Italize (underline in typing) foreign words in text only when they are not commonly used in legal English.

Macronics—mixing two or more languages—is common. A request mixing English, Spanish, and Yiddish recently overheard in New York City: “Bagel con shmear, por favor.” (To which the New York deli owner answered, “If I can make it here, I can make it anywhere.”) Macronics is favored in formal writing only when necessary to quote or repeat dialect.

c. When to Use Latin & French

Latin is a dead language, as dead as it can be. First it killed the Romans, and now it’s killing me. Unless, a fortiori, you have an acute case of terminal pedantry, use Latin 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.

Substitute the following English words for Latin words:

- “Agendas” (which is already plural; the singular of “agenda” is “agenda,” not “agendum”).
- “Appendixes” (not “appendices”).
- “Curriculums” (not curricula”).
- “Dogmas” (not “dogmata”).
- “Focus” (the plural of “focus” is “focuses,” not “foci”).
- “Formulas” (not “formulae”).
- “Forums” (not “fora”).

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- "Graffiti" (always write in the plural; the singular "graffito" is rare).
- "Indexes" (not "indices").
- "Kudos" (always write in the plural; "kudo" is not a word).
- "Maximums" (not "maxima").
- "Memorandums" (not "memoranda" or, worse, "memorandas").
- "Minimums" (not "minima").
- "Radiuses" (not "radii").
- "Referendums" (not "referenda").
- "Stadiums" (not "stadia").
- "Syllabuses" (not "syllabi").

But:

- "Alumnus" (singular masculine), "alumna" (singular feminine), "alumnae" (plural feminine), "alumni" (plural masculine and plural masculine and feminine). To avoid the problem, use "graduate."
- "Criteria" (plural of "criterion," although the plural of the Greek "criteria" might one day become the hybrid "criterias").
- "Data" (plural of "datum"). Note that "data" has become a skunked term because most people have a problem reading "data are."
- "Media" (the preferred plural of "medium" is "media," not "mediums").
- "Phenomena" (plural of "phenomenon").
- "Stimuli" (plural of "stimulus").
- "Strata" (the preferred plural of "stratum" is not "stratums").

Terra firma: The opinion writer may use "stare decisis" for "precedent"; "sua sponte" for "on its own motion" or "of its own accord"; "amicus curiae" for "friend of the court"; "res gestae" for "things done"; or "pro bono" for "free legal work for the public good." The lay reader, or vox
populi, will not fully understand the English terms anyway. Thus, you and your alter ego will not be personae non gratae if your modus operandi is to use bona fide foreign terms of art. But caveat emptor: You may use only those terms of art that have been long incorporated into the lingua franca of legal English and which have no commonly known and well-understood English equivalents.

Errata: If you must use Latin and French, at least use them correctly. It is de rigor (really de rigueur) that you use foreign words correctly. Exempli gratia, misspelling Latin words is not de minimus (really de minimis). Inter alia, using foreign words might lead to redundancies, such as ordering chile con carne with meat smothered in au jus sauce while you travel with your Rubenescque-like friend on the Rio Grande River, and etc. (“Con carne” means “with meat”; “au jus” means “in its natural juice”; the suffix “esque” means “like”; “Rio” means “river”; “and” means “etc.”) Similarly, “please RSVP” makes little sense; the “plaît” in RSVP already means “please.” Quod vide “vis-à-vis,” or “face to face,” which means “compared with,” not “about.” You will, moreover, be taken for an ignoramus if you write “ignorami” or assume that all Latin plurals ends in “i.” “Ignoramus” is a Latin verb, not a noun that ends in “us” in Latin. The plural is “ignoramuses.”

Here is a sine qua non of good legal writing: Do not use Latin and Norman French terms instead of (in lieu of?) well-known English equivalents. Example: “I met the Chief Judge in person,” not “I met the Chief Judge in personam.”

- “Ab initio” becomes “from the beginning.”
- “Arguendo” becomes “for the sake of argument,” “assuming.”
- “Aliunde” becomes “from another source.”
- “Cestui qui trust” becomes “beneficiary.”
- “Child en ventre sa mere” becomes “fetus.”
- “Dehors the record” becomes “outside the record,” “not in the record.”
- “Dubitante” becomes “tentative,” “doubtful.”
- “Ergo” becomes “therefore.”
- “Ex contractu” becomes “in contract,” “contractual.”
- “Ex delictu” becomes “in tort.”
- “Ex hypothesi” becomes “by hypothesis,” “hypothetically.”
- "Exempli gratia" (e.g.,—for example; but use “e.g.,” in a citation).

- “Id est” (id.—“in other words,” “that is”; but use Id. or id. in a citation).

- “In esse” becomes “in being.”

- “In haec verba” becomes “verbatim.”

- “Inter alia” becomes “among others.”

- “In toto” becomes “on the whole.”

- “Ipso facto” becomes “by itself,” “necessarily.”

- “Ita est” becomes “so it stands.”

- “Justa causa” becomes “just cause.”

- “Pro se” becomes “self-represented,” “unrepresented.”

- “Pro tanto” becomes “as far as it goes.”

- “Non compos mentos” becomes “insane,” “senile,” “incapable of handling affairs,” or a similar variant.

- “Nonobstante” becomes “notwithstanding.”

- “Nisi prius” becomes “court of first instance,” “hearing court,” “trial court,” “sentencing court,” or something similar, or just name the court.

- “Qua” becomes “as.”

- “Res nova,” “res integr” become “an undecided question,” “an issue of first impression.”

- “Simpliciter” becomes “simply,” “taken alone.”

- “Sub judice” becomes “under judicial consideration.”

- “Sub silencio” becomes “silently,” “tacitly.”

- “Sui generis” becomes “one of a kind,” “unique.”

- “Ultra vires” becomes “beyond the legislative or rule-making authority to enact.”
d. Pseudo English

What do you think of these two sentences? Both come from an appellate brief submitted to the Ninth Circuit: "The duty owing from defendants to plaintiffs in the abstract will vary... relative to the juxtaposition of the real world environmental encasement of the two sides. The concept of causation would seem less plastic." The Ninth Circuit quoted the sentences and wrote, "Briefs should be written in the English language!" (Gottreich v San Francisco Investment Corp., 552 F.2d 866, 867 n 2 [9th Cir 1977, Dunaway, J.]). West Publishing then placed that exhortation in a headnote and assigned the headnote to its key-number system.

Do not write, "The choice of exogenous variables in relation to multi-collinearity is contingent upon the derivations of certain multiple correlation coefficients" when you mean to write, "Supply determines demand." (From James P. Degnan, The Ph.D. Illiterate in The Washington Post [Sept. 12, 1976].)

e. Flowery Language Fails

If you would not say it, do not write it. As Alexander Pope wrote, "A vile concert in pompous words express'd/ Is like a clown in regal purple drees'd."

Excise flowery and ornate language: "'An ornate, pretentious, grandiose style, replete with superfluous frills and rhetorical extravagances, can act only as an undesirable distraction.'" (Edward D. Re and Joseph R. Re, Brief Writing & Oral Argument 10 [8th ed 1999], quoting Stern, The Writing of Judicial Opinions, 18 Pa B Assn Q 40 [1947].)

Target trial opinions first to the litigants and their counsel.

Choose words and phrases that smart high-school students understand.

Prefer short words to long ones. Short words hit the reader harder in the intestine, er, gut. Experts agree that "those who run to long words are mainly the unskilled and tasteless; they confuse pomposity with dignity, flaccidity with ease, and bulk with force." (H.W. Fowler, Dictionary of Modern English Usage 342 [Ernest Gowers ed, 2d ed 1965].)

Prefer well-known words to esoteric words.

Prefer single words to circumlocutions (roundabout ways of speaking).
Prefer simple words to complex words.

- "Ameliorate" becomes "improve," "get better."
- "Effectuate" becomes "bring about."
- "Elucidate" becomes "explain."
- "Eventuate" becomes "happen."
- "Implement becomes "carry out," "do."
- "Posit" becomes "assume."
- "Remunerate" becomes "pay."

Prefer concrete words to abstract words.

Remember that "legalese" is a pejorative term:

- "As per the contention, the court should like to advise and apprise defendant that he must cease and desist commencing from this day forward. The court does not communicate or posit with regard to elucidating what transpired prior to the happenstance at issue but rather, assuming, arguendo, inter alia, that, inasmuch as the foregoing is true, what the court will do to initiate its prerogative subsequent to now, or, viz., to wit, henceforth."

Engage in sesquipedality—by using words like "sesquipedality" (long words of Latin origin)—not as an intellectual exercise, to impress your reader, or to teach your reader new words, but only when a better, simpler, or familiar word will be undignified or will not fit the context. Otherwise, your profundity will be taken for obscurity, your rigor for snobbery. Make your reader study your judicial opinion, not a dictionary. Many will tell you that a rich vocabulary is a key to success. That is true for reading but not for writing.

Use legal neologisms like "conclusory," "certworthy," and "pretextual," even though they will not be found in dictionaries or spell checkers. It is not the lawyer’s fault. Dictionaries have not kept up with legal language. Otherwise, do not invent words. Nix neologisms not seen in the language of the law. They tend to be trendy or fad words.

16. Sentence Length

Shorter is better than longer. Strive for an average length of 15–17 words.
Varying sentence length is best. Too many short sentences in a row sound clipped, angry, and impatient. Variety of length makes the opinion spicier, more readable, less monotonous and boring. A series of choppy sentences:

“See Dick. See Dick see Jane. See Dick see Jane’s purse. See Dick take Jane’s purse. See Dick run.”

Maximum length: Twenty-five words or three lines (whichever is less) for legal writing (20 words in other forms of writing) and one thought only. As four New York Law School experts explain, “a sentence that includes too many thoughts makes it difficult to follow the point . . . .” Cathy Glaser, Jethro K. Lieberman, Robert A. Ruescher, and Lynn Boepple Su, The Lawyer’s Craft: An Introduction to Legal Analysis, Writing, Research, and Advocacy 184 [2002] [urging writers to use only “one main thought in each sentence”).

If your one-thought sentence is still too cumbersome or complex, cut, chop, slice, and dice again.

Exception: Of the writers who use lengthy sentences for dramatic effect from time to time, Justice Scalia is a master, and his famous 202-word sentence in Edwards v Aguillard (482 US 578, 637 [1987, Scalia, J., dissenting]) breaks some rules, although it is a linguistic tour de force, because his sentence length poetically matches the point he illustrated—that legislators have many reasons to support or oppose legislation—and because he composed a readable sentence, in which he controlled sprawl by counting syllables, by featuring his subject through parallelism (the thirteen “He may haves”), by breaking up his sentence into units of between eight and 24 words, and by using eleven polysyndetons (the conjunction “or”). (Note: My sentence has 109 words, not including the citation.) Here is Justice Scalia’s sentence:

“He may have thought the bill would provide jobs for his district, or 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 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 mad at his wife 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.”
Begin your sentence with a short, simple thought. Save the complex, lengthy part for the end.

For an opinion that should win more than merely the Longest and Most Complex Sentences Award, see *In re Goalen* (30 Utah 2d 27, 29–30, 542 P2d 1028, 1029–1030 [1973, Henried, J.]). In *Goalen*, the Utah Supreme Court, in a series of incomprehensible sentences, forbade a woman from marrying an inmate. Here are two sentences from that opinion, reprinted verbatim. The first is 158 words. The second is a 161-word fragment. With 161 words, the court should at least have written a full sentence. The two sentences are shocking, not only because of their grammatical errors and length:

“When and if the Supreme Court of the United States says the Fourteenth Amendment guarantees an unrestricted right for two persons of any character or status to marry—the 50 states to take it lying down—simply because citizens or resident aliens or felons, or syphilitics, etc. profess to have unlimited civil rights, and that a felon has the same constitutional right to marry, and perhaps become a behind-bars father without any semblance of parental control,—which also would deny to the states a right to prevent a couple of homosexuals, for example, from marrying, or condone the switch of wives by swingers, this country then will have switched to legalized indiscriminate sex proclivities with a consequent rising incidence of disease, poverty, and indolence,—but worse, to subject unwary citizens to the whim and caprice of the federal establishment,—not the states,—leading to a substitution of a bit of judicial legislation for plain ordinary, horse sense."

“However, this does not mean that the Constitution of the United States, which in no uncertain terms says the states are supreme in this country and superior to the philosophy of federal protagonists who deign to suggest that a coterie of 3 or 5 or even 9 federal persons immune from public intolerance, by use of a pair of scissors and the whorl of a 10 cents ball-point pen, and a false sense of last-minute confessional importance, can in one fell swoop, shakily clip phrases out of the Constitution, substitute their manufactured voids with Scotch-taped rhetoric, and thus reverse hundreds of cases dimmed only by time and nature, but whose impressions indestructibly already indelibly had been linotyped on the minds of kids and grandkids who vowed and now would or will vow to defend, not only the institution of marriage and motherhood, but to reserve to the states a full budget of legitimate, time-tested mores incident to that doctorate."
A postscript. In response to Goalen, the Utah Legislature allowed inmates to marry. The Supreme Court then denied certiorari for want of jurisdiction. (See 414 US 1148 [1974, Stewart, J., dissenting from denial of petition for certiorari].)

17. Paragraphing

Paragraphs divide material into digestible, readable bits; force the writer to develop separate themes; and make the writer’s organization apparent.

Maximum length: Two-thirds of a page or 250 words, whichever is less, or one large thought.

Despite what Miss Thistlebottom taught you in sixth grade, paragraphs need not have three sentences.

Reserve one-sentence paragraphs for those sentences that must have great emphasis. If you use too many one-sentence paragraphs, the emphatic effect will be lost.

Breaking up paragraphs is not hard to do. It is visually helpful to the reader. But too many short paragraphs in rapid order is distracting, choppy, and angry-sounding. As with sentences, vary paragraph length.

Topic sentences. Begin large ideas with a paragraph that starts with a topic sentence that introduces your topic. Every sentence in your large idea—which might take more than one paragraph to finish—must relate to and amplify your topic sentence. One way to have a topic sentence is to take the last sentence of a paragraph and put it onto the next.

Seamless webs. Use transitional devices to divide paragraphs and to connect one paragraph to the next when a paragraph becomes lengthy. The best transitional devices join paragraphs seamlessly. Repeat something—a word, a concept—from the last sentence of one paragraph in the first sentence of the next paragraph.

Thesis sentences. Conclude your large idea with a sentence that states your thesis. Your thesis sentence should summarize and answer your topic sentence but should not restate it. Thus, if the topic sentence is, “Defendant’s testimony was incredible,” the thesis sentence might be, “The court, therefore, rejects defendant’s version of the facts.” Just as every sentence in the large idea should relate to and amplify the topic sentence, every sentence in the large idea should lead to the conclusion set out in the thesis sentence.

18. Connectors and Transitions

a. Connectors
Avoid weak connectors: "along the same lines," "as regards," "based on," "concerning," "deals with," "due to" (as an adverb; "due to" is correct as a predicate adjective following a linking verb: "Her hesitancy was due to caution"), "in connection with," "in order that," "in regard to," "inasmuch as," "insofar as," "involving," "respecting," "so far as," "the necessity of," "with reference to." Substitute one of these graceless connectors with a descriptive verb or a precise explanation.

Fizzle fuzzy connectors:

- "The debate as to [or with regard to] the death penalty is reborn." Becomes: "The debate over [about] the death penalty is reborn."

- Use "as to" only at the beginning of a sentence:
  
  "The court attorney sorted out the motions as to difficulty." Becomes: "The court attorney sorted out the motions according to difficulty."

b. Transition Usage and Placement

No one can communicate without transitions. Here are some suggestions about which transitions work best and where they work best.

Be careful when using transitions at the beginning of a sentence. And be careful not to be repetitious—do not repeat the same transitions in the same sentence or in succeeding sentences. It is also sometimes not so useful to use transitions at the end of a sentence, however. Doing so doubly emphasizes the transition and forces the reader to look back two sentences.

Begin a sentence with a transition for drama, emphasis, or contrast, but place the transition elsewhere if drama, emphasis, or sharp contrast are not desired. When drama, emphasis, or sharp contrast are not desired, a good place for transitions is immediately after the subject, in the first part of the sentence.

In deciding, nevertheless, whether to place a transition near the beginning or in the middle of a sentence, it is, ultimately, a matter of drama, emphasis, and sharp contrast. The goal is to begin with a punch and, even more important, to end with a punch.

Miss Thistlebottom was wrong to tell you in sixth grade not to begin sentences with "and" ("plus" as a conjunction is informal), "but," and "however" (unless "in whatever way" or "to whatever extent" can replace "however"). However she explained the rule, she was wrong.

In giving emphasis, do not be afraid to begin sentences with "and" and "but." The rules of plain speaking and plain writing provide that it is better to begin with "and" and "but" than with "moreover" and "however." "Ands" and "butts" will move the reader much faster to the
punch than the heavy, ponderous three-syllable words “moreover” and “however,” followed by a comma, yet another pause.

As a master explained, “perhaps the [second] most wide-spread of many false beliefs about the use of our language is the . . . groundless notion that it incorrect to begin [a sentence] with ‘but’ or ‘and.’” (Bryan A. Garner, The Oxford Dictionary of American Usage and Style 322 [2000].) A bet: Read tomorrow’s New York Times. On the front page will be at least seven sentences that begin with “and” or “but.” The Wall Street Journal often has a baker’s dozen of “ands” and “buts” on its front page. If beginning with “and” and “but” is formal enough for the front page of the Times and the Journal—which people pay to read—it is formal enough for judicial opinions.

And (note no comma here) consider this about emphasizing at the beginning or the end of a sentence:

- “Jim drinks, but he’s a good worker” (or, even stronger, “Jim drinks. But he’s a good worker”). Vs. “Jim’s a good worker, but he drinks” (or, even stronger, “Jim’s a good worker. But he drinks”).

- “Although Jim drinks, he’s a good worker.” Vs. “Although Jim’s a good worker, he drinks.”

- “Respondent argues forcefully that the petition should be dismissed. However, that argument must be rejected.” Vs. “That argument must, however, be rejected.” Vs. “That argument must be rejected, however.”

The best writing repeats key words, phrases, concepts, and names, maintaining coherence by going from old to new and from simple to complex while climaxing to the right and the bottom. The best writing does not rely excessively on boring “therefores,” “moreovers,” “however,” “furthermores,” and similar transitions. These transitions are sometimes artificial anyway. Novices add them to impose a factitious, or contrived, cohesion to an otherwise incoherent paragraph. If the logic and movement of your ideas is clear, your reader connects thoughts without needing artificial transitional devices that impose superficial logic. “Therefores,” “moreovers,” and “however,” however, have the pretense of avoiding non sequiturs and, consequently, are therefore often better than nothing.

One transitional segue. Use “and” and “but” carefully. The phrase “poor but honest,” for example, implies that poor people are dishonest.

19. Inelegant Variation, Consistency, Repetition, and Ultraquistic Subterfuge

Is there another word for “synonym”? What is the opposite of “antonym”?
a. **Inelegant Variation**

Years ago the word “elegant” was pejorative. Thus, “elegant variation.” Today the pejorative is “inelegant.” Most writers on writing call the error by its original name, “elegant variation.”

Inelegant variation is the technique by which a writer uses different terms to identify one person, place, thing, or idea. The stylistic error here is that synonyms and variations confuse. The tone error is that those who use synonyms and variations are affected.

Use different words to mean different things. Do not use different words for the same thing. Some believe that variety in word choice gives depth to writing, that consistency is the hobgoblin of little minds. Not only are they wrong, but they are not right.

Miss Thistlebottom taught her sixth-grade students to reach for their thesauruses to find different words to say the same thing. Editors have devoted their careers to explaining why Miss Thistlebottom was wrong. Repeating the same word for the same thing strengthens and clarifies. Repetition is boring only to novices. As one author explained, “In legal writing, consistency is important. Don’t worry about seeming repetitious; it is far more important to be understood.” (Linda H. Edwards, Legal Writing: Process, Analysis, and Organization 250 [2002].) An example of inelegant variation, with the variations italicized:

- “I met with plaintiff’s attorney about the postponement he requested. The lawyer [attorney] for the litigant who brought the action [plaintiff] asked for [requested] an adjournment [postponement].” Confusing and affected, no?

b. **Consistency**

Be consistent in tone: Do not be formal in one place but informal in another.

Be consistent in point of view: Do not use your point of view in one place and the reader’s in another.

Be consistent in reference: Do not write “this court” in one place, “this writer” in another, “I” in a third.

Be consistent in voice: Do not write “this court finds” in one place but “it is found” in another.

c. **Repetition**
Repeating key nouns, verbs, articles, and prepositions adds power and aids comprehension. Repetition makes writing powerful and clear. Repetition is not redundancy. Repetition cures inelegant variation.

Notice the repetition of the preposition “to”:

- “I pledge allegiance to the flag of the United States of America and to the republic for which it stands . . .” (The Pledge of Allegiance.)

- “The law in its majestic equality, forbids the rich as well as the poor to sleep under bridges, to beg in the streets, and to steal bread.” (Anatole France, The Red Lily 75 [Modern Library 1917] [1894] [italics supplied].)

- “I come to bury Caesar, not to praise him.” (William Shakespeare, Julius Caesar, act III, sc II [italics supplied].)

Notice the repetition of the preposition “by”:

- “I should concur in this result more readily if the Court could reach it by analysis of the statute instead of by psychoanalysis of Congress.” (United States v Public Utilities Commn. of Cal., 345 US 295, 319 [1953, Jackson, J., concurring] [italics supplied] [opening line].)

Notice the repetition of the article “the”:

- “The law clerk and the confidential secretary are appointed.” (Otherwise, the law clerk and confidential secretary is one person.)

Repeating the same word can add rhetorical power to writing:

- “These acts shattered steel, but they cannot dent the steel of American resolve.” (President George W. Bush, September 11, 2001.)

Exception: Do not repeat yourselves accidentally:

- “He did that once before before a jury.”

- “In In re Rhea, . . .”

In lengthy lists, or for poetic value, repeat “because,” “that,” and similar words. Then make your lists parallel.
"The court finds that defendant is guilty of the crime charged, that defendant is a menace to society, and that defendant is entitled to no mercy."

Or "The court finds that defendant is guilty of the crime charged, a menace to society, and entitled to no mercy."

"The court announced that oral argument will last for an hour, and no rebuttal time will be granted." Becomes: "The court announced that oral argument will last for an hour and that no rebuttal time will be granted."

"Court attorneys write because they have something magical to express and because they are paid to write."

d. Uultaquistic Subterfuge

Do not repeat words that have different meanings. Doing so is called ultaquistic subterfuge:

- "Some litigators who practice in Civil Court are uncivil."

- "Plaintiff has a cause of action because the cause of his injuries was defendant's malpractice."

- "The court will not consider whether the promise was given without consideration."

- "Counsel appealed to the Appellate Term to decide the appeal."

- "Court of Claims has the jurisdiction to decide whether the plaintiff is in the court's jurisdiction."

- "Hear ye, hear ye. The court will hear from the witnesses at the hearing."

- "In any case, in the case at hand the judge opened his briefcase, looked at his case book, took out his notebook computer, and typed out uppercase letters for proper nouns."

But word play is effective, in the right context:

- "The halls of justice. That's the only place you see the justice. In the halls." (Lenny Bruce, quoted in Bruce Nash et al., Lawyer's Wit and Wisdom 74 [1995].)
“When there’s a rift in the lute, the business of the lawyer is to widen the rift and gather the loot.” (Arthur Garfield Hays, quoted in Bruce Nash et al., Lawyer’s Wit and Wisdom 74 [1995].)

“The business of America is business.” (President Calvin Coolidge.)

“The truth lies somewhere in the witness’s lies.”

“On calendar day the judge seemed bored. All he did was go through the motions.”

“The law student studied defamation in her torts class. The professor wanted to add insult to injury.”

“After she failed torts in her first year, the student took a class in retorts.”

“What do you call a man who owns real property free and clear in fee simple? A man for all seisens.”

“While drafting a contract to buy a racehorse, the lawyer added a rider.”

“Jury cases can be a trying experience.”

“Notaries seal their documents to make a good impression.”

“The Third Branch just cannot leave it to the Fourth Estate to fill the knowledge vacuum about the justice system.” (Judith S. Kaye, Rethinking Traditional Approaches, 62 Albany L Rev 1491, 1496 [1999].)

Do not repeat words that have contrary meanings: “When things are called by the same name, it is easy for the mind to slide into an assumption that the verbal identity is accompanied in all its sequences by identity of meaning.” (Lowden v Northwestern Natl. Bank & Trust Co. of Minneapolis, 298 US 160, 165 [1936, Cardozo, J.].) For example, an unconstitutional statute that covers invalids is best not called an “invalid statute.”

Sanction: “The Legislature sanctions the penal sanction.” (Avoid “sanction,” which means “to permit,” “to forbid,” or “to punish.”)

Oversight: “Although the partner had oversight over his associate, the brief was filed late because of an oversight.” (Avoid “oversight,” which means “intentional supervision” or “unintentional error.”)
May and might: “The law students may study hard.” (“Might” expresses greater doubt than “may.” Be careful when you use “may,” which means “are permitted to” or “is possible that they will.” A tip: Distinguish “may” from “might.”)

Table: “The bar association tabled the motion.” (Avoid “table” as a verb. In America, it means “to adjourn a matter for possible consideration later.” But many Americans use “table” in the British sense: to bring a matter forward for immediate consideration.)

For more on this topic, see Gerald Lebovits, The Legal Writer, What’s Another Word for “Synonym”?,” 74 NY St BJ 64 (Jan. 2002).

20. Word Precision

“Most of the disputes in the world arise from words.” (Morgan v Jones, [1773] Lofft 160, 176 [Lord Mansfield, Ch. J.]. Therefore, utilize words good. Irregardless how others employ words, you are suppose to use them like a writer should. Be especially careful to use adverbs correct. Otherwise your writing will look ghastily.

Criminal conversation. Lawyers and their words have been condemned through the ages.

Luke 11:52: “Woe unto you, lawyers! for ye have taken away the key of knowledge: ye entered not in yourselves, and them that were entering in ye hindred.” (See also Fred Rodell, Woe Unto You, Lawyers! [2d ed 1957].)

Franklin’s Poor Richard’s Almanac:

“I know you Lawyers can, with Ease,
“Twist Words and Meanings as you please.”
(2 The Papers of Benjamin Franklin 254 [Leonard Larabee ed 1960].)

“A lawyer is a man who earns his living by the sweat of his browbeating.”
(Leonard L. Levinson, Webster’s Unafraid Dictionary 133 [1967], quoting James Huneker.)

“Lawyers . . . practice ‘. . . the art of proving by words multiplied for the purpose, that white is black, and black is white, according as they are paid.’” (Harris v Superior Ct., 3 Cal App 4th 661, 666, 4 Cal Rptr 2d 564, 568 [2d Dist 1992, Gilbert, J.], quoting Jonathan Swift, A Voyage to the Country of the Houyhnhnms, in Gulliver’s Travels [1726] [emphasis in Swift].)

For correct word and style usage, look up the answer. Consult good usage guides, such as Theodore M. Bernstein, The Careful Writer: A Modern Guide to English Usage (1965) (coining

Animal, vegetable, or mineral? Sometimes courts define words incorrectly. These errors can become binding law. To the Supreme Court a tomato is really a vegetable, not a fruit. Why did the Court nix a definition scientists accept? Because a tomato is a vegetable “in the common language of the people.” (Nix v Heddon, 149 US 304, 307 [1893, Gray, J.]). Nix is not the only vegetable case that spiced up the English language. (See Sea-Land Services, Inc. v Pepper Source, 941 F2d 519, 519 [7th Cir 1991, Bauer, Ch. J.] (“This spicy case finds its origins in several shipments of Jamaican sweet peppers.”).


Watch your watch. It is difficult to intimate this to your intimate friends, especially while you try to polish the Polish furniture, but consider the pronunciation of homonyms:

- "The lawyer did not object to the admissibility of the object."
- "The judge shed a tear when she saw the tear in the victim’s clothes."
- "The court officer was too close to the door to close it."

Opinion writers must pronounce words correctly. Consider this, from the Book of Judges 12:6: “Then they said unto him, say now Shibboleth: and he said Shibboleth: for he could not frame to pronounce it right. Then they took him and slew him at the passage of Jordan.”

English is a peculiar language: Money talks but talk is cheap. Here is a collection of George Carlinisms. There is no egg in eggplant, ham in hamburger, or apple or pine in pineapple. English muffins do not come from England, french fries from France, or Canadian bacon from Canada. Sweetmeats are candies, while sweetbreads, which are not sweet, are meat. Quicksand can work slowly, boxing rings are square, all the squares in New York City are triangles, and guinea pigs are neither pigs nor from New Guinea. Writers write but fingers do not fing, grocers do not groce, and hammers do not ham. If the plural of “tooth” is “teeth,” why is the plural of “booth” not “beeth”? One goose, two geese, so one moose, two meese? One can make amends but not one “amend.” If your teachers taught, did your preachers pught? If a vegetarian eats vegetables, what does a humanitarian eat? In what language but English do people recite at a
play but play at a recital? Ship by truck and send cargo by ship? Have noses that run and feet that smell? How can a slim chance and a fat chance be the same but a wise man and a wise guy be opposites? Houses burn up as they burn down, forms are filled in when they are filled out, and alarms go off when they go on. And when stars are out they are visible, but when the lights are out they are invisible.

Be stingy with offensive words. Words like "niggardly," an obscurity of Scandinavian origin that really means "stingy," sound too much like the racial epithet and thus should be banished from the English language without epitaph. Do not be anti-Semitic. But English has lots of words. It can afford to lose a few.

The meaning of words changes over time and space. What was suitable yesterday might be unsuitable today. What is suitable somewhere might be unsuitable somewhere else. As Justice Holmes noted, "A word is not a crystal, transparent and unchanged. It is the skin of a living thought and may vary greatly in color and content according to the circumstances and the time in which it is used." (Toune v Eisner, 245 US 418, 425 [1918].) Word usage, too, changes over time. The correct contraction for "am not" is "ain't"; "amen't" does not exist. For reasons known to none, "ain't," considered good usage for generations, is acceptable today only in humor. If words and style did not evolve, we would still be speaking the King's English—the English of King Alfred the Great of the ninth century, that is—or the Queen's English: Queen Elizabeth I.

People disagree on the meanings of words. The lines below, from Alice’s Adventures in Wonderland, are paraphrased or quoted directly in dozens of published judicial opinions and law-journal articles. (A November 22, 2000, Westlaw check found 456 references to Alice in Wonderland or Alice’s Adventures in Wonderland in federal and state opinions published since 1945.)

"'When I use a word,' Humpty Dumpty said, in rather a scornful tone, 'it means just what I choose it to mean—neither more nor less.' 'The question is,' said Alice, 'whether you can make words mean so many different things.' 'The question is,' said Humpty Dumpty, 'which is to be master—that’s all.’” (Lewis Carroll, Alice’s Adventures in Wonderland & Through the Looking Glass 188 [Penguin Books 1960].)

In the law, words mean nothing by themselves. After all, "[t]he logic of words should yield to the logic of realities.” (Di Santo v Pennsylvania, 273 US 34, 43 [1927, Brandeis, J., dissenting].) Moreover, "[n]othing is more certain in modern society than the principle that there are no absolutes, that a name, a phrase, a standard has meaning only when associated with the considerations which gave birth to the nomenclature.” (Dennis v United States, 341 US 494, 508 [1951, Vinson, Ch. J.].)

Substitute words that could confuse: “The cavalry rode to Calvary.” Becomes “The soldiers rode to Golgotha.”

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Substitute phrases that could confuse, such as the Fifth Circuit’s “prophylactics against a wrongful discharge.” (Findeisen v North East Indep. Sch. Dist., 749 F2d 234, 238 [5th Cir 1984, Politz, J.], cert denied 471 US 1125 [1985].)

21. Specialize in Simple Words

Substitute simple words for ornate, stuffy, stilted, officious words and phrases. Use the shortest synonym. Be precise, specific, and definite.

- "Accord," "afford," "allocate" become "give."
- "Acquire" becomes "get."
- "Adequate amount" or "adequate number of" become "enough."
- "Adjudicate" becomes "decide."
- "Aggregate" becomes "total."
- "Ameliorate" becomes "better," "improve."
- "Anterior to" becomes "before."
- "Applicable" becomes "that applies."
- "Approximately" becomes "about"; "around" is incorrect.
- "Arrive" becomes "come."
- "As to" becomes "about," "according to"
- "Assist" becomes "aid," "help."
- "At all times" becomes "always."
- "At no time" becomes "never."
- "At the present time" becomes "currently," "now."
- "Attain" becomes "reach."
- "Attempt," "endeavor" become "try."
“Attired” becomes “dressed.”

“Commence” becomes “begin,” “start.”

“Commitment” becomes “promise.”

“Complete” becomes “end,” “finish.”

“Component” becomes “part.”

“Conceal” becomes “hide.”

“Constitute” becomes “make up.”

“Deem” (consider whether to use “consider” or “treat as”).

“Demise” becomes “death.”

“Demonstrate” becomes “show.”

“Depart” becomes “go.”

“Discontinue” becomes “stop.”

“Donate” becomes “give.”

“Echelons” becomes “levels.”

“Effectuate” becomes “carry out.”

“Eliminate” becomes “remove.”

“Elucidate” becomes “explain.”

“Employ” (use “use” to avoid misuse, unless you mean “work” or “hire”).

“Ensue” becomes “follow.”

“Equivalent” (consider “same”).

“Excessive number” becomes “too many.”

“ Expedite” (consider “speed up”).

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"Expressed himself to the effect that he believed" becomes "said."

"Extend" becomes "give."

"Facilitate" becomes "make easy," "simplify."

"Feasible" becomes "possible."

"Furnish" becomes "give."

"In case" becomes "if."

"In the event that" becomes "if."

"In the instance where" (or "when, "in which," "that") becomes "if."

"Inaugurate" becomes "begin" (but "inauguration" in the ceremonial sense).

"Incumbent upon" becomes "must," "should."

"Indicate" becomes "show."

"Individual" becomes "person."

"Initiate" becomes "begin," "open," "introduce."

"Inquire" becomes "ask."

"Institute" becomes "begin."

"Intimate" (as a verb) becomes "suggest."

"Irregardless" (not a word but rather a barbarism—an irregularly formed word; use "regardless").

"Is able to" becomes "can."

"Is entitled to" becomes "may," "should."

"It is the duty of" becomes "must."

"Locate" becomes "find."
“Magnitude” becomes “size” (except for the cliché “different order of magnitude”).

“Manner” becomes “way.”

“Nebulous” becomes “vague.”

“Necessitate” becomes “require.”

“Notwithstanding the fact that” becomes “although.”

“Obtain” becomes “get.”

“Occasion” (as a verb) becomes “cause.”

“On or about” (one or the other, depending on the context, or “by”).

“Originate” becomes “start.”

“Per annum” becomes “a year.”

“Peruse” becomes “read.”

“Portion” becomes “part.”

“Possess” becomes “own,” have.”

“Present” (as a verb) becomes “give.”

“Preserve” becomes “keep.”

“Prior” becomes “earlier.”

“Proceed” becomes “go.”

“Procure” becomes “get.”

“Promulgate” becomes “enact.”

“Purchase” becomes “buy.”

“Recapitulate” becomes “sum up.”

“Relate” becomes “tell.”
- "Remain" becomes "stay."
- "Remove" becomes "take away."
- "Render" becomes "make," "give" (except, "render justice").
- "Request" (as a verb) becomes "ask."
- "Retain" becomes "keep."
- "Secure" becomes "get."
- "Seek" becomes "look for."
- "Sufficient" becomes "enough."
- "Summon" becomes "send for," "call."
- "Terminate" becomes "end," "fire," "finish."
- "Transpire" becomes "happen" (except for its special uses in physics).
- "Upon" becomes "on" (unless idiom suggests "upon").
- "Utilize" becomes "use."
- "Verbose" becomes "wordy."
- "Without New York" becomes "outside New York."

22. Noun Strings

Nix noun banging, also called "noun piling." When you see a pile of nouns, begin by omitting nonessential descriptive words. Then insert prepositions, without packing too many prepositions into your newly cast sentence or phrase:


23. And vs. To

Do not use "and" to show causality or in an infinitive phrase. Use "to":

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“I am going to try and win the case.” (It is best to try to write “try to,” except here, where the writer might have meant “try a case.”)

“I went to the court’s supply room and got a CPLR.” Becomes: “I went to the court’s supply room to get a CPLR.”

“Look and see whether you can find Barry Kamins’s sentencing chart.” Becomes: Look to see whether you can find Barry Kamins’s sentencing chart.”

24. Who vs. Whom

From Arthur H. Weston:

“It’s hard to devise an appropriate doom
For those who say who when they ought to say whom.
But it’s even more hard to decide what to do
With those who say whom when they ought to say who.”

“We” is the subject.

Correct: “Who built the Ark? Noah, Noah!”

Whom” can be an object or a subject:

Object:

Correct: “Whom did you see at 42nd and 8th?”

Subject of a complementary infinitive:

Correct: “Appellant is the person whom respondent shot.”

A tip: Answer the implicit question the sentence raises to see whether “he” (“she”) or “him” (“her”) can replace “who” or “whom.” “He” or “she” replaces “who”; “him” or “her” replaces “whom.” Mnemonic: the “m” in “him” matches the “m” in “whom.”

Example: A pretentious, hypercorrection-prone butler: “Whom shall I say is calling?” The answer is, “He or she is calling.” Therefore, the butler should have asked, “Who shall I say is calling?” Another example: Hemingway’s classic is titled “For Whom the Bell Tolls.” Answer: “The bell tolls for him [or her—or thee]”—not “The Bell Tolls for He [or She].” Therefore, Hemingway titled his book correctly. (No surprise about that.)

Nab nonstructural “whos” and “whoms.” Delete “who” or “whom” if you can:
25. Absolute & Superlatives


"This opinion is 100 percent perfect." Delete "100 percent." Explanation: "Perfect" may not be qualified.

This goes in the "I Wish I had Thought of That" Department: "[A] more perfect union." (Preamble to the U.S. Constitution.) Problem: It will take a constitutional amendment proposed by pedants to fix the Constitution.

"It is more preferable [delete more] not to qualify incomparable adjectives."

"The judge awarded a more equal distribution of property." Becomes: "The judge awarded a more equitable distribution" or "The judge awarded a more nearly equitable distribution." Explanation: "Equal" may not be qualified.

"Though I've worked many years to make marriage more equal, I never expected to take advantage of it myself." (Gloria Steinem, quoted in Newsweek, Dec. 25, 2000, at 99 [italics supplied].) (Should be "more equitable.")

Use comparatives for two items:

Correct: "The better of the two." Correct: "The taller of the two."

Use superlatives for three or more items:

Correct: "The best of the three." Correct: "The tallest of the three."

Exception: We put our best foot forward, even if we have but two feet.
Some super advice about superlatives:

- Superlatives are evaluative words designed to express high approval: “amazing,” “astounding,” “fabulous,” “fantastic,” “terrific.” Supplant superlatives. They have no force. To express high approval, choose a modest evaluative word instead. Then be concrete: Explain the quality you admire by giving the facts that underlie your conclusion.

26. False, Flabby Intensifiers

“His prose is very lean and truly strong.” Notice how, while falsely strengthening the sentence, the writer weakened it with two empty adverbial dogmatisms, “very” and “truly.”

As Mark Twain wrote in Puddin’head Wilson (1894), “As to the adjective, when in doubt strike it out.” Many adjectives are flabby. Some are cowardly. Others intensify falsely. Voltaire was right: “The adjective is the enemy of the noun.”

The right word needs no bolstering. Cut the following to place emphasis on the noun, verb, or adjective: “absolutely,” “actually,” “basically,” “certain,” “certainly,” “clearly,” “completely,” “deepest,” “extremely,” “greatly,” “in fact,” “in effect,” “more or less,” “nearly,” “obviously,” “particular,” “plainly,” “practically,” “pretty much,” “quite,” “really,” “so” (as in “not so wonderful”), “sort of,” “surely,” “truly,” “various,” “very,” “virtually.”

27. Adverbial Excesses

“Clearly,” “obviously,” “certainly,” “undoubtedly,” “incontestably,” “utterly.” Do not use an adverbial excess except to concede your own error (“I obviously erred”) or to show appropriate modesty (“I clearly do not know the answer”).

Adverbial excesses, like false intensifiers, weaken the sentence. Worse, they obscure what can be written clearly. Worse still, they suggest that those who disagree with you are stupid. Worst of all, “when a judge . . . begins a sentence with a term of utter conviction (‘Clearly,’ ‘Undeniably,’ ‘Undeniably,’ ‘It is plain that . . .’), the sentence that follows is likely to be dubious, unreasonable, and fraught with difficulties.” (Walker Gibson, Literary Minds and Judicial Style, 36 NYU L Rev 915, 925 [1961].)

28. Cowardly Qualifiers

The right stuff: Kill conditionals. Undermine unnecessary auxiliaries. It is worse to be irresolute, vague, or bloodless than to be wrong. Opinion writers must be brave and decisive. If you are unsure, look up the answer and then rewrite until you are so precise that you leave no room for equivocation. Some opinion writers use qualifiers to protect themselves from libel suits
(even though they have immunity, whether qualified or absolute) or, not knowing better, to copy timid legal-writing models. Equivocate only if you are uncertain on an important matter. Then explain the reason for the uncertainty.

Cardozo's qualifying consideration: “The sentence may be so over-crowded with all its possible qualifications that it will tumble of its own weight.” (Benjamin N. Cardozo, Law and Literature, 52 Harv L Rev 471, 474 [1939], reprinted from 14 Yale Review [N.S.] 701 [1925].)

In one of the funniest books about lawyers, White described how lawyers often write:

“Take the sentence ‘The sky is blue.’ No junior associate would be so naive as to think this proposition could pass muster in a big firm.
If he made it through law school, he knows enough to say, ‘The sky is generally blue.’ Better yet, ‘The sky generally appears blue.’ For extra syllables, ‘The sky generally appears to be blue.’ A senior associate seeing this sentence [would correct it:] ‘In some parts of the world, what is generally thought of as the sky sometimes appears blue.” (D. Robert White, The Official Lawyer’s Handbook 177 [1983] [emphasis in the original].)


- “If you would [or could] let us know . . . .” Becomes: “If you will let us know . . . .”

- “Court attorneys can [or could] write well if they study writing.” Becomes: “Court attorneys will write well if they study writing.”

- Be specific and definite. Save “would” and “could” for real uncertainties.

- “I would agree.” Becomes: “I agree.”

Doubtful, timid, hedge, and weasel words, equivocations, and phrases: “Apparently,” “at least as far as ‘A’ is concerned,” “basically,” “conceivably,” “evidently,” “if practicable,” “in effect,” “it may well be,” “it might be said,” “it is respectfully suggested,” “it seems,” “more or less,” “nearly,” “practically,” “perhaps,” “probably,” “purportedly,” “rather,” “seemingly,” “somewhat,” “sort of,” “virtually,” “would contend.”

Does this sentence add uncertainty?

- “I would suggest that it generally appears that, traditionally, at least, most of the time it is hardly ever wise to qualify your language.”
Take the phrase “reasonably necessary.” Does the modifier “reasonably” strengthen or weaken the “necessary”? It does both. It should not be used.

Take the phrase “generally always.” Isn’t that a contradiction?

Avoid “provided that” in opinions. Use the conditional “if . . . then” construction instead.

- If the “if” clause defines the “who” or a “what,” start the sentence with an “if”: Correct: “If appellant wins his appeal, then trial term will conduct a new trial.”

- Make sure that the “if” and the “then” modify the proper element:

  “If defendant proves the affirmative defense of entrapment to a preponderance, the burden then shifts to the People to rebut entrapment beyond a reasonable doubt.” Becomes: “If defendant proves the affirmative defense of entrapment to a preponderance, then the burden shifts to the People to rebut entrapment beyond a reasonable doubt.”

Cardozo Law School Professor Richard H. Weisberg (When Lawyers Write § 5.4, at 68 [1987]) gives the following “if . . . then” subjunctive and conditional constructions:

- “If the court is reasonable” (present) “then plaintiff will prevail” (future).

- “If the court was reasonable” (past) “then plaintiff would prevail” (conditional).

- “If the court had been reasonable” (pluperfect) “then plaintiff would have prevailed” (conditional past).

- “If the court be reasonable” (subjunctive present) “then plaintiff will prevail” (future).

- “If the court were reliable” (subjunctive past) “then plaintiff would stand a chance” (conditional).

- “The slip-and-fall injury took place at or near the State Capitol on or about July 4, 1993. The action must therefore begin on or before July 4, 1997.” 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.

- By the way: The “by” in “by March 6” is ambiguous. Does it mean before “March 6” or “on or before March 6”? Tell the reader which one you mean.
"Plaintiff owes the judgment debtor eighteen ($18.00) dollars in attorney's fees." (Why write $18 twice? A judicial opinion is not a negotiable instrument that can be forged.)

(Note: The phrase should be "attorney fees" because the fees belong to the client, not the attorney.)

Drop double hedges. A single hedge is weak but arguably justified to show uncertainty. Double hedges are never justified:

- Double hedge: "Defendant might, we believe, be innocent."

- Double hedge: "Petitioner suspects that Respondent might have filed papers late."

29. Pour Concrete

To be concrete is to describe someone or something that can be seen, smelled, tasted, heard, or touched. To be abstract is to state or name something intangible—an idea, quality, or relationship—in a conclusory way. It is a matter of show and tell. To show is to describe, to be concrete. To tell is to offer a conclusion, to be abstract.

Write concretely because writing is not a bloodless sport. William Strunk Jr. and E.B. White, in The Elements of Style 22–23 (4th ed 2000), give two examples, one from Herbert Spencer, the other from Orwell and Ecclesiastes (King James Version, 9:11), “to illustrate how the vague and general can be turned into the vivid and particular”:

- Poor example (from Herbert Spencer's Philosophy of Style):
  
  "In proportion as the manners, customs, and amusements of a nation are cruel and barbarous, the regulations of its penal code will be severe."

- Good example (from Herbert Spencer's Philosophy of Style):
  
  "In proportion as men delight in battles, bullfights, and combats of gladiators, will they punish by hanging, burning, and the rack."

- Poor example (from George Orwell):
  
  "[S]uccess or failure in competitive activities exhibits no tendency to be commensurate with innate capacity, but that a considerable element of the unpredictable must inevitably be taken into account."

- Stellar example (from Ecclesiastes 9:11):
"I returned, and saw under the sun, that the race is not to the swift, nor the battle to the strong, neither yet bread to the wise, nor yet riches to men of understanding, nor yet favor to men of skill; but time and chance happeneth to them all."

The next nugget comes from Gertrude Block, Effective Legal Writing 107 (5th ed 1999). In the first example, Professor Block quotes an abstract, general example from Chief Justice Warren Berger. In the second, she quotes a concrete, specific example from Benjamin Franklin:

- Abstract example (from Chief Justice Warren Berger):
  
  "It is a false assumption that every graduate of a law school is, by virtue of that fact, qualified for ultimate confrontation in the courtroom."

- Concrete example (from Benjamin Franklin):
  
  "Lawyers, preachers, and tomtit eggs: there's more of them hatched than come to perfection."

Confucius says, "No abstractitis":

"If concepts are not clear, words do not fit. If words do not fit, the day's work cannot be accomplished, morals and art do not flourish, punishments are not just. If punishments are not just, the people do not know where to put hand or foot." (Confucius, Analects X111, at 3, quoted in Bryan A. Garner, The Oxford Dictionary of American Usage and Style 7 [2000].)

30. Use Words Literally

- "New York has held . . . ." (Which court held? Which statute provides?)
- "The jury found defendant innocent." (A not-guilty finding is different from a finding of innocence.)

31. Repeat Concepts & Names to Connect

Topic sentences and thesis sentences do not alone connect topics within paragraphs. The following examples come from Tom Goldstein and Jethro K. Lieberman, The Lawyer's Guide to Writing Well 103–104 (1989). The examples explain how to glue sentences together. The first example is imperfect; the second is excellent. The topics of each sentence are italicized.
Imperfect: “An accredited law school must graduate lawyers before the bar examination is open to them to take. The bar will not admit them to practice until they pass the exam. Only then can they hang out a shingle. And even then, the finer points of law practice will elude them; it will be many years before they can practice comfortably. That experience is not gained overnight.”

Excellent: “Lawyers must graduate from an accredited law school before they may take the bar examination. Not until passing it may they be admitted to the bar and hang out a shingle. Even then, it will be many years before they can comfortably say they understand the finer points of law practice. They cannot gain that experience overnight.”

Note that the “they” in the second example is not a vague referent. The “they” refers to one thing only: lawyers.

32. Subject-Verb/Object Proximity

Keep your subject near your verb or object. The subject of a sentence and the principal verb should not be separated by a phrase or clause that can go at the beginning of the sentence. Placing qualifying or descriptive information before the main subject and its verb is called “front-loading.” Some writers front-load intentionally to hide their true message. Others front-load because they do not know how to get to the point quickly.

Misplacing your subject, not keeping your subject near your verb or object, or front-loading are common but serious errors that lead to a lack of clarity, sometimes absurdly so:

“Your explanation of the way Judge X decides appeals is accurate.” Becomes: “You accurately explain how Judge X decides appeals.” (Lengthy underlined interjection between subject and verb.)

“The judge’s overruling the objection on hearsay grounds was correct.” Becomes: “The judge correctly overruled the objection on hearsay grounds.” (Lengthy underlined interjection between subject and verb.)

“Given the cases that hold that contracts require consideration, cases that have existed for centuries and have come down since the Year Books, if not the Flood, in my opinion this contract is valid.” (Front loading: twenty-seven words precede “in my opinion,” the main subject.)

Solution: To eliminate front-loading, break the sentence into two or flip the sentence so that the main subject and verb go first.
"She decided she wanted to be a lawyer when she was eight years old." *Becomes:* "When she was eight years old, she decided she wanted to be a lawyer." (Modifier placement.) (One may not become a lawyer at age eight.)

"Millions of youths do not go to college in America." *Becomes:* "Millions of youths in America do not go to college." (Modifier placement.) (It is irrelevant to the reader of this sentence how many youths go to college in foreign countries.)

"Nine percent of married men cheat in New York City." (Modifier placement.) (This sentence suggests that 91 percent of married men cheat outside the Big Apple.)

"The game warden filed four complaints charging illegal hunting in Justice Court." *Becomes:* "The game warden filed four complaints in Justice Court charging illegal hunting." (Modifier placement.) (The illegal hunting did not occur in Justice Court, we hope.)

"Plaintiff pleads that the statute is ambiguous in paragraph three of his complaint." *Becomes:* "Plaintiff pleads in paragraph three of his complaint that the statute is ambiguous." (Ambiguous prepositional placement.) (The statute is not ambiguous in his complaint.)

Solution: Place prepositional phrases next to what they modify.

"They scrutinized every figure in the account in the embezzler's handwriting." *Becomes:* "They scrutinized every figure the embezzler wrote in the account." (Adjacent prepositional phrasing.) (Is the entire account in the embezzler's handwriting, or just some of the figures?)

Knock, knock. *Who's there?* "Justice Edward J. McLaughlin, the maternal grandson of the late Chief Judge Albert Conway, who presides in New York County . . . ." *Becomes:* "Justice Edward J. McLaughlin, the maternal grandson of the late Chief Judge Albert Conway, presides in New York County. Justice McLaughlin . . . ." (Relative pronoun placement.) (Without the revision, the reader will believe that the late Chief Judge still presides, in Manhattan.)

33. **Reflexive & Intensive Pronouns**

Pronouns substitute for nouns. *Mnemonic:* "Pro" means "for," as in, a pronoun stands "for" a noun.

Reflexive and intensive pronouns are used only when they refer back to a pronoun:

- “I said that to myself.” (Reflexive pronoun.)
- “I myself said that.” (Intensive pronoun.)

A tip: Delete first pronoun. Then ask whether the sentence reads with an “I,” “me,” “he,” “him,” “she,” “her,” “they,” or “them”:

- “The judge and me [or myself] went to the crime scene.” No: “I went to the crime scene.” Therefore: “The judge and I went to the crime scene.”
- “She and him [or himself] went to trial.” No. “He went to trial.” Therefore: “She and he went to trial.”
- X: “How are you?” Y: “Fine. And yourself?” No. “And how are you?” (Not “And how are yourself?”) Therefore: “Fine. And you?”

Note: After fixing a reflexive-pronoun problem, do not shift pronouns: “When one reads the court’s opinion, you are [should be one is] struck by how elegant it is.” Shifts lead to confusion. Writers should not shift your (should be their) point of view.

Shun nonstandard reflexive and intensive pronouns: “theirself,” “themselves,” “themself,” “themselves.”

34. You, I, and Me

“Between you and I.” Becomes: “Between you and me.” This error of hypercorrection is called a “solecism,” a word or phrase that violates correct idiomatic usage.

“Appellant posed two questions to my colleagues and I.” No. “Appellant posed two questions to me.” Therefore: “Appellant posed two questions to my colleagues and me.”

More between: “Confining a prisoner costs between $200 to $300 a day.” Becomes: “Confining a prisoner costs between $200 and $300 a day.” Or “Confining a prisoner costs $200 to $300 a day.”

Question: “Who’s at the door?” Answer: “It is me!” No. “I am at the door,” not “Me is at the door.” Therefore: Question: “Who’s at the door?” Answer: “It is I!” But modern usage requires that you say “it’s me,” not the pretentious “it’s I.” Similarly, “Judge Shulman and me
wrote the article” becomes “Judge Shulman and I wrote the article.” (Me did not write the article.) A tip: Delete “Judge Shulman and.”

Strange but true. Do you recall Sammy Davis Jr.’s song “I Gotta be Me”? He should have sung “I Gotta be I.”

In a list of pronouns, you (“I” or “me”) are listed last. Thus, “My colleagues and me,” not “Me and my colleagues.”

- Exception: For emphasis and climax, you may list yourself before you list others: “Whom are you going to believe? Me or your own eyes?” (Groucho Marx.)

Embarrass elliptical expressions:

- “He is taller than me” is incorrect because one may not write, “He is taller than me is.” Correctly written, it is “He is taller than I.” Better still, write, “He is taller than I am.” The “am” is elliptical, and in informal writing need not be expressed, because the reader understands that the writer meant to include the “am.” The “am” should be included in opinion writing because it adds clarity. What of the reader who reads “He is taller than I” to mean “He is taller than I was [or will be]”?

35. Gender Neutrality

Gender neutrality in judicial-opinion writing is official OCA policy. As the court system’s anti-gender-bias committee has explained, “all of us who work in the courts or work in the court system [must] avoid unintended slights or compromises to the ideal of justice.” (NYS Judicial Committee on Women in the Courts, Fair Speech: Gender-Neutral Language in the Courts [2d ed 1997 OCA].)

Some believe that gender neutrality is part of an unfortunate and passing phase of political correctness. They are wrong. It is a fortunate phase—and one here to stay. Sexist writing offends readers of both genders, and for good reason. Discriminatory beliefs are reflected in discriminatory writing, and discriminatory writing perpetuates discrimination. Moreover, sexism is often double discrimination. Consider the old-fashioned labels “Jewess” and “Negress.” Have you ever heard of a “Christianess,” a “whitess,” or a “Caucasianess”? And who can forget the old expression “woman lawyer”? Perhaps one reason no one used the term “lawyerette” is that women were still excluded from the profession when “ette” suffixes were popular. (See, e.g. In the Matter of the Motion to Admit Miss Lavinia Goodell to the Bar of this Court, 39 Wis 232, 236 [1875, Ryan, Ch. J.] [“This is the first application for admission of a female to the bar of this court. And it is just matter for congratulation that it is made in favor of a lady whose character raises no personal objection: something perhaps not always to be looked for in women who forsake the ways of their sex for the ways of ours.”].) Opinion writers have a special obligation to
be gender neutral so that they can render, and be seen as rendering, fair and equal justice under the law.

Others believe that gender-neutral writing sacrifices precision. They are wrong about that, too. If you accept that non-gender-neutral writing is discrimination in print, you will make the effort to write gender-neutrally. You will see for yourself how simple it is to be both precise and nonexist. The Chief Judge said it well: “[G]ender-neutral writing is not only a good habit but also an easy one to acquire and internalize.” (Judith S. Kaye, Perspective, A Brief for Gender-Neutral Brief-Writing, NYLJ, Mar. 21, 1991, at 2, col 1 [arguing in Point I that gender-neutral writing “is simply the right thing to do”].)

According to Deborah Pines, In the Courts, When ‘She’ Replaces ‘He’ at Foley Square, NYLJ, Nov. 1, 1993, at 1, col 3, law clerks can take some credit for gender-neutral opinion writing:

“If it is a battle of ‘he said/she said,’ ‘she said’ is winning in the texts of recent federal district and appellate court rulings in New York.

“A virtual linguistic revolution, in the name of gender neutrality, has left most judges avoiding pronouns, using ‘he or she,’ alternating between the two, or just using 'she' in describing hypothetical litigants, lawyers or judges.

“The move by judges of all genders, ages and political stripes is a sign of how mainstream the cause of ‘inclusive language’ has become 30 years after the feminist movement of the 1960s. But it also is a sign, in some instances, of renewed behind-the-scenes pressure from young law clerks whom some call progressive and others label as politically correct.”

Use gender-neutral terms:

- “Brother Justice” (or “fellow Justice” or “brethren”) becomes “Sibling Justice” or “Colleague Justice.”

- “King” becomes “sovereign.”

- “Madam Justice Ginsburg” becomes “Justice Ginsburg.”

- “Mr. Justice Souter” becomes “Justice Souter.”

- “Sister state” becomes “sibling state.”
“Statesmanship” becomes “diplomacy.”

Delete the suffix “-man.”

“Assembly Member” (not “Assemblyman”).

“Chair” (not “chairman” or the inelegant “chairperson”).

“Con artist” (not “con man”).

“Firefighter” (not “fireman”).

“Presiding juror” or the inelegant but standard “foreperson” (not “foreman”).

“Police officer” (not “policeman”).

“Supervisor” (not “foreman”).

Delete the prefix “man-.”

“Staff” (not “manpower”).

Avoid masculine terms—“mankind” (“humanity”); “manmade” (“made by hand”); “common man” (“average person”).

Change terms once reserved for women:

“Mrs.” and “Miss” become “Ms.” (unless the person prefers “Mrs.” or “Miss”).

Avoid the suffixes “-ette,” “-ess,” and “-trix”:

“Waitress” becomes “waiter” or “server” (not “waitron”); “actress” becomes “actor”; “poetess” becomes “poet”; “stewardess” becomes “steward” or “flight attendant”; “executrix” and “prosecutrix” become “executor” and “prosecutor.” Retain only historical usages like “suffragette.”

But: Fiancé (man), fiancée (woman); née (Jane Smith, née Clark) (woman’s maiden or birth name); blonde (“a blonde woman,” “a blond-headed man”).

Make the antecedent plural (easiest device):
"An infant younger than seven may not be convicted of petit larceny. He is immune from prosecution." Becomes: "Infants younger than seven may not be convicted of petit larceny. They are immune from prosecution."

Rephrase to eliminate the pronoun (second easiest devise):

"He who cannot do the time should not do the crime." Becomes: "Anyone who cannot do the time should not do the crime." Becomes: "If you cannot do the time, do not do the crime."

"A gourmet likes her coffee black." Becomes: "A gourmet likes black coffee."

Repeat the noun (third easiest device).

Use second-person pronoun (fourth device).

Use passive voice (a last resort).

Use parallel language:

"Man and wife" becomes "husband and wife" or "man and woman."

One: Y2K Star Trek: "To go boldly where no one [or none, but not where no man] has gone."

But note that "one," as a synonym for the informal "you," can seem too stuffy.

Do not be inelegant. If you do not believe me, ask Miss Thistlebottom. He or she will tell you that I am right. Inelegance includes:

- S/he.
- (S)he.
- S/he/it. (Think about this one.)
- He or she, him or her.
- Alternating between "he" and "she."
- Gender disagreement:
- “Someone is eating their soup.” Becomes: “Someone is eating his soup.”
  Becomes, by eliminating the pronoun: “Someone is eating soup.”

- “[I]f someone is a good legal writer, they may score better on exams than
  you do, even if you 'know more law' than they do.” Becomes, by
  eliminating the pronoun: “A good legal writer will score better on exams
  than you will, even if you know more law.” (Original from Marion T.D.
  Lewis, The Law School Rules 56 [1999].) (“Someone” cannot be “they.”)

- You (too informal for opinion writing).

- Womyn (too je ne sais quoi for opinion writing).

- Inelegant variation: “Find a court officer. He can help you.” Should not become
  “Find a court officer. That is the official who can help you.” Instead of finding a
  synonym for “court officer,” repeat “court officer,” as in, “Find a court officer. A
  court officer can help you.” Besides, a court officer is a “who,” not a “that.”
  (Contra, Fair Speech: Gender-Neutral Language in the Courts, supra, at 8 [“Replace
  the pronoun with a synonym. ‘You should find a court officer. That is the official
  who can help you,’ may replace ‘You should find a court officer.’ He is the one
  who can help you.”] [emphasis in the original].)

- Stunt stereotyping:

  - Wrong: “Real opinion writers write every day, right after they put on their
    make-up.”

  - Wrong: “Real opinion writers write every day, right after they shave.”

  - Possibly right: “Real opinion writers write every day, right after they get to
    work.”

For more on this topic, see Gerald Lebovits, The Legal Writer, He Said—She Said:
Gender-Neutral Writing, 74 NY St BJ 64 (Feb. 2002).

36. Nominalizations

Nominalizations are nouns converted from verbs. Do not turn verbs into nouns. Rather,
find the buried verbs. Nominalizations are wordy; they hide; they are abstract. Wipe out words
and phrases on steroids:

- “Please do not hesitate to contact us if there is anything we can do to assist you in
  the implementation of this presentation.” Becomes: “Please do not hesitate to
contact [telephone, write, e-mail?] us if we can do anything to help you [do not add to] give your presentation.”

“The fine was far in excess of . . . .” Becomes: “The fine far exceeded . . . .”

“The court reached the decision that . . . .” Becomes: “The court decided that . . . .”

“She has a tendency to . . . .” Becomes: “She tends to . . . .”

“I am writing (enclosing, attaching) . . . .” Becomes: “I write (enclose, attach) . . . .”

“I have knowledge that . . . .” Becomes: “I know that . . . .”


“Defendant is guilty of committing the crime of an attempt to commit the crime of criminal possession of a controlled substance.” (Recast to use gerunds to delete the “of.”)

“Petitioner made a motion in support of . . . .; then she made an objection.” Becomes: “Petitioner moved” (not “motioned”), “to support,” and “objected.”

“The Housing Part judge was of the belief that his decision would be affirmed.” Becomes: “The Housing Part judge believed that his decision would be affirmed.”

“The intention of the parties was to reach an agreement.” Becomes: “The parties intended to agree.”

“The Surrogate gave a description of the procedure.” Becomes: “The Surrogate described the procedure.”

“The court clerk has a preference for the submission of documents.” Becomes: “The court clerk prefers that litigants submit documents.”

“My law-school intern assisted in the preparation of this article.” Becomes: “My law-school intern assisted in preparing this article.”

“Supreme Court’s charge had an influence on the jury.” Becomes: “Supreme Court’s charge influenced the jury.”

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"Plaintiff made the statement that . . . ." Becomes: "Plaintiff stated that . . . ."

"The court attorney showed devotion to her craft." Becomes: "The court attorney was devoted to her craft."

"District Court gave consideration to that issue." Becomes: "District Court considered that issue."

"The Court of Appeals placed reliance on . . . ." Becomes: "The Court of Appeals relied on . . . ."

"The regulatory agency has wide discretion with respect to the enforcement of . . . ." Becomes: "The regulatory agency has wide discretion to enforce . . . ."

"The establishment of the discovery violation might be difficult." Becomes, by eliminating the nominalization: "Establishing the discovery violation might be difficult." Becomes, by featuring the subject, by eliminating the imprecise "establishing," and by converting the lame "might" (or "may") to the assertive "will": "Plaintiff will have difficulty proving that defendant violated the court's discovery order."

Countless nominalizations and long derivatives abound in legal usage. Ban them:

"Articulated a formulation" becomes "formulated."

"Be abusive of" becomes "abuse."

A "be"-verb attached to a clause that ends in a preposition signals a circumlocution:

"Be applicable to" becomes "apply to."

"Be benefitted by" becomes "benefit from."

"Be desirous of" becomes "desire," "want."

"Be in agreement" becomes "agree."

"Be in attendance" becomes "attend."

"Be in error" becomes "err."

"Be in existence" becomes "exist."
"Be violative of" becomes "violate."

"Drew a conclusion" becomes "concluded."

"Delivered a lecture" becomes "lectured."

"Enter into a settlement" becomes "settle."

"Evidentiary material" becomes "evidence."

"Exhibit resistance" becomes "resist."

"Focus criticism on" becomes "criticize."

"Has an inclination to" becomes "is inclined to."

"Held a conference" becomes "conferred."

"Make a decision" becomes "decide."

"Make an inquiry" becomes "inquire."

"Make reference to" becomes "refer to."

"Offer a rebuttal" becomes "rebut."

"Predicated on the assumption" becomes "assumes."

"Proffer an argument" becomes "argue."

"Provides an update" becomes "updates."

"Show deference" becomes "defer."

"Sustained prejudice" becomes "was prejudiced."

"Take into consideration" becomes "consider."

37. Metadiscourse: Cut Preambles & Throat Clearing

Metadiscourse is discourse about discourse. Get to the point without using a running start that takes up space but adds nothing. Metadiscoursive writers talk to their readers by explaining the writers' thinking and writing. Metadiscourse is throat clearing.
The adage "First say what you will say, then say it, then say you've said it" works only if you are subtle. Do not say that you are about to say something. That pedantic and condescending way of speaking and writing frustrates even children.

Delete the following from your sentences.

- "Another aspect of the case that ought to be considered is that . . . ."
- "As a matter of fact . . . ."
- "As far as the court is concerned . . . ."
- "Bear in mind that . . . ."
- "Consideration should be given to the possibility of [or that] . . . ."
- "For all intents and purposes . . . ."
- "From our point of view . . . ."
- "I would venture to suggest that . . . ."
- "If I may be permitted to add . . . ."
- "In connection with . . . ."
- "In dissent I propose to argue that . . . ."
- "In our opinion . . . ."
- "In the final analysis . . . ."
- "It appears to be the case that . . . ."
- "It can be said with certainty that . . . ."
- "It goes with saying that . . . ."
- "It has come to our attention that . . . ."
- "It is clear that . . . ."
- "It is conceivable that . . . ."
"It is hornbook law that . . . ."

"It is important [or helpful or interesting] to remember that . . . ."

"It is important to state at the outset that . . . ."

"It is logical to believe that . . . ."

"It is significant that . . . ."

"It is submitted that . . . ."

"It is the court's conclusion that . . . ."

"It is true that . . . ."

"It is well settled that . . . ."

"It should be emphasized that . . . ."

"It should [or must] be noted that . . . ."

"It should not be forgotten that . . . ."

"It stands to reason that . . . ."

"It would seem that . . . ."

"Let me say that . . . ."

"Needless to say . . . ."

"On balance . . . ."

"One feature of which one should be aware . . . ."

"Petitioner is aware that . . . ."

"Please be advised that . . . ."

"Speaking with all deference . . . ."

"Suffice it to say . . . ."
- "That is to say . . . ."
- "The court recognizes that . . . ."
- "The court suggests that . . . ."
- "The fact of the matter is that . . . ."
- "The fact is that . . . ."
- "The first thing this court will write about is . . . ."
- "The point I am trying to make is that . . . ."
- "The next issue the court will deal with is . . . ." Becomes: "The next issue is [or Second,] . . . ."
- "The third section of the opinion concerns . . . ."
- "There is no doubt but that . . . ."
- "This court finds that . . . ." (Use rarely, and only to show a sharp break between the litigants' contentions and the court's findings.)
- "This is a case that . . . ."
- "This is to inform you that . . . ."
- "To get to the point . . . ."
- "To me . . . ."
- "We believe that . . . ."
- "We happen to believe that . . . ."
- "What I mean to say is that . . . ."
- "When all is said and done . . . ."

Suffer not sing-song metadiscourse:
"The contract is invalid. Why is the contract invalid? The contract is invalid because it violates public policy. How does the contract violate public policy? The contract violates public policy because it promotes illegal gambling. How does the contract promote illegal gambling? ...."

For more on this topic, see Gerald Lebovits, Legal Writer, Writers on Writing: Metadiscourse, 74 NY St BJ 64 (Oct. 2002).

38. Shifts

Shape shifting is for the shiftless. Shifts confuse readers.

Tense shift: "When the confidential secretary learned how to use e-mail, he gets frustrated." Becomes: "When the confidential secretary learned how to use e-mail, he got frustrated." (Shift from past tense to present tense.)

Mood shift: "The court attorney will rewrite the opinion if her judge were to ask her." Becomes: "The court attorney will rewrite the opinion if her judge asks her." (Shift from indicative mood to subjunctive mood.)

Voice shift: "First you should read the litigants' submissions, then pen should be put to paper." Becomes: "First you should read the litigants' submissions, then you should put pen to paper." (Shift from active voice to passive voice.)

Person shift: "Student interns should insta-cite case law, and you should study the cases you find." Becomes: "Student interns should insta-cite case law and study the cases they find." (Shift from third person to second person.)

Number shift: "Spelling mistakes are troublesome, but a spelling mistake is not fatal." Becomes: "Spelling mistakes are troublesome but not fatal." (Shift from plural to singular.)

Discourse shift: "Counsel asked whether he could file the brief and 'Will the court accept it?'" Becomes: "Counsel asked whether he could file the brief and whether the court will accept it." (Shift from indirect discourse to direct discourse.)

39. Pick on the Correct Idiom

An idiom is a phrase whose meaning is greater than the sum of its parts. Take "by and large." The phrase means more than the individual words "by," "and," and "large." Idiomatic expressions cause trouble when the idiom ends in a preposition. For example, one "agrees with" another person, but one "agrees to" a proposal and "agrees on" a plan.

Some incorrect idiomatic expressions in legal writing:
- “Accord to” becomes “accord with.”
- “Adverse against” becomes “adverse to.”
- “Aim at proving” becomes “aim to prove.”
- “Angry at someone” becomes “angry with.”
- “As regards to” becomes “as regards.”
- “Authority about” becomes “authority on.”
- “Blame it on me” becomes “blame me for it.”
- “Centers around” becomes “revolves around” or “centers on,” “centers in,” or “centers at.”
- “Comply to” becomes “comply with.”
- “Contrast to” becomes “contrast with.”
- “Convicted for [or in] a crime” becomes “convicted of a crime.”
- “Convicted for a count in the indictment” becomes “convicted on a count in the indictment.”
- “Correspond with” (as a comparison, it is “correspond to.” You “correspond with” when you write a letter to someone).
- “Desirous to” becomes “desirous of.”
- “Equivalent with” becomes “equivalent to,” “equivalent of.”
- “Free of” becomes “free from.”
- “Graduated law school” becomes “graduated from law school,” “was graduated from law school.”
- “Identical to” becomes “identical with.”
- “In accordance to” becomes “in accordance with.”
- “In search for” becomes “in search of.”
"Plead the Fifth Amendment" becomes "take [or invoke] the Fifth Amendment."

"Prefer ... over" becomes "prefer ... to."

"Relation with" becomes "relation to."

"Relations to" becomes "relations with."

"Stay for awhile" becomes "stay a while" or "stay for a while."

"Ties with" becomes "ties to."

"Warrant for eviction" becomes "warrant of eviction."

40. Sentence Revision

Lift the main subject, verb, and object. Remove imprecise subject-verb combinations. Then revise for subject-verb-object order: who did what to whom (active voice).

Keep subjects near their verbs and verbs near their objects. Northwestern School of Law Professor Shapo, writing with Brooklyn Law School Professors Marilyn R. Walter and Elizabeth Fajans, explained the reason for this fundamental rule: "When you separate the subject and the verb with a series of interrupting phrases, you leave the reader in limbo." (Helene S. Shapo et al., Writing and Analysis in the Law 165 [3d ed 1995].)

Feature the subject, but do not begin every sentence with a subject ("The court noted . . . ."); "The court found . . . ."; "The court held . . . ."). From time to time substitute subjects with subordinate clauses, subordinating in dependant clauses to assure flow and to rank ideas by importance. Then place the main idea in the main clause, after the dependant clause. Thus, for variety begin sentences occasionally with "after," "although," "as," "as if," "as long as," "because," "before," "if," "though," "until," "when," "where," or "while."

Vary sentence structure. The simple sentence has one subject and one verb. It is no simpleton, though: "Simple declaratory sentences are the easiest to read." (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].) Some believe that simple sentences dumb down writing. These lost souls should read Hemingway. In his work they will see the power of the simple sentence. Not every sentence should be simple. A few should be compound, complex, or compound-complex. Compound sentences contain two independent clauses; the clauses are linked with a semicolon, or they are linked with a coordinating conjunction. Complex sentences contain a main, independent clause and at least one dependent clause linked by a subordinating conjunction, as explained in the preceding paragraph. Compound-complex sentences contain at least two independent clauses, and at least one dependent clause, all
somehow linked. A tip: Coordinate to link independent clauses; subordinate to put the main idea in the main clause and the less important idea in the dependant clause.

Revisit sentences whose primary phrases are not prominent:

- Infinitive phrases: “File the opinion with the clerk to avoid delay.” Becomes: “Avoid delay by filing the opinion with the clerk.”

- Participial phrases: “Judge X picked up a pen, writing the opinion in two hours.” Becomes: “Judge X wrote the opinion two hours after she picked up a pen.”

The moment of revision is the moment of true vision. As Justice Brandeis observed, “there is no such thing as good writing. There is only good rewriting.” (Charles W. Pierce, The Legal Profession, 30 The Torch 5, 8 [1957], quoting Louis D. Brandeis, who in turn borrowed from Gustave Flaubert.)

Revisionist philosophy: Opinion writers do not have the time to study every revision technique every time they write. They must acquire techniques one at a time until their mental computers are programmed.

Good advice from a New York City Civil Court judge: Ask yourself two questions when you are at the “Moment of Truth”: “Have I done the right thing?’ Am I proud of how I have done it?” (Arthur Engoron, How to Draft Opinions: Practical Tips for Summer Interns 9 [unpublished outline for summer interns in Supreme Court, Civil Term, New York County] [June 7, 2001].)

41. Proofreading

Proofread carefully on a hard copy to see whether you any words out. Always proofread word-for-word. Read critically important documents aloud. Check and re-check your mathematical computations. After any major edit, reread to make certain that your transitions still make sense and that something written “above” or “below” is still there and still conveys relationships accurately. Always proofread to assure a consistent style for honorifics, capitalizations, abbreviations, and acronyms. Proofread at the very end one last time; then try to get someone else to proofread your work. Writers are notoriously poor at catching their own errors. They tend to see what they believe they wrote, or what they should have written, and not what they actually wrote. (George John Miller, Legal Writing Style 43 Ky LJ 235, 250 [1955].)

42. Widows/Orphans

Never end a page with a caption or begin a page with only a few words left over from the preceding page or with only a signature line or date.
MECHANICS IN OPINION WRITING

1. Italics

Use italics

- for foreign words not commonly used in legal English;
- for citations (writers should prefer italics, which are easy to read, to underlining);
- for stressing important parts of quotations; and
- for emphasis—**ON THOSE VERY RARE OCCASIONS WHEN, BECAUSE YOU ARE A PARANOID, YOU ABSOLUTELY “MUST” EMPHASIZE!!!!**

Even then, limit your italicizing. Legal writers should avoid foreign words, and quotations should be so pared down that emphasizing is unnecessary. Novices like to emphasize words or phrases they want the reader to see. That technique fails in legal writing. Emphasizing overstates, and successful legal writing understates. Moreover, emphasizing by underlining or italicizing, or by quotation marks or by bold type, is annoying because the reader does not know whether the unemphasized portions are unimportant. Italics also draw special attention and might elevate their importance in a way the author did not intend. Writing concisely and concretely is more powerful than using artificial, grating devices like emphasizing.

Justice Shientag supplied some emphasis to the subject: “Be sparing in your use of italics. For the most part, the rule prohibits them. ‘I can understand what you mean without being “shouted at as it were, in capital letters.’” (Bernard Shientag, *The Appellate Division, First Department, Its Jurisdiction, How it Functions in Conference, Briefs and Oral Argument*, 5 Record of Assn of Bar of City of NY 377, 413 [1950], quoting Ruskin.)

2. Numerals (when to spell out and when to use Arabic or Roman numerals as figures):

“Number” is the mathematical concept. “Numeral” is the expression to denote the concept. “Words” denote numerals in ABCs. “Figures” denote numerals in 1,2,3s. Cardinal numbers express quantity or magnitude (one, two). Ordinal numbers express position (first, second).

Spell out numerals up to and including nine and use figures for numerals above nine, according to the 2002 Tanbook. Other authorities, including the Bluebook, recommend spelling out zero to ninety-nine in text and zero to nine in footnotes. My opinion? Count me among the Tanbook’s adherents. Spelling out numerals gives opinions a formal air, but figures are easier to read than letters.
Bluebook: Use figures for numerals larger than 99 except for round numerals, which you may spell out if you do so consistently.

Bluebook: Use only figures in a series if one numeral is greater than 99.

*Tanbook & Bluebook:* Fractions are written out until one. Use figures for fractions greater than one.

*Tanbook & Bluebook:* Use "feet" and "inches," not symbols.

- 9" becomes "Nine inches."

- 9' becomes "Nine feet."

Bluebook: Spell out degree symbols: "Ninety-eight degrees," not "98°" (unless you are referring to the boy band 98°). *Tanbook:* 98 degrees.

Identify constitutional, statutory, and contractual provisions as they appear in the original.

Spell out figures only when drafting a legal document, such as a contract, a will, or a bank check, that could contain an inaccuracy. Do not spell out figures in a judicial opinion. Few have the gumption to forge a judicial opinion.

*Tanbook & Bluebook:* All sentences should begin with a capital letter. Spell out section symbols ("Section," not "§"), and spell out figures, including years, at the beginning of a sentence. If it bothers you to begin a sentence with "Two thousand and two will be a better year than 2001," begin with "We hope that 2002 will be a better year than 2001," or a similar variant.

*Tanbook & Bluebook:* Use figures for calculations.

*Tanbook & Bluebook:* Spell out approximations ("about three weeks ago").

3. Dates

Enclose parentheticals: "January 30, 1999, was a good day," not "January 30, 1999 was a good day."

Pronounce the "th," "rd," or "rd" when you speak, but do not spell them out when you write figures: "January 30," not "January 30th."
Unless you preside over an international tribunal or a military court, write "January 30, 1999," not "30 January 1999."

Less is more: "January 1999," not "January, 1999" or "January of 1999."

Spell out ordinal numbers: "first," not "1st" or "1st."

"6 B.C." (before Christ) and "6 A.D." (in the year of the Lord); "6 B.C.E." (before the Common Era) and "6 C.E." (in the Common Era).

Lowercase centuries ("he is entering the twentieth century") and seasons ("she studied legal writing in the fall of 1999").

4. Time

Timing is everything. Use "a.m." or "p.m." (note periods and no spaces; lowercased in type; lo-caps when printed: "A.M.").

Use figures when using "a.m." or "p.m." but not when writing "o'clock": "11:00 a.m.," but "eleven o'clock." (Note: The Tanbook recommends stating the minutes following the colon even on the hour, but many authorities disagree).

Use "a.m." or "p.m." only after figures. "The trial ended at four in the p.m." Becomes "The trial ended at 4:00 p.m." Or "The trial ended at four in the afternoon."

"10:00 a.m. in the morning" is redundant.

Write "noon" or "midnight," not "12 m." or "12 p.m." (Note: The Tanbook recommends using "12:00 p.m. (noon)" and "12:00 a.m. (midnight)."

Half a loaf is better than none. And it might be redundant, but two halves are better than one: "A half an hour" or "a half of an hour" become "a half hour" or "half an hour."

The time is right. Unless you have no choice, do not use a preposition to fix an exact time. Vague prepositions to avoid if you can: "about," "after," "before," "between," "by," "during," "from," "in," "on," "since," "till," "to," "until," "within."

Double trouble. If one vague preposition cannot fix an exact time, two doubly vague prepositions will not help: "[T]he usual lawskick antidote for an inadequate word—double it—only makes matters worse. That tried and untrue formula yields such chestnuts as at and after, at or before, from and after, on or after, on or before, up until. They make you talk to yourself and count on your fingers to figure out what they are trying to tell you." (David Mellinkoff, Legal Writing: Sense & Nonsense 41 [1982] [emphasis in the original].)
Time is of the essence. Legalisms that fix time are vaguer than prepositions. Avoid “forthwith,” “imminent,” “in due course,” “with all due deliberate speed.”

Time out. Delete the expression “such time as.” Family Court judge: “The father shall remain in jail for contempt until such time as he pays child support.” Becomes: “The father shall remain in jail for contempt until he pays child support.”

Time is tight. “A New York minute” is less than a minute.

5. Capitalization

Failing to capitalize correctly is a Capital Offense. Learning to capitalize correctly is a Capital Investment. Follow the Official Style Manual (Tanbook). The pre-2002 editions of the Tanbook contradicted other authorities on what should be capitalized. For example, the previous Tanbook provided that the letter “j” in the “judge” should always be capitalized, no matter the context. (The previous Tanbook also provided at page 52 that words like Bar, as in the group of attorneys, be capitalized.) All other authorities, including the 2002 Tanbook, recommends lower-casing titles that do not precede a name unless the title is “President of the United States,” “Justice of the United States Supreme Court,” or “Judge of the New York State Court of Appeals.”

Key capital to remember: “the People” (but “defendant,” without an article, and “the complaining witness,” with an article).


- A helpful aide: The first legal-aid society in the United States is the organization in New York City. To distinguish that society from others, call it “The Legal Aid Society,” with a capital “T.”

Capitalize:

- The first letter in the first word of a sentence. Symbols and figures at the beginning of a sentence must be converted to words.

- The first letter of the first word of a direct question in a sentence.

- The first letter in the first word of a line of verse, unless the first letter is lowercased in the original.

- The first letter in the first word of a salutation and the complimentary close of a letter:

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“Respectfully Yours (or Submitted)” becomes “Respectfully yours (or submitted).”


Words derived from proper names (proper adjectives): “New Yorker,” “Orwellian.”

But capitalize only the adjective in a proper adjective: “Spanish-speaking residents.”

Titles that precede proper names: “Mother Theresa,” “Senior Associate Judge George Bundy Smith.” Titles that go after a name are not capitalized, unless the title is important. Correct: “Jack Mozzarella is the president of the New York Cheese Company.”

The pronoun “I.”

All references to God: “the Supreme being,” “the Creator,” “the Sovereign,” “the Lord,” “Him,” “He,” “His Name,” “Her,” “She,” “Her Name.”

Languages, religions, nationalities, countries, and races (African-American, Caucasian) but not colors (black, white).

School courses but not academic disciplines: Correct: “I took Psychology 101 because I majored in psychology.”

A title before a name but not afterward:

“Mother Theresa.” But: “Theresa was a mother.”

“The Reverend Dr. Martin Luther King Jr.” But: “Dr. Martin Luther King Jr. was a reverend.”

Titles of relatives not preceded by a possessive:

“It is as American as Mother’s eating apple pie.” But: “It is as American as my mother’s eating apple pie.” “My, Grandma. What big eyes you have.” But: “My grandma has big eyes.”

Historical events, eras, and documents: “World War II,” “the Dark Ages,” “Magna Carta.”
Compass points, but only when identifying a specific area, not when referring to a direction:

"Grits is popular in the South." But: "The cold front in New York came from the north, from Canada, in a southerly direction."

Words in titles of works. Do not capitalize articles and conjunctions or a preposition that has four or fewer words. Capitalize the first and last word of a title and the first word after a colon or an em dash even if the word is a preposition, an article, or a conjunction:


Personifications: "Beauty is Truth."

Nouns, adjectives, particles, and prefixes in hyphenated compounds. Correct: "The Pre-Columbian Art Show." But do not capitalize after a hyphen in hyphenated single words: "His address is 155 West Sixty-eighth Street."

The first letter in a quotation, if the first letter is capitalized in the original and if the quotation is an independent clause:

Correct: The judge wrote, "The appearance of propriety is as important as propriety itself."

Correct: "The appearance of propriety," the judge wrote, "is as important as propriety itself."

Correct: The judge wrote that an "appearance of propriety is as important as propriety itself."

The names of organizations, institutions, ships, and buildings.

Brand names and trademarks.

Botanical and zoological names if not in English. Capitalize the genus but not the species: "Hyacinthus orientalis" (but "hyacinth"), "Giraffa camelopardalis" (but "giraffe").

The first letter of a word following a colon if what follows the colon is an independent clause but not if what follows the colon is a dependant clause.
Capitalize days ("Monday") and months ("March") but not seasons ("fall back, spring forward").

Lowercase the names of statutes and rules that exist today only as legal doctrines: "Statute of frauds," "statute of limitations," "rule against perpetuities." (A rule not in perpetuity: The previous Tanbook tells opinion writers to capitalize these doctrines, but the 2002 Tanbook amends that rule.)

Lowercase titular appositives.

"Convicted Terrorist Timothy McVeigh was executed." Becomes: "Convicted terrorist Timothy McVeigh was executed." Garner calls this journalistic practice "titular tomfoolery." (Bryan A. Garner, The Oxford Dictionary of American Usage and Style 7 [2000].)

Do not capitalize proceedings (unless they are named after a case), legal words, foreign words, or applications, orders, papers, or motions.

Proceeding: "The court held a Suppression Hearing." Becomes: "The court held a suppression hearing."

But: "The court held a combined Mapp, Huntley, and Wade hearing."

Legal words: "Plaintiff has the Burden of Proof." Becomes: "Plaintiff has the burden of proof."

Foreign words: "The doctrine of Stare Decisis applies." Becomes: "The doctrine of stare decisis applies."

Applications, orders, papers, and motions:

"Defense counsel served an Application to Set Aside the Verdict." Becomes: "Defense counsel served an application to set aside the verdict." Or "Defense counsel served an application to set the verdict aside."

"Respondent filed an Order to Show Cause." Becomes: "Respondent filed an order to show cause."

"Appellant submitted his Opening Brief." Becomes: "Appellant submitted his opening brief."
“Petitioner made a Motion to Reargue.” Becomes: “Petitioner made a motion to reargue.” Or, better, “Petitioner moved to reargue.”

But capitalize forms: “On April 15, the millionaire Park Avenue partner filed a Form 1040-EZ.”

For more on this subject, see Gerald Lebovits, The Legal Writer, Uppercasing Needn't Be a Capital Crime, 75 NY St BJ 64 (May 2003).

6. Typographical Conventions

Margins:

- Love is the Golden Rule(r). One inch on the top, bottom, right, and left, unless you use red-ruled paper, in which case it is 1½ inches on the left and half an inch on the right.

- Not a marginal rule. Most readers prefer ragged-right margins for typed documents but fully justified margins for published documents.

- A good rule about margins. Leave plenty of white space on your paper.

Typeface:

- Prefer a serifed typeface font like Times New Roman to a sans-serif typeface font like Courier. This handbook is in the serifed GoudyOlst BT, 12-point font.

  Compare:

  - This is Courier New 12 point, a sans-serif typeface.

  - This is Times New Roman 12 point, a serifed typeface.

  - This is GoudyOlst BT 12 point, a serifed typeface. For old folks like me, it is easier to read than 12-point Courier New or 12-point Times New Roman.

Em dashes “—”. No spaces before or after:

- Correct: “The judge—an honest man—decided the case impartially.”

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§ & ¶ (para, paras). Add spaces before and after:

Correct: “Defendant pleaded guilty to disorderly conduct, a violation. (See Penal Law § 240.20 [1].)”

$. Add a space before but not after:


Note: Prefer “$10” to “$10.00.”

(l) (subsection (federal usage) or subdivision (New York State usage)). Rule number 1: Underline or italicize the “l” to distinguish a lowercased letter “L” from the number “1” or the uppercased letter “L.”

1000. No comma after the “1.” Would you use a comma after the “2” to denote the year 2001? Of course not. But add a comma to separate figures that equal or exceed five figures: $10,000.

Twenty-five. Bluebook: Hyphenate all compound numbers between twenty-one and ninety-nine. Tanbook: Numerals 10 and higher be expressed in figures, not letters.

%, per cent, percent, or percentum? “Per cent” (according to the previous Tanbook, page 54, but “percent” according to most other authorities).

Spacing:

Two spaces between sentences, before and after citations, and after colons (but only one in publishing).

One space after semicolons and parentheticals.

Double space between paragraphs, footnotes, and endnotes if single spacing.

Indenting: Most readers prefer indented paragraphs (one tab).

Here is what one court wrote about typographical conventions:

“We do not (except in the caption) follow the appellant’s counsel’s interesting practice of writing the names of the people involved in CAPITAL LETTERS. Neither do we follow the appellee’s counsel’s practice of writing appellant’s name in BOLD-FACED CAPITAL LETTERS. Nor do we intend to write all numbers
both as text and numerals, as in ‘eleven (11) loose teeth, two (2) of
which were shattered[;] moreover, her jaw was broken in three
(3) places.” Appellee’s Brief at 7. Finally, we will also not

‘set off important text’

by putting it on

‘separate lines’

and enclosing it in

‘quotation marks.’

See id. at 10. While we realize counsel had only our welfare in
mind in engaging in these creative practices, we assure them that
we would have paid no less attention to their briefs had they been
more conventionally written.” (United States v Snider, 976 F2d
1249, 1251 n 1 [9th Cir 1992, Kozinski, J.].)

7. Citing Rules and Statutes

Rules:

L. & R. 101 (McKinney 2001).”

Under the 2002 Tanbook, add a section symbol when CPL is written in full:
“Civil Practice Law and Rules § 101.” This contradicts federal practice and the
Bluebook, which provide that rules, whether abbreviated or written in full, have
no section symbols. Thus, “FRCP 8” and “Federal Rules of Civil Procedure 8”;
“FRE 8” and “Federal Rules of Evidence 8.”

CPL 180.80, not “CPL § 180.80” or “C.P.L. 180.80” Under the 2002 Tanbook, add a
section symbol when CPL is written in full: “Criminal Procedure Law § 101.”

22 NYCRR part 130 or 12 NYCRR 39.8 (no periods or section symbols). Under the 2002
Tanbook, add a section symbol when NYCRR is written in full: “New York Codes Rules and
Regulations § 101.”

CPLR 5529 (e) or CPLR 5529(e)? (Former: Tanbook; latter: Bluebook.)
The Tanbook requires that citations in parentheses—but not in text—appear thus:
“(CPLR 5529[e]).”

Statutes:

Penal Law § 125.25, not “PL” or “P.L.”

To abbreviate statutes correctly, see the Tanbook and the front of the relevant McKinney’s volume for “Cite this volume as . . . .”

8. Page Numbering

Number the pages of your opinion (bottom center), but suppress numbering for page one.

9. Honorifics

Do not use both Mr. (or Ms. or Professor) and “Esq.” Incorrect: “Mr. John Smith, Esq.”

Refer to lawyers in business writing as Esq.: “Deborah Fisher, Esq., is a wonderful court attorney.” But avoid the honorific in opinion writing. Similarly, avoid “Mr.” or “Ms.” in opinion writing unless you need to distinguish between spouses.

Do not refer to yourself as an “Esq.” The British derivation of “esquire” is “gentleman.” Those who call themselves “gentleman” probably aren’t. Ditto for those who refer to themselves as “Honorable.”

Use Dr. or M.D. but not both. Unless the author wishes to be generous, a nonphysician is not called “Dr.” Thus, a J.D. is not called “Dr.” in the United States, although a lawyer is called “Maitre X” in French-speaking jurisdictions and “Licenciado X” in Spanish-speaking jurisdictions. If in doubt, give more honorifics than fewer.

Honors. Write, “The opinion was written by the Honorable Stephen G. Crane” or, in informal writing, “The opinion was written by Hon. Stephen G. Crane.” When “Honorable” is written in full, it is preceded, when not at the beginning of a sentence, by a lowercased “the.” When “Hon.” is abbreviated (and the title should not be abbreviated in formal writing), the “the” is absent.

From the Dead Letter Department. Use only a deceased’s last name, not Mr. X or Ms. Y, unless the deceased had an important title. If the deceased had an important title, writers, at their option, may include it.

Correct: “Joe Blow died in bed during the War of 1812.”
But: "New York's Cardinal O'Connor was a saint."

10. Spelling and Grammar Checking

Always use your spell checker. Consider using Grammatik (on WordPerfect). Do your final proofread on a hard copy to avoid the mistake one lawyer made: He omitted the "L" when he wrote to his client that he would charge "a fat fee."

Bundt cake? I would rather have a home-run cake. Be careful to use the rite (wright? write? right?) homonym. Watch out for homonym and homophone errors and other mistakes. Homonyms are words that have the same form as other words but which have different meanings ("through" the wall or "through" with work). Homophones are words that are pronounced the same but spelled differently ("aid" and "aide", "dear" and "deer", "hear" and "here", "aisle" and "isle", "bee" and "be").


"I have a spelling Checker;  
It cam with my PC.  
It clearly marks for my revue,  
Mistakes I cannot sea.  
I've run this poem threw it;  
I'm sure your pleased to no.  
Its letter perfect in it's weigh;  
My Checker tolled mi sew!

"Two rite with care is quite a feet,  
Of witch won should bee proud.  
And we mused dew the best wee can,  
Sew flaws are knot aloud."

Homophones in a sense. In 1988 a court reporter transcribed a trial judge's instruction to a jury in a criminal case that "each defendant is presumed to be innocent in a sense." The Appellate Division affirmed the conviction but chastised the judge. (See People v Jorge, 159 AD2d 237, 238 [1st Dept 1990, mem] [emphasis in the original], lv denied 76 NY2d 859 [1990].) After the Appellate Division's opinion was published, the People moved to correct the opinion. Here is how the Appellate Division decided the motion:

"Essentially, the People confront us with the same problem which confounded Frederick, the love-starved hero of The Pirates of Penzance, whose life, as all Savoyards know, was severely complicated by the failure of his nurse, in his infancy, to
understand his dying father's wish that Frederick be apprenticed to a pilot. Due to a sad misunderstanding, the nurse apprenticed Frederick to a pirate, with dire consequences that are only resolved in the last act. Thus the People urge here that Justice McLaughlin, in his charge to the jury, did not say that the defendant is presumed to be innocent "in a sense", but merely repeated the word 'innocence'. There is no suggestion that this was done through "innocent merriment", in the sense used by The Mikado." (People v Jorge, 161 AD2d 372, 372 [1st Dept 1990, mem] [emphases in the original] [amending opinion "in fairness to the parties, and indeed to the Trial Judge"].)

11. Footnotes\(^1\) and Endnotes

Most opinion writers prefer footnotes to endnotes. The Official Reports uses footnotes only.

The bottom line. All believe that footnotes or endnotes are acceptable for collateral thoughts, special effects, excerpts of testimony, and quoting statutory or constitutional provisions.\(^2\)

Above and beyond. Some believe that citations should appear in footnotes, although most opinion writers put citations in their text. Citations in text are called "sentence citations."

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2. An acceptable special effect for a footnote is a sidelight. For a classic example of a sidelight, see People v Benton (77 Cal App 3d 322, 324 n 1, 142 Cal Rptr 545, 546 n 1 [4th Dist 1978, Gardner, P.J.]). The Benton court used a footnote to lament that defendant, a gun-point robber, told his victims "don't say another mother-f---ing word." (Id.) The Benton court yearned for the good old days, when English highwaymen used richer criminal argot like "Stand and deliver." (Id.) Another sidelight appeared in Golden Panagia S.S., Inc. v Panama Canal Commun. (791 F2d 1191, 1199 n 2 [5th Cir 1986, Goldberg, J.]): "Counsel for Golden Panagia informed this court at oral argument that Newell is now, in any event, dead. A Higher Court thus has jurisdiction over Henry Newell, and we are confident that any sins he may have committed will be dealt with appropriately there. See Matthew 25:41–46 (explaining Final Judgment procedures)."
A movement led by legal-writing guru Bryan A. Garner is afoot to use citational footnotes, or sentence citations in footnotes. (See William Glaberson, Legal Citations on Trial in Innovation v. Tradition, NY Times, July 8, 2001, at 1, col 1 [footnote in title omitted].) According to the Times, anti-traditionalists who favor moving sentence citations into footnotes argue that sentence citations are “aggravating,” a “nuisance.” They also note that using citational footnotes forces opinion writers to make sure that what remains in the text does not look like “legal code.” And that, they urge, makes opinions more accessible and democratic. Garner himself argues that volume and page numbers should be put into footnotes because doing so will make sentences shorter; paragraphs more forceful and coherent; ideas, not numbers, more controlling; poor writing more laid bare; caselaw better discussed; and string citations less bothersome. (Bryan A. Garner, Clearing the Cobwebs from Judicial Opinions, 38 Court Review 4, 4, 6, 7, 8, 10, 12 [2001].) The Times reported, however, that opponents of citational footnotes argue that looking up and down at the footnotes is itself distracting. (See also Richard A. Posner, Against Footnotes, 38 Court Review 24 [2001].)

Whatever approach you favor—sentence citations or citational footnotes—is acceptable. The 2002 Tanbook allows either approach. One can even compromise by putting case names in the running text and citations in the footnotes. I offer three cautions if you use citational footnotes.

First, use footnotes only for citational letters and figures. Do not develop legal authority in footnotes or use footnotes for any other purpose. In short, do not let an opportunity to use footnotes for citations lead you to put into your footnotes what should properly appear in your text.

Second, if your opinion goes online, readers will have a difficult time hyperlinking to your footnoted citations. They will be forced to move their cursors up and down repeatedly.

Third, add relevant information to your running text to explain the citation’s weight of authority—such as the name of the court and the year of the opinion—even if that information will also be in your citation. Do not force your reader to read your footnotes.

Do not include deep analysis or textually relevant discussion in footnotes or endnotes or make footnotes or endnotes too lengthy.3 Information in footnotes and endnotes might go unread. That would be unfortunate because “[a] footnote is as important a part of an opinion as the matter contained in the body of the opinion and has like binding force and effect.” (Melancon v Walt Disney Productions, 127 Cal App 2d 213, 214 n., 273 P2d 560, 561 n. [2d Dist 1954, McComb, J.].)

3. The footnote widely acknowledged as the nation’s most important comes from United States v Caroline Products Co. (304 US 144, 152 n 4 [1938]), in which Justice Stone, in three paragraphs, set out the levels of constitutional scrutiny.
Footnote fairly. Because footnotes and endnotes might go unread, legal writers sometimes sneak important information into them to hide content or to treat it disdainfully. A Justice once commented on that technique, of which, he argued, the majority was guilty. (See Lewis v City of New Orleans, 415 US 130, 137 [1974] [Blackmun, J., dissenting] ["[I]t is no happenstance that in each case the facts are relegated to footnote status, conveniently distant and in a less disturbing focus."].) Footnotes and endnotes can hide useless, irrelevant information born of "exhaustive research [that] would be a shame to discard." (John E. Simonett, The Footnote as Excursion and Diversion, 55 ABA J 1141, 1142 [Dec. 1969].) For ways that legal writers engage in skullduggery and other bad habits in footnotes, see Arthur D. Austin, Footnote Skullduggery and Other Bad Habits, 44 U Miami L Rev 1009 (1990) (footnotes in title omitted).

Too few footnotes or endnotes draw special attention and might elevate their importance in a way the author did not intend. Too many footnotes or endnotes lessen the value of all the footnotes or endnotes. (See generally Arthur J. Goldberg, The Rise and Fall (We Hope) of Footnotes, 69 ABA J 235 [Mar. 1983].)

Footnotes or endnotes should not be written merely to show that the court is scholarly. When an appellate court does that, years of litigation can ensue, as the Supreme Court has acknowledged. (See e.g. H.J. Inc. v Northwestern Bell Tel. Co., 492 US 229, 237–238 [1989] [noting years of controversy sparked by one footnote in Sedima, S.P.R.L. v Imrex Co., 473 US 479, 496 n 14 [1985]].)

Write footnotes and endnotes in the same font and point size as those in the text. Single-space footnotes and endnotes even when the text is double-spaced. These rules may be different for published materials, depending on the publisher.

Double space between footnotes and endnotes. Here, too, this rule may be different for published materials, depending on the publisher.

If you justify the text, justify the footnotes and endnotes as well.

Footnote and endnote numbers appear in the text as superscripts (raised above text in smaller type). Writers may use more than one footnote or endnote number in a sentence. Footnote and endnote numbers immediately follow the word, phrase, clause, or quotation to which they refer.

When footnote and endnote numbers follow punctuation, place them immediately (no space) after quotation marks, periods, commas, question marks, exclamation points, colons, and semicolons but before parentheses.

All sentences, including those in footnotes and endnotes, should be complete. No sentence fragments.

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The first time you cite in a footnote or an endnote, give a full citation, even if you already gave a full citation in your text.

When pinpoint-citing to footnotes or endnotes, use an ampersand ("&") when the reference is found at the page and in the footnote: "(A v B, 91 AD2d 19, 19 & n 9 [1st Dept 1991, mem])." If the reference is found in the footnote or endnote alone, cite the page and the footnote or endnote directly: "(X v Y, 16 NY2d 61, 62 n 3 [1981].)" Cite multiple footnotes as follows: (X v Y, 16 NY2d 61, 62 nn 3–4 [1981].)

Some writers like footnotes. (See e.g. Edward R. Becker, In Praise of Footnotes, 74 Wash U LQ 1, 1-2 [1996] ["[W]ell-conceived and well-crafted footnotes are valuable tools of their trade."]). Others do not. To those who deride them, footnotes and endnotes have been the subject of mirth. Pennsylvania Judge (and later Dickinson Law School Dean) Laub once said, "Anyone who reads a footnote in a judicial opinion would answer a knock at his hotel door on his wedding night." (Ruggiero J. Aldisert, Opinion Writing 177 [1990], quoting Burton S. Laub.) U.S. District Court Judge Gordon of Wisconsin once remarked that "[i]f judicial opinions had Blue Cross, they could go to the hospital and have their footnotes removed." (Myron L. Gordon, A Note on Footnotes, 60 ABA J 952, 952 [Aug. 1974].) And D.C. Circuit Chief Judge (and later Presidential Counsel) Mikva once wrote, "If footnotes were a rational form of communication, Darwinian selection would have resulted in the eyes being set vertically rather than on an inefficient horizontal plane . . . ." (Abner J. Mikva, Goodbye to Footnotes, 56 U Colo L Rev 647, 648 [1985]; Abner J. Mikva, Law Reviews, Judicial Opinions, and Their Relationship to Writing, 30 Stetson L Rev 521, 524 [2000] ["If God had intended the use of footnotes to be a norm, He would have put our eyes in vertically instead of horizontally."])

For more on this subject, see Gerald Lebovits, The Legal Writer, The Bottom Line on Footnotes and Endnotes, 75 NY St B 64 (Jan. 2003) (endnotes omitted from title).

12. **Quoting**

   a. **Generally**

   "Quote" is a verb; "quotation," a noun: "Law clerks use too many quotes [should be quotations] when they draft opinions."

   Delete "to" after the word "quote":

   - "To win his case, the lawyer would quote to the devil." **Becomes:** "To win his case, the lawyer would quote the devil."

b. **Quote the Relevant and No More**

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Quote the relevant—but only the relevant—provisions of a contract or statute. Otherwise, eliminate all but pungent quotations. As someone once said, in a passage worth quoting, “I hate quotations. I do not read them unless I must. Tell me what you know, in your own words.”

Quote essentials, things others have said better than you can, authoritative sources, and the text of something in dispute. Appellate courts should cite and quote from their own opinions to show adherence to precedent. Quoting also helps clarify who said what to whom when other signals are weak. But do not quote excessively or at length.

When done correctly, in context, accurately, and reasonably, quoting is good. Quotations prove that your argument is reliable, so reliable that the reader need not consult the source to confirm the reliability of your argument. Paraphrasing often detracts from reliability.

Quoting excessively or at length, however, reveals a lack of analysis. Anyone can cut and paste, and “[r]eaders generally dislike a paste-pot opinion, so called because it is largely a collection of quotations . . . . A quotation that is not integrated as part of the opinion is very likely to have a negative effect on the court’s rationale.” (American Bar Association—Appellate Judges Conference, Judicial Opinion Writing Manual 13 [1991].) Quoting at length also makes an opinion look too dense and can inadvertently contradict or weaken the writer’s point.

Judges know their colleagues’ reputations. Some judges are quoted and cited often; others are never quoted or cited. Judges who are quoted and cited often are known to be principled, intelligent, sincere, and knowledgeable. Judges not seen as credible sources are never cited. Do not quote those afflicted by baggage or stigma, no matter how clever or on point their lines are.

Never quote an obscure source; doing so is pretentious, alienating and confusing, and you will have to waste space explaining why you are quoting the obscure.

Do not quote the over-quoted. How many times can Tocqueville appear in print? What of Yogi Berra? Especially because he is quoted as saying, “I never said 85 percent of the things I said.”

George Bernard Shaw is reported to have said, “I often quote myself. It adds spice to my conversation.” What is true for conversationalists is untrue for judges. Trial judges should not cite or, worse, quote themselves. Appellate judges should cite their courts’ opinions but should not quote from opinions they wrote.

c. Lead-ins, Weaves, and Upshots

To integrate your quotation into your opinion, weave your quotation into your sentence or introduce it with a lead-in or, better, an upshot. That will give you double the bang for your buck and assure that your reader reads your quotation.
Do not begin sentences—or, worse, paragraphs—with quotations in legal writing. Beginning with quotations causes your quotations to go unread.

- **Bad form:** The Court of Appeals discussed the law-of-the-case doctrine. “[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction.” (*Matter of Dondi v Jones*, 40 NY2d 8, 15 [1976].)

Use a lead-out in nonlegal writing.

- Journalism’s single lead-out: “My client is innocent,” the defense lawyer said. (The lead-out in this example is italicized.)

- Fiction’s double lead-out: After Professor Kingsfield gave a student a dime and told him to call his mother to tell her that he will never become a lawyer, the student screamed: “You’re a son of a bitch, Kingsfield.” “That’s the first intelligent thing you’ve said,” Kingsfield replied. “Come back. Perhaps I’ve been too hasty.” (John Jay Osborn, Jr., *The Paper Chase* 15 [1971].) (The double lead-out in this example is italicized.)

**Lead-ins:** They introduce the reader to a necessary quotation that might otherwise go unread. Lead-ins prevent sentences and paragraphs from beginning with a quotation. Many lead-ins are boring, but they are better than no introduction at all:

- “[A] court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction.” (*Matter of Dondi v Jones*, 40 NY2d 8, 15 [1976].) **Becomes:** As the Court of Appeals has explained, “a court should not ordinarily reconsider, disturb or overrule an order in the same action of another court of co-ordinate jurisdiction.” (*Matter of Dondi v Jones*, 40 NY2d 8, 15 [1976].)

**Upshots:** An upshot is the most effective quotation device. Upshots precede a quotation and paraphrase the meaning of the quotation. Reserve upshots for important quotations you want to explain and emphasize. Upshots force the reader to read the passage twice:


**Weaves:**
A direct weave integrates the quotation directly into your sentence:

"I believe that a triable issue of fact exists." (X v Y, 1 Misc 2d 1, 2 [Sup Ct, Nassau County 1991].) Becomes: Judge Gebbia denied the summary-judgment motion because he found "a triable issue of fact." (X v Y, 1 Misc 2d 1, 2 [Sup Ct, Nassau County 1991].)

An indirect weave uses a preceding comma to link your introductory clause to the quotation. Use a comma before a quotation if the quotation is an independent clause (2) requires a change in syntax to fit the clause to which the quotation attaches: Marie Antoinette said, "Let them eat cake." If either condition is absent, do not introduce the quotation with a comma. Said differently, use a comma before a quotation only when the quotation is an independent clause and when (2) what precedes the quotation is inapposite to the quotation or to replace a "that" or a "whether" before the quotation.

d. Quote Accurately

Double check the accuracy of your quotation comma by comma, letter by letter. One slip and the inspector of the quotation police—Ms. Quoting—will knock on your door late at night to arrest you.

Tow (really toe) the line: "Quote me as saying I was misquoted." (Groucho Marx.) Why are some famous quotations misquoted? Because folk etymology alters the original, often for the better, and because few consult the original. A "Welsh rarebit," for example, a dish of melted cheese on toast or crackers, was originally called a "Welsh rabbit." The dish, however, contained no rabbit meat, and thus the original changed. The critical lesson is that all writers must verify the accuracy of every quotation, including every quotation within a quotation, by reading the original. Many of the following examples are inspired by teaching notes from New York Law School Professor I. Cathy Glaser and Academic Dean Jethro K. Lieberman:

Incorrect: "Hard cases make bad law." Correct: "Hard cases, it has been frequently observed, are apt to introduce bad law." (Winterbottom v Wright, 10 W & M 109, 152 Eng Rep 402, 406 [Ex of Pleas 1842, Rolfe, B.J.]) Correct: "Hard cases, it is said, make bad law." (Ex Parte Long, 3 WR 19 [QB 1854, Lord Campbell, Ch. J.]) Correct: "Great cases, like hard cases, make bad law. For great cases are called great, not by reason of their real importance in shaping the law of the future, but because of some accident of immediate overwhelming interest which appeals to the feelings and distorts the judgment." (Northern Securities Co. v United States, 193 US 197, 400 [1904, Holmes, J., dissenting].)
Incorrect: “[F]ree speech would not protect a man shouting fire in a crowded theater.”
Correct: “[F]ree speech would not protect a man in falsely shouting fire in a theater and causing a panic.” (Schenck v United States, 249 US 47, 52 [1919, Holmes, J., dissenting].)

Incorrect: “The devil can quote Scripture for his own purpose.” Correct: “The devil can cite Scripture for his own purpose.” (William Shakespeare, The Merchant of Venice, act I, sc III.)

Incorrect: “Consistency is the hobgoblin of little minds.” Correct: “A foolish consistency is the hobgoblin of little minds.” (Ralph W. Emerson, Self-Reliance in Ralph Waldo Emerson 131, 137 [R. Poirier ed 1990].)

Incorrect: “To gild the lily.” Correct: “To gild refined gold, to paint the lily.” (William Shakespeare, King John, act IV, sc II.)

Incorrect: “All that glisters [or glitters] is not gold.” Correct: “All that glisters is not gold.” (William Shakespeare, The Merchant of Venice, act II, sc VII.)

Incorrect: “I have nothing to offer but blood, sweat, and tears.” Correct: “I have nothing to offer but blood, toil, tears, and sweat.” (Blood, Toil, Tears and Sweat: The Speeches of Winston Churchill [David Cannadine ed 1989].)

Incorrect: “Money is the root of all evil.” Correct: “[T]he love of money is the root of all evil . . .” (I Timothy 6:10, quoting St. Paul.)

Shaw popularized this twist: “The lack of money is the root of all evil.” (Leonard L. Levinson, Webster’s Unafraid Dictionary 131 [1967], quoting George Bernard Shaw.)

Incorrect: “Music hath charms to soothe the savage beast.” Correct: “Music hath charms to soothe the savage breast.” (Gertrude Block, Language Tips, 69 NY St Bj 53, 53 [Jan. 1997], quoting William Congreve.)

Incorrect: “All power corrupts, and absolute power corrupts absolutely.” Correct: “All power tends to corrupt, and absolute power corrupts absolutely.” (World Treasury of Religious Quotations 100 [Ralph L. Woods ed 1966] [letter of Apr. 5, 1881, from Lord Acton to Bishop Mandell Creighton].)

Incorrect: “I escaped by the skin of my teeth.” Correct: “I escaped with the skin of my teeth.” (Job 14:1.)

Incorrect: “Pride goeth before a fall.” Correct: “Pride goeth before destruction, and an haughty spirit before a fall.” (Proverbs 16:18.)
Incorrect: “Prophet without honor in his own country.” Correct: “Prophet not without honor save in his own country.” (Matthew 13:57.)

e. Punctuation

There is no question about this. Period! It is not a matter of logic. It is not a matter of what looks better. It is a matter of current American usage. To ascertain what is now the standard format, Doubting Thomases should skim current Court of Appeals and federal court opinions; every large American newspaper, magazine, and popular book; and even the 2002 Tanbook.

Place periods and commas inside the quotation mark.

Place colons and semicolons outside the quotation mark.

Place question marks and exclamation points inside or outside quotation marks depending on whether the question marks and exclamation points are part of the original.

- Correct: Did Judge Jones sentence defendant to “100 years in jail”? (Question mark not part of original.)

- Correct double quotation mark: “Did Judge Jones sentence defendant to ‘100 years in jail’?”

- Correct: Judge Jones asked the Parole Board, “Will defendant really serve 100 years in jail?” (Question mark part of original.)

- Correct double quotation mark: “Judge Jones asked the Parole Board, ‘Will defendant really serve 100 years in jail?’”

- Correct: Judge Jones sentenced defendant to “100 years in jail”! (Exclamation point not part of the original.)

- Correct double quotation mark: “Judge Jones sentenced defendant to ‘100 years in jail’!”

- Correct: Judge Jones told defendant, “You will serve 100 years in jail!” (Exclamation point part of the original.)

- Correct double quotation mark: “Judge Jones told defendant, ‘You will serve 100 years in jail!’”
Quotations within quotations: "X was a 'good sport,'" said Y. (Note that British usage and American newspaper headlines begin and end quotations with a single quotation mark: New York Post headline: ‘Headless Man Found in Topless Bar.’)

f. Blocked Quotations

Avoid blocked (double indented) quotations unless you are quoting important provisions of a statute or a contract or a critical test from a case. Even then, it is best to divide your quotation into several parts and to integrate your quotation into your text.

You can quote me on this. If you must use lengthy quotations, follow these Tanbook rules and Law Reporting Bureau conventions:

- Block (double indent) quotations of 50 words or more.
- Put the citation at the end of the block quotation, after the closing quotation marks.
- Single space blocked quotations, but double space between blocked paragraphs.
- Use double quotation marks around the entire blocked quotation. Use single quotation marks around a quotation within a quotation. (The Tanbook's justification for putting quotation marks around the entire blocked quotation is that online services do not preserve the indentations around the blocked quotation. The Bluebook recommends not surrounding the quotation with quotation marks.)
- Never end a paragraph with a blocked quotation.
- The line that precedes the blocked quotation may not end with a period. Thus, never begin a blocked quotation without an introduction from the line preceding the quotation. The introduction may be a colon, a comma, or no punctuation at all. The first word of the blocked quotation begins with a lowercased letter, even if the letter is altered by a bracket, or an uppercased letter.
- If you omit one or more paragraphs in a blocked quotation, go to the next line, indent, insert four ellipses (asterisks in pre-2004 Tanbook style) preceded by a quotation mark, and resume the quotation on the next line, skipping a space.
- If your blocked quotation has more than one paragraph, begin each paragraph with quotation marks but place the closing quotation mark only at the end of the final paragraph, not after each paragraph.

g. Alterations & Omissions
Alter, add to, or delete from your quotation to assure a grammatical fit in your sentence. But paraphrase instead of overly altering your quotation. If you alter your quotation too much, you will invite suspicion that you are fudging its meaning.

Use brackets "[]" to show alterations or additions to a letter or letters in a word:


- Addition: “The judge did [not] like to arrive lat[e] to court.”

Note: When quoted material contains a spelling, usage, or factual error, use “[sic],” meaning “thus,” after the error. If, however, the context makes it clear that the mistake was in the original, do not add “[sic].” Moreover, do not overuse the “[sic]” device. The reader will wonder why the author quoted material only to point out an error. Did the author mean to embarrass someone? Altering the quotation is often the answer: “The judge did [not] like to arrive lat[e] to court.” Other times paraphrasing is better: “The judge liked to come to court on time.”

Use ellipses “...” (asterisks in pre-2004 Tanbook style—“** **”) to show omission:

- Use three-dot ellipses (“...”), all separated by spaces, to show omissions of punctuation or a word or more in the middle of your sentence.

- Use four-dot ellipses (“....”), all separated by spaces, to show omissions at the end of a sentence if (1) the end of the quotation is omitted; (2) the part omitted is not a citation or a footnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse.

- When using ellipses to quote from only the relevant portion of something, do not write: “The statute provides, in relevant part, ....” Your ellipses already show that you quoted the relevant portion only. The phrase “in relevant part” is always unnecessary. Quote only the relevant part.

- Do not use ellipses before the portion you quote. You are already telling the reader whether you are omitting something by how you introduce your quotation:

  Incorrect: The Third Department found that the action “... should not have been dismissed.” (Monfort v Larson, 257 AD2d 261, 265 [3d Dept 1999].) Correct: The Third Department found that the action “should
not have been dismissed.” (Monfort v Larson, 257 AD2d 261, 265 [3d Dept 1999].)

Incorrect: The Third Department found the “... fourth cause of action” valid. (Monfort v Larson, 257 AD2d 261, 265 [3d Dept 1999].) Correct: The Third Department found the “fourth cause of action” valid. (Monfort v Larson, 257 AD2d 261, 265 [3d Dept 1999].)

- Do not use ellipses to show the omission of a footnote or a citation before the end of the portion you are quoting. Instead, follow the citation with a notation that something is omitted, added, or deleted.

- Thus, you would write: “As explained elsewhere, ‘[w]hen sanitation workers—New York’s Strongest—are assigned to courthouses, they collect the “litter of the law.”’” (A v B, 101 Misc 2d 101, 103 [Sup Ct, Bronx County 1996], quoting B v A, 99 Misc 2d 99, 100–101 [County Ct, Rockland County 1999] [footnotes and citations in A v B omitted] [emphasis in B v A deleted].)

- Note: The Tanbook provides that italics in published opinions, if supplied in the Official Reports, should be noted in a parenthetical or a bracket: “(italics supplied).”

- Do not use “footnote omitted” or “citation omitted” if the citation or footnote you are omitting is at the end of the portion you are quoting. That comes up often because the Tanbook, both pre- and post-2002, allows opinion writers (1) to end a sentence with a period and then begin the citation after a parenthetical or (2) to end a sentence without a period and then begin the citation with a parenthetical. (In the first example, the period is placed outside the parenthetical. In the second example, the period is placed inside the parenthetical.) Add “footnote added” in the bracket to your parenthetical if you add to your quotation a footnote not in the original quotation.

For more on quoting, see Gerald Lebovits, The Legal Writer, You Can Quote Me: Quoting in Legal Writing—Part I, 76 NY St BJ 64 (May 2004); Gerald Lebovits, The Legal Writer, You Can Quote Me: Quoting in Legal Writing—Part II, 76 NY St BJ 64 (June 2004).
XVII
GRAMMAR

A few remarks for the grammarphobic. The first grammarian was Plato, who divided sentences into subjects ("onoma") and verbs ("rheme"). Prescriptive grammar sets the norms of correct usage. Descriptive grammar accepts incorrect usage if most people accept it. Miss Thistletbottom will give you two A's if you spell "grammar" correctly. She will rap you on your knuckles if you become a descriptive grammarian.

1. Run-On Sentences

Too much of a sentence—not too lengthy a sentence. A run-on sentence can be short: "I wrote she edited."

A run-on sentence has (1) conjunctive adverb ("accordingly," "again," "also," "besides," "consequently," "finally," "for example," "furthermore," "hence," "however," "moreover," "nevertheless," "on the other hand," "otherwise," "rather," "similarly," "then," "therefore," "thus"), not preceded by a semicolon or a period, between two independent clauses; (2) only a comma between two independent clauses (the comma splice); or (3) no punctuation at all between two independent clauses.

Conjunctive adverb run-on sentence:
- "Judge Y wrote the opinion, however, she never gave it to the litigants." Becomes: "Judge Y wrote the opinion; however, she never gave it to the litigants." Or "Judge Y wrote the opinion. However, she never gave it to the litigants."

Note: It is not a run-on sentence to separate two independent clause with a coordinating conjunction: "and," "but," "or," "for," "nor," "so," "yet."

Comma-splice run-on sentence:
- "Judge Y wrote the opinion, she never gave it to the litigants." Becomes "Judge Y wrote the opinion; however, she never gave it to the litigants." Or "Judge Y wrote the opinion. However, she never gave it to the litigants."

No-punctuation run-on sentence:
- "Judge Y wrote the opinion she never gave it to the litigants." Becomes: "Judge Y wrote the opinion; however, she never gave it to the litigants." Or "Judge Y wrote the opinion. However, she never gave it to the litigants."

Run-on quotation:
"'He filed the brief,' the lawyer said, 'he filed a good brief.'" Becomes "He filed the brief,' the lawyer said. 'He filed a good brief.'"

"Do not write run-on sentences they are hard to read, moreover, you should punctuate." Becomes: "Do not write run-on sentences. They are hard to read. Moreover, you should punctuate."

The classic run-on sentence, from Descartes’s translator: "I think, therefore I am." He should have been translated, with or without a comma after "therefore": "I think; therefore I am" or "I think. Therefore I am."

It is not a run-on sentence to use asyndetons—independent clauses not joined by conjunctions: "I came, I saw, I conquered."

2. Sentence Fragments

Too little of a sentence—not too short a sentence. A sentence fragment lacks a subject, a predicate, or both.

About fragments. Sometimes OK. Like in advertising. Or to arrest attention. Or for special effects. Even in judicial opinions. Got a problem with that?


3. Subject-Verb Agreement

A verbs must agree in numbers with its subjects:

- "The color of the stairs are red." (Color is red.) (Note that one would write, "The stairs are red.")

- A tip: Do not let prepositional phrases ("color of") fool you. Focus on the subject and verb only.

- "Splits in the Housing Court has arisen." (Splits have arisen.)

- "Warner Bros. Pictures present." (Company presents.)

- "The Yankees was robbed!" (The Yankees are baseball players, not a singular team, and thus were robbed.) (In any event, until the 2001 World Series, the Yankees had not been robbed for a long time.)

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- "The difference between Cardozo and Holmes, and between Frankfurter and Jackson, are striking." (Difference is striking.)

- "The Court of Appeals, and the Appellate Division and the Surrogate’s Court, are in Albany." (The Court of Appeals is in Albany.)

- Justice Holmes, as well as [together with, along with, like, and in addition to] the hundreds of judges who have copied him, rely on plain writing." (Justice Holmes relies.)

- The rule: Nothing in a phrase contained in a subject affects the number of the verb that follows.

- "Judge X’s audience were her colleagues, law professors, and the New York Times, not the litigants and their lawyers.” (Audience was.)

Compound subjects take the singular: “The order and decision was the first thing the judge rendered after he ate ham and eggs, which is his favorite meal.”

Use a singular verb when two nouns refer to the same person: “The treasurer and secretary is ready to speak.”

Multiple subjects modified by “each” and “every” take a singular verb: “Every court attorney and every law clerk has been told to attend.”

Some plurals are really singulars. Correct: “Chambers is [not are] across the street.” Incorrect: “Politics are [should be is] the art of the possible.” Correct: “Mathematics is [not are] fun.” Incorrect: “My measles are [should be is] killing me.” Incorrect: “Grits were [should be was] featured in My Cousin Vinny.”

Some singulairs may have a different meaning when they are made plural. A “premise,” for example, is a predicate to a logical argument. “Premises” can be the plural of a “premise” or a piece of land with a structure on it.

Measure for measure. A measurement noun—avenue, inch, mile, second, minute, hour, year, pound, ton—is singular before the noun it modifies but plural after it: “A twelve-ounce steak” but “A steak that weighs twelve ounces.” When a unit of measurement is collective, use the plural: “Two pounds of briefs is what he read yesterday.”

Plural units denoting amounts. A plural noun that denotes a small unit by which a larger unit is measured takes a singular verb. Correct: “Five hours to write this opinion is [not are] enough.”
The problem with "-ics." Academic disciplines and sciences that end in the suffix "ics" are singular: "Physics is . . . ." All other words that end in "-ics" are plural: "Plastics are . . . ."

Count on it. Addition and multiplication problems are singular or plural, although they are more commonly singular in modern American usage.

- "One and one is [or are] two." (But prefer "is".)
- "Two times two makes [or make] four." (But prefer "makes".)

A number of agreement problems. "A number of" is plural: "A number of cases were [not was] decided."

The "there" conundrum. The subject that follows the "there" governs the number of the verb. If a compound subject follows the "there," the number of the verb is still singular, except when the first subject is plural.

- Correct: "There was one court attorney in the pool for every two judges." But: "There were two judges for every court attorney in the pool."
- A tip: Avoid the "there" conundrum by avoiding "there was," "there are," and "there is" constructions.

The implied subject. If, for concision, you delete "the area of," "the fact of," "the field of," "the subject of," or a similarly implied subject, you may, idiomatically, convert a plural into a singular.

- Correct: "Torts is my worst subject."
- Correct: "British and American legal writing differ [not differs] in many ways."

A decades-old problem. Decades take a plural. Correct: "The 90s were [not was] a golden age for legal writing."

Subject-verb contractions. Do not use contractions in legal writing. Use contractions in informal writing, but make verbs agree with their subjects.

- "He don't know where the Appellate Division is." Becomes: "He doesn't know where the Appellate Division is." (The singular He agrees with "does." Don't is the contraction for "do not.")
- "Here's my law books." *Becomes:* "Here are my law books." ("Law books" is a plural noun.)
- "There's my appellate briefs." *Becomes:* "There are my appellate briefs." ("Appellate briefs" is a plural noun.)

4. **Noun- & Pronoun-Antecedent Agreement**

"Everyone has their price." *Becomes:* "Everyone has his price." *Becomes:* "Everyone has a price."

Always singular: "another," "anybody," "anyone" ("anyone" is preferred to "anybody"), "anything," "each," "everybody," "everyone" ("everyone" is preferred to "everybody"), "everything," "little," "much," "nobody" ("none" is preferred to "nobody"), "nothing," "no one," "other," "one," "someone," "somebody," and "something."

- "One" exception:
  - "Judge Joan B. Carey is one of those jurists who *knows* what she is doing." *Becomes:* "Judge Joan B. Carey is one of those jurists who *know* what *they* are doing." The verb following "who" is plural because the antecedent of "who"—"those"—is plural. "Those," not "one," controls the verb.

- "Not one" exception: If "none" means "no one" or "not one," the verb is singular. If "none" refers to more than one person or thing, the verb is plural.
  - Correct: "None of us [meaning *not one of us*] knows grammar."
  - Correct: "None of the judges agree on how to interpret the statute."

- A pair of exceptions: "A pair of socks" *but* "Three pairs of socks."
  - A funny language. "Pants," which have two legs, is plural, but a person who also has two legs is singular. "Shirt," which has two arms, is singular. A toothbrush can brush more than one tooth.

"Neither . . . nor," "either . . . or," or "not only . . . but also," the verb should agree with its nearest subject. When all the elements in the "neither . . . nor," "either . . . or," not only . . . but also" constructions are singular, the verb is singular. The verb is plural when all the elements are plural. When the elements are different in number, the verb takes the number of the closer.

- "Neither the judge nor her court attorney is [not *are*] in. Please leave your message after the beep."
“Neither the defendant nor his attorneys were [not was] found.”

“Neither the defendants nor their attorney was [not were] found.”

“Neither you nor I am [not is] in.” (“I am not in.”)

Correlative elements should frame only two elements:

“The court decided neither A v B, C v D, nor E v F.” Becomes: “The court did not decide A v B, C v D, or E v F.” Or “The court decided neither A v B, nor C v D, nor E v F.”

Always plural: “both,” “few,” “many,” “others,” “several.”

“Both” is plural; “each” and “other” are singular. “Both said that the other was liable.” Becomes: “Each said that the other was liable.”

Sometimes singular, sometimes plural: Indefinite pronouns “all” “any,” “more,” “most,” “none,” and “some” are singular or plural depending on the noun or pronoun to which they refer:

All: “All the lawyers eat [not eats] pasta at Fortlini’s.” (Lawyers eat.) But: “All the pasta at Fortlini’s are [should be is] gone.” (Pasta is.) Thus, in our all-inclusive exception, “all” as a pronoun takes a singular verb when the sense is the whole (“All is forgotten”) and a plural verb when people or things are considered individually (“All have arrived”).

Some: “Some of the judge’s responsibility is [not are] ours.” But: “Some of the judges have [not has] decided the question.”

Collective nouns take a singular verb: “army,” “Assembly,” “couple,” “crowd,” “team.”

“The jury was right. They decided correctly.” Becomes: “It decided correctly.” Or “The jurors were right. They decided correctly.”

“The United States have [should be has] 50 states.” (E Pluribus Unum: A civil war was fought to assure this grammatical construct.)

“The audience should please take their seats.” Becomes: “The audience should please take its seats.” Or, better: “The members of the audience should please take their seats.” Or, even better: “The audience should please be seated.” Or, best: “Please be seated.”

Some good news. “News” is singular.
5. Ending With Prepositions

"That is the type of arrant pedantry up with which I shall not put." (Sir Winston S. Churchill.)

It is now often more a question of taste than of grammar whether a preposition is something to end a sentence with. Like my abs, in other words, this rule has become less firm over the years. Despite what Miss Thistlebottom told you in sixth grade, you may end a sentence or clause with a preposition—especially in conversational speech. But end with a preposition in formal writing only when your sentence or clause would be tortured or stilted were you not to end with a preposition. Unless, of course, you believe that a different rule off you ticks, er, ticks you off. All things being equal, though, do not to end with a preposition. Writers should place their closing emphasis on something more significant than a preposition. And some readers prefer that sentences not end with prepositions.


What about inserting a preposition at the end of a clause that begins with “that”? The well-regarded Texas Law Review Manual on Style 33 (6th ed 1990) posits the following:

“Incorrect: The case that the lawyer was working on never went to trial.”
“Correct: The case on which the lawyer was working never went to trial.”

Many writers on writing, however, argue that the “incorrect” version is over-written in some contexts and that the “correct” version is too casual in other contexts. My view: Any preference between the two approaches concerns style and tone. The language police may disagree, but sometimes they use excessive force.

A preposition links a noun or a pronoun to another word. A preposition fixes time or lays out a position; hence its name. The most common prepositions: “about,” “above,” “across,” “after,” “against,” “along,” “amid,” “around,” “as,” “at,” “behind,” “before,” “below,” “beneath,” “beside,” “between,” “beyond,” “but,” “by,” “despite,” “down,” “during,” “except,” “for,” “from,” “in,” “inside,” “into,” “like,” “near,” “of,” “off,” “on,” “onto,” “opposite,” “out,” “outside,” “over,” “past,” “since,” “through,” “toward,” “under,” “underneath,” “until,” “upon,” “with,” “within.”

Do not fix a preposition problem only to err anew:

- Paul and Linda McCartney’s band Wings got it wrong in the James Bond theme song Live and Let Die: “But if this ever changing world in which we live in makes you give it a cry, live and let die.” The extra “in” is a sentence extra.
Another sentence extra: "Where is it at?" Becomes: "Where is it?"

6. Split Infinitives

The infinitive is the basic form of the verb: "To speak," "to sue." To split an infinitive is to insert a word or phrase between the component parts of the infinitive.

Try to not split them, except if you have to really do so. (Becomes: "Try not to split them, except if you really have to do so.")

"To boldly go where no man has gone before." (The Prime Directive: Should be "To go boldly" or "Boldly to go.") (Note also sexism and concision problems. "Man" should be "one," and "before" is redundant.)

"Do you breathe easily or do you easily breathe?" If you want to breathe easily when language snobs surround you, you will not split infinitives unless you must. As Professor Weisberg and countless others observe, "many reformers of legal language paradoxically condone split infinitive usage . . . . [But] split infinitives can be graceless and unnecessary." (Richard H. Weisberg, When Lawyers Write § 5.3, at 65 [1987].)

Some writers like to vigorously split infinitives. From George Bernard Shaw to the *Times of London*:

- "There is a busybody on your staff who devotes a lot of time to chasing split infinitives . . . . I call for the immediate resignation of this pedant. It is of no consequence whether he decides to go quickly or to quickly go or quickly to go. The important thing is that he go at once."

- Many editors will not correct a writer's splits. The previous Tanbook's guidance to the Law Reporting Bureau: "In respect to split infinitives, follow style used by Judge in manuscript." (The 2002 Tanbook does not deal with split infinitives.)

Split-infinitive problems will be rare if you avoid adverbs like the "boldly" in "To boldly go." The best writing uses adverbs for special emphasis only. And the best writing ends on something better than "go" if the real emphasis is on "boldly."

Justified splits include

- "To flatly state" (different from "To state flatly").

- "I ask the members of the audience to kindly take their seats" (different from "To take their seats kindly" and from "I ask the members of the audience kindly").
Not a split-infinitive issue, but a related question:

Context and the ear dictate whether to place an adverb between "to be" or "to have" and the main verb. Is it "to be separately written" or "to be written separately"? Is it "to have spontaneously combusted" or "to have combusted spontaneously"? You decide. It is a question of taste about which no one can err.

Adverbs modify a verb, an adjective, or another adverb. They should be placed near the words they modify, most often between the auxiliary and the main verb. An adverb should not be placed between a transitive verb and its object.

- "If every lawyer studied legal writing, the advantage law clerks have would largely [not largely would] disappear."

- "I soon will write the opinion." Becomes: "I will write the opinion soon." Or "I will soon write the opinion."

- "The advantage has been virtually eliminated [not has virtually been or virtually has been or has been eliminated virtually]."

- The judge has finally [not finally has] finished the opinion.

7. Logic in Sentencing

a. Sentence Structure

- "This Article 78 petition must be dismissed due to a fatal defect in the record." (A defect in the petition? A defect in the record below?)

- "Objectant's papers [or motions] argue that . . . " Becomes: "Objectant argues that . . . " (Litigants, not their papers, argue.)

- "The principle in Hadley v Baxendale (1854) holds that . . . " Becomes: "The principle in Hadley v Baxendale (1854) is that . . . " (Principles do not hold; only courts hold.)

- "The Huntley hearing determined that the confession is admissible." Becomes: "Following a Huntley hearing, the court determined that the confession is admissible." (Courts, not hearings, decide cases.)

- "The holding in X v Y held that . . . " Becomes: "The X v Y court held that . . . " (Courts, not holdings or cases, decide cases.)

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b. Fake Analysis

The following profundities state propositions so obvious that they must be banned from good writing:

- "Anything can happen."
- "Further developments can happen."
- "It is not possible to predict."
- "It is too early to tell."
- "It remains to be seen."
- "Only the future can tell."
- "This may occur in the foreseeable future."
- "Whether that will happen is unknown."

8. Comparisons

To compare something to something else is to liken one person or thing to another. To compare something with something else is to note similarities or differences.

a. Make Comparisons Logical

- "The court was overturned." With what? A bulldozer? (The court's decision was overturned.)

- "The test balanced the interests." (Incorrect relationship: Courts use tests to balance interests. Tests themselves cannot balance.)

- "New York's death-penalty law differs from 36 other states." (Incorrect category: A law is not a state.)

b. Superlative Comparisons
The better advice: Use superlatives ("est" or "most") to compare three or more items. Use comparisons ("er" or "more") for one or two. Play by the numbers:

- "The best of the two opinions is Gideon v Wainwright." Becomes: "The better of the two opinions is Gideon v Wainwright."

- "Caroline Antonacci is the quicker of the three court attorneys in the Appellate Division." Becomes: Caroline Antonacci is the quickest of the three court attorneys in the Appellate Division."

Most-good advice: Do not use "mostly" if you mean "the greatest degree."

- "Those most [not mostly] affected by the decision took it the worst."

Almost right advice: Do not use "most" instead of "almost."

- "Most every law clerk is underpaid." Becomes: "Almost every law clerk is underpaid."

c. Make Comparisons Complete

For "better" or "worse": "Judge X's elder [not older] brother's writing is better." Better than what? If "better" refers to "writing," then better than whose writing?

Than: "Judge X is closer to her husband than her law clerk." Becomes, we hope: "Judge X is closer to her husband than to her law clerk."

That: "The color of her robes is darker than her purse." Becomes: "The color of her robes is darker than that of her purse."

Relatively: "The District Court judge has a relatively light caseload." Becomes: "District Court Judge X's caseload is light relative to [or compared with] District Judge Y's caseload." (In the first sentence, the reader does not know to whom or to what "relative" applies. Relative to or compared with his brother-in-law's? Relative to or compared with Judge X's caseload last term?

Morph your "mores": "The court attorney enjoys writing more than her." More than the court attorney enjoys her? Or more than she enjoys writing? (If the latter, rewrite: "The court attorney enjoys writing more than she does.")

- A tip: Do not end with a subjunctive-case personal pronoun in formal writing. "The judge is a better writer than he." Becomes, by clarifying the ellipticism: "The judge is a better writer than he is." Without clarifying the ellipticism, your reader might believe that you mean "than he was" or "than he used to be."
More important comparisons: Prefer "more important" to "more importantly."

The final part of a comparison should agree with every part of a sentence. Incorrect: "Judge X is one of the best, if not the best, writer in New York State." Correct: "Judge X is one of the best writers in New York State, if not the best.

When comparing elements of the same kind, use "any other" or "anyone else":

- "Judge Karen Rothenberg’s opinion is better than any opinion I have ever read."  
  Becomes: "Judge Karen Rothenberg’s opinion is better than any other opinion I have ever read."

- "Judge X writes better than any [add other] judge." Without the addition, the sentence means that Judge X writes better than any judge, including Judge X.

- "Judge Y was as happy as anyone [add else] about the verdict." "Anyone," but not "anyone else," includes Judge Y.

Such (that) is the way it is: Never use the legalism "such" as an adverb or use a "such" that can mean more than one thing. And "such" cannot displace "very," as in, "She is such a good writer." Use a comparison instead: "She is such a good writer that . . . ."

Complete your prepositions:

- "The opinion was notable for his disagreement and disrespect for his colleagues."  
  Becomes: "His opinion was notable for his disagreement with and his disrespect for his colleagues."

Complete comparisons concisely with apostrophes:

- "Judge Fern Fisher’s writing is as powerful as a novelist."  
  Becomes: "Judge Fern Fisher’s writing is as powerful as a novelist’s." (Translation: "as that of a novelist" or "as a novelist’s writing.")

d. Absolute Comparisons

Do not use comparisons as absolutes:

- "Good style books are found at better book stores everywhere."  
  Becomes: "Good style books are found at the best book stores everywhere."

- "Bifocal glasses help many older people."  
  Becomes: "Bifocal glasses help many old people."
e. **Double Comparisons**

Do not use double comparisons: "more better," "most coldest."

9. **Modifiers**

Modifiers are words, phrases, or clauses that limit or qualify meaning. Modifiers can be misplaced, dangling, and squinting:

a. **Misplaced Modifiers**

The Lost and Found Department. You can lose your mind or even your head, but do not misplace your modifiers. A misplaced modifier is a phrase, clause, or word placed too far from the word or words it modifies.

- "X: 'I once met a man with a wooden leg named Smith.' Y: 'What's the name of his other leg?'" (From the movie *Mary Poppins.)*

- "I threw the baby down the stairs some candy."

- "Last night I shot an elephant in my pajamas. How it got in my pajamas I'll never know." (Groucho Marx.)

- "I went to a lawyer with legal problems." (Did the lawyer have too many legal problems to help the client?)

b. **Dangling Modifiers**

You have reached a nonworking number. A dangling modifier, or dangling participial phrase (past or present), is a type of misplaced modifier. It is a phrase that modifies the wrong phrase.

- "Preferring not to decide the case, the return date was adjourned." (The return date did not prefer not to decide the case.)

- "Applying appellate oversight to review the facts below, the trial court properly determined issues of credibility." (The trial court did not apply appellate oversight to review its own credibility determinations.)

- "Based on the court's decision, our client must appeal." ("Based on" modifies "our client," thus suggesting that the decision was based on the client. Solution: Substitute "Given" for "Based on.")
A tip to de-dangle modifiers: Participles, including past participles, are adjectives. Adjectives must be placed next to the words they modify.

c. Dangling Participles

Do not twist in the wind. Let your epidermis show, but do not let your participles dangle. A dangling participle is a word or phrase that describes something left out of the sentence. The participle is not hinged to any part of the sentence.

"Writing carefully, dangling participles must be avoided." (Who writes carefully? Who must avoid dangling participles? Do dangling participles write carefully?)

"Having found no error, the judgment is affirmed." (In this elliptical clause, the reader does not know who found no error or who affirmed the judgment.)

"To determine whether to reverse, four factors must be considered." (Only a court, not factors, can determine, reverse, and consider.)

"Turning the corner, the view was different." (Did the different view turn the corner?)

A tip to de-dangle participles: Identify who is doing what to whom. If you avoid double passives by identifying your subjects, your participles will not dangle.

Exceptions:

- A participle converted over time into a preposition or an adverb is an acceptable dangler: "Considering the circumstances, you acted in self-defense."

- A dangling participle is permitted when either the modifier or the subject of the main clause is metadiscoursive: "To win at trial, it is essential that cross-examination be effective."

d. Squinting Modifiers

An adverbial modifier should modify only one word. Where would you put "only" in these sentences?

"[Only] the [only] prosecutor [only] wanted [only] to [only] adjourn [only] the [only] case [only]." (The placement of the word "only" alters the sentence's meaning.)
- “The rule only applies to predicate felons.” Becomes: “The rule applies only to predicate felons.” Or “The rule applies to predicate felons only.” (It is not “The rule only.” It is “applies only to predicate felons” or “to predicate felons only.”)

Squints include “almost,” “also,” “even,” “exactly,” “hardly,” “just,” “merely,” “nearly,” “scarcely,” “simply,” “solely.”

Recall the potato-chip ad: “Betcha can’t eat just one.” The “just” is placed just right.

What did Shakespeare mean when he wrote, “There’s a divinity that shapes our ends rough hew them how we will”? (William Shakespeare, The Tragedy of Hamlet, Prince of Denmark, act V, sc II.) Shapes our ends rough? Or rough hew them how we will?

A tip to treat squints: Reposition any adverb that modifies either of two words or rewrite the sentence.

e. Treacherous Placement.

Sentences that contain a modifier and two or more nouns can confuse.

Consider this: “The court attorney relied on a 100-year-old law book and Westlaw synopsis.” The problem—beyond the attorney’s research—is that the book might be 100 years old, but the Westlaw synopsis is not.

- Best solution: Invert the sentence: “The court attorney relied on a Westlaw synopsis and a 100-year-old law book.” Second best solution: Break up the sentence into two: “The court attorney relied on a 100-year-old law book. She also relied on a Westlaw synopsis.”

10. Gerund Errors & Fused Participles

a. Gerund Errors

A gerund is the subject or object of a verb, infinitive, or preposition that ends in “ing.”

Use gerunds to avoid nominalizations: “The impeachment of his testimony will be difficult.” Becomes: “Impeaching his testimony will be difficult.” But avoid gerunds in the following examples:

- “The court granted the motion to suppress finding that the police lied.” (This sentence, with or without a comma before “finding,” suggests that the motion to suppress found that the police lied.)
A tip: Solve a gerund error by degerundizing and placing the verb after the subject; by dividing the sentence into two; or by subordinating:

Degerundized verb after the subject: "The court found that the police lied and therefore granted the motion to suppress."

Two sentences: "The court found that the police lied. It therefore granted the motion to suppress."

Subordinate: "After the court found that the police lied, it granted the motion to suppress."

"The fourth cause of action alleging a breach of contract should have been sustained." Becomes: "The fourth cause of action, which alleges a breach of contract, should have been sustained." (The original suggests, ambiguously, that the fourth cause of action is but one of the causes of action that alleges a breach of contract. Even if that is true, the corrected version is still more precise than the original.)

"The papers supporting this result are on the bench." Becomes: "The papers that support this result are on the bench." (The original does not identify the tense. The corrected version does. "Supporting" may mean "will support," "had supported," or other variants.)

b. Fused Participles

Phase out fused participles. Fused participles, an unfortunate term, result when a writer fails to use a possessive form of a noun or pronoun to introduce a gerund. This is an example of a fused participle: "The People objected to defendant leaving the courtroom a free man." Here, the gerund "leaving," which is fused into the noun "defendant," is the object of the preposition "to" and does not modify the noun "defendant." In this example the People did not object to the defendant, although that is what the sentence means. Rather, the People objected to the notion that the defendant would leave the courtroom a free man.

Fused-participle problems are easy to solve. Think of it as a matter of logic. Where should the reference and stress be?

"Do you mind us getting all these cases." Becomes: "Do you mind our getting all these cases." (The writer did not mean to write "Do you mind us?")

"The police objected to them possessing contraband." Becomes: "The police objected to their possessing contraband." (The writer did not mean to write, "The police objected to them.")
Press Release: "New Yorkers need fear nothing from the court restructuring."
* Becomes: * "New Yorkers need fear nothing from the court's restructuring." (The author of the press release did not mean to write, "New Yorkers need fear nothing from the court.")

"Father objected to me living alone." * Becomes: * "Father objected to my living alone." (The writer did not mean to write, "Father objected to me living.")

"The judge feared the Constitution's becoming a shield for lawlessness." * Becomes: * "The judge feared that the Constitution would become a shield for lawlessness." (The judge feared the "becoming," not the Constitution.)
XVIII
PUNCTUATION

A. The Rules

1. Periods

At the end of a declarative sentence or command.

At the end of a citation before a new sentence.

Two spaces between sentences when typing (one in publishing). A citation, with or without a signal, is a sentence for this rule.

No spaces between periods when using initials:

- “Paul McDonnell, J.D.,” not “J. D.”

No two-period usage when ending a sentence: “9:30 a.m.,” not “9:30 a.m..”

No periods for well-known acronyms: FBI.

In American usage, add a period at the end of an abbreviated title even if the title is not a true abbreviation (“Ms.”) and even if the last letter of the abbreviated title would not end with a period if it were unabbreviated (“Doctor Smith” becomes “Dr. Smith,” not “Dr Smith”). Note that British usage is “Dr Smith.”

Abbreviated American and British (Imperial) weights and measures end in a period (“qt.” for “quart”), but degrees and metric abbreviations are not followed by a period (“F” for “Fahrenheit,” “C” for “Centigrade,” “cm” for “centimeters”).

Periods always go inside the quotation mark.

2. Commas

Eliminate commas that, are not necessary. Commas should however enclose parenthetical words. Should read: “Eliminate commas that are not necessary. Commas should, however, enclose parenthetical words.”

To set off dates or addresses—but not zip codes. (Note: In typing, add two spaces before a zip code.)
"The opinion is dated March 6, 1955, and signed by the judge."

Note: Some authorities argue that the comma after the year looks awkward and interrupts. But the comma is necessary nonetheless. If the comma feels cumbersome, rearrange the sentence: "The opinion, which the judge signed, is dated March 6, 1955."

"The Housing Court court attorney works at 141 Livingston Street, Brooklyn, New York 11201."

After closings ("Sincerely yours," ) and informal salutations ("Dear Art,"). Formal salutations require a colon ("Dear Mr. Arthur;").

For interruptive words or phrases.

Before a title: "Lucas A. Ferrara, J.D."

To set off phrases that add nonessential information to a preceding clause and which begin with words like "despite," "including," "irrespective of," "particularly," "perhaps," "preferably," "probably," "provided that," "regardless of," and "usually."

To set off a tag question: "The judge read the court rules, didn't she?"

No comma after a question mark or an exclamation point after a quotation: "Dismiss the petition! the tenant insisted." Becomes: "Dismiss the petition! the tenant insisted."

To omit words (double adjectives) ("She is a strong, careful writer.") ("As a youth, Judge Y went to new, hip joints; now he went for a new hip joint."). Noncoordinate adjectives are unpunctuated because they carry equal weight: "Under his robes, the judge wears a gray flannel suit."

To separate two parts of a double-comparative: "The more, the merrier."

Use an introductory comma for clarity after an introductory word, clause, or prepositional or participial phrase or subordinate clause:

Introductory word: "Frankly, Judge Friendly wrote the opinion." (Without the comma, a reader who reads quickly might believe that the judge's name, or nickname, is "Frankly Judge Friendly.").

Introductory phrase: "Although Judge Smith gave her court attorney explicit instructions for revising, the draft opinion got worse." (Without the comma, a
reader who reads quickly might confuse “revising” with “revising the draft opinion.”

Introductory clause: “In German, nouns are always capitalized.” (Without the comma, a reader who reads quickly might believe that the introductory phrase was, “In German nouns,” not “In German.”)

Use or omit mid-sentence commas for clarity:

Consider: “The problem in Judge FitzGerald’s opinion is that A v B is not cited.” Vs. “The problem in Judge FitzGerald’s opinion is that A v B is not cited.” (The former refers to Judge FitzGerald’s belief. The latter refers to Judge FitzGerald’s decision.)

Appositive (parenthethic) commas:

Be positive about appositives. Appositives are nouns or pronouns that rename other nouns or pronouns. Commas must frame nonrestrictive appositives:

“The Supreme Court, Appellate Division, First Department, is in New York County.”

“Judge X, who presides in Chemung County, and Judge Y lectured last week.” (And note the absence of a comma after “Judge Y.”)

“Judge John Smith, Jr., is presiding.” But note that Strunk and White correctly argue that “Jr.” is restrictive and therefore that no comma is needed before or after “Jr.” (William Strunk Jr. and E.B. White, The Elements of Style 3 [4th ed 2000].) Thus, add a comma before and after, depending on the named person’s preference.

Do not use commas to separate nouns from restrictive terms of identification: “William the Conqueror.”

Use commas to set off a phrase that describes a noun or phrase and to separate names and titles. The following example covers both categories:

“Judge Ernest Cavallo (title, noun, and name), the Supervising Judge of the Housing Part, New York City Civil Court, New York County (phrase that describes the title, noun, and name), is a Housing Court judge.”

Use commas to eliminate confusion:
“You’re a better man than I, Gunga Din.” (Unless you mean “I Gunga Din.”)

“Where’s the beef jerky?” (Unless you mean, “Where’s the beef, jerky?”)

Avoid if possible by inverting the sentence:

“Judge Barbara I. Panepinto, after reviewing the papers, granted the motion.”

Becomes: “After reviewing the papers, Judge Barbara I. Panepinto granted the motion.”

“Even when doing simple tasks, choices must be made.”

Becomes: “Choices must be made even when doing simple tasks.”

Restrictive (defining) vs. nonrestrictive (nondefining):

Because not everyone lives in glass houses, it is, “People who live in glass houses should not throw stones,” not “People, who live in glass houses, should not throw stones.”

Conversely, because every person is sentient, it is, “People, who are sentient, appreciate being treated with dignity,” not “People who are sentient appreciate being treated with dignity.”

Explanatory commas:

Bigamy quiz: X: “How is your wife Carol?” Y: “As opposed to my other wife? My wife, Carol, is fine.” (The writer has one wife. The absence of commas in the sentence would be correct if the writer has more than one wife. The issue is whether the person is defining, or restrictive, to the sentence. If yes, commas go fore and aft.)

Conjunctions, conjunctive adverbs, and independent clauses:

Use semicolons or periods, not commas, to set off two independent clauses joined by a conjunctive adverb (“accordingly,” “again,” “also,” “besides,” “consequently,” “finally,” “for example,” “furthermore,” “hence,” “however,” “moreover,” “nevertheless,” “on the other hand,” “otherwise,” “rather,” “similarly,” “then,” “therefore,” “thus”).

Place a comma before a coordinating conjunction (“and,” “but,” “for,” “or,” “nor,” “so,” “yet”) when the coordinating conjunction precedes a second independent clause, unless the two independent clauses are short. If they are short, no comma is necessary unless you wish to emphasize the second clause.
Comma required: “The court attorney studied in the law library, and while there he drafted an opinion.” (Two independent clauses joined by a coordinating conjunction.)

Correct use of comma before the two “ands”: “Certainly courts are not, and cannot be, immune from criticism, and lawyers, of course, may indulge in criticism. Indeed, they are under a special responsibility to exercise fearlessness in doing so.” (In re Sawyer, 360 US 622, 669 [1959, Frankfurter, J dissenting].)

Comma prohibited:

Correct: “The court attorney studied in the law library and drafted an opinion there.” (Only one independent clause.)

Correct: “[A] legal system is not what it says but what it does.” (United States v Antonelli Fireworks, 155 F2d 631, 662 [2d Cir 1946, Frank, J dissenting]) (Only one independent clause.)

Comma optional: “He wrote and she researched.” (Two short independent clauses.)

To introduce a quotation. Use a comma before a quotation only (1) when the quotation is an independent clause and (2) when what precedes the quotation is inapposite to the quotation or to replace a “that” or a “whether” before the quotation.

Do not use a comma after a question mark or an exclamation point following a quotation: “Did Learned Hand really write that?” we asked.

Do not use a comma before “because” unless the sentence is long or complex.

Do not use a comma before a verb. Incorrect: “When to use a comma, [omit the comma] befuddles law students.”

Do not use a comma after a compound subject. Incorrect: “Many court attorneys use e-mail, fax machines, and telephones, [omit the comma] nearly every day.”

Serial commas: As with much in written English, the key is consistency. Always or never use serial commas before the final “and” or “or” in a series of three items or more. For serial commas, there is no “it depends.” But the better practice is to use them. Forget what your sixth-grade teacher told you.
Many believe that serial commas are unnecessary because, they contend, the "and" or "or" already separates the final two elements of a series. Others, such as newspapers and magazines, omit serial commas to save space.

But serial commas are helpful for three reasons.

First, they reflect a natural pause in spoken English. Sound out this sentence: "Apples, oranges, and bananas." Did you pause before the "and" that preceded "bananas"? Of course you did.

Second, serial commas promote clarity, as the following example proves: "X: 'Yesterday the police arrested five criminals, two robbers and three burglars.' Y: 'How many people did the police arrest, five or ten?"' If you use serial commas, the reader will answer "ten." If the reader knows that you never use serial commas, the reader will answer "five." No ambiguity will arise.

Third, serial commas are required to divide elements from sub-elements:

- Eat, drink, and be confused: "Juice, fruits and nuts, and dairy"; or "Juice, fruits, and nuts and dairy"; or "Juice, fruits and nuts and dairy."

An example of correct serial-comma usage: The legal-writing "process incorporates five stages: prewriting, writing, rewriting, revising, and polishing." (Mary Barnard Ray and Jill J. Ramsfield, Legal Writing: Getting it Right and Getting it Written 416 [3d ed 2000] [capitals deleted]).

Exception: Do not use a serial comma before an ampersand: "Dewey, Cheatem & Howe."

Use commas after signals (id see.) under previous New York State style (but not in Bluebook, Maroon Book, or ALWD style). Note that the 2002 Tanbook disfavors using commas after signals.

Use commas to define or explain terms:

- "Respondent moved for legal, or attorney, fees."

- "Fight noun banning, or noun plagues."

Use a comma to omit an elliptical word, a word a reader can immediately supply: "He chose a wordprocessor; she, dictation." (The comma replaces "chose.")

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Commas go after parentheticals, not before them: “I went to New York University School of Law (NYU), graduating in 1986.”

In Bluebook format, commas go after citations when citing in the text: “The court in X v. Y, 99 F.4th 99 (14th Cir. 2002), held that . . . .” But: This issue does not arise under New York’s Tanbook, which requires that parentheses enclose a citation in the text and provides that commas not surround the parentheses: “The court in X v Y (99 F4th 99 [14th Cir 2002]) held that . . . .”

Commas should modify correctly. Consider the Hawaii Constitution (Art. XVI, § 13): “Insofar as practicable, all government writing meant for the public, in whatever language, should be plainly worded, avoiding the use of technical terms.” The phrase “In whatever language” modifies “public”; that phrase should be moved to modify “writing.” (And that says nothing of the legalism “insofar as.”)

Commas always go inside the quotation mark.

For more on this topic, see Gerald Lebovits, The Legal Writer, The Pause That Refreshes: Commas, 74 NY St B’l 64 (Mar./Apr. 2002); Gerald Lebovits, The Legal Writer, The Pause That Refreshes: Commas—Part 2, 74 NY St B’l 64 (May 2002).

3. Semicolons

To connect closely related independent clauses.

Conjunctive adverbs: Either (1) separate two independent clauses with a semicolon if the second independent clause begins with a conjunctive adverb (“accordingly,” “again,” “also,” “besides,” “consequently,” “finally,” “for example,” “furthermore,” “hence,” “however,” “moreover,” “nevertheless,” “on the other hand,” “otherwise,” “rather,” “similarly,” “then,” “therefore,” “thus”) or (2) start a new sentence, placing the conjunctive adverb somewhere in the new sentence, preferably in the first third, right after the subject.

Lists (if the list contains an internal comma or an “or” or “and”: “apples; oranges; and peaches and pears”).

The first letter following a semicolon is lowercased unless it is a proper noun.

A series that contains semicolons must have a semicolon before the final element: “apples; oranges; and peaches and pears,” not “apples; oranges and peaches and pears.”


One space after a semicolon.

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Many confuse colons with semicolons. The difference between a colon and a semicolon is that a colon presses the reader forward while a semicolon slows the reader down.

Semicolons always go outside the quotation mark.

4. **Colons**

After salutations in formal writing. Use a comma, not a colon, after a salutation when writing to friends.

To separate hour from minute: 9:30 a.m.

To separate book titles from subtitles.

To separate chapter from verse.

Only after independent clauses to

- Introduce lists;
- Introduce an illustrative quotation;
- Show that something will follow.

Capital after colon? Yes: But, as in this example, only when an independent clause follows the colon.

To replace “is” or “are”: “The diagnosis: terminal double-speak.”

Two spaces after a colon in typing; one space in publishing.

Colons always go outside the quotation mark.

5. **Apostrophes**

Use the apostrophe in its proper place and omit it when its not needed. (Note: It’s means it is or it has. Its is the possessive.)

Ownership or possession: The genitive case applies to people and, with increasing frequency, to inanimate objects. (“The rules of the court” are now “the court’s rules”). Note, however, that apostrophes for some inanimate objects look inelegant: “Section 7’s provisions” becomes “The provisions of Section 7.”
S' or s's; ses'; X's and Y's or X and Y's or X's and Y?

Use an apostrophe "s" after a singular possessive ending in a sibilant (S, X, or Z sound): "Myers's Rum," not "Myers' Rum." Without the apostrophe, the latter variant would be pronounced, incorrectly, "Myer's Rum." Note that the rule applies to sibilants, not to words that merely end in "S," "X," or "Z." Thus: Illinois' but not Illinois's. (The "s" in "Illinois" is silent; the state is pronounced "ill-in-oy," not "ill-in-oise.")

Do not use an apostrophe "s" after a plural possessive ending in a sibilant: "The courts' rules," not "The courts's rules."

A proper noun ending in a sibilant is pluralized by adding an "es": One refers to the Lebovits family as the Lebovitses. A book that belongs to more than one Lebovits is "the Lebovitses' book," not "the Lebovits' book" or "the Lebovitses's book."


Exceptions:

- Use the periphrastic possessive if the possessive looks awkward:

  "St. Gertrude's brief." Becomes: "The brief of St. Gertrude's."

- Some nouns violate all the rules: They look like plurals, are pronounced like singulars, and take no apostrophe, even when they are possessive:

  "United States brief" or "brief for the United States," not "United States's brief" or "United States' brief."

The inelegant apostrophe:


Use an apostrophe "s" after a second singular proper noun to show unity: "Ben & Jerry's ice cream," not "Ben's and Jerry's ice cream."

Use an apostrophe "s" after each singular proper noun to show disunity: "X's and Y's attorneys moved separately for severance."
To show contractions: “Can’t” (“cannot,” as in “unable,” not “can not”)—different from “may not,” as in “not permitted to,” and “might not,” as in “perhaps not”), “I’m” (“I am”), “it’s” (“it is”—different from the possessive “its”), “he’s,” “she’s,” “they’re” (“there are”—different from the possessive “their” or the location “there”), “you’re” (“you are”—different from the possessive “your”), “you’ve” (“you have”), “who’s” (“who is”—different from the possessive “whose”), and “we’re” (“we are”—different from the subjunctive or the past plural “were”). But don’t use contractions in formal writing. Contractions aren’t appropriate.

To omit letters or figures:

- Letters: “N SYNC”; “rock ‘n’ roll”; “Amazin’ Mets”; “good ol’ boy”; “cause” (for “because”); “bucket o’ chicken,” Gene Kelly’s “Singin’ in the Rain”; “till” (for “until”) is correct, but ‘til is incorrect.

- Figures: “He wrote his best opinions in the ‘40s.”

Plurals should not have apostrophes if they do not show possession.

To omit “of” in dates (“four years’ imprisonment”).

Pronouns that express ownership never get an apostrophe: “his,” “hers,” “its,” “ours,” “theirs,” “yours.”

Mind your P’s and Q’s. 1990’s or 1990s? The latter is more common, but the apostrophe in the former is no catastrophe. The key here is to eliminate confusion. A’s, for example, will not confuse. As will. Is As the word or the plural of A? If your reader will understand you if you do not use an apostrophe, do not use one. Do not, however, add an apostrophe to pluralize an abbreviation that has no internal periods: OKs. Add an apostrophe to the “s” to abbreviations that have internal periods: J.D.’s.

For more on this topic, see Gerald Lebovits, The Legal Writer, *Apostrophe’s and Plurals*, 76 NY St BJ 64 (Feb 2004).

6. **Question Marks**

None at the end of a sentence that begins with “whether.” “Whether” is a statement, not a question.

None at interrogative sentences that

- (a) command (“Would you write the opinion now, please”);
- (b) expect no reply (“May we have the pleasure of seeing you in court”);
(c) make a request ("Please send me a copy of the opinion"); or

(d) ask a question indirectly or as a declarative ("I wonder whether I will finish the trial this week.")

To suggest uncertainty: "Judge X wrote two (?) opinions today."

Place inside parentheses if you ask a question: "Judge Y's opinion (when did he learn to write?) is stellar."

Inside or outside quotation mark? Depends on whether the question is in the original.

7. **Quotation Marks**

Use for direct quotations, including a speaker's words.

To explain or express words and phrases, when referring to the word or phrase rather than the meaning of the word or phrase, or to set off a definition:

- **Correct:** "Anyone who uses the term 'mens rea' instead of 'guilty intent' should have a guilty conscience."

- **Correct:** "'Love' means 'never having to say you're sorry.'"

Unless the writer's goal is to show superiority—and a writer should never be egotistical—it is better to change the word or phrase than to use a quotation mark to show sarcasm, irony, informality, nonstandard usage, or ambiguous words or phrases.

Use quotation marks sparingly to note that a word or phrase is inappropriate in context: "The 'litter' of the law."

Unless you are quoting, do not use quotation marks when italics are required or when hyphenating ("exculpatory no" doctrine or exculpatory-no doctrine; "so called" Spiegel Law or so-called Spiegel Law). (Note: "So called" means that the term is wrong. It does not mean that some correctly refer to the term that way.)

When the original quotation is ill, tell your readers that it is "[sic]": Insert a [sic], and underline or italicize it, according to the Tanbook.

Do not use quotation marks until you start the quotation. **Incorrect:** "[The litigants] sought to dissolve their marriage." (O'Shea v O'Shea, 93 NY2d 187, 189 [1999].) **Correct:** The litigants "sought to dissolve their marriage." (O'Shea v O'Shea, 93 NY2d 187, 189 [1999].)
Triple, double, and single quotation-mark usage: Newspaper headlines and British writers use single quotation marks. American usage requires that the first quotation mark be a double quotation mark and that the first internal quotation mark be a single quotation mark. The second internal quotation mark is a double quotation mark.

8. Parentheses

To set off interruptions, explanations, or phrases that obscure the main text, or to direct readers to other information. But these parentheses are (usually) too informal for opinion writing.

Avoid parentheses (trust me!) except

- To introduce abbreviations in acronyms;

- To cite in New York State style; or

- To explain ambiguous citations following the citations. In that case you use brackets, according to the Tanbook.

Brackets, not double parentheses, go inside parentheses, according to the Tanbook (but not the Bluebook).

Add a space between parentheses and brackets: “)” (“)” [”] and “] [”. Not: “)” (“)” [”], or “[”].

Full sentences in parentheses begin with a capital letter and end with a period inside the parenthetical.

Enclose your parentheses: “(1),” not “1).” Unenclosed parentheticals are difficult to read.

Except in some record citations, put the comma after the parenthetical, not before: “ABC, Inc. (ABC), is the plaintiff,” not “ABC, Inc., (ABC) is the plaintiff.”

A parenthetical that forms an independent clause at the end of a sentence must begin a new sentence inside a parenthetical (not doing so, as in this example, is wrong).

Two spaces, when typing, after a parenthetical that starts a new sentence. (One space in publishing.) One space (whether in type or print) when using a parenthetical inside a sentence.

If the parentheses appear at the end of a sentence, the punctuation goes after the final parenthesis. If the parentheses contain an independent clause, the punctuation goes inside the
final parenthesis. Thus, “Lawyers must read carefully (and write carefully).” But “Lawyers must read carefully. (And they must write carefully.)”

For an explanation of citation, or explanatory, parentheticals, see the subsection titled “Citing,” above.

The test for correct parentheses: Does the rest of the sentence make sense without them?

9. Brackets

To show alterations in a quotation.

To reflect additions, such as years and names of courts, to what must be cited, according to the Tanbook. Examples: People v X (50 AD3d 50, 50 [5th Dept 2004]). Or (People v X, 50 AD2d 50, 50 [5th Dept 2004]).

Brackets go inside parentheses.

10. Hyphens

Hyphenate to divide words between syllables from one line to the next.

Hyphenate to join names, if the person uses that style: “Ms. Jones-Day.”

Compound adjectives:

Math quiz: “X: ‘In my pocket are 10 dollar bills.’ Y: ‘How much money is in your pocket?’”

Answer: Ten-dollar bills = from 20 dollars to infinity. Ten dollar bills = ten dollars (ten one-dollar bills).

Explanation: Hyphenate compound adjectives as you would pronounce the phrase. Where is the stress? On the “10 dollars” or on the “dollar bills”?

Height quiz: “X: ‘Is Kenneth a small claims arbitrator?’” “Y: ‘No. Kenneth is a four-year-old boy. He is too small to arbitrate claims. But in a few years he will be a small-claims arbitrator.”

Job quiz: “X: ‘Are you a real estate practitioner?’ Y: ‘Nothing about my estate practice is fake. But mostly I’m a real-estate practitioner.’”

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Explanation:

Some experts argue against hyphenating the "real estate" in "real-estate practitioner." Their argument is that no one will misunderstand the expression "real estate practitioner" for more than a split second. But (1) formality in writing is prized, and correct hyphenation is a sign of formality; (2) there is no need to burn even one of your reader’s brain cells with even a split-second’s confusion; and (3) no one will be troubled by the hyphen, and some might be impressed that you know the correct rule.

Exceptions:

Do not hyphenate when the compound is not an adjective phrase:

- "Small-claims arbitrator" but "arbitrator of small claims."
- "Real-estate owner" but "owner of real estate."

Do not hyphenate when the first word in the adjectival phrase ends in "ly":

- "Criminally-negligent homicide." Becomes: "Criminally negligent homicide."
- "Newly-elected Supreme Court justice." Becomes: "Newly elected Supreme Court justice."

Rule: Do not use hyphens between adjective-adverb combinations.

Some say that writers should not hyphenate two-word modifiers whose first element is a comparative or a superlative. I disagree. But the following examples represent that view:

- "Highest-priced books." Becomes: "Highest priced books."
- "Upper-income bracket." Becomes: "Upper income bracket."
- "Best-qualified candidate." Becomes: "Best qualified candidate."

Do not insert a hyphen in a compound predicate adjective whose second element is a past or present participle:

- "The effects were far-reaching." Becomes: "The effects were far reaching."
But: "The far-reaching effects."

Hyphenate suspension adjectival phrases:


Do not hyphenate foreign words used in an adjectival phrase:

- "Mens-reo element." Becomes: "Mens rea element."

Hyphenate a title that precedes "elect": "President-elect."

Do not hyphenate capitalized proper-noun adjectival phrases: "Off-Wall-Street Jam, Inc." becomes "Off Wall Street Jam, Inc." But hyphenate capitalized nonproper-noun adjectival phrases: "Legal-Writing Seminar."

Prefixes: Hyphenate only (1) when omitting the hyphen will confuse the reader (pre-judicial vs. prejudicial, re-sign vs. resign, re-count vs. recount, re-cover vs. recover, re-sent vs. resent); (2) when the nonhyphenation will be visually troubling (anti-injunction); (3) when the base is a proper noun (anti-Nixon, pro-Washington); and (4) when using the words "ex" ("an ex-court attorney" but consider "ex-patriot vs. expatriot), "quasi" as a compound adjective (quasi-contractual), or "self" (self-defense) (except when adding "self" to a suffix (selfless).

To join words thought of as one expression: "secretary-treasurer."

Majority opinion: Titles denoting a single office are not hyphenated: "editor in chief," "attorney at law," "vice president." (But the Tanbook, following Webster’s 3d, disagrees: "vice-president," "attorney-at-law").

Well: Hyphenate after "well" when you use "well" in an adjectival phrase ("well-known person"). Otherwise, hyphenate after "well" if the phrase does not mean the same thing if it is flipped around. Thus, "Judge X is well-read" is correct because unless Judge X has many tattoos, Judge X cannot be read well.

Hyphenate compound numbers from twenty-one to ninety-nine under the Bluebook. (This issue does not arise under the Tanbook, which requires figures for the numeral 10 and higher.)

The evolution of words: long ago ("tele phone"), not so long ago ("tele-phone"), and now ("telephone").

11. Em & En Dashes
Mnemonic device: An “em” dash (“—”) is as wide as the capital letter “M,” or sometimes longer, depending on the printer. It is represented by two dashes (“- -”) in typing. An “en” dash (“–”) is as wide as the capital letter “N.” In print an en dash is wider than a hyphen (“-”).

Em dashes set off explanations and—the authorities agree—interruptions. What is enclosed between em dashes is an interpolated clause.

Em dashes indicate a sudden change of thought or a sharp break—for drama. In this example, the em dash replaces a colon.

Some contend that em dashes suggest rather than define connections. Others contend that em dashes are too conversational for legal writing. (See Ann Enquist and Laurel Currie Oates, Just Writing: Grammar, Punctuation, and Style for the Legal Writer § 9.5.6, at 254 [2001] [arguing that “dashes are too informal for the serious work of law”].) But most believe that em dashes—when brief and to the point—are powerful plain-writing devices with flair. You could go through life without em dashes—but you would be the poorer for it.

Consider the rhythm in Justice Brandeis’s em dashes:

“To declare that in the administration of the criminal law the end justifies the means—to declare that the government may commit crimes in order to secure the conviction of a private criminal—would bring terrible retribution. Against that pernicious doctrine this court should resolutely set its face.” (Olmstead v United States, 277 US 438, 485 [1928, Brandeis, J., dissenting].)

Most insert no spaces before or after em dashes. But spaces should be inserted when the text appears distorted, such as when the text is fully justified (typing) or a typesetter is unavailable (publishing).


In this example, a hyphen, an en dash, and an em dash are used correctly: “Ms. Jones–Day spent five minutes reading the Prosser–Keeton text on torts—and promptly fell asleep.”

In WordPerfect: A hyphen is found on the keyboard (symbol keys; do not shift). An en dash is found by going into “Insert,” then “Symbol,” then “Typographical Symbols,” and then inserting the symbol on the seventh line, third from the left (keystroke number 4,33). More simply, the em dash is created by tapping the hyphen key twice and resuming your typing without leaving a space. An em dash is found by going into “Insert,” then “Symbol,” then “Typographical
Symbols,” and then inserting the symbol on the seventh line, fourth from the left (keystroke number 4,34).

12. Virgules (Slashes)

And/or: eliminate virgules. Use only “or” if the conjunction is disjunctive. Use only “and” if the connection is conjunctive. If the phrase is disjunctive and conjunctive, write “x or y or both.” Correct: “A defendant found guilty of driving while intoxicated may be sentenced to jail, a fine, or both.” If you write, “A defendant found guilty of driving while intoxicated may be sentenced to jail and/or a fine,” your reader might believe that the defendant must be sentenced to jail and a fine, not to one or the other or both.

Use a slash to stand for “per”: “65 mi./hr.”

To divide one line of verse from the next in text: “O, what a tangled web we weave/when first we practice to deceive.” (Sir Walter Scott, Marmion: A Tale of Flooden Field 617, [1808], quoted in Columbia Dictionary of Quotations 521 [Robert Andrews ed 1993].)

To separate parts of a date in informal writing: “3/6/55.”

To set off units:

- “John Smith, a/k/a John Doe.”
- “Joseph’s Restaurant Emporium d/b/a Joe’s Deli.”

Note: The New York Official Reports will spell out “a/k/a” (“also known as”) and “d/b/a” (“doing business as”).

Some call a virgule or slash a “solidus.”

13. Exclamation Points

For emphasis! Exclamation points get attention. Hey! See?

Be bold: Exterminate exclamation points!!!!!

Do not emphasize simple statements. Rather, reserve exclamation points for real exclamations and commands. And avoid exclamation points in legal writing.

Before or after the quotation mark? Depends on where it is in the original.

14. Ellipses/Asterisks
Three dots (asterisks in pre-2004 Tanbook style) within a sentence. Space out dots: "...", not "..." The State Reporter now publishes thus "..." but published thus before 2004: "* * *"

Four dots (asterisks in pre-2004 Tanbook) at the end of a sentence if (1) the end of the quotation is omitted; (2) the part omitted is not a citation or a footnote; and (3) the remaining portion is an independent clause. Unless all three criteria are satisfied, use a period, not an ellipse. Space out thus: "XXX . . .", not "XXX...." or "XXX. ..." or "XXX....."

Note: The previous and the new Tanbook offer no guidance about the four-ellipses rule: "However, considerable flexibility is permissible in the use and placement of the punctuation at the end of a quote (i.e., periods, question marks, exclamation marks), and this ending punctuation need not conform to the original." (Previous Tanbook, page 46.)

This lack of guidance poses a problem for the scrupulous opinion writer. The old and new Tanbooks offer room to confuse readers. They allow a quotation whose "ending need not conform to the original." What scrupulous quotation does not conform to the original or warn the reader that the quotation was altered? But the confusion can be eliminated. The solution is to make all your citations full sentences. The old and new Tanbooks permit either of the following two citations:

(1) As the Ríos Court noted, "none of the defendants testified" (Ríos v. Smith, 95 NY2d 647, 653 [2001]).

The problem with this citation is that I chopped off the end of the quotation in Ríos, but a reader who does not verify the original will never know that. Neither a period nor ellipses precede the closing quotation mark. Below is the better citation—and the one this handbook uses:

(2) As the Ríos Court noted, "none of the defendants testified . . . " (Ríos v Smith, 95 NY2d 647, 653 [2001].)

Notice in the second example not only the ellipses but also (1) the two spaces between the closing quotation mark and the opening parenthetical before Ríos and (2) a period between the closing bracket and the closing parenthetical. The first variant contains (1) one space between the closing quotation mark and the opening parenthetical before Ríos and (2) a period after the closing parenthetical.

Use three ellipses in the middle of a sentence to show pause . . . or interruption.

Never give ellipses before a quotation.

15. Accent Marks
Names (at the person's preference).

French words—if they are in current English usage ("cliché", "divorcé," "divorcée"; "fiancé," "fiancée") or if the English word means something other than the one intended ("résumé" as opposed to resume (re-sume)).
B. The Quiz

1. Commas

a. The view that trial judges have agendas, is not supported by case law.

   Answer: Delete the comma. (Also note passive. Should read: “Case law does not support the view that trial judges have agendas.”)

   Rule: No comma between subjects and their verbs or between verbs and their objects.

b. The Family Court Hearing Officer found, X is liable for child support.

   Answer: Replace the comma with “that.”

   Rule: Commas do not substitute for “that” (except before quotations that are fully independent clauses that need not be altered syntactically). But commas may substitute for “and” or “but” to separate two or more adjectives modifying the same noun in a series: “It was a hot, muggy day.” However, do not separate two adjectives before a noun when the first adjective modifies the second adjective or when the second adjective and the noun form one unit: “Appellant raised a strong constitutional argument.”

c. The District Court, and the Civil Court will be merged if the Unified Court System’s proposal succeeds.

   Answer: Delete the comma.

   Rule: No commas between parts of a double subject. Also, do not insert a comma between parts of a double predicate or double object unless you need to emphasize or clarify.

d. (i) The Appellate Division Fifth Department, the state’s second highest court will be created in the year 2000.

(ii) The litigant who spoke to the judge was held in contempt.

(iii) I am involved in litigation which troubles me.

(iv) Justification was his first, and ultimately his only excuse.

Answers: (i) Add commas after “Division” and “court.”
(ii) Whether you add a comma after “litigant” and “judge” depends on what you mean.

(iii) If all litigation troubles you, add a comma before “which.” If you are troubled by one aspect of your litigation, replace the “which” with a “that.”

(iv) Delete the comma after “first” or, if the comma remains, add a comma after “only.”

**Rule:**

Use commas to set off nonrestrictive words, phrases, and clauses, or appositives, but not to set off restrictive words, phrases, and clauses or nonappositives. (Note serial-comma usage in preceding sentence.) Add a comma before a word that belongs to two or more phrases (“Justification was his first excuse,” “Justification was his only excuse”).

**e.** After her microwave oven blew up Ellen sued.

**Answer:** Add a comma after “up.”

**Rule:**

Use commas to set off independent clauses from preceding dependent clauses and to set off all but the shortest prefatory phrases.

**f.** The motion is frivolous, however, sanctions will not be awarded and the nonmovant will not be compensated for responding.

**Answer:** Start a new sentence with “however” or delete the comma after “frivolous” and replace it with a semicolon. Then either start a new sentence with “and” or add a comma after “awarded.”

**Rule:**

If a conjunctive adverb used as a transition (“accordingly,” “again,” “also,” “besides,” “consequently,” “finally,” “for example,” “furthermore,” “hence,” “however,” “moreover,” “nevertheless,” “on the other hand,” “otherwise,” “rather,” “similarly,” “then,” “therefore,” “thus”) separates two independent clauses, insert a semicolon before the conjunction or begin a new sentence after the conjunction. It is a run-on sentence if you do not. Also, add a comma before a coordinating conjunction (“and,” “but,” “or,” “for,” “nor,” “so,” “yet”) to separate two independent clauses. Exception: Do not add a comma before a conjunction if the clauses are short. Exception to the exception: Add a comma before a conjunction when the clauses are short if you wish to emphasize.

**g.** This lecture will be held in Rochester, New York on November 19, 1999 a Friday.

**Answer:** Add commas after “New York” and “1999.”
Rule: Set off dates, places, and explanatory phrases.

2. Colons

a. The area codes he calls most often are: 212, 718, 516, 914, and 518.

Answer: Remove the colon.

Rule: Colons introduce material but do not go between a preposition and its object or between a verb and its object. Unless a colon is used for form (such as in a salutation), use a colon only after an independent clause. Capitalize the first letter after a colon only if the clause following the colon is an independent clause.

3. Semicolons

a. "Judge X, of Rochester, Judge Y, of Nassau, and Judge Z, of Saratoga wrote the handbook, the verdict is now with the readership, therefore, it will be a long wait."

Answer: Add semicolons after Rochester, Nassau, handbook, and readership. Or, to avoid too much of separation between subject and verb, write "Judge X (Rochester), Judge Y (Nassau), and Judge Z (Saratoga) wrote the handbook." (Note that either periods or semicolons should also be added after "handbook" and "readership").

Rule: Use semicolons in enumerations or lists in a series that contains internal punctuation; between distinct parts of a compound sentence if the conjunction is omitted; and before a conjunctive adverb aligned between two independent clauses. Semicolons may also appear between clauses joined by conjunctions if doing so makes the sentence more clear; but most experts would place a period before the conjunction and start a new sentence with the conjunction or recast the sentence entirely.

4. Apostrophes

a. Mr. Jones's rule provides that it's the litigants's burden to satisfy the courts rules on President's Day.

Answer: "Jones's" is correct. "It's" should be "it's," but because legal writing requires formality, write "it is." Its is the possessive; it's is the contraction for "it is" and "it has"; its is an illiteracy. "Litigants's" should be litigants'. "Courts" should be "court's" or "courts,' depending on whether the word is singular or plural. "President's Day" should be "Presidents Day"; that day is pluralized because it belongs to us, not to Presidents Washington or Lincoln. Similarly, it is "the New
Judges Seminar," not "the New Judges' Seminar." The seminar is for new judges; it is not a seminar of the new Judges or a seminar that belongs to new judges. But follow the organization's usage, even when the usage is incorrect. Thus, write "New York County Lawyers' Association (NYCLA)." (NYCLA should have no apostrophe; it is an association of lawyers. NYCLA does not belong to lawyers in New York County.) (Correct usage: "NYS Trial Lawyers Association.")

Rule:

To pluralize most nouns, add "s" ("lawyers") or "es" ("the Joneses") if the noun ends in "ch," "s," "sh," or "x." To make a singular noun possessive, add an apostrophe "s," even when the noun already ends in an "s." Nouns that end in "y" preceded by a vowel are pluralized with an "s": "attorneys." Words that end in "uy" follow a different format: "soliloquies." Nouns whose concluding letter is a consonant require that the "y" change to an "i" and that "es" be added: "juries." Nouns ending in "o" are pluralized with an "s" if preceded by a vowel; if a consonant precedes the final "o," consult your dictionary. Thus, "zeros" but "tomatoes." Some battles royal have been fought over how to pluralize plural compounds: "Attorneys General," not "Attorney Generals"; "notaries public," not "notary publics," "passersby," not "passerbyrs," "mothers-in-law," not "mother-in-laws." But add an "s" to a compound plural if there is no noun in the compound ("mix-ups") or if the compound ends in the suffix "-ful." ("armfuls"). Some words, but not names, that end in "f" or "fe" are made plural by changing the ending to "v" and adding "es." ("selves"). The spelling of a few words change when they become plural ("woman" vs. "women," "louse" vs. "lice"). Still other words remain constant whether they are singular or plural ("swine," "series"). Finally, some foreign words are rendered plural by the rules of their language of origin ("analysis" vs. "analyses," "axis" vs. "axes").

To make most singular nouns possessive, add an apostrophe and an "s" if the last letter ends in "x," "z," or "s." To make plural nouns possessive, simply add an apostrophe (Joneses'), and add an 's ("Women's Bar Association of the State of New York") to plural nouns that do not end in "s." And watch out for contractions, which are too informal for legal writing: they are (they're); there is (there's); there are (there're); you are (you're); who is (who's); should have (should've; not "should of").

Note that not all opinion writers add "es" to pluralize nouns ending in "s":

"The author is aware of the grammatical rule which dictates that to create the plural form of a proper name that ends in an 's' one must add an 'es.' E.g., The Chicago Manual of Style § 6.5 (13th rev. ed. 1982). Thus, the plural of 'Erkins' would be 'Erkinses.' However, the author finds the name
‘Erkinses’ so distracting that he chooses to ignore the rule. No such willingness to ignore the rules of the English language should be imputed to Judges Winter or Calabresi.” (In re Gaston & Snow, 243 F3d 599, 599 n 1 [2d Cir 2001, Van Graafeiland, J.].)

5. **Hyphens and Dashes**

a. He filed a 10 page brief - claiming that plaintiff raised a legally insufficient argument - on a criminal justice issue.

**Answer:** Hyphenate between “10” and “page” (a “10-page brief,” not a “10 page-brief”; not hyphenating between “10” and “page” means that you refer to a “page-brief”), but do not hyphenate “a brief of 10 pages.” Em dash (double dash, no spaces) between “brief” and “claiming” and between “argument” and “on.” Hyphenate between “criminal” and “justice,” but note that you would not hyphenate if you wrote “an issue of criminal justice.”

**Rule:** Hyphenate words combined into a single adjective. Some who argue that hyphens are needed only if not hyphenating leads to confusion would write “common law rule.” Purists, however, correctly write “common-law rule” but “rule of common law.” The purists are correct because the emphasis is on “common law,” which modifies “rule.” It is not a “common law-rule.” But an adverb and an adjective are not hyphenated: “commonly made mistake,” not “commonly-made mistake.” Moreover, foreign words are not hyphenated: “actus reus element,” not “actus-reus element.” In America (but not in England), capitalize the word following a hyphen in a title: “I teach Common-Law Contracts,” not “I teach Common-law Contracts” or “I teach Common Law Contracts.” Use em dashes—two hyphens when typing or a long dash “—” in published text—to set off asides that deserve emphasis. Also, use suspension hyphens: “a 10- or 20-page brief.”

6. **Parentheses, Brackets, Ellipses, and Asterisks**

a. The court found, “... [T]he defendant is a (predicate) felon” ... and sentenced him accordingly.

**Answer:** The court found that “the defendant is a [predicate] felon” and sentenced him accordingly.

**Rule:** No ellipses (asterisks in pre-2004 Tanbook Style) before a quotation; the absence of a capital letter says it all. Three ellipses to show an omission within a quotation. Four ellipses at the end of your quotation if your quotation ends your
sentence, if you delete part of your quotation, if the deleted portion is not a footnote or a citation, and if the part of the remaining quotation is an independent clause. Also, use brackets, not parentheses, to alter your quotations, and do so grammatically.
XIX

PROBLEM WORDS AND PAIRS IN OPINION WRITING

Use words precisely. Use precise words. Eliminate improper word usage. And do not take this for granite: Make mincemeat of malapropisms—from the character Mrs. Malaprop in Richard Brinsley Sheridan’s The Rivals (1775)—confusing words that sound alike. Make mountains of metathesis—transposing words like “ax” and “ask,” “irrelevant” and “irrevelant.” Finally, do not wix up your murmurs, and verse visa.

A lot. “A lot” is a measure of land. Only colloquially does the wordy “a lot of” mean “much” or “many.” “A lot” is incorrect.

A while. See while.

Ability, capacity. “Ability” is the power to do something. “Capacity” is the ability to receive or hold something. A tip: Avoid both words. “He has the ability to write well” becomes “He can write well” or “He writes well.”


Academic, moot. Something “academic” is no longer relevant. Something “moot” is debatable. Incorrect: “Now that defendant’s point is resolved against her, all her remaining contentions are moot.” If “moot” meant what most lawyers believe it means, “moot” would have contrary meanings: (1) pertaining to a settled controversy and (2) pertaining to an unsettled controversy. Moot Court is offered by academia, and often sponsored by academicians, but Moot Court covers debatable points, not irrelevant ones.


Accused, alleged, claimed, suspected. By definition, someone cannot be an accused or suspected criminal, as in, “Mr. X is an accused murderer.” God bless America: One is not a criminal until conviction. One can only be accused or suspected of murder. One may be accused of committing a crime, but one may not be accused of committing a civil fault. To “allege” is to assert without proof. One alleges in a complaint, therefore, but once proof, no matter how weak, is offered, the proof is no longer an allegation. Crimes and conditions can be “alleged”; people and law cannot be alleged. Wrong: “He is an alleged murderer.” Wrong: “Appellant alleged that the statute provides that . . . .” An accusation is already an allegation. Thus, do not write, “Defendant was charged with alleged criminally possessing a sawed-off shotgun.” When you give a reason for or against something, you do not allege; you contend or argue. A “claim” is a demand for or entitlement to relief. To “claim” is to assert a right to something. Except
colloquially, to “claim” is not to “allege,” “argue,” “conclude,” “contend,” “declare,” “maintain,” or “state.”

Actually. “Actually” means “in fact.” It no longer means “now.”

Adhesion, cohesion. Different substances are joined by “adhesion.” Similar substances are joined by “cohesion.”


Admission, admittance, confession. “Admission” is used in the figurative and nonphysical sense. Correct: “Joe Shmo was admitted to the bar in 1981.” “Admittance” is used in the physical sense. Incorrect: “No Admission. Restricted Area.” (Should be “No Admittance.”) In criminal law, an “admission” is a concession, without acknowledging guilt, that an allegation or factual assertion is true. A “confession” concedes the factual assertion and acknowledges guilt.

Admittance. See admission.

Adverse, averse. To be “adverse” is to be opposed. To be “averse” is to be unwilling. Correct: “Court attorneys averse to learning how to use computers must learn to tolerate adverse criticism.”

Affect, effect. “Affect” as a verb: to influence; as a noun: a feeling or state. “Effect” as a noun: something resulting from another action; as a verb: to come into being, to cause something to happen. Correct: “Mr. X, whose manner is affected, put his theory into effect. His theory had a profound effect. It affected many things.”

Affinity. To have an “affinity” with or between someone or something is to describe a reciprocal relationship. Incorrect: “Judge X has an affinity for the law.” (The law cannot have an affinity for Judge X.) “Affinity” is followed by “between” or “with,” not by “for” or “to.” Colloquially, to have an “affinity” for someone means “to like someone.” In this colloquial sense, “affinity” applies to people only. “Aptitude” or “knack” refer to things.

Aggravate, irritate. To “aggravate” is to worsen a condition. Only colloquially does it mean to “irritate” or “annoy.”

Agreeable, compatible. To be “agreeable” is to be easy to get along with or enjoy. “Compatible” shows a relationship between people or things. Correct: “The judge and his law clerk are compatible because they are agreeable.”

All around. See all round.
All ready, already. To be “all ready” is to be prepared. “Already” means “by this,” “a specified time,” or “previously.” William Safire advises not to use a comma in “Enough already.”

All right or alright?—the former. “Alright” is not an accepted word.

All round, all around. “All round” is well rounded. “All around” is to circle.

All together, altogether. “All together” means “things or people together.” “Altogether” means “entirely, with all included,” or “on the whole, with everything considered.”

Alleged. See accused.

Allude, elude, refer. To “allude” is to imply or to refer indirectly. To “elude” is to forget or to avoid detection. To “refer” is to identify indirectly.

Already. See all ready.

Alternate (alternately), alternative (alternatively), option. To “alternate” is to offer or do one after the other. An “alternative” is a choice between two things. For more than two choices, use “option,” “selection,” “possibility.” Note: One cannot use “alternative” if no choice is offered. Thus, a last-minute decision to reschedule an event leads not to an alternative date but to a new, different date.

Alternative. See alternate.

Although, while. “Although” is a contrast. “While” is a comparative time concept. Consider: “Judge A always rose when the jury entered the courtroom, while Judge B never did.” Does the “while” here mean “at the same time,” “and,” “but,” “whereas,” or “although”?

Altogether. See all together.

Ambiguous, ambivalent. Something “ambiguous” is uncertain or unclear. To be “ambivalent” is to have mixed feelings or conflicting desires.

Ambivalent. See ambiguous.

Amend, emend. To “amend” is to change formally. To “emend” is to correct a mistake. Correct: “The Legislature amended the statute to emend the statute’s numbering.”

Amid, among, between. Use “amid” with mass nouns and “among” with plural nouns. Correct: “Amid [not among] a series of authorities, this opinion stands out.” Incorrect: “Amid [should be among] the judge’s three loyal staff members, her law clerk stood out.” Do not use “among” to mean “in,” or “with.” Correct: “In [or with, not among] the judge’s contingent was his
confidential secretary.” “Among” refers to more than two people or things. “Between” (“by-twain”) refers to two. Exceptions: (1) Use “between” if individual elements are closely related to one another. Correct: “An understanding was reached between the six codefendants.” (2) Use “between” to express the relation of one physical thing to many surrounding things. Correct: “The property I own is between three mountains.” Note: Use an “and” to connect the two objects to which “between” refers. Correct: “Judge X sat in chambers between 8:00 a.m. and [not to or or] 9:00 a.m. every morning writing her opinions.” Recall that the expression is “Between you and me,” not the solecistic, hypercorrection “Between you and I.” The contractual expression “between and among A, B, and C” means “among A, B, and C and between A and B, A and C, and B and C.” If you read between the lines, you will find the following among White’s bric-a-brac: “A lawyer who doesn’t know the difference between ‘among’ and ‘between’ has missed his true calling as a bricklayer . . . . Why it is not enough to say simply that the contract is entered ‘by’ the parties is an issue going to the very heart of the law.” (D. Robert White, The Official Lawyer’s Handbook 186 [1983].)

Among. See amid.

Amount, number. An “amount” refers to a quantity of something that cannot be counted or counted easily: “amount of work,” “amount of sand.” A “number” refers to things that can be counted: “A number of motions.”

Amuse, bemuse. To “amuse” is to entertain. To “bemuse” is to confuse. Correct: “The amusing lawyer bemused the jury.”

Analogous, same, similar. “Analogous” refers to a partial similarity between different things. “Similar,” meaning “general resemblance,” is different from “same.” “Judge X died of a heart attack. His son met a similar [should be the same] fate.”

Antagonist, protagonist. An “antagonist” is an adversary. An “antagonist” is not necessarily the opposite of a “protagonist,” the leading character in a story. “Antagonists” and “protagonists” may be good or bad.

Ante-, anti-. “Ante-“ means “in front of” or “before.” “Anti-” means “against” or “opposite.” Use a hyphen after “anti” if the next letter is an “i” (“anti-interdependent”) or a capital (“anti-Semitic”). (Note: “Antipasto” does not mean “against pasto.” And “provalone” does not mean “in favor of valone.”)

Anti-. See ante-.

Anticipate, expect. To “anticipate” is to do something about a foreseen event. To “expect” something of a person, or from a nonperson, is to foresee but not do anything about it. Correct: “The judge anticipated the argument and therefore covered it in advance.” Correct: “Judges expect loyalty of their law clerks and efficiency from their computers.” Never follow “anticipate”
with an infinitive or a “that” clause. Incorrect: “The attorney anticipated that his client would settle.”

Anxious, eager. “Anxious” means “worried.” “Eager” means “enthusiastic” or “impatient.”

Any body, anybody, any one, anyone. “Any body” is a single mass of flesh, living or dead. Person in a morgue: “Is any body home?” anybody” is “anyone”—which is preferred to “anybody.” When stressing a single person, use “any one”: “The judge would have ruled for any one of them.”

Any more, anymore. Use “anymore” to mean “no longer”: “I do not write anymore.” Otherwise, use “any more.”

Any one. See any body.

Any way, anyway. Use “anyway” to mean “in any event.” Correct: “Although the litigants should settle the case, they will try it anyway.” Otherwise, use “any way,” which means “in whatever way.”

Anybody. See any body.

Anymore. See any more.

Anyone. See any body.

Anyway. See any way.

Apology, excuse. Someone who “apologizes” accepts blame. Someone who offers an “excuse” accepts no blame.

Apparent, evident, obvious. Something “apparent” appears to be as believed. Something “evident” is proven. Something “obvious” is even more certain than something evident. The word “apparent” is apparently misused. “Judge Y died of apparent cancer.” Becomes: “Judge Y apparently died of cancer.” What is apparent is not the cancer but that Judge Y will now be judged by a court on high.

Appeal, apply. A litigant who “appeals” does so of right or after the litigant has already received permission to do so. But a litigant “applies” for discretionary review, such as for a writ of certiorari to the United States Supreme Court or for leave to the Court of Appeals.

Apply. See appeal.

Appraise, apprise. To “appraise” is to set a value. To “apprise” is to inform or notify.
Apprehend, comprehend. To "apprehend" is to come to know. To "comprehend" is to understand fully.

Apprise. See appraise.

Arbiter. See arbitrator.

Arbitrator, arbiter. An "arbiter" decides or settles legal disputes. An "arbiter" resolves disputes other than legal ones, such as a political or domestic dispute.

As, like. Use "as" as a comparison to introduce clauses: "It tastes good as [not like] a cigarette should." Otherwise, "as" is a comparative time concept. Do not use "as" as a conjunction to mean "because," "since," "when," or "while." Use "like" as a comparison to introduce nouns or noun phrases: "Judge A decides cases like Learned Hand did." Like, man, this is as good as it gets: "As" means "the same"; "like" means "similar to." Use "like" when you make a valid comparison between substantives. Correct: "The judge treats her court attorney like [not as] as friend." Correct: "Judges like [not such as] Brandeis write rhythmically."

Do not use "like" in place of "as though" and "as if": "The judge sustained the objection as if [not like] the attorney had actually objected." And can you appreciate this? Do not use "appreciate" to mean "like." "I do not appreciate it when you question my integrity." Correct: "I do not like it when you question my integrity." Old-fashioned grammarians prefer "so" to "as" in negative combinations, and all prefer "as" to "so" in positive combinations. Correct: "He is not so smart as Cardozo was." Correct: "He is as smart as Cardozo was."

Assume, presume. To "assume" is to posit the accuracy of an argument and then to go on from there. To "presume" is to take the truth of something for granted. Correct: "I assume [delete "for the sake of argument"] that you were told, 'Dr. Livingston, I presume?'"

Assure, ensure, insure, promise. Correct: "Please be assured that your insured investment will ensure high profits." Do not use "promise" as a verb to mean "assure." Hanging judge: "I promise you that you will be convicted." Becomes: "I assure you that you will be convicted." "Assure," which has the sense of setting someone's mind to rest, applies to persons. "Ensure" and "insure" imply making an outcome certain or securing something from harm. "Insure" means to cover with insurance.


Authentic, genuine. What is "authentic" tells the truth about its subject. What is "genuine" is real. If you told your court-attorney colleagues about the amazing opinion you were drafting when all you really did was watch your judge conduct voir dire yet again, your story would be genuine but inauthentic. If you passed off as your own a true story you heard from another court attorney about writing an opinion, that story would be authentic but not genuine.
Average, median, mean, mode, mediocre. To determine an “average,” add the numbers and divide by the number in that series. The “median” is the middle number. With three numbers, 1, 2, and 3, “2” is the median (and, in this example, also the average and the mean). The “mean” is determined by adding the highest and lowest and dividing by two. The “mode” is the most common number; the mode of 5, 5, and 6 is “5.” “Mediocre” means “average.” It does not mean “below average” or “bad.”

Averse. See adverse.

Avocation, vocation. An “avocation” is a hobby. A “vocation” is a calling or profession.

Awhile. “Awhile,” an adverb, is not preceded by “for.” Correct: “Stay [not for] awhile.”

Bad, badly. Use “bad,” an adjective, to modify a noun or pronoun (“He did a bad job”) or to describe emotions. Use “badly,” an adverb, to modify a verb, to answer the question “how” (He played badly”), or to describe physical sensations. Correct: “The court attorney felt bad because his judge felt badly after she fell off her chair.”

Badly. See bad.

Balance, remainder. A “balance” is not a remainder, except as a part of an account. The “remainder” is what is left over.

Bellwether. A wether is a male sheep that leads its flock and has a bell around its neck. The word is not spelled “bellweather.”

Bemuse. See amuse.

Beneficent, benevolent. To be “beneficent” is to do good. To be “benevolent” is to offer supportive sentiments. Correct: “I would rather be ruled by a beneficent than a benevolent dictator.”

Benevolent. See beneficent,

Between. See amid.

Bi-, semi-. “Bi-” is an ambiguous prefix. Biweekly, for example, means every two weeks, but many believe, incorrectly, that it means twice a week. Twice a week, in fact, is “semiweekly.” Semiperfect advice for those who need bifocals: Do not use “by-“ or “semi-“; both have the potential to confuse. Instead, write “twice a week,” “once every two weeks,” and so on.

Bisect, dissect. To “bisect” is to cut into two equal parts. To “dissect” is to cut into parts of any number or size but two equal parts.
Blatant, flagrant. Something or someone "blatant" is offensive or brazen. A "flagrant" act is a wrong act, done openly and knowingly.

Boat, ship, vessel. A "boat" is a small craft. A "ship," the more common word for "vessel," is a large craft suitable for travel on the high seas.

Bombastic. To be "bombastic" is to be pompous, not strident or violent.

Bookkeeping. See accounting.

Breach, breech. "Breach" as a noun, means a "violation" or a "gap." As a transitive verb, "breach" means "make a gap in." As an intransitive verb, "breach" means "to break through water." A "breech" is the back part of a gun or gun-barrel or a birth in which the baby's buttocks emerge first.

Breech. See breach.

Bring, take. To "bring" is to carry toward. To "take" is to carry away. Correct: "She brings home the bacon but takes it to work."

Broke, broken. "Broken" is the participle of "broke." It is illiterate to write that something is "broke." A person who writes free handbooks on legal writing, however, becomes "broke" in the pecuniary sense.

Broken. See broke.

Burglarize, burgle. Neither back-formation is acceptable in formal writing.

Can, could, may, might. "Can" and "could" mean "able." Do not use either word to express a possibility or permission. "May" means "permission" or "possibility." "May" will confuse when it can mean either "permission" or "possibility." If "may" might mean either "permission" or "possibility," use "might." Thus, "I may write the opinion" can mean "I am permitted to write the opinion" or "I will write the opinion if I get around to it." "Might" is the past and past perfect tense of "may"; implies a conditional ("Ms. X might run for Village Justice"); expresses a supposition when used in the subjunctive ("The court attorney is acting as if he is might run for judicial office"); and is a strong synonym for "may" ("Judge X said that it may happen, but I am certain that it might").

Cannot, can not? — the former.

Capacity. See ability.
Capital, capitol. The seat of government is the “capital.” “Capitol” is the building. Capital punishment awaits those who confuse “capital” with “capitol.”

Capitol. See capital.

Carat, caret, karat. Editors use a “carat” (“^”) to note that something should be inserted. A “caret” is a unit of weight for precious metals and stones. A “karet” is a measure of the weight of gold.

Caret. See carat.

Catch-22, dilemma, Hobson’s Choice. A “Catch-22” is an impossibility. Correct: “John could not get a job without experience, and he could not get experience without a job.” A “dilemma” is a choice between two bad bargains—also known as a “Sophie’s Choice” or being “between a rock and a hard place.” To be in a dilemma does not mean “to be in a bind, plight, predicament or quandary.” A “Hobson’s Choice” is no choice at all. A Hobson’s Choice means “take it or leave it.” In the clichés “between a rock and a hard place” and “between Scylla and Charybdis,” neither offers any comfort, but in the latter offers a safe though difficult exit.

Character, reputation. “Character” defines what you are. “Reputation” is what others think of you.

Cite, citation, site. “Cite” is a transitive verb: “The court attorney's citations [not cites] are accurate.” Correct: “He cited [omit to] a case.” In legal writing, authorities are called “citations,” not references. A “site” is a place, such as a battle site or a Web site.

Citation. See cite.

Claimed. See accused.

Cohesion. See adhesion.

Cohort. A “cohort” is not a colleague or a co-conspirator. A cohort is a group so large it cannot be counted and which is united in common goal. Correct: “A cohort of law clerks pressed for a raise.” In Roman times a “cohort” was a group of 500-600 soldiers.

Common, mutual. Correct: “We and our mutual friend share common interests.”

Compare to, compare with, contrast. Use “compare to” when the things being compared are alike, when the phrase introduces a similarity. Use “compare with” when the things being compared are both alike and different. Correct: “The court compared the New York statute with the New Jersey statute.” Do not use “compare with” if you make no comparison. “The Chief Judge hired five court attorneys this year compared with four last year.” Becomes, for example: “The Chief
Judge hired five court attorneys this year; last year she hired four.” Use “contrast” when things are compared only for their differences. Your sixth-grade teacher’s “compare and contrast” is a tautology. To compare something with something else is to note similarities and differences.

**Compare with.** See compare to.

**Compatible.** See agreeable.

**Compel, impel, induce.** To “compel” is to force. To “impel” is to persuade. To “induce” is to impel gently.

**Compendious.** “Compendious” means “abridged,” not “voluminous.”

**Compleat, complete.** Both mean “perfectly skilled or equipped,” but “compleat” is archaic.

**Complement, compliment.** To “complement” is to complete something. To “compliment” is to flatter. Correct: “Because the judge’s necklace complemented her judicial robes, the court officer complimented the judge.”

**Complete.** See compleat.

**Compliment.** See complement.

**Comprehend.** See apprehend.

**Comprise, consists of, includes.** “Comprise” means “to contain,” “to embrace,” or “to consist of.” “The elements comprise the statute” is incorrect because statutes comprise elements, not the other way around. A tip: Use “has” instead of “comprises”: “The statute has elements.” Note: “Includes” precedes a partial list and thus is not a synonym for “comprises.” More to “include”: A sentence that includes “include” may not also include “some.” Thus, the following is incorrect: “Some of the briefs included one from an amicus.”

**Concerned about, concerned with.** To be “concerned about” is to worry about it. To be “concerned with” is to have an interest in it. Correct: “Ms. X, the court attorney, was concerned about the intern’s writing because Ms. X was concerned with writing a draft opinion.”

**Concerned with.** See concerned about.

**Confession.** See admission.

**Confute, deny, refute.** To “confute” is to “refute” conclusively. To “deny” is to disavow. To “refute” is to destroy by argument. Incorrect: “He refuted the charge.” Use “denied.”
Congenial, genial. To be “congenial” is to be easy to get along with. To be “genial” is to be pleasant. Correct: “Her geniality made her congenial.”

Connote, denote. Words “connote” what they suggest. They “denote” what they mean.

Consecutive, continuous, continual, successive. “Consecutive” and “continuous” mean “uninterrupted” or “unbroken.” “Continual” and “successive” mean “intermittent” or “repeated at intervals.”


Consistently, constantly. Both suggest something ongoing. What occurs “consistently” occurs without contradiction. What occurs “constantly” occurs persistently.

Consists of. See comprise.

Constantly. See consistently.

Consul. See council.

Contemptible, contemptuous. To be “contemptible” is to deserve contempt. To be “contemptuous” is to feel or express contempt. Correct: “The court is contemptuous of contemptible attorneys.” A contemnornor has been contumacious and is guilty of contempt.

Contemptuous. See contemptible.

Contiguous. See adjacent.

Continual. See consecutive.

Continually. See continue.


Continuous. See consecutive.

Continuously. See continue.

Contrast. See compare to.
Converse, reverse. The “converse” is the turning about: “The judge knows the defendant” is the converse of the defendant knowing the judge. The “reverse” is the opposite or the contrary. Correct: “Please list your citations in reverse chronological order: from newest to oldest.”

Convince, persuade. To “convince” is to satisfy by argument. To “persuade” is to influence someone that you are correct. An attorney may convince a client that he should settle but not persuade him to do so. Correct: “Opinion writers must persuade. It is not good enough for them to convince.”

Correspond to. See correspond with.

Correspond with, correspond to. Use “correspond with” to mean “writing to other people.” Use “correspond to” to analogize.

Correspondent, co-respondent, correspondent. A “correspondent” is a euphemism that describes the third party in a divorce action. A “co-respondent” is a second litigant responding to a proceeding or, in some jurisdictions, an appeal. A “correspondent” writes letters or is a journalist in any medium.

Co-respondent. See correspondent.

Cost, price, value, worth. “Cost” is the amount the purchaser paid. “Price” is amount the seller asks for the article. “Value” is assessed by comparing the article with a fair standard. A buyer’s need or desire for an article determines its “worth.” Correct: “He knows the cost of everything and the value of nothing.”

Could. See can.

Council, counsel, consul. A “council” is an organization. “Counsel,” a noun or a verb, is advice or someone who gives advice. A “consul” is an officer in the foreign service. Correct: “Counsel gave good counsel to the Council of Elders and the French consul.”

Counsel. See council.

Credence. See credible.

Credible, creditable, credulous, credence, incredible, incredulous. A “credible” person or thing is believable. “Creditable” means “worthy of belief or praise.” A person who is “credulous” is someone too willing to believe. “Credence” means “mental belief” or “acceptance.” “Incredulous” is the opposite of “credulous.” A person or thing unworthy of belief is “incredible.”

Creditable. See credible.
Credulous. See credible.

Critical. See criticism.

Criticism. See criticize.

Criticize, criticism, critical. To “criticize” is to assess. “Criticism” and “critical” assessments can be positive or negative, but neither is given without explanation. A “critic” criticizes the good and the bad. A “critical” person finds fault everywhere.

Currently, presently. “Currently” is “now.” “Presently” is “soon.” Note: It is redundant to use the present tense “is,” “am,” or “are” with “currently.” Excise accordingly: “[Currently] I am a law clerk.” Soon after you learn this rule you will cut currently presently. A tip: Use “now” or “soon” rather than the pretentious “currently” or “presently.”

Data, datum. “Data” is plural. “Datum” is singular. Avoid a construction that uses “datum,” which is obsolete.

Datum. See data.

Deduction, induction. “Deduction” is reasoning from general principles to specific conclusions. Reasoning deductively is a civil-law hallmark. “Induction” is reasoning from one or more specific observations to a general principle. Reasoning inductively is a common-law hallmark.


Definitive. See definite.

Delete, omit. To “delete” is to erase. To “omit” is to leave something out intentionally or to neglect accidentally.

Delusion, illusion. A “delusion” is a false belief. An “illusion” is a false perception.

Denote. See connote.

Deny. See confute.

Des’ert, desert’, dessert. The issue here is pronunciation: Place the right emPHASIS on your syllABLES. Correct: “Her friend wanted to desert her while they were eating dessert in the desert. She got her just deserts.”

Dessert. See des’ert.
Diagnosis, prognosis. A “diagnosis” analyzes a bodily condition. A “prognosis” is a projected course of a disease or condition.


Dialectic. See dialectal.

Dialectical. See dialectal.

Differ from, differ with. Correct: “The two court clerks differ from each other in temperament.” Correct: “The two court clerks differ with each other about politics.”

Differ with. See differ from.

Different from, different than. The former is always correct, unless the sentence sounds tortured, but the latter may be used to compare differences: “Judge A’s writing style is different from Judge B’s, but Judge C’s style is even more different than Judge A’s and Judge B’s.” The phrase “should be no different from” is incorrect. Correct: “The rule should not be different from . . . .”

Different than. See different from.

Dilemma. See Catch-22.

Dis-, un-. Words that have an “un-“ prefix are weaker than words that have a “dis-“ prefix. An “ununited group,” for example, was never united. A “disunited” group was once united but is no longer. To be “uninvolved” is not to be involved. To be “disinvolved” is to have withdrawn from involvement. To be “unorganized” is to lack order. To be “disorganized” is to have been organized but now to be in disarray. To be “unqualified” is to lack qualifications. To be “disqualified” is to lose one’s qualifications. To be “unsatisfied” is to be not entirely satisfied. To be “dissatisfied” is to be entirely unhappy.

Disassemble, dissemble. To “disassemble” is to take apart something that was once assembled. To “dissemble” is to conceal.

Disburse, disperse. To “disburse” is to pay out. To “disperse” is to separate and move apart in into different directions.

Disclose, divulge, expose, reveal. To “disclose” is to make private information public. To “divulge” is to pass a secret to a select group. To “expose” is to make public something reprehensible. To “reveal” is to unveil something beyond one’s knowledge.

Discomfit, discomfort. To “discomfit” is to thwart. To “discomfort” is to make uncomfortable.
Discomfort. See discomfit.

Discover, invent. To "discover" is to find something that exists but which was unknown. To "invent" is to bring something new into existence. Correct: "The pilgrims might not have discovered America, but they invented the Thanksgiving Dinner."

Discreet, discrete. To be "discreet" is to be circumspect. Something "discrete" is separate or disconnected.

Discrete. See discreet.

Disinformation, misinformation. "Disinformation" is a deliberate falsehood. "Misinformation" is incorrect information.

Disingenuous. See ingenious.

Disinterested, uninterested. To be "disinterested" is to be neutral. To be "uninterested" is not to care. Correct: "We want our judges to be disinterested, not uninterested."

Dissect. See bisect.

Dissemble. See disassemble.

Dissimulate, simulate. To "dissimulate" is to conceal. To "simulate" is to feign or to create the effect of. The two words are not antonyms.

Distinct, distinctive. "Distinct" means "easily perceived." Something "distinctive" is different.

Distinctive. See distinct.

Divers, diverse. According to divers authorities, "divers views" are various views. "Diverse" views are opposing views. But "divers" is archaic.

Diverse. See divers.

Divulge. See disclose.

Doubtless, no doubt, doubtlessly, indubitably, undoubtedly. Even doubting Thomases agree that "doubtless" and "no doubt" suggest "probably" and therefore are weak. "Doubtlessly" and "indubitably" are pretentious. Pick "undoubtedly" to express certainty. But recall that adverbs often weaken. Thus, "He lied" is stronger than "He undoubtedly lied."

Doubtlessly. See doubtless.
Duplicate, replicate. A “replica” is a copy made by the original creator. A “duplicate” is an exact copy.

Eager. See anxious.

Easy, easily. “Easy” is an adjective: “Writing is easy for those who sweat blood.” “Easily” is an adverb: “Judge X finished her opinion easily.” These clichéd exceptions are easy to remember: “take it easy” and “easy does it.” They should be “take it easily” and “easily does it,” but no one uses them that way.

Easily. See easy.

Economic, economical. “Economic” is the science of economics and life’s necessities. “Economical” means “thrifty.”

Economical. See economic.

Effect. See affect.

Effete: “Effete” means “exhausted.” But since Spiro Agnew’s “effete corps of impudent snobs,” most people believe that “effete” means “snobs.” The solution is never to use this skunked word.

Egoist, egotist. “Egoists” think only of themselves. They are not altruistic, but they are not necessarily conceited, either. “Egotists” are immodest.

Egotist. See egotist.

Elicit, illicit. To “elicit” is to evoke or draw. Something “illicit” is illegal or immoral.

Elude. See allude.

Emblem, symbol. An “emblem” is a pictorial representation, often with a motto. A “symbol” is a spiritual sign. Correct: “The First Amendment prohibits religious symbols on our national emblem.”

Emend. See amend.

Emigrate, immigrate. One “emigrates” from. One “immigrates” to. Correct: “The court attorney emigrated from Canada and immigrated to the United States.”

Empathy, sympathy. To have “empathy” is to identify with another’s emotions. To have “sympathy” is to understand another’s feelings. Correct: “My sympathy is with you at this sad moment. My parents died last year; I empathize with your loss.”

Endorse, indorse. Use “indorse” for negotiable instruments and endorse in all other contexts. I believe that most American authorities will endorse this view.


Enervate. See energize.

Enormous, enormousness, immense. “Enormousness” and “immense” connote size. “Enormous” has a moral connotation, and “immense” does not. Correct: “Hitler committed enormous wrongs in an immense area.”

Enormousness. See enormous.

Ensure. See assure.

Enters, enters into. Correct: “After X entered the transaction in the books, X and Y entered into a contract.”

Enters into. See enters.

Envy, jealousy. “Envy” refers to resenting a luckier person. “Jealousy” refers to affairs of the heart. To have “sour grapes” is to malign what one wants but does not have or cannot get.

Epitaph, epiteth. An “epitaph” is an inscription on a gravestone. An “epithet” is a slur.

Equivocate, prevaricate. To “equivocate” is to mislead by half-truths, ambiguities, and evasions. To “prevaricate” is to lie.

Especial. See special.

Every day, everyday. Correct: “If you wrote an opinion every day, that would not be an everyday feat.”

Evident. See apparent.

Evoke, invoke. To “evoke” is to cause. To “invoke” is to ask for or use.

Ex-. See former.
Excuse. See apology.

Exist, subsist. One “exists” by being alive. One “subsists” on what one eats to stay alive. Correct: “To exist during court dates at 100 Centre Street, the prisoner subsisted on cold tea, cold pea soup, and cold bologna sandwiches.”

Expect. See anticipate.

Explicit, implicit. “Explicit” means “express,” “clear,” or “definite.” It does not mean “full” or “complete.” “Implicit,” the antithesis of explicit, means “implied.” It does not mean “empty” or “incomplete.” Some explicit advice: Use “express” or “implied,” which have not acquired colloquial meanings.

Expose. See disclose.

Express, expressed. To “express” means, pretentiously, to “say” or “write.” “Express” also means “clear” or “definite.” “Expressed” means “stated.” Correct: “New York State Unified Court System’s express policies are expressed in Title 22 of the New York Codes Rules and Regulations.”

Expressed. See express.

Factious, factitious, fractious. “Factious” is characterized by factions. “Factitious” means “artificial.” “Fractious” means “inclined to make trouble,” not “fractions.”

Factitious. See factious.

Falsehood, lie. A “falsehood” is untrue, intentional or not. A “lie” is an intentional falsehood. A lie is not a fiction; fiction does not pretend to be true.

Famous, infamous, notorious. All mean “widely known,” but “notorious” and “infamous” have negative connotations.

Farther, further. “Farther” refers to literal distance. “Further” refers to figurative distance and all senses but distance: “degrees,” “quantity,” “time.”

Feasible. See possible.

Feel, think. “Feel” indicates emotion or sensation. As a verb, to “feel” is to be aware of something instinctively rather than through experience or to be convinced of something emotionally rather than intellectually. Correct: “I feel for the witness.” Correct: “I feel I know who should win this case, but I cannot put my reasons into words.” “Feel” is not a synonym for “assert,” “assume,” “believe,” “conclude,” “contend,” “infer,” “submit,” or “think.” X: “How do you feel?” Y:
"With my fingers." A court cannot feel, and judicial opinions are better written when the judges do not write how they feel about a case. This is something to think about: Authors who write, “I do not think that the statement is true” suggest that they do not think, not that they believe that the statement is false. Write, “I do not believe that the statement is true” or, better, “I believe that the statement is false” or, best, “The statement is false.”

Few, fewer, less. Less is more: Use “less” for things that cannot be counted or which can be counted, but only as a group, not individually. Use “fewer” for things that can be counted individually. Correct: “Less sand; fewer grains of sand.” As a comparative, “fewer” means “a smaller number”: “fewer people.” As a comparative, “less” means “a smaller amount of”: “less pay.” “Fewer” is the correlative of “many.” “Much” is the correlative of “less.”

Fewer. See few.

Figuratively. See literally.

Flagrant. See blatant.

Flammable, inflammable. Both mean capable of being set on fire, but “flammable” is more popular. The antonym of both is “nonflammable.” Firesale advice: To be safe, use “combustible” and “noncombustible.”

Flaunt, flout. To “flaunt” is to show off. To “flout” is to scoff at.

Flay. To flay is to skin. Only metaphorically does it mean to criticize negatively.

Flounder. See founder.

Flout. See flaunt.

Forbid. Do not use “from” with “forbid.” “The court did not forbid defense counsel from contacting the witness.” Becomes: “The court did not forbid defense counsel to contact the complaining witness.”

Forego. See foregoing.

Foregoing, forego, foregoing, forgo. The “foregoing” is something that went earlier or has gone on before. “Forgoing” means “to give up.” Correct: “Forgoing the opportunity to make the lawyer read the entire opinion, the judge referred the lawyer to the foregoing.” Similarly, to “forego” is to precede in time and place. To “forgo” is to do without. Tip: When you mean “to do without,” do without the “e” in “forgo” and “forgoing.” Another tip: Most words that use the prefix “for-” mean “completely” or “against.” All words that use the prefix “fore-” mean “before.”
Foreword. A "foreword" is a preface written by someone other than the author of the text for which the foreword is written. It is not spelled "forward."

Forgo. See foregoing.

Forgoing. See foregoing.

Former, ex-, latter. The "former" refers to what went first. The "latter" refers to what came most recently. These words may refer to two things only. In a series of three or more, use "the first (thing mentioned)" and "the last (thing mentioned)." As a time concept, "ex-" refers to the immediately preceding; "former" refers to all but the immediately preceding. Incorrect: "Bill Clinton is a former President." As of October 2001, President Clinton is the ex-President. Correct: "Gerald Ford is [not was] a former President." The word "ex" may be used without a hyphen. Correct: "Fred is Gwendolyn's ex."

Forthcoming. "Forthcoming" means "about to appear" or to be "available when required or promised." To be "forthcoming" does not mean to be honest, helpful, or cooperative.

Fortuitous, fortunate. A "fortuitous" event is accidental or coincidental. "Fortunate" means "lucky."

Fortunate. See fortuitous.

Founder, flounder. To "founder" is to go lame, to sink, or to fail completely. To "flounder" is to stumble about clumsily.

Fractious. See factitious.

Fulsome, noisome. "Fulsome" is offensively excessive. "Noisome" is unpleasant, unwholesome, or dangerous. Neither word is complimentary, and neither necessarily refers to size or noise.

Further. See farther.

Genial. See congenial.

Genius. See authentic.

Genuine. See authentic.

Good, well. Use "good" to modify a noun—"I feel good about this opinion." Use "well" to modify verb or adjective—"I feel well enough to write an opinion today." Correct: "The law clerk did good things well." Do not use "good" as an adverb. "You write good." Becomes: "You write
well.” Do not use “well” as an adjective to mean “good.” “Your robes look well.” Becomes: “Your robes look good.”

Gourmand, gourmet. A “gourmand” eats a great deal of food of whatever quality. A “gourmet” is an epicure, a fastidious eater who appreciates fine food.

Gourmet. See gourmand.

Gratuitous. “Gratuitous” means “unwarranted,” “unnecessary,” or “undeserved.” It does not mean “free.”

Guilty, liable. “Guilty” carries a stronger connotation of blameworthiness than “liable.” One is guilty of a crime but liable for a civil wrong.

Hanged, hung. One is “hanged” by the neck. Something is “hung”: on the wall, a jury.

Healthful. See healthy.

Healthy, healthful. To be “healthy” is to be in good health. Something “healthful,” such as good food, can make people healthy. Correct: “The healthful food made me healthy.”

Historic, historical. “Historic” means “important in history.” “Historical” refers to history, such as a historical book, like the Gutenberg Bible, as opposed to a history book. Correct: “The historical popularity of the printing press comes from the historic Gutenberg Bible.” Note: “A,” not “an,” precedes historic and historical, each of which has an aspirated “h.”

Historical. See historic.

Hobson’s Choice. See Catch-22.

Hoi polloi. “Hoi polloi” are the common people, not the elite. It may be Greek to you, by the way, but “hoi” in Greek means “the.” “Hoi polloi” takes no “the.”

Hopefully. “Hopefully” means “with hope,” not “I hope.” “Hopefully I will do the right thing.” Becomes: “I will do the right thing, I hope.” Or “I hope I will do the right thing.” I am hopeful that you will remember this rule: “Abandon ‘hopefully’ all ye who enter here.”

Hung. See hanged.

If. See where.

If, whether. “If,” when compared with “whether,” means “if and only if.” “Whether,” when compared with “if,” means “whether or not.” Attorney: “Judge, please let me know if (or
whether?) you want me to brief the issue.” The “if” requests an answer only if the judge wants a brief. The “whether” requests an answer to the attorney’s question no matter what. Law clerk: “Your opinion writing will be competent if (or whether?) you practice writing.” For most people, it is “if.” Only stars write competently whether or not they practice writing.

Illegal. Anything against the law, including the civil law, is illegal. If you mean illegal in the penal sense, prefer “criminal” to “illegal.”

Illicit. See elicit.

Illusion. See delusion.

Immanent. See eminent.

Immens. See enormous.

Immigrate. See emigrate.

Imminent. See eminent.


Impel. See compel.

Impending. See pending.

Implicit. See explicit.

Imply, infer. To “imply” is to suggest or express indirectly. To “infer” is to surmise or conclude. The writer implies; the reader infers.

Important, importantly?—the former. The pretentious “more importantly” is grammatically incorrect, a hypercorrection.

Importantly. See important.

Impracticable. See possible.

Impractical. See possible.

In, into, in to. “In” means “within.” “Into” means “from outside to inside” or “from one point to another.” The “in” in an adverb-preposition combination modifies a verb. Correct: “While
drunk, Mr. X drove in his corvette. In his stupor he drove into a van. But he turned himself into an honest citizen by turning himself in to the police.”

Includes. See comprise.

Incredible. See credible.

Incredulous. See credible.

Individual. See people.

Indorse. See endorse.

Indubitably. See doubtless.

Induce. See compel.

Induction. See deduction.

Inequity, iniquity. An “inequity” is an inequality or unfairness in treatment. An “iniquity” is an evil deed.

Infamous. See famous.

Infer. See imply.

Inflammable. See flammable.

Informant, informer. The two are synonymous; both give information. But only an informer gives information to law enforcement. Some information: New York courts habitually call informers “informants,” as in “confidential informants,” because “informers” has a pejorative connotation.

Informer. See informant.

Ingenious, ingenuous, disingenuous. Something or someone “ingenious” is innovatively smart. Someone “ingenuous” is candid and guileless. “Disingenuous” people hide their feelings and thoughts. A “disingenuous” argument might be a correct argument, but it is not a candid argument.

Ingenuous. See ingenious.

Iniquity. See inequity.
Innumerable, numerous. Things “innumerable” can be counted, but only with great difficulty. “Innumerable” does not mean “countless.” “Numerous” means many.

Instinctive, intuitive. “Instinctive” behavior is inborn. “Intuitive” behavior is unreasoned. Correct: “After the witness instinctively blinked and swallowed, the trial judge intuitively suspected that the witness was lying.”

Insure. See assure.

Inter. See Intra.

In to. See in.

Into. See in.

Intra, inter. “Intra” means “within” or “inside.” “Inter” means “between” or “among.” An intramural Moot Court competition, for example, is a competition held within a school for students of that school only. An intermural Moot Court competition is held for students of more than one school.

Intuitive. See instinctive.

Invaluable. See valuable.

Invent. See discover.

Invoke. See evoke.

Involve. To “involve” means “to envelop.” It does not mean to “cause,” “concern,” “imply,” “mean,” “result in,” or “use.” Incorrect: “The case involved a civil-rights dispute.”

Irritate. See aggravate.

Jealousy. See envy.

Judicial, judicious. “Judicial” pertains to the judiciary. To be “judicious” is to be wisely cautious.

Judicious. See judicial.

Jurist. A “jurist” is someone well versed in the law. Not all judges are jurists, and not all jurists are judges.

Karat. See carat.
Last, latest. “Last” means “final.” “Latest” means “most recent.”

Latest. See last.

Latter. See former.

Lay. See lie.

Leave me alone, let me alone. “Leave me alone” means “leave me by myself.” “Let me alone” means “do not disturb me.”

Lectern, podium. Speakers put notes, and pound on, a “lectern.” Speakers stand on a “podium.” If you want a podium under your lectern, get a platform. Those who do not know the difference between these words should get off their pulpit.

Lend. See loan.

Lengthy, long. “Lengthy” refers to books, articles, talks, and arguments. “Long” refers to distance.

Less. See few.

Let me alone. See leave me alone.

Liable. See guilty.

Liable to, likely. Both mean “probably,” but “liable to” suggests negative consequences. Correct: “The plaintiff will likely go to trial. She is liable to lose the liability phase.”

Libel, slander. “Libel” is written defamation; “slander,” oral.

Lie, lay. To “lie” is to prevaricate or to recline or remain in one condition; conjugate—“I lie down,” “yesterday I lay down,” “I have lain down.” To “lay” is to place or produce; conjugate—“I lay down the papers,” “yesterday I laid the papers down,” “I have laid the papers down.”

Lie. See falsehood.

Like. See as.

Likely. See liable to.


Loan, lend. “Loan” is a noun. “Lend” is the verb. “Lend [not loan] me your ears.”

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Loath, loathe. To be “loath” is to be hesitant. To “loathe” is to hate. “I am loath to eat broccoli because I loathe broccoli.”

Loathe. See loath.

Logistic, logistics, logistical. “Logistic” is the adjective. “Logistics” is the noun, not the plural of “logistic.” “Logistical” is pretentious bureaucratese.

Logistical. See logistic.

Logistics. See logistic.

Long. See lengthy.

Low. See nominal.

Majority, plurality. A “majority” is a number greater than half. A “plurality” is the greatest number of votes, but less than half. “Majority” is not a synonym for “most” or “major.” Incorrect: “The law clerk spent the majority of her time drafting opinions.” Drafting might, however, have occupied most of her time, the major part of her time, or the majority of her hours.

Masterful. See masterly.

Masterly, masterful. Someone or something “masterly” has or contains the skills of a master. Someone “masterful” is powerful. Correct: “The masterful Chief Judge wrote a masterly opinion.”

May. See can.

May be, maybe, perhaps. “May be,” an adverb, means “is possibly.” Correct: “It may be that the court reporter is right. On second thought, maybe the court clerk is right.”

Maybe. See may be.

Mean. See average.

Median. See average.

Mediocre. See average.

Meretricious, meritorious. “Meretricious” means “obviously vulgar.” Something “meritorious” has merit.
Meritorious. See meretricious.

Meticulous, scrupulous. To be “meticulous” is to be fussy about small details. To be “scrupulous” is to handle details precisely and in a principled way.

Might. See can.

Militate. See mitigate.

Misinformation. See disinformation.

Mitigate, militate. To “mitigate” is to moderate or to alleviate. “Militate” is to have weight or effect, for or against. Correct: “The facts militate for mitigation of sentence.”

Mode. See average.

Momentarily. Something that happens “momentarily” happens for a fleeting moment. “Momentarily” does not mean “at any moment.”

Moot. See academic.

Mutual. See common.

Nauseated, nauseous. Correct: “I felt nauseated after I smelled the nauseous fumes of formaldehyde.” Not to repeat this ad nauseam, but it is incorrect to write, “I felt nauseous yesterday.”

Nauseous. See nauseated.


No doubt. See doubtless.

Noisome. See fulsome.

Nominal, low. How low can you go? A “nominal” amount is so low it is merely symbolic.

Nonsense. “Nonsense” is gibberish. Only colloquially does it mean “incorrect.” Incorrect: “Appellee’s argument is nonsense.” Correct: “Carroll loved to write nonsense: ‘Twas brillig, and the slithy toves/ Did gyre and gimble in the wabe: All mimsy were the borogoves/ And the mome raths outgrabe.’” (Lewis Carroll, Through the Looking Glass and What Alice Found There 18-19 [1946].)
Notorious. See famous.

Number. See amount.

Numerous. See innumerable.

Observance, observation, observed. “Observance” means “comply with” or “celebrate.” Correct: “In observance of its rules, the OCA allowed its nonjudicial employees to engage in the observance of New Year’s Day.” (Written without the nominalizations, that sentence should read, “To observe its rules, the OCA allowed its nonjudicial employees to observe New Year’s Day.”) A quick observation: “Observation” and “observed” mean “noting” or “seeing.” Correct: “The court officer made an observation in court after she observed the exhibit.”

Observation. See observance.

Observed. See observance.

Obsolescent, obsolete. Something “obsolescent” is becoming “obsolete.”

Obsolete. See obsolescent.

Obstacle. See impediment.

Obtuse. See abstruse.

Obvious. See apparent.

Omit. See delete.

Opaque, translucent, transparent. Light cannot shine through something “opaque,” and “opaque” people are obtuse. Light can shine through something “translucent,” but images cannot be perceived. Images can be seen through something “transparent,” and “transparent” people are frank and open.

Option. See alternate.

Oral, verbal. “Oral” refers to spoken communication. “Verbal” refers to any communication using words, as opposed to nonverbal communication.

Oriented. See oriented.
Oriented, orientated. “Oriented” is weak. Recast the sentence. “Orientated” is an unaccepted back-formation to some and an illiteracy to others.

Overlook, oversee. To “overlook” is not to notice. To “oversee” is to supervise. Correct: “The overseer overlooked something.”

Oversee. See overlook.

Paltry, petty, trivial. Something “paltry” is worthlessly small, especially compared to something else. “Petty” is used pejoratively. A “petty” thing or act is an unimportant thing or act. A “petty” person is narrow-minded. Something “trivial” is insignificant. Correct: “After defendant made a paltry contribution of $1.00 toward his $10.00 fine, a petty administrative-law judge resentsized him to pay $15.00 for committing a trivial offense on the subway.”

Parameter, perimeter. “Parameter” is a mathematical term that denotes a quantity that varies depending on conditions. Only colloquially does it mean “perimeter”: “boundary,” “extent,” or “limit.”

Partially. See partly.

Partly, partially. Unless idiom suggests otherwise, use “partly” to mean “in part.” “Partially,” like most adjectives that become adverbs (words that end in “ly”), are so prettified they look ugly. Especially avoid “partially” when that word is ambiguous: “The Appellate Division, Third Department, ruled partially for the appellant” might mean that the court was not impartial.

Party. See people.

Pending, impending. Something “pending” has not yet come or is not yet settled. Something “impending” adds a threat.

Penniless, penurious. To be “penniless” is to be poverty stricken. To be “penurious” is to be stingy.

Penultimate. “Penultimate” means “next to last.” It does not mean “ultimate” or “paramount.”

Penurious. See penniless.

People, persons, party, individual. Use “people” for individuals collectively. Use “persons” for a small and specific number of individuals. Does this compute? “Three people were in court, but two left. One person remained.” No. One “person” remained. Therefore, “three persons were in court.” And do you party? It is technically incorrect to refer to one litigant or person as a “party”—a party of one makes for a boring party—although this usage abounds in legal writing. “The party of the first part” is a legalism, and a stylistically incorrect one at that. Use “individual” to contrast one person with many. Do not use “individual” as a synonym for

Percent, percentage. Use percent with a number. Correct: “Exactly 99.999 percent of New York’s court attorneys are good at legal research.” Use “percentage” when a number is omitted. Correct: “What percentage of the judge’s opinions are decided within 90 days?” Neither “percent” nor “percentage” is spelled with two words in modern American English. Incorrect: “Per cent.”

Percentage. See percent.

Perhaps. See maybe.

Perimeter. See parameter.

Persons. See people.

Persuade. See convince.

Peruse. To “peruse” means “to read carefully,” not “to glance at.”

Petty. See paltry.

Place, put. To “place” is to “put” carefully.

Plead. See pleaded.

Plead ed, pled. The past participle of “plead” is “pleaded.” “Pled” is disfavored.

Plurality. See majority.

Podium. See lectern.

Possible, feasible, practical, impractical, practicable, impracticable. What is “possible” can and likely will happen. What is “feasible” or “practicable” is desirable and efficient and can be done easily. A person or thing can be “practical,” as opposed to “theoretical,” but only a thing can be “practicable.” “Practical” means “useful” or “sensible.” It refers to an actuality. “Feasible” and “practicable” refer to potential. Correct: “It is possible that you will find the Manual for Small Claims Arbitrators a practical guide. Reading it in time for your next court date is practicable.” Correct: “What is practicable is not always practical.”

Practicable. See possible.
Practical. See possible.

Precedence, precedents. "Precedents" are court decisions, whether binding, persuasive, distinguishable, on all fours, reversed, overturned, right, or wrong. Something given "precedence" has a priority in time or rank.

Precedents. See precedence.

Precipitant. See precipitate.

Precipitate, precipitant, precipitous. To "precipitate" is to cause something rashly. "Precipitant" and its adverb "precipitantly" stress the speed of "precipitate." "Precipitous" refers to physical steepness.

Precipitous. See precipitate.

Prescribe, proscribe. To "proscribe" is to prohibit. To "prescribe" is to require.

Presently. See currently.

Presume. See assume.

Pretense, pretext. A "pretense" is a pretending. A "pretext" is an excuse for doing or not doing something. Correct: "The police officer had a pretense to expertise when he testified that he knew what a pretextual arrest is."

Pretext. See pretext.

Prevaricate. See equivocate.

Price. See cost.

Principal, principle. As a noun, a "principal" is money or someone who either empowers an agent to agree to a contract or to commit a crime or who is first in rank. As an adjective, "principal" means "main." A "principle" is a basic truth, a fundamental law, a doctrine. Incorrect: "She is an effective principal court attorney." No, although she might be an effective principal court attorney if she has learned her legal principles and is ethically principled. Mnemonic: The school principal is your pal, and a principle, which means "a rule," ends in "le," like "rule."

Principle. See principal.

Prognosis. See diagnosis.
Promise. See assure.

Prone, prostrate, supine. Being "prone" is lying face down. Being "prostrate" is lying face down submissively or fearfully. (A "prostate" is a male body part; a man cannot have prostrate cancer, although the illness may cause him to become prostrate.) Being "supine" is lying face up.

Prophecy, prophesy. A "prophecy" is a prediction. To "prophesy" is to make a prediction. Correct: "Judge X tried to prophesy a prophecy: 'You will not be a prophet in your own country.'"

Prophecy. See prophecy.

Proposal, proposition. A "proposal" is an offer or plan that can be accepted or rejected quickly. A "proposition" requires study.

Proposition. See proposal.

Proscribe. See prescribe.

Prostrate. See prone.

Protagonist. See antagonist.

Proved, proven. "Proven" is disfavored in formal writing except to modify nouns directly. Thus, "Defendant was proved guilty," not "Defendant was proven guilty." Correct: "The assistant district attorney proved the guilt of defendant, a proven liar."

Proven. See proved.

Punctilious, punctual. "Punctilious" means "meticulous." "Punctual" means "on time."

Punctual. See punctilious.

Purposefully, purposely. To do something "purposefully" is to do it single-mindedly. To do something "purposely" is to do it intentionally.

Purposely. See purposefully

Rare, scarce. Things "rare" are forever in short supply. Things "scarce" do not have great value but are unavailable for the moment. Diamonds are rare; food might be scarce.

Rationalize. See reason.
Reason, rationalize. To “reason” is to use analytical skills. To “rationalize” is to find an excuse for something.

Recollect, remember. To “recollect”—re-collect—suggests searching the mind to remember. To “remember” suggests instant recall.

Recur, reoccur. Something that “recurs” happens repeatedly. Something that “reoccurs” is repeated once.

Refer. See allude.

Refute. See confute.

Regretful, regrettable, regrettably. A “regretful” person is full of regret. “Regrettable” refers to situations that cause regret. Judge X: “Regrettably, counsel’s papers muddied the issues.” Becomes: “The court regrets that counsel’s papers muddied the issues.”

Regrettable. See regretful.

Regrettably. See regretful.

Reluctant, reticent. To be “reluctant” is to be hesitant. It used to mean “obstinate.” To be “reticent” is to prefer not to speak.

Remainder. See balance.

Remember. See recollect.

Reoccur. See recur.

Replicate. See duplicate.

Reputation. See character.

Restive, restless. “Restive” is resistant or impatient. “Restless” is uneasiness of mind.

Resume. See continue.

Reticent. See reluctant.

Reveal. See disclose.

Reverse. See converse.
Revolt, revolution. A "revolt" is an uprising. A "revolution" is a successful revolt. Not a revolting development: "The American Revolution began as a revolt."

Revolution. See revolt.

Rudimentary, vestigial. Something is "rudimentary" if it appears at the beginning of an evolutionary process. Something "vestigial" is a trace of what is left at the end of the evolutionary process.

Same. See analogous.

Sanctimony, sanctity. "Sanctimony" is hypocritical holiness. "Sanctity" is holiness.

Sanctity. See sanctimony.

Scan, skim. To "scan" means "to scrutinize closely." To "skim" is not to "scan."

Scarce. See rare.


Scrupulous. See meticulous.

Sectarian, secular. "Sectarian" means "pertaining to religious groups." "Secular" means "not religious," "worldly."

Secular. See sectarian.

Semi-. See bi-.

Seminal. "Seminal" means "pertaining to semen" or "original." In legal writing, a "seminal case" is the original case on the subject.

Sensual. See sensuous.

Sensuous, sensual. Something or someone "sensuous" appeals to any of the five senses. "Sensual" refers to things sexual.

Ship. See boat.

Similar. See analogous.

Simulate. See dissimulate.
Site. See cite.

Skim. See scan.

Slander. See libel.

Some day. See sometime.

Some time. See sometime.

Someday. See sometime.

Sometime, some time, someday, some day. "Sometime" refers to an indefinite or future time. "Some time" refers to an amount of time or, if the object of a preposition, at a particular time. The same distinction applies to "someday" and "some day."

Special, especial. "Special" means "specific or particular." "Especial," a word not much in current use, means "outstanding." Correct: "Especial people teach special education."

Spectator. See audience.

Stationary, stationery. Something "stationary" does not move. "Stationery" is writing paper and envelopes.

Stationery. See stationary.

Stipulation. A "stipulation" is a formal agreement between litigants. Judicial opinions, statutes, and attorney's briefs do not "stipulate."

Strategy, tactics. A "strategy" is a plan. "Tactics" put the plan into effect.

Subsist. See exist.

Successive. See consecutive.

Supine. See prone.

Suspected. See accused.

Symbol. See emblem.

Sympathy. See empathy.
Tactics. See strategy.

Take. See bring.

Talk to, talk with. “Talk to” suggests advising or reprimanding. “Talk with” suggests a conversation between equals, with equal participation.

Talk with. See talk to.

Technology. See science.

Tenant, tenet. A “tenant” leases premises. A “tenet” is a doctrine a group accepts as true. Correct: “A tenet of New York landlord-tenant law is that nonpayment proceedings differ from holdovers.”

Tenet. See tenant.

Thankfully. Judge X: “Thankfully, counsel’s papers are excellent.” Becomes: “The court is thankful that counsel’s papers are excellent.”

Think. See feel.

Tortuous, torturous. “Tortuous” means “twisting and turning” or “devious.” “Torturous” means “pertaining to torture” or “painful.”

Torturous. See tortuous.

Toward, towards?—the former. The latter is the British variant, and American spelling is always simpler and shorter than British spelling. The same applies to “afterward” and “afterwards,” to “upward” and “upwards,” and to “onward” and “onwards.” A tip: Spell conventionally, but use the shorter variant when you have a choice. Thus, prefer “dissociate” to “disassociate.”

Towards. See toward.

Translucent. See opaque.

Transparent. See opaque.

Trivial. See paltry.

Un-. See dis-.

Undoubtedly. See doubtless.
Unidentified. See unknown.

Uninterested. See disinterested.

Unknown, unidentified. When referring to persons known or unknown, only hermits are unknown. Incorrect: “No arrest was made. The assailant is unknown.” Correct: “No arrest was made. The assailant was unidentified.”

Us, we. The Founding Fathers’ problem: Should they have written “We the people” or “Us the people”? Use “we” as a subject or a subject complement. Use “us” as an object. Correct: “We the people must form a more perfect union.” Correct: “They called on us the people to form a more perfect union.” We the people can therefore be grateful for what the Founding Fathers wrote for us in the preamble to the U.S. Constitution. And how about the toy store? The correct name should be Toys “R” Us. It is “We are Toys,” not “Us are Toys.”

Valuable, valued, invaluable. Something “valuable” has intrinsic or monetary worth. It is “invaluable” if it is priceless. Something or someone “valued” is held in high regard or appraised. Both valuable and invaluable mean “having great value.” Some valuable advice: Because valuable and invaluable are synonyms, not opposites, do not use “invaluable,” which many believe means “not valuable.” Correct: “The entire Official Law Reports series is both valued and valuable.”

Value. See cost.

Valued. See valuable.

Venal, venial. Someone “venal” is corruptible. Someone or something “venial” is forgivable.

Venial. See venal.

Verbal. See oral.

Vessel. See boat.

Vestigial. See rudimentary.

Virtually. See nearly.

Vocation. See avocation.

We. See us.

Well. See good.
When. See where.

Where, when, if. "Where" denotes a place. "When" denotes a time. Do not use "where" or "when" to define something. Recast the sentence to use "if." Also do not write, "The seminal case is Mollineaux, where the court held . . ." Write, "The seminal case is Mollineaux, in which the court held . . ."

Whether. See if.

While. See although.

While, a while. "While" refers to a period of time. Incorrect: "He wrote the opinion during the time that [should be while] he was in court." "A while" refers to a short period of time. Correct: "I will write for a while." Correct: "I will write awhile."

Worth. See cost.

Zeal, zest. To have "zeal" is to be eager. To have "zest" is to enjoy. Correct: "I have zeal about his zest for writing."

Zest. See zeal.
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<tr>
<th>The Mark</th>
<th>The Mark in Text</th>
<th>Explanation</th>
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<td>was not there; rather, she was</td>
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<td></td>
<td>The court declined the proposal</td>
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**Page 430-B**
XXI
RECOMMENDED READINGS ON OPINION WRITING


