

Fordham University School of Law

From the Selected Works of Hon. Gerald Lebovits

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Legal-Writing Myths

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THE
SCRIBES JOURNAL
OF LEGAL WRITING

Tribute to Beverly Ray Burlingame by
Bryan A. Garner

Articles by
Joseph Kimble
Kenneth A. Adams
Ross Guberman
Matthew R. Salzwedel
Kenneth Bresler

The "Best of"
Gerald Lebovits

SJLW

From the Editor

We've got an agenda. Just one. And it's right there in our back-cover manifesto: promoting better legal writing. Yet our manifesto also acknowledges the subject's breadth. The field of legal writing is expansive, and some of its not-so-far reaches touch the blurry edges of jurisprudential and political perspective. This volume reflects that; it contains some spirited entries with frank points of view. As you'll see, it all comes back to writing. And the frequent subtext is that inattentive (or untrained) drafting sometimes forces courts to make educated guesses.

A number of our authors examine judicial writing and decision-making, and their commentary ranges from the laudatory to the instructional to the critical. For our editorial staff, the sharper points posed a dilemma. The judiciary has long been a welcome and active partner in our mission. (Just check volumes 13 and 15.) But if there was occasional editorial discomfort over authorial candidness, we were even less comfortable censoring authors who've more than earned their lines in the legal-writing dialogue. We strove for a fair, even tone, but we did not mute our authors' voices.

Again, in the end, it all comes back to writing, and we welcome — encourage — submissions offering a different perspective on any point raised in this volume.

We lead with Joe Kimble's latest work, which takes on the canons of construction and textualism. Joe was the drafting consultant on the projects to restyle the Federal Rules of Civil Procedure and Evidence — projects meant to help judges and lawyers more easily extract meaning from the rules' text. So some may find it ironic that this plain-language lion now sinks his teeth into textualism, which was historically known as a "plain language" theory of jurisprudence and which still,

in its modern form, puts a premium on the words in the text.¹ Whatever your views, you'll find the article thought-provoking.

Drafting expert Ken Adams, a recent recipient of the Legal Writing Institute's prestigious Golden Pen Award, also advocates against a strict adherence to canons of construction. His petri dish is a federal case in which, he believes, a long-recognized canon produced mischief instead of genuine insight.

Stepping beyond the canons, our remaining authors offer a unique mix of style and content, including a bit of memoir, prophecy, Oscar Wilde wit, and praise for "impure" court opinions.

Ross Guberman, whose book *Point Made: How to Write Like the Nation's Top Advocates* has been something of a sensation, shares an excerpt from his forthcoming book, *Point Taken: How to Write Like the World's Greatest Judges*. The book advises judges on effective opinion-writing, and his article shows how and why some judges infuse breezy prose into their opinions.

Matthew Salzwedel, founder of the *Legal Writing Editor* and *Lawyerist* blogs, recounts his formative years while exploring the challenges faced by new legal writers. And he wonders whether the best educational innovation for today's students might be to restore some old-fashioned traditions.

Kenneth Bresler, who penned Massachusetts' first legislative-drafting manual (among other things), gives us a potpourri of sorts. He gazes into his crystal ball for a peek at legal language's future, advocates for a new entry in *Black's Law Dictionary*, and teaches us how to avoid those common, everyday redundancies that so frequently sneak into our prose.

We finish with the next installment of our "Best of" series, this time featuring short pieces by Gerald Lebovits. Judge

¹ See Ronald Turner, *Title VII, the Third-Party Retaliation Issue, and the "Plain Language" Mirage*, 5 Ala. C.R. & C.L. L. Rev. 77, 82 (2013); Jonathan T. Molot, *The Rise and Fall of Textualism*, 106 Colum. L. Rev. 1, passim (2006).

Lebovits is a frequent contributor to the *New York State Bar Association Journal*, in which he offers practical advice shaped by his years as a legal reader and writer. He has written many pieces worthy of inclusion here, but we've picked our favorite favorites.

Besides these articles, you'll find a few items of special note. First, we take a moment to remember Beverly Ray Burlingame, whose passing touched so many Scribes members. Her name and work will always be associated with this publication, and it's an association that we wear with pride.

You'll also notice a page (the back inside cover, actually) thanking the law firms whose generous financial contributions helped make this volume possible.

Let me thank our new assistant editor, Laurel Romanella, for her hard work. And my thanks to Joe Kimble and Ray Ward for their usual editorial excellence. As always, we thank Karen Magnuson, the world's finest copyeditor. And thank you, Cindy Hurst, for your eagle eyes.

Finally, I offer special thanks to our dedicated (and remarkably tolerant) typesetter, Patricia Schuelke. Thank you, Trish. After all, you make the *Journal*.

— Mark Cooney

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Legal-Writing Myths

Gerald Lebovits

Don't begin a sentence with *And* or *But*. Never end a sentence with a preposition. Splitting an infinitive is always bad. And those are just some of the grammatical myths that many lawyers still believe in. This article explores some of my favorite fallacies about legal writing.

Myth #1. Literary style isn't important in legal writing.

Reality: You can't be a great lawyer, whatever your other qualities, unless you write well. As Fordham Law School's former Dean explained, "Without good legal writing, good lawyering is wasted, if not impossible."¹ Imperfect writing leads to imperfect results: "[A]bout as many cases are lost because of inadequate writing as from inadequate facts."²

Legal educators agree on little. But many agree that legal writing is the most important skill that future lawyers must acquire.³ Legal ethicists have their debates. But they agree that legal writing must be competent.⁴

¹ John D. Feerick, *Writing Like a Lawyer*, 21 Fordham Urb. L.J. 381, 381 (1994).

² Tom Arnold & Jack C. Goldstein, *Persuasion in Brief and Oral Argument*, 350 Prac. L. Inst./Pat. 921, 925 (1992) (quoting Robert L. Simmons, *Trials to the Court*).

³ See, e.g., Task Force on Law Schools and the Profession: Narrowing the Gap, Am. Bar Ass'n, *Legal Education and Professional Development — An Educational Continuum* 264 (July 1992), available at http://www.americanbar.org/content/dam/aba/publications/misc/legal_education/2013_legal_education_and_professional_development_maccrate_report.authcheckdam.pdf (suggesting that law schools must make a more "concerted effort" to teach writing at a higher level).

⁴ See, e.g., Debra R. Cohen, *Competent Legal Writing — A Lawyer's Professional Responsibility*, 67 U. Cin. L. Rev. 491 (1999).

Style is important. If good legal writing is critical to effective client representation — and it is — then style is critical to good legal writing. A brief 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.”⁵ Good style for lawyers is that writing “should be *constructed* with good words, not plastered with them.”⁶

Those who assume that style is unimportant see legal writing as complicated dos and don’ts. The rules confound us, although the toughest are rules of legal style and general usage, not rules of grammar. To compose effectively, you don’t need to know every rule, which can be learned one by one anyway. Nevertheless, the sooner you learn the rules, the better. After legal style comes literary style, and “with some talent and practice, it’s not hugely difficult for a master of legal style to get comfortable with literary style.”⁷

Myth #2. Creativity is the essence of good legal writing.

Reality: Except in hard cases, the law doesn’t reward creativity. It rewards logic and experience. Justice Oliver Wendell Holmes once wrote that “the law is not the place for the artist or the poet. The law is the calling of thinkers.”⁸ Thinkers follow format; they adhere to court rules. They don’t invent new methods of legal writing or argue positions that lack support.

Lawyers must rely on precedent. A scientist who invents a novel approach is an innovator. Not so the lawyer. Imagine,

⁵ Am. Bar Ass’n, Sect. on Jud. Admin., Comm. Rpt., *Internal Operating Procedures of Appellate Courts* 31 (1961).

⁶ Bernard E. Witkin, *Manual on Appellate Court Opinions* § 103, at 204–05 (1977) (emphasis in original).

⁷ John Lovell, *Literary Lawyers*, 17 Me. B.J. 217, 217 (2002).

⁸ G. Edward White, *Justice Oliver Wendell Holmes: Law and the Inner Self* 211 (1993).

in response to a judge's question "What's your authority for that?," you say: "It's my invention. No one ever thought of that before I did." Your creativity will go unappreciated.

Legal writers gain nothing by reinventing the wheel. The most they can do is to urge a change in the law that only legal authority itself can justify.

Myth #3. Good legal writers write for themselves.

Reality: Good legal writers write for their readers: "[E]ffective writers do not merely express, but transform their ideas to meet the needs of their audience."⁹

In a brief, the audience is the judge, not the client or opposing counsel. To write persuasively, a lawyer must grab the judge's attention quickly, argue concisely, and express clearly the relief sought. Techniques that fail with judges:

- throwing in the kitchen sink instead of picking winning arguments and developing them;
- attacking opposing counsel and other judges (even when they deserve it);
- offering up a historical treatise instead of arguing an issue;
- writing facts in a conclusory way;
- using adverbs and adjectives instead of nouns and verbs;¹⁰
- using intensifiers and qualifiers;¹¹

⁹ Nancy Soonpaa, *Using Composition Theory and Scholarship to Teach Legal Writing More Effectively*, 3 J. Legal Writing Inst. 81, 91 (1997).

¹⁰ Peter D. Baird, *Persuasion 101*, 15 Experience 26, 28 (Fall 2004) ("Use nouns and verbs to show rather than adverbs and adjectives to tell because 'He raced his Cadillac at 98 miles per hour' is stronger than 'He drove his vehicle dangerously and at a reckless rate of speed.'").

¹¹ Adverbial intensifiers like *certainly*, *obviously*, and *undoubtedly* weaken writing, and the same is true for adjectives that prop up nouns or other adjectives. See

- shouting at readers with false emphatics like italics, underlining, bold, or capitals;¹²
- failing to apply law to facts;
- overstating anything — because understatement is a key to persuasion;
- using long quotations or, worse, misquoting and misciting;
- forgetting to open with an orientation, or road map, to tell readers where they're headed; and
- dwelling on givens.

Dwelling on givens fails with nonjudges as well. An associate writing to a partner specializing in an area of law shouldn't include every step in the analysis. The partner will understand the writing in its legal context.¹³

But if your audience is unknown, “assume that your readers will be generalists unversed in special technicalities.”¹⁴ That way you'll address not only lawyers and judges, who are familiar with legal technicalities, but also nonlawyers, who appreciate writing that they understand.

Brendan T. Beery, *Some Particularly Useless Words*, 82 Mich. B.J., July 2003, at 56, 57. (quoting Stephen King, *On Writing: A Memoir of the Craft*, 125 (2000)) (“I believe the road to hell is paved in adverbs, and I will shout it from the rooftops.”); *id.* (quoting William Strunk Jr. & E.B. White, *The Elements of Style* 73 (4th ed. 2000)) (“*Rather, very, little, pretty* — these are the leeches that infest the pond of prose, sucking the blood out of words.”).

¹² Jonathan Byington, *How to Make Your Appellate Brief More “Readable,”* 48 Advocate (Idaho) 17, 18 (July 2005).

¹³ Diana V. Pratt, *Legal Writing: A Systematic Approach* 210 (1989).

¹⁴ Bryan A. Garner, *The Elements of Legal Style* 181 (2d ed. 2002).

Myth #4. Writing a lengthy brief is harder and takes more time than writing a short one.

Reality: Writing something short, concise, and pointed 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.”¹⁵ Although it’s more difficult to write something short and concise, courts need short and concise writing.¹⁶ A lengthy brief suggests that a lawyer didn’t do “‘enough work on the finished product.’”¹⁷

Myth #5. Know everything about your case before you begin to write.

Reality: Some argue that “[a]n effective brief is fully thought through before a word is set to paper.”¹⁸ But you’ll never start to write, or you’ll start to write the night before your brief is due, if you insist on knowing everything before you begin. The key is to know everything by the time you’re done. You can always change focus in midstream, especially if you compose on a computer. Outlining in advance and constant editing will control your writing.

¹⁵ *Hayes v. Solomon*, 597 F.2d 958, 986 n.22 (5th Cir. 1979) (quoting Blaise Pascal, *Provincial Letters: Letter XVI* (Dec. 4, 1656) (English translation)).

¹⁶ See *Commonwealth v. Angiulo*, 615 N.E.2d 155, 168 n.17 (Mass. 1993) (quoting Joseph R. Nolan, *Massachusetts Practice: Appellate Procedure* § 24, at 11 (1991)) (“An attorney should not prejudice his case by being prolix. . . . Conciseness creates a favorable context and mood for . . . judges.”).

¹⁷ Tom Goldstein & Jethro K. Lieberman, *The Lawyer’s Guide to Writing Well* 157 (2d ed. 2002) (quoting Richard Emery).

¹⁸ Judith S. Kaye, *Effective Brief Writing* § 2:27.70, at 109, in 1 John W. Cooley, *Callaghan’s Appellate Advocacy Manual* (Lawyer’s ed. 1992).

Myth #6. Outlining increases the workload. It's just one more thing to do.

Reality: Organizing before writing avoids problems. One problem is not including important information: “A gap in your logic caused by poor organization can give your opponents an opening for attack.”¹⁹ Another is repetition. The key to organization is to say it once, all in one place. Organizing before writing lets you focus on what to say and how to say it.

One form of organization is a written outline. It “not only provides the organization necessary to complete a complex writing task, but serves as a perpetual reminder of the ‘big picture.’”²⁰ Organizing by outline conserves energy, especially if the case is complicated.

For lawyers who think visually, a diagram or flowchart will work. And brainstorming works for lawyers who have many ideas but can't connect them.

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

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

Myth #7. Finish early.

Reality: Start early — and edit late. Your labor will be more efficient if you start writing before facts and argument get cold in your mind. Starting early lets you start over if you learn new facts, develop a new argument, or realize that you went down

¹⁹ Veda R. Charrow, Myra K. Erhardt, & Robert P. Charrow, *Clear and Effective Legal Writing* 141 (4th ed. 2007).

²⁰ Toni M. Fine, *Legal Writers Writing: Scholarship and the Demarginalization of Legal Writing Instructors*, 5 J. Legal Writing Inst. 225, 236 (1999).

the wrong path. Then take the time and make the effort to edit until your work is due. Editing reflects pride of authorship and an understanding that “something as trivial as a typographical error can detract from the message.”²¹ So spell-check every time you exit your file. Edit carefully on a hard copy as well. “Readers expect a level of competence, care, and sophistication in writing. When those elements are missing, the writer presumably does not possess the necessary legal skills or fails to display consideration for his audience.”²²

Myth #8. Legal writing is subjective. Lawyers see so much bad writing, they’ve little incentive to improve their own writing.

Reality: Objective standards determine whether legal writing is good. People disagree mainly about the less-important aspects of legal writing. Precisely because so much legal writing is poor, lawyers should strive to write well. Poor writing goes unread or is misunderstood. Good writing is appreciated. Great writing is rewarded lavishly.

Perfection in writing is impossible. But perfection should be the goal, so long as perfection doesn’t interfere with a deadline. Poor legal writing might result in an injustice for a client: a judge might misunderstand what a lawyer is seeking; an adversary might seize on an ambiguity. To avoid these problems, strive for perfection.

Myth #9. Good legal writers rarely need time to edit between drafts.

Reality: According to William Zinsser, “A clear sentence is no accident. Very few sentences come out right the first time, or

²¹ Bryan A. Garner, *An Approach to Legal Style: Twenty Tips for the Legal Writer*, 2 *Scribes J. Legal Writing* 1, 34 (1991).

²² Martha Faulk, *The Matter of Mistakes*, 13 *Perspectives* 28 (Fall 2004).

even the third time.”²³ Put your project aside a few times while you write and edit. You’ll catch mistakes that you didn’t see earlier and make improvements that you might not have thought of earlier. Read aloud: “By relying on your ear — not just on your mind’s ear — for guidance, you will also find more ways to improve your phrasing.”²⁴ Self-editing requires objectivity. If you have an editor, take advantage. Welcome suggestions gratefully and think about them, even if you ultimately reject them. Editors, unlike some writers, always consider the only one who counts: the reader.

Myth #10. No one cares how you cite, so long as your citations can be found.

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

Some judges and law clerks insist that they don’t care 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 couldn’t care less about lawyers’ citations say so for one or more false reasons: as code to suggest that they’re so fair and smart, they can see through the chaff to let only the merits affect their decision-making; because they themselves don’t know the difference between good citing and bad; or to communicate their low expectations of the lawyers who appear before them. Many judges and law clerks do tolerate improper citation.

²³ William Zinsser, *On Writing Well: The Classic Guide to Writing Nonfiction* 9 (7th ed. 2006).

²⁴ Garner, *An Approach to Legal Style: Twenty Tips for the Legal Writer* at 34.

But you should make the effort to cite properly, for yourself and your client. Improper citations detract from your credibility. And citing improperly won't give you the chance to persuade now and use your citations as future references. Citing properly "dictates that you include the information your readers need to evaluate your legal argument."²⁵ Use citations to strengthen, not lengthen, your writing, and use pinpoint citations to refer your readers to the exact page at which your point is made.

Conclusion

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

²⁵ Stacey L. Gordon, *Legal Citation in Montana: Teaching Lawyers the Proper Format*, 28 Mont. Law. 7, 8 (Sept. 2002).

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The Scribes Journal of Legal Writing seeks to promote better writing within the legal community. Because the field is so broad, the *Journal's* contents are purposely eclectic. We hope to appeal to all with an interest in improving legal writing, whether in the courthouse, the law office, the publishing house, or the law school.

The writing in the *Journal* should exemplify the qualities we advocate: lucidity, concision, and felicitous expression. Meanwhile, we hope to spread the growing scorn for whatever is turgid, obscure, and needlessly dull.