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Legal-Writing Myths—Part I

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Legal-Writing Myths — Part I

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 myths folks ask lawyers to generally put up with. This two-part column explores The Legal Writer's favorite fallacies.

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 ex-Dean Feerick 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 they all agree that legal writing is the most important skill future lawyers must acquire.[3] Legal ethicists have their debates. But they all agree that legal writing must be competent.[4] From University of Michigan Professor Cooper: "One of the singular distinctions of the legal profession is that lawyers have but one tool — language."[5]

Style is important. If good legal writing is critical to effective client representation — and it is — 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."[6] Good style for lawyers is that writing "should be *constructed* with good words, not plastered with them."[7]

Those who assume that style is unimportant see legal writing as complicated do's and dont's. The rules confound us, although the toughest are rules of legal style and general usage, not rules of grammar. Anyone who can speak English, though, can write English. 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."[8]

You don't 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 needn't know the difference between syntax — the order of words in a sentence — and the parts of speech. With study, practice, and the right attitude, you can write as comfortably as you drive. Experienced motorists drive without thinking about every part of an engine. To fret constantly about an engine is never to arrive at the destination, or never to be happy with the trip. To fret constantly about usage is never to finish a document, or never to be happy with it.

Myth #2. 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 only 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 #3. Write in a comfortable setting. Then finish a section before you take a break.

Reality: These are matters of personal preference. But most people find writing difficult. You'll finish faster and more concisely if you write in an uncomfortable setting. Justice Holmes, who suffered from knee injuries, wrote standing at a high desk. He said, "If I sit down, I write a long opinion and don't come to the point as quickly as I could." Ernest Hemingway, who wrote to the bone, also often wrote while standing.[9]

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, do so at a time and place with few distractions.

Myth #4. Reread your writing soon after you submit it.

Reality: The time to edit your writing is before you submit it.

Rereading what you've written months later helps measure progress. Rereading something right after you submit it leads to frustration. Lawyers' egos are wrapped up in their writing, and nothing can be improved after it is

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submitted. As Chief Justice Marshall wrote, "The past cannot be recalled by the most absolute power."[10]

It's difficult to edit your work. To overcome that difficulty, distance yourself from your work. Doing so will make you objective and allow critical self-editing.[11]

Myth #5. 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 Holmes once wrote that "[t]he law is not the place for the artist or poet. The law is the calling of thinkers."[12] 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, 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 reinventing the wheel. The most they can do is urge a change in the law that only legal authority itself can justify.

Myth #6. 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."[13]

Lawyers, who write different documents for different audiences, must identify their audience. In a brief, the audience is the judge, not the client or opposing counsel. To write persuasively, a lawyer must grab a judge's attention quickly, argue concisely, and express clearly the relief sought. Techniques that fail with judges are

- 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;[14]
- using intensifiers and qualifiers;[15]
- shouting at readers with false emphatics like italics, underlining, bold, and capitals;[16]
- not applying fact to law;
- overstating anything, because understatement is a key to persuasion;
- using long quotations or, worse, misquoting and misciting;
- not opening with an orientation, or roadmap, 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.[17]

If your audience is unknown, "assume that your readers will be generalists unversed in special technicalities."[18] That way you'll address not only lawyers and judges, who are familiar with legal technicalities, but also nonlawyers, who appreciate writing they understand.

Myth #7. Boilerplate is good.

Reality: Many legal-writing professors give students model briefs to imitate. That's fine if students will copy format and see which techniques work and which fail but counterproductive if they pattern ideas on them. Allowing imitation gives "the erroneous impression that the writing process is separate from the thinking process and divorced from the analytical process."[19] A lawyer's real work is researching and fact-gathering. Thus, "most of [the] writing effort . . . is done out of a sense of requirement on behalf of the client ('this needs to be in writing'), not of opportunity on behalf of the writer ('since I need to think this out clearly, I will write it out')."[20]

To communicate research and fact to a judge, a client, or another lawyer, the lawyer must excel in legal writing. Writing is linked to thinking: "As you draft a legal document, you will find that the process of putting your thoughts in writing will sharpen and deepen your understanding of the analysis . . . ."[21] Boilerplate forms speed mundane, routine work. They offer elements that a legal document must include. And they show required office or court format. But relying on them for an important or complex case can lead to malpractice.

> You'll never start, or you'll start the night before your brief is due, if you insist on knowing everything before you begin.

Myth #8. 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."[22] Although it's more difficult to write something short and concise, courts need short and concise writing.[23] A lengthy brief suggests that a lawyer didn't do "enough work on the finished product."[24]

Myth #9. If you have little to say about something, even something important, don't devote much space to it.

Reality: If you've nothing to say, or nothing good to say, don't 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."[25] But something that must be communicated will get lost if little space is devoted to it. Because many courts enforce page limits on lawyers' briefs, ensure that each word tells and that every sentence expresses something important. Expand your important points to give them the stress they deserve. And never take shortcuts at the expense of clarity.[26]

Myth #10. 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."[27] 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.

Lawyers and judges worry about different things. Judges don't stay up nights wondering how a lawyer should argue a case. Lawyers don't have to worry about deciding a case correctly. This means in a persuasive brief that you, as the advocate, should spot issues and apply and argue fact and law to those issues — and not think about stuff over which you've no control. If you argue issues and not case law or theory, you'll see that unless you're arguing before a high appellate court, you don't have to understand every nuance to get started and make your best case persuasively and ethically. Just pick your issues and figure out what facts, rules, and citations go with each issue.

Stay tuned for Part II of this column. Until then, turn myth into reality. ■

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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.*, Am. Bar Ass'n, 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).

4. *See, e.g.*, Debra R. Cohen, Competent Legal Writing — A Lawyer's Professional Responsibility, 67 U. Cin. L. Rev. 491 (1991).

5. Frank E. Cooper, Writing in Law Practice 1 (1963).

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

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

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

9. Kent Haruf, Writers on Writing, *To See Your Story Clearly, Start by Pulling the Wool over Your Own Eyes*, N.Y. Times, Nov. 20, 2000, at E1, col. 1 (noting also that John Cheever wrote in his underwear and Thomas Wolfe over a refrigerator).

10. *Fletcher v. Peck*, 10 U.S. [6 Cranch] 87, 135 (1810).

11. For a self-critiquing method, see Mary Beth Beazley, *The Self-Graded Draft: Teaching Students to Revise Using Guided Self-Critique*, 3 J. Legal Writing Inst. 175 (1997).

12. Oliver Wendell Holmes, *quoted* in Case & Comment 16 (Mar./Apr. 1979).

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

14. 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.'").

15. Adverbial intensifiers like "certainly," "obviously," and "undoubtedly" weaken writing. As Stephen King explained, "I believe the road to hell is paved in adverbs, and I will shout it from the rooftops." Brendan T. Beery, *Some Particularly Useless Words*, 82 Mich. B.J. 56, 57 (2003) (quoting Stephen King, On Writing 125 (2000)). The same is true for adjectives that prop up nouns or even other adjectives: "*Rather, very, little, pretty* — these are the leeches that infest the pond of prose, sucking the blood out of words." *Id.* (quoting William Strunk, Jr. & E.B. White, The Elements of Style 73 (4th ed. 2000)). Adverbial qualifiers like "generally," "traditionally," and "usually" are similarly harmful. They show a hesitant and doubtful writer. Make definite assertions. It's better to be wrong than cowardly.

16. Jonathan Byington, *How To Make Your Appellate Brief More "Readable,"* 48 Advocate (Idaho) 17, 18 (2005).

17. Diane V. Pratt, Legal Writing: A Systematic Approach 210 (1989).

18. Bryan A. Garner, The Elements of Legal Style 177 (1991).

19. Pamela Lysaght & Christine D. Lockwood, *Writing-Across-the-Law-School Curriculum: Theoretical Justifications, Circular Implications*, 2 J. Ass'n Legal Writing Directors 73, 95 (2004) (footnote omitted). Of course, legal-writing teachers are damned no matter what. Some first-year students will complain if they get models. Others will complain if they don't. Still others will complain about the models they get if they get any.

20. George D. Gopen, *The Professor and the Professionals: Teaching Writing to Lawyers and Judges*, 1 J. Legal Writing Inst. 70, 80 (1991).

21. Charles R. Calleros, Legal Method and Writing 9 (4th ed. 2002).

22. Blaise Pascal, Provential Letters xvi (*quoted in Hayes v. Solomon*, 597 F.2d 958, 986 n.22 (5th Cir. 1979) (Hill, J.), *cert. denied*, 444 U.S. 1078 (1980)).

23. "An attorney should not prejudice his case by being prolix. . . . Conciseness creates a favorable context and mood for . . . judges." Joseph R. Nolan, Massachusetts Practice: Appellate Procedure § 24, at 11 (1991) (*quoted in Commonwealth v. Anguilo*, 615 N.E.2d 155, 169 n.17 (Mass. 1993) (Liacos, J.)).

24. Tom Goldstein & Jethro K. Lieberman, The Lawyer's Guide to Writing Well 157 (2d ed. 2002) (quoting New York City lawyer Richard Emery).

25. James Russell Lowell (*quoted in* William H. Ginsburg, Winning Strategies and Techniques for Civil Litigators, Prac. L. Inst./Ref-Civlit. § 7.6, at 231 (2001)).

26. Strunk & White, *supra* note 15, at 79.

27. Judith S. Kaye, *Effective Brief Writing* § 2:27.70, at 108, 109, *unpublished paper printed in* 1 John W. Cooley, Callaghan's Appellate Advocacy Manual (Lawyer's ed. 1992) (*quoted in* Albert M. Rosenblatt, *Brief Writing and Oral Argument in Appellate Practice*, 24 Trial Lawyers Q. 22, 22 (1994)). Truly talented writers like Judges Kaye and Rosenblatt are able to think through writing before beginning to compose. Mortals like me, and perhaps you, are better off just starting to write.

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