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Free at Last from Obscurity: Clarity—Part I

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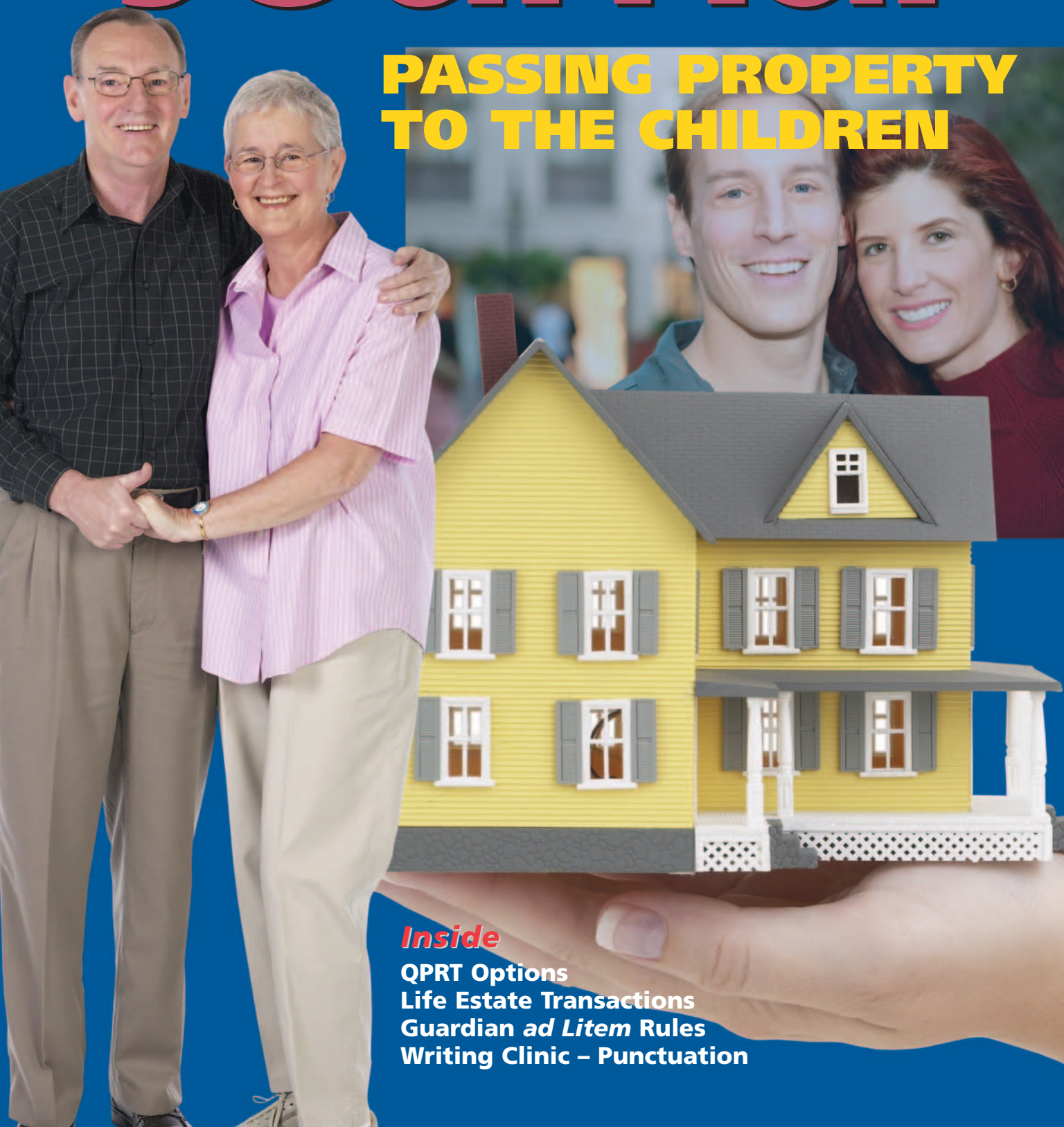

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THE LEGAL WRITER

Free at Last From Obscurity: Clarity

BY GERALD LEBOVITS

The most challenging and enjoyable part of legal writing is the prewriting phase, when the writer sorts out how to express and argue fact and law. The most boring part is the editing phase, when the writer clarifies sentences, paragraphs, and sections.

The boring editing phase explains why clear legal writing isn't 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."[1]

Writing clearly is critical. Above all else, the lawyer must be understood. This two-part column discusses that tedious but essential part of legal writing: clarity.[2]

• Write only if you have something to say. Simplify your writing 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 didn't.)

• In general, don't 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. Don't simply write that exceptions exist. If you don't 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 won't understand you if you discuss the terms of a contract before you establish that the parties have 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, legal writers should define references: "George W. Bush, the President of the United States." Unattributed references and allusions should be used only if the writer is certain that the reader will comprehend them immediately.

But allusions done well can be brilliant. Alluding to President Lincoln's Gettysburg Address, for example, the Reverend King said, on the steps of the Lincoln Memorial, "Fivescore years ago, a great American, in whose symbolic shadow we stand today, signed the Emancipation Proclamation."[3]

• Dovetail (a type of segue) to connect one sentence or paragraph to the next: Move from old to new, from short to long, and from simple to complex.

• State the point before you give the details, raise the issue before you answer it, and answer before you justify.

• Address threshold issues before you address the merits.

• Recite the facts, state the law, and 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 you discuss what that person or entity did or didn't do. Give the full names of people and entities the first time you mention them. Use a short-hand variant thereafter. Similarly, familiarize the reader with the concept before you discuss it, familiarize the reader with the case before you draw an analogy or distinguish it, and define technical terms as you use them.

Legal writers must prefer directness and clarity to politesse.

• Keep related matters together. Then say it once, all in one place.

• Begin with an effective introduction, or roadmap, that summarizes your case and the legal principles. Use small-scale transitions — concepts and words — to link sentences, paragraphs, and sections together. Use topic sentences and thesis paragraphs. Assure paragraph coherence by topic and person. Move logically from one sentence, paragraph, and section to the next.

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• If you must use acronyms, define them.

• Give a full citation before you give a short-form citation.

• Put the parts of each sentence in logical order.

• 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; no restrictions regarding its use have been placed on anyone else.

• Make comparisons complete and logical.

• Make your presentation pleasing to the eye, but write for the ear, not 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, "Good legal writing should never leave the reader puzzled or guessing."[4]

• 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."

• 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 don't 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, legal writers must prefer directness and clarity to politesse. Readers should debate as little as possible the meaning of a judicial opinion or a statute. Example: "Defendant is entitled to a fair trial." *Becomes*: "The People must turn over all 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."[5]

• Use headings and subheadings to break up the text of an argument 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. Legal writing 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 to amuse. In *Young v. Lynaugh*,[6] the court opined that "the state has played procedural football" in a case in which the 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.*,[7] the court created a reason to compose 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 to be clear, concise, and subtle. Avoid 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 ("automobile," *not* "transportation"; "wrote a letter," *not* "contacted"). The more concrete the writing the better ("1966 souped-up Corvette," *not* "automobile"). Phrases should also be concrete: "After the accident, plaintiffs sought justice" *becomes* "Johnny Smith's parents sued Jones in Part C after Jones's 1966 souped-up Corvette struck 5-year-old Johnny, who was riding his tricycle on a sidewalk in Central Park."

• Feature the subject. Most sentences have 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 needn't be featured when the reader knows what or who the subject is or when the writer must write a memorable slogan. Example: "The monarchy should not be allowed to tax us unless we can elect our own representatives." *Becomes*: "No taxation without representation."

Next month: This column continues with plain language, punctuation, and writing like Hemingway.

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1. Correspondence of Mr. Justice Holmes and Lewis Einstein, 1903–1935, at 21 (James Bishop Peabody ed. 1964).
2. Judicial writing, like all legal writing, must also strive for clarity: "The 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).
3. Reverend Dr. Martin Luther King Jr., "I Have a Dream," August 28, 1963.
4. Irving Younger, Persuasive Writing 82 (1990).
5. Griffin B. Bell, *Style in Judicial Writing*, 15 J. Pub. L. 214, 215 (1966).
6. 821 F.2d 1133, 1134 (5th Cir.) (Goldberg, J.), *cert. denied*, 484 U.S. 986 (1987).
7. 650 F.2d 724 (5th Cir. 1981) (Goldberg, J.).