If I Were a Lawyer: Tense in Legal Writing

Gerald Lebovits
THE ROLE OF RHETORIC

Rhetoric is the art of ruling the minds of men.
-Plato

Rhetoric is the art of transaction as if it were a free play of the imagination.
-Immanuel Kant

Rhetoric is nothing but reason well addressed and argument put in order.
-Jim Komoroski

For rhetoric, he could not open his mouth, but out there flew a trope.
-For all a rhetorician's rules
-Teach nothing but to name his tools.
-Samuel Butler

The duty and office of Rhetoric is to apply Reason to Imagination for the better moving of the Will.
-Francis Bacon

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**If I Were a Lawyer: Tense in Legal Writing**

**BY GERALD LEOVITS**

Timing is everything. At least in the foreseeable future, those who forget the past are doomed to be made redundant by it. Is repeating the past a bad thing? Not if you want to be current with the law. This column will presently present readers with some presents about the present—all to help with the here and now.

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, immutable 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 dependent clause:** “Albert Einstein proved that E equals mc².”
- **Past fact, permanent truth not in dependent clause:** “Albany was where the late Chief Judge Albert Conway 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.” *Tense shift:* “When the Wall Street partner learned how to use e-mail, she gets frustrated.” (Shift from past tense to present tense.) *Becomes:* “When the Wall Street partner learned how to use e-mail, she got frustrated.”

- **Discard the double past:** “I was a former prosecutor.” *Becomes:* “I am a former prosecutor.” Or “I was a prosecutor.”

**Using Has and 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 brief” refers to something begun in the past but which recently concluded. Use “We finished the brief” 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 rock band 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” or, best, “I must get you into my life.”

Got grammar? “I have got no memory for case law” becomes “I have no memory for case law.”

Correct use of “having done,” from Kafka: “Someone must have traduced Joseph K., for without having done anything wrong he was arrested one fine morning.”

**Using Was and 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.”

**State permanent, immutable truths in dependent clauses in the present tense.**

“If I were a rich man . . . . [read: I am a poor man].” (From Tevye, in Fiddler on the Roof.)

Simon & Garfunkel used poetic license but erred in their hit, “Homeward Bound.” They should not have sung, “I wish I was homeward bound.” Because they wanted to go homeward but were not traveling in that direction, they should have sung, “I wish I were 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 attorney was [not were] not at her desk, she was probably in the library.”

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Shall and Will

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 brief tomorrow.” In all other persons, “will” is used to express a prediction or intention: “They will write their briefs tomorrow.”

Similarly, “should” is used in the first person to express a preference: “I [or we] should like to write the brief tomorrow.” “Would” is used in all other persons to express a preference: “They would like to write their brief 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 legal writing, “will” will do and “would” should suffice.

Cardozo Law School Professor Weisberg gives the following “if . . . then” subjunctive and conditional constructions: 3

- “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 could be reasonable” (subjunctive present) “then plaintiff will prevail” (future).
- “If the court were reliable” (subjunctive past) “then plaintiff would stand a chance” (conditional).

Time Frames

From the Department of Redundancies Department. Temporal redundancies: “Am (is, are) going to” becomes “will.” “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.”

Currently, presently. Currently means now. Presently means soon. It is redundant to use the present tense is, am, or are with currently. Excise accordingly: “[Currently] I am an associate.” Soon after you learn this rule you will cut currently presently. A tip: Use now or soon rather than the pretentious currently or presently.

“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.”

As the Chinese proverb teaches, “The best time to plant a tree is ten years ago. The second best time is today.” Unless you’re past your prime, therefore, there’s no time like the present to stop tense structure from tending you up. You can set your clock by that. Being current with the past is not passé. It used to be, but that’s behind us now.

1. Isn’t this phrase an oxymoron? The future is unforeseeable.