SECOND EDITION

WRITE BETTER
TRAIN BETTER
MENTOR BETTER

Legal Writing Pro Resources

Ross Guberman
President, Legal Writing Pro

Table of Contents

About This Book

Happy legal writers are like professional house painters.

A professional wouldn't start your job by slopping paint on the walls "just to get it done."

Nor would a professional painter stare at your room as an artist might, paralyzed with anxiety about the interplay of natural lights and various shades of blue.

Instead, the professional painter would arrive at your house confidently, ring the doorbell, and know exactly what's going to happen and in what order before the work even begins.

I seek a similarly reliable writing system for you, whether you're a lawyer or work with lawyers.

At Legal Writing Pro, I try to make legal writing fun and productive, not intimidating and idiosyncratic. My goal is to find empirical answers to all questions and to share proven solutions to all challenges.

Inside, you'll find many practical tips and insights to help you along that path.

About Ross Guberman

Ross Guberman is the president of Legal Writing Pro LLC, a training and consulting firm. He has conducted more than a thousand programs on three continents for many of the largest and most prestigious law firms, for federal judges, and for dozens of government agencies and bar associations.

Ross is also a Professorial Lecturer in Law at The George Washington University Law School, where he teaches a seminar on drafting and writing strategy.

Ross holds degrees from Yale, the Sorbonne, and the University of Chicago Law School.

Ross's *Point Made: How to Write Like the Nation's Top Advocates* became an Amazon bestseller shortly after it was published by Oxford University Press in 2011. Reviewers have praised it as a "tour de force," "a must for the library of veteran litigators," and "an indispensable tool" filled with "practical, trenchant advice." His next book will be on how to write like the world's greatest judges.

An active member of the bar, Ross is also a former professional musician, translator, and award-winning journalist. After the federal takeover of Fannie Mae in 2008, *Slate* magazine called his 2002 article about the company "totally brilliant and prescient." In her 2011 bestseller *Reckless Endangerment*, *New York Times* business columnist Gretchen Morgenson called the article "groundbreaking" and said that it "made even the most jaded Washingtonian take note."

Ross has commented on business, law, writing, training, and lawyer development for newspapers, radio stations, and television networks. Among the major international conferences he has addressed are the American Society for

Training & Development, the NALP's Annual Education Conference, the Professional Development Consortium, the Professional Development Institute, and the Association for Continuing Legal Education.

The American Society for Training & Development awarded Ross its Certified Professional in Learning and Performance™ credential for passing a rigorous eight-part test and for creating a standardized writing assessment that he has since administered to more than a thousand lawyers.

A Minnesota native, Ross lives with his wife and two children outside Washington, DC.

About Legal Writing Pro

My interactive programs are short on generalities and long on specific tips and examples. Participants spend at least half their time writing, editing, or otherwise interacting. I also work with my clients to tailor each program to their specific needs.

Participants often say that my half-day programs are the best training they've had at their firms or agencies. In fact, more than 99 percent of participants recommend the workshops to colleagues.

At the same time, my programs are challenging; I don't engage in short-term crowd-pleasing gimmicks like distributing examples of horrible writing or sharing war stories or video clips that have no learning component.

Here's a taste of what participants have said about the Legal Writing Pro line-up: "empowering," "practical," "engaging," "immediately applicable," "extremely helpful," "compelling," "simply outstanding," "fresh, timely," "fun," "fabulous," "sophisticated."

And here are some sample comments from my clients: "exceptional and consistent," "high marks from 100% of the participants," "professional and engaging," "extremely creative," "first-class learning experience," "rave reviews," "proven programming with proven results."

For hundreds more endorsements, please visit my website (www.legalwritingpro.com) and my LinkedIn profile.

Programs and Services

Summer Associates

- Summer Associate Package

New Attorneys

- Start Off Strong

Attorneys

- Four Steps to Standout Legal Writing
- Point Made: How to Write Like the Nation's Top Advocates
- Advanced Transactional Drafting
- Advanced Regulatory Writing
- Advanced Legal Editing
- Writing About the Law
- Winning Feedback

Judges

- Secrets of Great Opinion Writing

Non-US Lawyers

- Transatlantic Communications
- Transpacific Communications

Individual Attorneys

- 360° Writing Prescription Package
- Full-Day Writing Clinic

Business Staff and Corporations

- Email, Business Writing, and Litigation Basics

Law Firm Clients

Akin Gump
Allen & Overy
Alston & Bird
Andrews Kurth
Arent Fox
Arnold & Porter
Axinn, Veltrop & Harkrider
Baker & McKenzie
Baker Botts
Baker Donelson
Baker Hostetler
Benesch
Bennett Jones
Blackwell Sanders
Blank Rome
Bodman
Brown Rudnick
Buchanan Ingersoll
BuckleySandler
Clark Hill
Cleary Gottlieb
Clifford Chance
Connolly Bove
Cooley Godward Kronish
Covington & Burling
Crowell & Moring
Cuneo Gilbert & LaDuca
Davis Polk
Davis Wright Tremaine
Day Pitney
Dechert
Dewey & LeBoeuf
Dickstein Shapiro
DLA Piper
Dow Lohnes

Law Firm Clients

Dykema
Faegre & Benson
Fenwick & West
Fish & Richardson
Fitzpatrick Cella
Foley Hoag
Fox Rothschild
Freshfields Bruckhaus Deringer
Frost Brown Todd
Fulbright & Jaworski
Gardere
Gibbons
Goodell, DeVries, Leech & Dann
Goodwin Procter
Greenberg Traurig
Gunster, Yoakley & Stewart
Harter Secrest & Emery
Herbert Smith
Hirschler Fleischer
Hogan Lovells
Holland & Hart
Hunton & Williams
Jenner & Block
Jones Day
K&L Gates
Katten Muchin Rosenman
Keller and Heckman
Kelley Drye
Kilpatrick Stockton
King & Spalding
Kramer Levin
Loeb & Loeb
Manatt, Phelps & Phillips
Maslon
Mayer Brown

Law Firm Clients

McDonnell Boehnen
McGuireWoods
McKenna Long & Aldridge
Milbank
Miles & Stockbridge
Miller & Chevalier
Morgan Lewis
Nelson Levine de Luca & Horst
Nelson Mullins
Nixon Peabody
O'Melveny & Myers
Oppenheimer
Orrick
Patton Boggs
Paul Weiss
Pepper Hamilton
Pillsbury
Polsinelli
Quarles & Brady
Reed Smith
Reinhart
Robins, Kaplan, Miller & Ciresi
Ropes & Gray
Schiff Hardin
Sedgwick
Seyfarth Shaw
Shearman & Sterling
Sheppard Mullin
Shook, Hardy & Bacon
Sidley Austin
Simpson Thacher & Bartlett
Skadden
Snell & Wilmer

Law Firm Clients

Sonnenschein
Spriggs & Hollingsworth
Steptoe & Johnson
Sterne Kessler Goldstein Fox
Stinson Morrison Hecker
Strasburger
Sutherland
Thompson Coburn
Van Ness Feldman
Venable
Vinson & Elkins
Watt, Tieder, Hoffar & Fitzgerald
Weil, Gotshal & Manges
White & Case
Whiteford, Taylor & Preston
Wiley Rein
Wilkinson Barker Knauer
Williams Mullen
Willkie Farr & Gallagher
WilmerHale
Wilson Sonsini
Winston & Strawn
Womble Carlyle
Young Conaway

Corporations, Agencies, Bar Associations, Public Interest Clients

Alaska Attorney General's Office
AllianceBernstein
Apple
California Attorney General's Office
Colorado Bar Association
District of Columbia Bar
Department of Defense
Department of Education
Department of Health and Human Services
Department of Justice
Department of Transportation
Eighth Circuit Judicial Conference
Eleventh Circuit Judicial Conference
Environmental Protection Agency
Federal Aviation Administration
Federal Communications Commission
Federal Judicial Center
Federal Labor Relations Authority
The Hartford
Indian Health Service
Kingdom of Bhutan
Life Technologies
Marriott
Massachusetts Attorney General's Office
Minnesota CLE
Missouri Bar Association
Monroe County Bar Association
National Association of Attorneys General
New Jersey Attorney General's Office
New Mexico State Bar
New York City Bar
NFL Players Association

Corporations, Government, Bar Associations, Public Interest Clients

North Carolina State Bar
Office of Military Commissions
Ohio State Bar Association
Oregon State Bar
Qwest
Securities and Exchange Commission
Siemens
Social Security Administration
Virginia CLE
Western District of Pennsylvania
Wisconsin State Bar

Introduction

Why Johnny, Esq., Can't Write: Ten Causes and Ten Solutions

At 4:06 a.m., John Associate looks at his email to Jane Partner, attaches his 23-page summary judgment motion, and hits "Send." He rubs his eyes and smiles proudly. Then he crawls into bed. He goes to the office six hours later. Jane's return email is waiting for him. Her first comment at the top of the page catches his eye: "Good start. Too long. Analysis confusing. Hard to follow. Can you redo by the end of the day?"

"Just who does she think she is?" John fumes. For the past two weeks, he had pushed everything aside for this motion. The research was impeccable, the argument clever and assertive. Besides, everyone has always told him what a great writer he is. He sure has the resume of one: *summa cum laude* in English from Cornell, a prestigious journal at Columbia Law, plaudits all through school. The firm must have agreed. Jane and her fellow partners appeared to love his writing when he was a summer associate. "And this was so much better!" he thinks.

On the red-inked pages of John's would-be masterpiece, you can find two of the great mysteries of law firm life. First, why do associates see writing as their greatest strength, while partners often consider it the associates' greatest weakness? Second, if partners are such great writers themselves, why can't they teach associates to produce drafts that make partners happy?

As a professional-development expert, seeing one associate after another who has writing problems, you've probably pondered these same mysteries yourself. The good news is, you can do a lot to improve associates' writing. But let's first consider the bad news: the many reasons why law firm writing is such a tough skill to master.

Ten Causes

1. **A cursed genre**. As a famous law school dean once said, "There are two things wrong with almost all legal writing. One is its style. The other is its content." Indeed, you couldn't find a better recipe for bad prose than legal writing: Start with dry subject matter, mix in dense and abstract legal standards, and add endless citations and quotations from writing that's not so terrific in the first place. It's no wonder that many of us lawyers struggle to make our writing readable and clear.

2. **Confident in all the wrong places**. Associates consider themselves smart, and they believe that smart people write well. So while they'll concede that they need to learn how to take depositions or to negotiate stock-purchase agreements, they don't expect to devote much of their career to perfecting their writing skills. Yet "writing needs improvement" figures on evaluations of even the best associates.

3. **The limits of law school**. The standard research-and-writing course that law schools offer to first-year students is too ambitious. Professors are expected to teach students how to reason, how to cite, how to conduct online research, and how to incorporate cases and secondary authorities. They must also teach students what a legal memorandum and an appellate brief look like, and they must introduce the basics of oral advocacy. Little time remains for style, structure, or any of the other skills so dear to law firm supervisors' hearts. Yet many new associates believe that

their legal writing training is finished simply because they took the same introductory course everyone else did and then churned out a few papers or a journal article.

4. **"Look how smart I am."** Many associates see writing projects as a chance to show partners how much research they have done. But partners don't want to see the work that went into the memorandum; they want to see a solution to the problem on their desk. Nor do partners want the intellectual pontification that many associates include to make themselves look clever.

5. **"Who wants to be plain?"** In the words of a Wisconsin judge, "Great legal writing does not sound as though it was written by a lawyer." The "Plain English" movement arose from such sentiments, and it has done wonders for legal writing. But when associates hear partners say "use plain English," they think that means "dumb everything down." And so they resist. In some cases, they fill their prose with jargon, legalese, and 50-cent words that only obscure their points. In other cases, they use abstract, ponderous language because they're not sure what their points are in the first place. In the process, they misunderstand the message of the Plain English movement: that crisp, clear, uncluttered prose allows readers to focus on substance rather than form.

6. **Scoring points on the page.** Law school exams reward students for spotting issues—for what educators call "ideational fluency." But law firms reward associates not for spotting problems, but for solving them. Partners want associates to distill complex ideas and cut to the chase. One of the most frequent complaints I hear from partners, in fact, is that associates' drafts read like an answer to a law school exam. Many associates take years to make this shift from law school writing to law firm writing.

7. **Priorities out of whack.** Associates obsess over idiosyncratic style differences among partners ("Does she like 'notwithstanding' or 'despite'?"). That wouldn't be a problem if associates didn't spend so little time worrying about the 95 percent of writing traits that all partners want to see improved: cluttered prose, awkward clauses and sentences, rambling structure, faulty usage, ineffective use of authorities.

8. **"Beneath my pay grade."** Many associates tell me they see themselves as "idea people." Because of the way law firms are structured, however, they should first try to be detail people. Many partners at elite firms say that usage and grammar mistakes are among the most common flaws they see in associate work product. Even more complain about typos and proofreading errors. The causes of these are many. Law school professors rarely penalize students for mechanical errors. High schools and colleges no longer teach grammar. Many associates believe that support staff or other attorneys will correct their citation and proofreading errors. And let's face it: Today's computer, email, and instant messaging culture doesn't encourage polished prose.

9. **"You call that feedback?"** Partners play their own role in associates' writing problems. In most firms, "feedback on writing" means two things. On day-to-day projects, a partner often marks up drafts so ferociously that the associate has no way to make sense of the edits: Which changes matter most? What messages should I remember for the next project? At evaluation time, many partners veer to the other extreme, offering such vague pronouncements as "Your writing needs improvement" or "Your arguments need to be better organized." Unless the partner offers specific solutions, such advice generates much anxiety but little growth.

10. **"Why even bother?"** Associates often have a passive-aggressive approach to mark-ups. Like many of us, when they say they want feedback, what they really want are compliments. So when assignments come back drowning in red ink, associates become defensive. They tell themselves the changes are arbitrary or, what's worse, that there's no point in working hard on drafts because the partner will change everything anyway.

Ten Solutions

You can meet these challenges on many fronts. Some creative solutions you can carry out alone; for others you'll need support from partners and from the associates themselves.

1. **What is "writing" anyway?** Help your firm define what "writing" means in each practice area. Partners agree more than you might think when you ask them to break down "writing" into specific, trackable skills. Ask your firm's partners for the three or four writing skills they'd most like to see improved, then communicate the results to your associates. You can predict what you're likely to hear: cutting clutter, drafting active sentences and clauses, streamlining structure, incorporating authorities, and proofreading.

2. **Evaluating without tears**. Hearing "your writing needs improvement" is painful and unhelpful. Develop a better form for feedback on writing projects. When associates get mark-ups, you want them to focus on writing techniques they can use the next time, not on their supervisors' style quirks or on pronouncements about their talents. Most partner changes fall into four distinct categories: stylistic (cutting clutter and making provisions and sentences more forceful); structural (staying on message and using authorities effectively); mechanical (wording, usage, and formatting); and substantive (understanding nuances in the law and

making judgment calls about which arguments are best). Using a form that encourages partners to put their feedback into these categories will help them provide the editing guidance associates need.

3. **Do you follow me?** Collections of model agreements and litigation documents are overrated. Unless the firm explains exactly what makes each model a model, the associates will simply copy or guess. Ask your most dedicated partners to annotate model documents in their practice areas with clear, practical advice. *What* makes the heading good? *Why* is the indemnity clause drafted this way?

4. **Stop usage fights**. Get every associate a legal usage manual. Attorneys waste too much time arguing over usage issues and correcting common errors. Unless your firm has its own style manual, buy every lawyer a good desktop guide. The best all-purpose reference is Bryan Garner's *A Dictionary of Modern Legal Usage*, now in its third edition. For corporate attorneys, consider the second edition of Kenneth Adams's *A Manual of Style for Contract Drafting*, published by the ABA.

5. **I'll scratch your back**. Encourage associates to seek feedback from peers. Most of us are better editors than writers. Associates should consider asking one another to review drafts before sending them up the food chain. Even if the "editors" can't bill the time, trading drafts is a great way to build skills and relationships.

6. **Give me five!** Encourage partners to follow the "five-minute rule." If an associate has billed more than 20 hours for a project, urge the partner to sit down with the associate for five minutes to go over big-picture writing issues rather than simply review the individual changes on the draft. You may think that five minutes isn't very long, but it's better than nothing, which is how much face-to-

face mentoring most associates get after they turn in a writing assignment.

7. **The perfect partner program.** In the best in-house programs I've seen, partners sit down with the associates in their practice group and go over a document point by point. In a corporate department, for example, partners lead a discussion on why each contract provision is there and why each reads as it does. This approach is much better than the typical one-hour lunch meeting during which the partners speak in generalities about good writing or simply tell war stories.

8. **So what do you want me to do about it?** Urge partners to tell associates what they should do, not how their writing should be. Although telling associates to "be concise" or to "be clear" may sound helpful, it is not. Much better advice: "Cut 10 percent of your words by deleting unnecessary adjectives and adverbs," or "Start by listing three specific reasons why the judge should grant the motion."

9. **Triage time.** Discourage everyone from dwelling on idiosyncratic tics. You can attack this problem on two fronts. Try to get partners to distinguish between their favorite wording quirks and the make-or-break writing skills that their clients need. If they say, "But everything I want is important," remind them that if associates are left to choose, they will focus on subjective wording preferences and ignore what matters most. Urge the associates themselves to divide mark-ups into two groups: (1) changes that are idiosyncratic or cosmetic and (2) changes that are stylistic or substantive. Associates should keep a running list of changes in the second group to refer to for all future assignments. Of course, if several partners make the same edits, associates should add them to their list even if they think they are idiosyncratic.

10. **A fresh voice.** Go outside the firm when necessary. If you want to book an external writing workshop, look for an interactive course that's short on generalities and long on specific tips and examples. Make sure the associates will spend at least half their time writing, editing, or otherwise interacting. If you're looking for a long-term curriculum, a good start would be an overview program for new associates, practice-specific workshops for midlevels, and then a supervising and editing course for senior associates. For associates with serious writing problems, group courses aren't enough. Seek one-on-one coaching as needed, but make sure the associate has committed to a specific plan for working with the consultant on long-range goals, not on next week's memo deadline.

Concluding Words

As the famous litigator Floyd Abrams once said, "The difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being." Law firm writing is always a sensitive topic, all the more so when associates and partners disagree so vehemently about the quality of associates' writing skills. That said, by encouraging your colleagues to provide better models, practical guidance, and detailed feedback, you can boost morale, spur associate development, and help all attorneys produce the sort of writing that their clients and judges will appreciate.

Ross Guberman, "Why Johnny, Esq., Can't Write: Ten Causes and Ten Solutions," *Professional Development Quarterly*, Nov. 2006.

Write Better

Start with a Bang

No Time for an Opus: Write Well in Year One

Congratulations! As a new lawyer, you're about to fulfill many people's dream: to work as a well-paid professional writer. Now for the less good news. At most law firms, the associates think writing is their greatest strength, while the partners think writing is the associates' greatest weakness.

As a writing consultant and trainer for dozens of AmLaw 100 firms, I spend my time helping associates prove those partners wrong. I ask what the partners want to see in work products—and then give associates practical advice on how to deliver. Here are some tips to help you start your first year strong.

1. **You wanted what?** Amid the hustle and bustle of law firm life, supervisors often forget to relay key information about assignments. If you ask the right questions, though, you can avoid the most common misunderstandings: (1) how long the work product should be, (2) how much time you should spend on it, (3) whether the firm has another document you can use as a model, (4) what format the assignment should take, and (5) what the assigning attorney will do with your project once you submit it.

2. **Don't be a stranger.** After you've worked on a project for several hours, call or email your supervisor to explain where things stand and what questions about the project remain. Communicating in this way will also help you

focus your thoughts and avoid drowning in the details of your research.

3. **Easy does it.** If you have writer's block, rather than stare at a gaping blank screen in a growing state of paralysis, tell yourself that you're allowed to handwrite only four sentences about whatever issue you need to address. Your writer's block will disappear—and you'll also have the basis for a solid big-picture structure. Type those four sentences on your screen, and go from there.

4. **Descend from the clouds**. According to partners, many new associates err by trying to show off their newfound legal lexicon or intellectual firepower. No one cares if your work product is "impressive" in the abstract. Instead, when supervisors review your work, they're asking themselves whether what you've written can help solve a problem, change someone's mind, or get the client's job done. Everything on the page should be there for the reader, not for the writer.

5. **Take a stand.** When drafting memos, avoid the navel-gazing "on the one hand, on the other hand" approach that often characterizes junior associate work. Also avoid the saw that "the law is unclear." That's why the assigning attorney needs a memo! Use your judgment to make the law clear—or at least clearer. Try to deduce trends in the law or at least explain why courts or regulators disagree.

6. **Remember the sweet spot of style**. In the words of a Wisconsin judge, "Great legal writing does not sound as though it was written by a lawyer." Indeed, as attorneys gain confidence and experience, their sentences become lighter and tighter—less "lawyerly" and more refreshing. Here's the truth: If readers don't understand your sentences, they won't find your prose "interesting" or "complex," as many associates would hope. Instead, they'll assume you are a poor writer—or worse, a poor thinker. By

contrast, if readers feel smart when they read your writing, they'll think you are smart. No partner or judge has ever said, "Terrific brief. I see the issues clearly and understand how to resolve them. I just wish the attorney had used bigger words and longer sentences."

7. **Trim is in**. With every assignment, put aside time to cut needless words, phrases, and constructions. If you ruthlessly cut these, you'll rarely have to cut substance. Your writing will also have a high bang-per-buck ratio—which will make the reader believe that every word counts.

8. **Don't stand on authority**. When it comes to statutes, case law, and regulatory orders, describe less and analyze more. Explain how the authorities help make your argument or support your conclusions. Don't focus on what the parties did or even what the court or agency "stated" about each issue. In other words, get beyond copying and summarizing; connect your authorities to your analysis so the reader doesn't have to do this for you.

9. **Use the one-minute rule**. Do you want one structure rule that will help make partners happy? Move your conclusions to the front! A partner who will read 300 pages to learn how a murder mystery resolves will still refuse to wade through 10 pages to find out whether collateral estoppel applies. Before submitting any assignment, print it and then read it as if you were the assigning attorney. After the first few paragraphs, stop and ask yourself, "Have I answered the key question that prompted this assignment?" If the answer is no, draft a new opening that starts with your bottom line and saves the details for later.

10. **Does anal-retentive have a hyphen?** You don't want to learn the hard way how much partners care about typos and other errors. To avoid mishaps, try proofreading from the last sentence to the first. And check every document for the most common mistakes: *it's* versus *its*, *affect* versus

effect, and *principal* versus *principle*, just to name a few. If you have any usage questions, look up the answers in a reliable authority (that doesn't include Google, by the way). Also read your final edit aloud: You'll catch many mistakes, and if you ever run out of breath halfway through a sentence, you'll know that sentence is too long.

11. **Find strength in numbers**. Most of us lawyers are better editors than writers. Consider asking your colleagues to review your drafts before you send them up the food chain. Even if the "editors" can't bill the time, trading drafts is a great way to build skills and relationships.

12. **You're perfect, now change**. Consider feedback a gift. Some associates want to challenge their assigning attorney's edits. Others become defensive or throw up their hands. Using criticism to your advantage can be as important as writing well in the first place. Maintain a single document for the changes supervisors make during your early years at the firm. You may want to divide these edits into four groups: stylistic (cutting clutter and making sentences more forceful); structural (staying on message and using authorities effectively); mechanical (wording, usage, and formatting); and substantive (understanding nuances in the law and making judgment calls about which arguments are best).

13. **Realize when it's triage time.** Don't obsess over idiosyncratic style differences among partners ("Does she prefer 'on the part of' or 'on its part'?"). Wording preferences are fun to track, but partners are not always consistent. In any event, it's better to spend your time on the 95 percent of writing traits that all partners want to see improved: cluttered prose, awkward clauses and sentences, rambling structure, faulty usage, ineffective use of authorities.

14. **Enjoy the happy days.** Law firm writing is more skill than talent, more science than art. Consider your projects an outgrowth of what first brought you to the profession. As a lover of language, you should enjoy polishing your style and mastering even the most subtle usage rules. As a lover of thinking, you should enjoy turning scattered factoids and research threads into a well-honed analysis. Put another way, the more your projects are a pleasure to write, the more they'll be a pleasure for your supervisors to read.

Ross Guberman, "Not the Time for an Opus," *Legal Times*, Oct. 1, 2007.

Memos That Matter

1. **Serve the meat first.** Make sure the "question presented" and "brief answer" include enough key facts to stand alone. These sections should tell the reader what happened, what the legal issue is, and how you resolve it.

2. **The 60-second rule.** If someone found your memo on the floor, would he or she grasp the problem and the solution after reading a page or two? Few memos pass this test.

3. **Cut the self-reference.** Avoid this sort of drivel: "This memo will first discuss X, but because the memo is not supposed to rely too much on X, the memo will then discuss Y at great length based on my current research as it stands to date." Just declare which issues matter—and then tackle them succinctly.

4. **Rich headings.** Headings should convey your conclusions much as newspaper headlines do. Avoid asking questions or merely announcing a topic. Readers love substantive headings, but these will also help you focus your sections on practical points rather than on legal issues in a vacuum.

5. **Today's rule, not yesterday's case.** The biggest flaw in most memos is excessive reliance on cases. The reader does not want to wade through dozens of case summaries, each analogized or distinguished methodically and in isolation. Instead, use your judgment to derive take-away principles that supervisors can apply to their clients' problems.

Three Ways to Save Research Time and Money

Many attorneys waste time hunting for the law in all the wrong places. I asked Ellen Callinan, a top legal research expert, for tips on streamlining the process. Here are three of her suggestions.

1. **Stand on the shoulders of giants.** Don't reinvent the wheel when researching well-trodden issues such as privilege, expert disclosure, and collateral estoppel. Start with a print treatise before you even consider expensive online research. Consult a librarian or a law school research guide to identify the best titles, such as Edna Epstein's *The Attorney-Client Privilege and the Work-Product Doctrine*.

   If you prefer to start online, try a free—but vetted—Web encyclopedia, such as the legal section in Answers.com or Cornell's Wex site. If you search "collateral estoppel," for example, on these sites, you'll get short summaries, more search terms, cites to major cases, and cross-references to related issues.

2. **Crack down on the law.** When working with regulatory matters, resist the urge to dive into the case law. Start with an annotated statute, where you'll find the text of the statute and its history; cites related statutes, regulations, articles, and treatises; and annotations of court and agency decisions.

   You should also find out the popular name that serves as insider shorthand for complex regulatory regimes. If you use that name in an online search, you'll save time and get more precise results. Searching "Superfund" or "CERCLA" is much cleaner than searching "(prohibit! require!) AND (closed abandon!) AND hazardous waste sites."

3. **Follow the chain.** A key way to save money and time is to target a recent, binding case from the highest court in your jurisdiction. Before you can find such a case, though, you have to know the court structure. In New York, for example, the New York Supreme Court is not the top of the heap; you need a Court of Appeals decision to make it there.

   A good resource: the latest edition of *Nation's Court Directory* from WANT Publishing. You'll find graphs that show you how the courts are structured in each jurisdiction. You'll discover where disputes originate and how they get appealed. You'll also learn the names and numbers of key court personnel.

Did Strunk and White Give "Stupid Advice"?

April 2009 marked the fiftieth anniversary of the publication of *The Elements of Style*, a beacon for generations of lawyers. How did the linguist Geoffrey Pullum celebrate?[1] By calling Strunk and White "grammatical incompetents" whose beloved book does "real damage" through its "atrocious" advice.

Guilty as charged?

Count One

The authors' attempt to discredit the passive voice is "either grammatically misguided or disingenuous," part of "the book's toxic mix of purism, atavism, and personal eccentricity."

My Verdict: Mixed

In legal writing, as in all professional writing, overusing the passive voice will make your writing wordy and abstract.

You can use the passive sometimes: when the actor is self-evident or unimportant ("The motion was denied") or when you want to keep the subject the same throughout the sentence ("The regulation applies to hedge funds, but it has yet to be tested by the courts").

Otherwise, favor the active voice, as Strunk and White suggest.

That said, I do agree with Pullum that some of Strunk and White's examples are misleading, if not "misguided." Pullum is outraged that *The Elements of Style* suggests changing "There were a great number of dead leaves lying on the ground" to "Dead leaves covered the ground."

Pullum's complaint: The first version isn't passive—it's just weak. Fair enough, but Strunk and White's advice—favor active transitive verbs and avoid weak openers such as "there were"—still holds. As the authors note, strong verbs will make your writing "lively and emphatic."

Count Two

The authors' preference for nouns and verbs rather than adjectives and adverbs is a "mysterious decree" whose motivation is "unclear."

My Verdict: Not Guilty

Pullum has some fun here, citing Strunk and White's use of the phrase "weak or inaccurate noun" to show how they allegedly violate their own anti-adjective advice. Yet "weak" and "inaccurate" are objective adjectives that tell you something specific about the noun "noun." No writing experts, including Strunk and White, object to qualifiers such as those.

But for all other qualifiers—particularly those that modify limp nouns or verbs—Strunk and White are right. In fact, one of the best ways to improve your writing is to change adverb-verb or adjective-noun combinations into more precise verbs or nouns.

So, for example, when Pullum claims that *The Elements of Style* has "significantly degraded" American students' grasp of grammar, he might have said instead that the book has "destroyed" it. And when he says that Strunk and White fail to notice their own "egregious flouting of" their book's rules, he might have accused them of failing to notice their own "breach."`

Count Three

The authors engage in "an unnecessary piece of bossiness" when they claim that you should avoid splitting infinitives unless you want to stress the adverb.

My Verdict: Not Guilty

Strunk and White have it right here as well. Many experts have tried to lift the split-infinitive ban. After all, famous writers have been splitting infinitives since the fourteenth century, as our two criticized authors acknowledge. And the main case for the ban—that Latin infinitives are just one word—is hardly persuasive.

Even so, in a 1988 survey, only 50 percent of the American Heritage Dictionary Usage Panel allowed splitting infinitives with one adverb, as in "The move allowed the company to legally pay the employees severance payments," and almost no members of the panel allowed a split with more than one adverb ("to gradually, systematically, and economically relieve this burden"). Many, though not all, contemporary usage manuals agree with the naysayers.

I'll echo Strunk and White here: In this conservative profession, you should avoid splitting infinitives in general, though you can do so for clarity ("Plaintiff failed to properly allege damages") or for emphasis ("To boldly go where no court has gone before").

Interim Conclusion

Don't throw away your *Elements of Style* just yet.

---

1. Geoffrey Pullum, "50 Years of Stupid Grammar Advice," *Chronicle Review*, Apr. 17, 2009.

The Three Biggest Mistakes I See—And How to Fix Them

Mistake 1: The opening of the document is topical or circular, not substantive.

What goes wrong. Although nearly all legal documents start with a "roadmap," many of these are simply guides to what's where: "In Part One, I will discuss the pros and cons of settlement."

Still others are circular: "As explained *infra*, you should settle this case because it is in your best interest to do so."

Why it matters. You'll draw readers into your writing only if you commit to proving something, not just to talking about it. Starting with substantive points will also give your reader context for the many details that follow.

Your action plan. Start by committing to prove three specific points by the end of your document: "As explained below, you should settle this case because (1) juries in this county often grant high punitive damages, (2) discovery will be unusually expensive and intrusive, and (3) three recent product liability cases cut against your position." Consider taping the list to your computer to help you stay on track.

Mistake 2: The case discussions sound like the work of a news anchor, not a pundit.

What goes wrong. Many paragraphs announce that an authority is "illustrative" or "distinguishable" and then summarize facts or copy language or both. As Judge Ruggero Aldisert once put it, the analysis feels like "a promiscuous uttering of citations."

Why it matters. When you use an authority as an end in itself, you force your reader to supply the missing logical links while

wading through irrelevant facts and language. The result: The reader feels more confused than ever and skips to the next paragraph.

Your action plan. When it's time to discuss a case or an order, use your own words first to explain how the authority proves the point you're making now. Only then should you summarize facts or copy any relevant language.

Mistake 3: The transitions are choppy and repetitive.

What goes wrong. In many legal documents, after a while the sentences all start to sound the same. They begin with a transition word followed by a comma and then string together abstract clauses long on nouns and short on verbs.

So we end up with too many sentences like this: "Consequently, the success of Plaintiff's case is contingent upon an affirmative showing of causation."

And too few sentences like this: "Plaintiff can thus prevail only by proving causation."

Why it matters. You want to push readers through your sentences, not tire them out. Varying your sentence structure will also help keep your reader's attention.

Your action plan. Every week, add a new transition word or phrase to your repertoire. And experiment with where you put those words in your sentences.

Just Say No:
Five Words and Phrases to Avoid

1. ***Clearly*, *plainly*, and *patently*.** We know we shouldn't use these words, but sometimes the temptation is too strong. Try to heed the advice of Second Circuit Judge Roger Miner: "Eliminate adverbs such as *clearly* and *obviously*. If things are so clear or obvious, why do we still have a legal dispute on our hands?"

2. ***As a matter of law*.** Many lawyers overuse this phrase. Example: "Because Plaintiffs have failed to allege facts supporting each of the four Counts, the Court must dismiss the Complaint as a matter of law." As one judge told me, "What else would it be a matter of? Art history?" Cut this phrase when you can.

3. ***As such*.** *As such* is clunky. When used for *therefore*, it's also incorrect. A common mistake: "As such, the Court should construe the arbitration clause against the drafter." Instead, try the following: "The Court should thus construe the arbitration clause against the drafter."

4. ***Said* and *such* to mean *the*, *this*, or *that*.** This use of *said* and *such* is archaic and awkward—a parody of legalese. Consider this excerpt from a brief in one of the McDonald's obesity cases: "[T]he 'fatty acid profile' of Chicken McNuggets more closely resembled beef rather than chicken as said nuggets were cooked with 'beef tallow.'" The problem with said sentence speaks for itself.

5. ***And/or*.** Courts have called this expression a "freakish fad," an "inexcusable barbarism," and a "Janus-faced verbal monstrosity." Drafting experts agree. To avoid ambiguity, rather than write that a landlord shall provide "gas and/or electricity," try "gas and electricity," "gas or electricity," or "gas, electricity, or both."

Still Saying No:
Five More Words and Phrases to Avoid

1. ***Provides that.*** Replace this heavy phrase with *under* and a comma. That way, you focus on the parties, not on the case name or statute.

> *Before:* "Section 102(a)(3) provides that life support may be removed upon notice of intent by the spouse to the hospital."
>
> *After:* "Under Section 102(a)(3), spouses can remove life support by notifying the hospital of their intent."

2. ***Additionally.*** Replace with *also*.

> *Before:* "Additionally, we request that you respond to our demand within fifteen days."
>
> *After:* "We also request that you respond to our demand within fifteen days."

3. ***The fact that.*** Strunk and White call *the fact that* a "debilitating expression." You rarely need it.

> *Before:* "The fact that you failed to raise the issue at trial has the consequence that you have relinquished your right to contest it on appeal."
>
> *After:* "Because you failed to raise the issue at trial, you cannot contest it on appeal."`

4. ***Hereinafter* or *hereinafter referred to as*.** Ban it.

> *Before:* "The Ford Motor Company (hereinafter, 'Ford')."
>
> *After:* "The Ford Motor Company ('Ford')."

Even better, just write "Ford" as long as it's clear which Ford you mean.

Here's what Judge William Eich once said about parenthetical repetitions:

"Excusable, perhaps, if the lawyer is 127 years old and was apprenticed in his youth to Silas Pinney, but never welcome in any piece of writing by anyone younger."

5. ***However* at the beginning of a sentence.** Most stylists are opposed.

> *Before:* "I have reviewed your letter and understand the points you are trying to make. However, I disagree with many of your arguments."
>
> *After:* "I have reviewed your letter and understand the points you are trying to make. I disagree, however, with many of your arguments."

However, some usage experts think that this "rule" is defunct. If it adds punch to your point, and if it avoids ambiguity, use it at the beginning.

Avoid These Clichés Like the Plague

1. An apple a day

> Example: "The State prosecuted the astronaut on a more serious charge because it wanted *a second bite at the apple*."

Don't distract your reader with an imaginary fruit salad. Instead, explain why your opponent shouldn't get what it wants: "The State added a new charge only because the court rejected its first bail request."

2. Giant ball of twine

> Example: "Her state tort law claims were *inextricably intertwined* with Medicare regulations."

Popular variations: *inextricably linked* and *inextricably connected*.

Don't get stuck in the tangled web. Instead, emphasize why the connection matters: "Unless the provider violated Medicare regulations, Plaintiff's state tort claims must fail."

3. Your eminence

> Example: "Dr. Smith's resume demonstrates that she is *eminently qualified* to opine on damages."

Have you ever heard of an expert who is qualified, but not eminently so? I didn't think so. The same goes for such expressions as *eminently reasonable* and *eminently clear*. Just stick to the facts: "Mary Smith is qualified to testify because

she has a doctorate in economics and has testified in 24 other federal antitrust cases."

4. Slip-sliding away

> Example: "If the Court allows large punitive damages in this case, it will head down a *slippery slope*."

When I was in law school, my contracts professor, Larry Lessig, challenged us to get through our entire course without once using the phrase *slippery slope*. We held out for just two days before someone slipped. In place of the slippery slope, just explain the danger of not doing what you want: "If the Court allows large punitive damages here, Defendants will be forced to pay many times for the same claim."

5. Bald faith

> Example: "Plaintiff's *conclusory allegations* and *bald assertions* cannot withstand scrutiny."

I'm convinced that some of us lawyers develop keystrokes for these couplets. Is any allegation *not* conclusory? Is any assertion *not* bald? Judges tell me that these predictable pairs are like fingernails on a chalkboard. Better to focus on what makes the assertions so bald: "Although Jones claims promissory estoppel, he cites no facts to suggest that he relied on Smith's alleged promise."

I'll stop now so I don't go down a slippery slope of my own. But if I've opened a Pandora's Box here and you think clichés are the Achilles' heel of legal writing, please send me more of these tempting truisms—either the ones you love to write or the ones you hate to read.

Computer Tips

For many lawyers, computers are the enemy: They tempt us to write before we think. But computers can also help solve common legal writing problems. Here are four easy ways to use computers to your advantage.

1. Search and rescue

Search for clutter to cut. Three common culprits: the preposition *of*, the throat-clearing introduction *it is*, and the word *clearly*.

When proofing, you can also hunt for errors that spell check won't catch. These two often slip by: *it's* versus *its*, and *principal* versus *principle*.

> Tip: In Microsoft Word 2010, go to Home > Editing > Find > Advanced Find > Reading Highlight. Check "Highlight All" before you do your search.

2. Passive aggressive

If you overuse the passive voice, set your Spelling & Grammar options to flag passive constructions. You don't have to change every passive construction, but this tool will help you find the worst offenders.

> Tip: In Microsoft Word 2010, go to Review > Spelling & Grammar. Click Options, then Proofing, then Settings. Check "Passive sentences."

3. Take ten

Wordiness is the biggest writing complaint I hear from judges and supervisors. As one wit put it, "Lawyers say less per square inch than anyone else on the planet."

Take two pages of your document and perform a word count. Now cut 10 percent of the words in 10 minutes. No excuses, no exceptions!

> Tip: In Microsoft Word 2010, click Words at the bottom left of the open window to open the Word Count dialogue box, which shows Pages, Words, Characters (no spaces), Characters (with spaces), Paragraphs, and Lines.

4. How do you rate?

You can also use "readability statistics" to gauge your writing quality. Microsoft Grammar will provide a Flesch Reading Ease Score. The formula reflects two key measures of reading ease: your average number of words per sentence and your average number of syllables per word. In both cases, fewer is usually better.

Do better Flesch scores mean better writing? Not necessarily. But you can use these guidelines to make even the most complicated document easier to digest.

So if you're feeling brave, check "Show readability statistics" in your Spelling & Grammar options.

> Tip: In Microsoft Word 2010, go to Review > Spelling & Grammar. Click Options, then Proofing. Check "Show readability statistics."

After you run your spell checker, your Flesch score will pop up.

The Flesch score ranges from 0 to 100, with higher numbers reflecting easier-to-understand writing. For internal communications and court filings, strive for 30. When you write to clients, your Flesch score should top 40.

For comparison purposes, Lincoln's Gettysburg Address scores about 60. This article gets a 56. U.S. Supreme Court decisions hover around 30. Junior associate memos rarely crack 20. Attorneys sent to me with "writing problems" are usually stuck at around 15.

If you're unhappy with your score, the solution is easy: Divide long sentences in two, and replace longer words with shorter ones. Your score will jump fast.

Absolute Power

Although he may have escaped criminal jeopardy, Dominique Strauss-Kahn still faces a civil suit from Nafissatou Diallo, the world's most famous hotel maid.

In moving to dismiss her complaint, his able lawyers claimed that "DSK," as he's known in France, should enjoy the same absolute immunity from civil suits that Washington diplomats enjoy from parking tickets.

The fact section is brilliant, juxtaposing Strauss-Kahn's lofty role at the IMF with the indignity of his arrest and confinement. In one paragraph, he's poised to meet with Angela Merkel; in the next, he's trapped at Rikers Island.

The legal argument makes a similarly strong case for immunity, but the prose bogs down a bit.

Here are six ways to tighten Dominique Strauss-Kahn's writing—and your own:

1. Share and share alike

Here's a great way to add flow: When you write a complex sentence, lead with a word or thought from the sentence before.

Consider these two sentences from DSK's Introduction:

> The United States is not a party to the Specialized Agencies Convention. Nevertheless, as we explain below, the absolute immunity that the Specialized Agencies Convention affords executive heads of specialized agencies, like Mr. Strauss-Kahn, has received such overwhelming accession from member countries of the United Nations that it has achieved the status of what is known as "customary international law."

The second sentence is tough going, not because it's especially long but because it hits you over the head with a new topic: absolute immunity. Try springboarding from the first sentence instead, linking "The United States" with the other U.N. member countries that you want the court to emulate. Also, put "absolute immunity" closer to what you have to say about it:

> **The United States** is not a party to the Specialized Agencies Convention. Yet as we explain below, **so many U.N. member countries** have granted specialized-agency heads **absolute immunity** that it is now considered "customary international law."

Those changes also halve the second sentence from 48 words to 24.

2. With no due respect

Whenever you see "with respect to" or "with regard to," cut it if you can, or change it to "on," "about," "for," or "as for." I promise that you'll never long for the original.

What do you notice about this sentence, for instance?

> In summary, **with respect to the privileges and immunities** enjoyed by an executive head of a specialized agency, the Specialized Agencies Convention incorporates **the absolute privileges and immunities** accorded to diplomatic envoys under the Vienna Convention.

You guessed it: This sentence is a great example of the "With respect to X, X" habit that traps so many of us lawyers.

Try this instead:

In sum, an executive head of a specialized agency enjoys the same privileges and immunities under the Specialized Agencies Convention that diplomatic envoys enjoy under the Vienna Convention.

3. Notwithstanding "notwithstanding"

Unless you draft contracts or legislation, see how many hours or days you can go without typing the word "notwithstanding." At best, it's heavy-handed. At worst, it lets everyone know how worried you are about whatever it is that you're trying to hide:

Nevertheless, as we explain below, the absolute immunity accorded to executive heads of specialized agencies has achieved the status of customary international law, **notwithstanding the United States' non-ratification of the Convention**.

I'm all for subordinating bad facts, but don't try to hide them. Instead, spell them out with a poker face and put them at the start of the sentence, not at the end:

As we explain below, however, **even though the United States has not ratified the Convention,** the absolute immunity granted to executive heads of specialized agencies is now considered customary international law.

4. "Of" note

Cutting "of" is another way to quicken your pace. Even if "notwithstanding" doesn't bug you in the example above, "non-ratification **of**" should scream "Find a verb!" In the next

examples, you'll meet many other "of" phrases that you could cut or trim.

Before:

> Mr. Strauss-Kahn enjoyed absolute immunity under customary international law not only while he was **the head of** the IMF, but also **for the period of time** after he had resigned from his post.

After:

> Mr. Strauss-Kahn enjoyed absolute immunity under customary international law not only **while he headed** the IMF, but also **after he resigned** from his post.

Before:

> The Court may consider evidence **outside of** the complaint in considering a motion to dismiss for lack of personal or subject-matter jurisdiction, including one **based on an assertion of** immunity.

After:

> The Court may consider evidence **outside** the complaint in considering a motion to dismiss for lack of personal or subject-matter jurisdiction, including one **that asserts** immunity.

Before:

> Mr. Strauss-Kahn was arraigned . . . on a criminal complaint based on the same false allegations that **form the basis of the complaint in this action**.

After:

> Mr. Strauss-Kahn was arraigned . . . on a criminal complaint based on the same false allegations that **underlie this Complaint**.

Before:

> Both the United States Supreme Court and the New York Court of Appeals have recognized **the existence of** "customary international law."

After:

> Both the United States Supreme Court and the New York Court of Appeals have recognized "customary international law."

5. Here and now

Also avoid affixing your points to the reader's "examination" or "review" of those points—or telling the reader what to "look to." Just make your case and disappear.

Take these two sentences:

> **To determine whether** a legal rule or principle has achieved the force of customary international law, **the court must look to** whether the rule or principle is "a general and consistent practice of states followed by them from a sense of legal obligation." **An examination of state practice is therefore paramount to determining** the existence and content of customary international law.

The first sentence is too neutral, and the second sentence is too obscure. In both sentences, telling the court to "look to" and "examine" and "determine" things clouds your points.

Consider something like this instead:

> A rule becomes customary international law when it is "a general and consistent practice of states followed by them from a sense of legal obligation." State practice thus informs whether and how customary international law applies.

Cutting the chaff also trims this passage from 61 words to 36.

6. Parallel lives

One last way to jazz up your prose: Include more parallel constructions.

In this first sentence, hear how the rhythm in the first two elements breaks once you get to the third:

> We are aware of no nation that denied Mr. Strauss-Kahn entry because of his absolute immunity, objected to such

immunity, or conditioned Mr. Strauss-Kahn's passage to and from its borders on his acquiescing to lesser immunity.

To maintain coherence all three elements should pivot around "immunity." So try this:

We are aware of no nation that denied Mr. Strauss-Kahn entry because of his **absolute immunity**, objected to **that immunity**, or forced him to agree to **lesser immunity** as a condition of crossing its borders.

Now let's cross over to another parallelism problem:

International law is clear that immunity does not cease immediately upon termination from a diplomatic post; rather, termination of immunity has both temporal and geographic components.

Semicolons can sharpen contrasts. But you need to put those contrasts in parallel form—and drop the "rather" or "however."

So try this:

Under international law, **immunity does not cease immediately upon** termination from a diplomatic post; **it ceases only after** a certain amount of time has passed and the diplomat has left the country.

Let's take one final example. Have you noticed how many of us lawyers love "not only . . . but" constructions like this one?

> [N]ot only is there no direct conflict between international law and the [International Organizations Immunity Act], but application of the absolute immunity rule here serves the underlying purpose of the Act.

Here, too, we need parallel structure, not just two vaguely related ideas. It would also help to keep "absolutely immunity" as the subject of both phrases rather than sliding between "international law" and "absolute immunity":

> Not only does granting **absolute immunity here not conflict** with the [International Organizations Immunity Act], but it **serves the purpose of the Act**.

To keep the rhythm of both phrases similar, I've followed DSK's lawyers' lead and resisted my urge to change "purpose of the Act" to "the Act's purpose."

Even so, to avoid the double negative "not only . . . not," try breaking the sentence in two:

> Granting absolutely immunity does not conflict with the Act. Indeed, it serves the purpose of the Act.

I'll leave it to you to predict whether absolute immunity will shelter DSK from his confessed "moral failing" in the Sofitel suite that day. In the meantime, happy cutting—and enjoy your new-found speed!

Too Hot to Handle

In May 2007, the Delaware Supreme Court reprimanded a lawyer for "disruptive, disrespectful, degrading, [and] disparaging rhetoric."[1] Lessons learned here still apply.

As the court put it, "Lawyers are not free, like loose cannons, to fire at will upon any target of opportunity."

Lessons Learned

1. Avoid comparing parties to animals of any kind.

> "Just because the LIRB is a citizen board does not mean that its members are given license to ignore the legal standards which govern their decisions. Otherwise the County would be permitted to appoint *a group of monkeys* to the LIRB and simply allow the [county] attorney to interpret *the grunts and groans of the ape members* and reach whatever conclusion the attorney wished."

2. Avoid tiresome attacks.

> "Why would the County want to start making decisions on the merits when it could continue to run [defendant] into the ground for sport based on whatever whimsical speculation the County could conjure up?"

3. Avoid sarcasm.

> "*Miraculously*, with the aid of legal counsel's *imaginative and creative writing skills*, the supposed reasoning for the

LIRB's decision became dramatically more extensive and well-reasoned."

———

1. Delaware Supreme Court Opinion (PDF): [http://courts.delaware.gov/opinions/download.aspx?ID=91480]

Parties of the Passage, Unite

One of the best ways to revise technical material is to attach each sentence to some sort of actor or party.

Take this rewritten version of a paragraph from a Seth Waxman brief in *eBay v. MercExchange*:

> [T]he ’265 patent, in general terms, describes an “electronic market” for the sale of goods. In a market such as this, merchandise can be put on display through the posting of pictures, product descriptions, and prices on a network of computers (e.g., the Internet). The subsequently displayed merchandise can be viewed by potential buyers through a connection to the network in which such product data resides. Following the selection of an item or product, a purchase can be completed electronically. The “electronic market” mediates this hypothetical transaction by assisting in the facilitation of payment and fulfillment. In addition to this mediation, enforcement by a central authority can ensure that the obligations and performance of all parties are fulfilled. Therefore, trust among participants is promoted.

Do you see how disjointed the passage is when written in this all-too-common way?

Now see what happens when you take the same dense material and attach it to buyers, sellers, and a central authority:

> [T]he ’265 patent, in general terms, describes an “electronic market” for the sale of goods. In such a market, **sellers can display** their wares by posting pictures, descriptions, and prices of goods on a computer network, such as the

Internet. A **prospective buyer can electronically browse** the goods on sale by connecting to the network. After selecting an item, the **buyer can complete** the purchase electronically, with the "electronic market" mediating the transaction, including payment, on the buyer's behalf. The **seller is then notified** that the **buyer has paid** for the item and that the transactional is final. A **central authority within the market can police** the obligations and performance of sellers and buyers over time, thereby promoting trust among participants.

Write Like the Stars

Legal Writing Lessons from *The New Yorker*

Looking for some writing inspiration?

Start with *The New Yorker*, the nation's best-edited publication. Add Jeffrey Toobin, one of the most talented legal journalists. Now mix in the unsolved murder of a Seattle federal prosecutor, a story Toobin told in a recent issue.[1]

Here are ten great techniques at work in Toobin's tale.

1. Start sentences with light openers.

> Wales, an Assistant United States Attorney in Seattle, had planned to have dinner and spend the evening with his girlfriend, Marlis DeJongh, a court reporter who lived downtown. *But* that afternoon Wales called DeJongh and said that he had projects he needed to work on at home.
>
> The notion that McKay was fired for failing to prosecute Democrats is plausible. *But* the passion that McKay brought to the Wales case may have played a part, too.

2. Link the first sentence of a paragraph to the last sentence of the one before.

> Neither Wales's romantic life nor the fender bender yielded promising leads in the murder investigation.
>
> Wales's work on gun control also failed to produce suspects.

3. Begin a paragraph with a short sentence.

Progress came slowly. Anderson remained the only suspect; in 2004, the Seattle *Times* reported that the F.B.I. had searched Anderson's home in Beaux Arts and removed twenty-seven boxes of possible evidence.

4. Follow a long, complex sentence with a short, punchy one.

By 2000, the investigation of the helicopter-conversion industry was winding down, with disappointing results for Wales and the U.S. Attorney's Office. *Only one case remained.*

The firm, called Intrex Helicopters, which was based at Powell's home, was renovating a single helicopter for civilian use. *Still, the stakes were substantial.*

5. Use a signpost to link your sentence to the previous one.

Several local entrepreneurs decided to retrofit the surplus military models for civilian use. *Such conversions were legal,* as long as they were conducted in accordance with safety rules established by the Federal Aviation Administration.

6. Convey chronology through transition phrases rather than dates and times.

- In July, *three months before his death,* Wales had been involved in an altercation at a parking garage near his office.

- *About fifteen minutes later,* someone shot him three or four times through the window from the back yard.

- *Two weeks after the murder,* the Senate confirmed a new U.S. Attorney for western Washington, John McKay.

- *A month after [Wales] was killed*, the group held a benefit in his honor, which was attended by more than five hundred people, including many prominent Democratic politicians in the state, and raised five hundred thousand dollars.

- *Meanwhile*, Wales's friends began to talk about creating a memorial.

- *Not long after the meeting*, John Ashcroft visited Seattle to give a speech at a Coast Guard base, but he didn't meet with McKay's staff or mention the Wales case.

7. Use semicolons for parallel constructions.

> [United States Attorneys] establish the priorities for each of the nation's ninety-four judicial districts and announce significant indictments and arrests; many are well known in their communities. Assistant U.S. Attorneys are more like civil servants; they perform the day-to-day work on important investigations and their public speaking is typically limited to the courtroom.

8. Hyphenate phrasal adjectives for clarity and elegance.

- cell-phone towers

- gun-control initiative

- death-penalty case
- law-enforcement official
- information-sharing system
- high-school students
- highest-ranking official
- organized-crime unit
- forty-year-old pilot

9. Set off explanatory phrases with dashes.

The proposal brought out the full might of the pro-gun lobby, which spent four million dollars—*primarily on television advertisements and direct-mail appeals*—and voters rejected the measure, seventy-one to twenty-nine percent.

The F.B.I gave the investigation the code name SEPROM—*short for "Seattle prosecution murder"*—but the bureau set the reward for tips leading to a prosecution in the case at twenty-five thousand dollars, which was widely regarded in Seattle as an insultingly small amount, and did not offer local investigators assistance from Washington, D.C.

10. Use a colon to set off an explanation that could stand as a complete sentence.

The phrase was partly a joke, a bit of feigned grandiosity to justify a tendency toward excessive meticulousness: Wales did things slowly.

1. Jeffrey Toobin, “An Unsolved Killing,” *The New Yorker*, Aug. 6, 2007. [http://www.newyorker.com/reporting/2007/08/06/070806fa_fact_toobin?printable=true]

Five Ways to Write Like Paul Clement

"Phenomenal," said our new Solicitor General, Donald Verrilli, Jr. "I commend it to you as an example of how to write an effective brief," he told the group of lawyers.

Was Mr. Verrilli touting the government's own brief defending the Affordable Care Act's individual mandate?[1]

Not at all. That "phenomenal" model was the brief penned by his dueling partner, Paul Clement.

So was Mr. Verrilli engaging in some twisted psychological warfare? Or is the 45-year-old Paul Clement poised to become the Right's next John Roberts?

If mandated to choose, I would pick option two.

But what makes Mr. Clement's brief so terrific? Let me share five reasons his brief is as "phenomenal" as the government thinks—or fears.

1. Full Circle

We lawyers talk a big game about having "a theme of the case," but how many briefs make good on that goal? To succeed, a theme must be at once bite-sized and specific. And it must cascade across the brief from the opening paragraph through the fact section and land on the conclusion.

Mr. Clement pulls no punches here, announcing in the very first sentence that "[t]he individual mandate rests on a claim of federal power that is both unprecedented and unbounded."

"**Unprecedented**" appears 20 more times in the brief, and "**unbounded**" another 8 times. The related idea of "**limit**" or "**limiting**," also introduced in the brief's opening paragraph, resurfaces no fewer than 40 more times.

Thus this theme is everywhere. Take the facts in the Statement of the Case. Here's the very first sentence:

> The Patient Protection and Affordable Care Act imposes **new** and substantial obligations on **every corner of society**, from individuals to insurers to employers to States.

And the theme [2] returns full circle in the argument's parting thought:

> The statute the federal government defends under the tax power is not the statute that Congress enacted. In that statute, the penalty provision is merely the tail and the mandate is the proverbial dog, not vice-versa. And that statute imposes a command that is **unprecedented** and invokes a power that is both **unbounded** and not included among the **limited** and enumerated powers granted to Congress. It is therefore unconstitutional, no matter what power the federal government purports to invoke.[3]

2. Don't Be Fooled

Although Mr. Clement rails against one type of mandated choice, he has no qualms about repeatedly forcing the Court to choose between two views of the case, his opponent's and his own. Because he is the one framing the contrast each time, he can sound the alarm that "this case is not about X; it's about Y." In doing so, he's exploiting a technique that I call Don't Be Fooled in *Point Made* and that rhetoricians call "antithesis."

One contrast juxtaposes two "either-or" views on the mandate:

> The **power to compel** a person to enter into an unwanted commercial relationship **is not** some modest step necessary and proper to perfect Congress' authority to regulate existing commercial intercourse. **It is** a revolution in the relationship between the central government and the governed.

Another compares two ways of "compelling individuals into commerce":

> The power to compel individuals into commerce is **exercised not to effectuate** regulation of existing commerce, **but rather to create** commerce so that Congress may regulate it.

Yet another pits "the Act is unprecedented"—Mr. Clement's theme—against "health care is unique"—the government's:

> The focus on the purported "uniqueness" of the health care market and the centrality of the individual mandate **might explain why this is the first** time Congress has asserted this unprecedented power, **but it does not explain why it will be the last**.

And still another passage contrasts two types of mandates and two reasons that those distinctions matter:

> That distinction between markets **matters not because** Congress' authority to regulate the market for health care services differs from its authority to regulate the market for health care insurance, or because the Constitution compels some sort of categorical distinction between the two. **It matters because** there is a critical difference between a mandate that individuals obtain insurance and a mandate

that individuals who obtain health care services use insurance when they do so.

3. Lead by Example

Never underestimate the power of creative examples, a trademark technique of all great legal writers. On the Right, Chief Justice Roberts famously compared choosing the best technology for controlling emissions to choosing the best car: "Mario Andretti would choose a Ferrari; a family of four a minivan." (*See* "Five Ways to Write Like John Roberts," page 79.) On the Left, Justice Kagan's early dissents have featured such memorable examples as this one from *Arizona Christian School Tuition Organization v. Winn*:[4]

> Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options?

In the individual-mandate litigation, the government's opening brief is comparatively weak on examples, both proactive and preemptive. Mr. Clement seizes the moment by conjuring up a parade of horribles about what the government might regulate next—examples ranging from different kinds of health care to different industries, different societal problems, and different kinds of insurance:

To pick an example from the "health care services" realm, some of the high costs generated by **emergency dental care** could have been prevented by regular trips to the dentist's office. The dynamic involves the same cost-shifting potential arising from the humane impulse not to deny care in emergency situations that the federal government suggests makes the mandate unique. It would hardly be "irrational" for Congress to attempt to reduce that burden on the health care services market by mandating that everyone visit the dentist twice a year.

Problems in the **automobile industry** could be solved by mandatory new car purchases. The congressional interest in ensuring the viability of the **agricultural industry**, which has typically been addressed through subsidies, could be furthered instead by compelling the purchase of agricultural products. Individuals' surprising unreceptiveness to substantial incentives to **invest in 401(k) accounts** could be overcome by mandating such investments. And so on. Most economic problems involve questions of demand and supply, and if Congress has the power not just to regulate commercial suppliers and those who voluntarily enter the market, but to compel demand as well, then we have truly entered a brave, new world.[5]

[L]ife insurance and burial insurance both finance far more universal needs that are every bit as likely to arise "from a bolt-from-the-blue event," and will be paid for one way or another even if individuals fail to plan for them.

4. Lighter Than Air

Most briefs feel heavy, even dreary. Mr. Clement's brief feels light and bright.

But as great editors often say, "If it reads easy, it wrote hard." So how does Mr. Clement make it work? I offer an eight-part recipe below.

1. ***Crisp, short sentences that provide balance and draw the reader's attention:***

> Yet the Court did not hesitate to hold the take-title provision facially unconstitutional once it concluded that the means Congress employed in that provision were "inconsistent with the federal structure of our Government established by the Constitution." ***Printz* is no different.**
>
> The federal government attempts to minimize the lack of constitutional grounding for a mandate to purchase health care insurance by recharacterizing it as something it is not: a "regulat[ion of] … the way in which individuals finance their participation in the health care market." **That is simply not true.**

2. ***An occasional sentence fragment that mimes the rhythms of great oratory:***

> Individuals' surprising unreceptiveness to substantial incentives to invest in 401(k) accounts could be overcome by mandating such investments. **And so on.**

> How much easier, for example, to support the price of wheat by compelling individuals to purchase wheat than to devise an elaborate system of subsidies and quotas and limit on-farm consumption to prevent an indirect effect on prices. And how much easier to stimulate the economy and promote the automobile industry by compelling new car purchases rather than by merely offering incentives, such as "cash for clunkers."

3. Figurative language and other evocative references:

But an otherwise invalid statutory provision derives no immunity **from the company it keeps**.

But that argument is another **dead end** because the penalty plainly operates as a penalty, not a tax.

It would be an odd notion of limited and enumerated powers that allowed the comprehensiveness of surrounding legitimate regulations to empower Congress to go the **final mile** and compel individuals to enter into its regulatory sphere.

The statute the federal government defends under the tax power is not the statute that Congress enacted. In that statute, **the penalty provision is merely the tail and the mandate is the proverbial dog**, not vice-versa.

To be clear, "applicable individual" is just the ACA's legalistic and **vaguely Orwellian way** of referring to virtually every human being lawfully residing in this country.

4. ***Vivid nouns and verbs, or what I call Zingers in* Point Made*:***

But such amendments were not proposed even by antifederalists deeply suspicious of the power of the new federal government for the rather obvious reason that the Commerce Clause was not some **vortex of authority** that rendered the entire process of enumeration beside the point.

The power to compel individuals to enter commerce, by contrast, **smacks** of the police power, which the framers reserved to the States.

In all events, the federal government gains nothing by asking the Court to **jettison** both the mandate and the penalty and replace them with a tax, as the hypothetical tax statute the federal government proposes would be no more constitutional than the statute Congress actually enacted.

The federal government attempts to **sidestep** the tax power problem it would create by insisting that the Court has "abandoned the view that bright-line distinctions . . ."

What is more, the Court did so for the very same reason that **dooms** the federal government's arguments here: because the means Congress adopted were neither valid exercises of the commerce power itself nor means "proper for carrying into Execution" that power.

5. ***Short conjunctions to start sentences:***

> For example, most individuals living in a flood zone will suffer flood-related losses at some point, and those losses are likely to be shifted to the rest of society through mechanisms such as publicly funded disaster relief. **And** the same kind of cost-shifting is just as inevitable in markets for basic necessities such as food and clothing, even though they are not financed by insurance.

> Rather than attempt to place any meaningful limits on the power that Congress actually asserted in the ACA, the federal government focuses most of its efforts on recharacterizing the individual mandate as a regulation of "the timing and method of financing the purchase of health care services." **But** the federal government's euphemistic description cannot obscure the simple reality that that is not what the individual mandate does.
>
> A power to control every class of decisions that has a substantial effect on interstate commerce would be nothing less than a power to control nearly every decision that an individual makes. **Nor** may the federal government save the mandate by resort to that "last, best hope of those who defend ultra vires congressional action, the Necessary and Proper Clause."

6. ***Light words and phrases:***

Mr. Clement favors my Triple-A set of "also," "although," and "about"—not the heavier constructions like "furthermore," "despite the fact that," "with respect to," and "regarding" that most lawyers love all too much:

The court **also** rejected the federal government's attempt to characterize the mandate as regulating participation in the market for health care services, as opposed to the market for health insurance . . . .

Although the court noted that Congress has regulated certain facets of both markets, it concluded that "[i]t simply will not suffice to say that, because Congress has regulated broadly in a field, it may regulate in any fashion it pleases."

The lack of apprehensions **about** the new power and the contrast between "regulate" and the surrounding terms that far more naturally empowered the federal government to establish, constitute, raise, coin, or otherwise bring things into existence suffices to make the point.

7. ***Gentle mockery and soft-pedaled exasperation:***

The power to force individuals to engage in commercial transactions against their will was the kind of police power that they reserved to state governments more directly accountable to the people **(or "applicable individuals," as the ACA would have it)**.

If Congress **really** had this remarkable authority, it would not have waited 220 years to exercise it. If this power **really** existed, both our Constitution and our constitutional history would look fundamentally different.

8. ***Strong and memorable parallel sequences and echoes:***

The federal government spends billions of dollars **feeding** the hungry, **clothing** the poor, and **sheltering** the homeless.

The reason why the mandate's penalty provision **is not labeled** a tax, **is not structured** as a tax, and **is not grounded** in Congress' tax power, and why the President emphatically assured the public that it is not a tax, is because the political branches lacked the public support to enact a tax.[6]

The statute the federal government defends under the tax power is not the statute that Congress enacted. **In *that* statute**, the penalty provision is merely the tail and the mandate is the **proverbial dog**, not vice-versa. **And *that* statute** imposes a command that is unprecedented and invokes a power that is both unbounded and not included among the limited and enumerated powers granted to Congress.

5. Take Me by the Hand

Lawyers in my workshops often think I'm joking when I say that counting how many different transition words and phrases appear in a document can help you gauge the writer's overall skill level. It's no joke! If all you see are "nevertheless" and "additionally" and "consequently," you know you're in the hands of a lawyer whose persuasive writing could use more passion and variety and rhetorical force.

Mr. Clement is the perfect teacher on this front. Of the 110 transition words and phrases on my list in *Point Made*, he uses almost every one—and he gives me a few ideas to add to my next version.

Here's just a sampling of the many ways that Mr. Clement links his points: "in that respect"; "in short"; "indeed"; "in all events"; "by contrast"; "in the same way"; "in any event"; "all of that may be true, but"; "for instance"; "quite the contrary"; "what is more"; "the bottom line"; "if anything"; "to be sure"; and "that is why."

Ending with his flurry of rhetorical constructions is apt. To my mind, if you stripped this brief of its citations, you'd have an example of sterling English prose, not just an example of good legal writing. Whether you agree with Mr. Clement's arguments or not, infusing your own writing with more of his passion and polish would offer the kind of insurance that we can all endorse.

———

1. Comments summary on *HHS v. Florida*: http://www.legalwritingpro.com/briefs/sg-brief.pdf

2. "A thematic approach and clear writing" are the hallmarks of Mr. Clement's briefs, said his associate Erin Murphy to Tony Mauro of the *National Law Journal*. Murphy is credited in the article for her substantial contributions to the brief and to preparation for oral argument.

3. Contrast the end of Mr. Clement's argument with the end of the government's argument: "The Court should follow the same course here in the event it concludes that the constitutionality of the minimum coverage provision under the tax power turns on whether

subsection (a) creates a free-standing obligation." The government's close leaves us scratching our heads.

4. Kagan's brief: http://www.law.cornell.edu/supct/html/09-987.ZD.html

5. In editing the allusion to Huxley's famous title here, Clement inserts a needless comma. The "new world" is a brave one; it's not "a new world" that's separately "a brave world." Huxley's *Brave New World* is correct as is: When one adjective modifies another, don't separate them with a comma.

6. This sentence contains one of the other rare mistakes in the brief. "Reason" takes "that," not "because." On that note, for those who think I'm praising Clement's writing too much here, I'll share two other glitches. First, in trying to avoid splitting an infinitive, Clement creates an awkward first line: "The individual mandate rests on a claim of federal power that is both unprecedented and unbounded: the power to compel individuals to engage in commerce **in order more effectively to regulate commerce**." And second, by cutting "that" after "maintains" in the following sentence, Clement suggests that the government is keeping the mandate alive, not proposing a reason to uphold it: "The federal government maintains the mandate is not an end in itself, but merely a means of 'mak[ing] effective the Act's core reforms of the insurance market.'" Other than these petty concerns, however, I can find no other slip-ups in this 82-page single-spaced brief. The government's brief, by contrast, is strong in many respects but includes quite a few typos, grammatical errors, awkward sentences, and faulty parallel constructions.

Five Ways to Write Like John Roberts

Before he became Chief Justice, John Roberts once wrote in a brief that determining the "best" available technology for controlling air pollution is like asking people to pick the "best" car: "Mario Andretti may select a Ferrari; a college student a Volkswagen beetle; a family of six a minivan. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on." (See "Write a Brief Like the Chief," page 99.)

Did Roberts feel the same way about "best" when Ruth Bader Ginsburg said that he was the "best" advocate to come before the Supreme Court? Or when Senator Chuck Schumer, who voted against his nomination, conceded that even Roberts's opponents called him "one of the best advocates, if not the best advocate, in the nation"?

Unlike sports, advocacy writing may not evoke a hit list of heroes. Even so, no one questions Roberts's rock-star status as a brief writer. Nor was the car analogy plucked at random: According to two Supreme Court insiders, when Alaska hired the nation's "best" brief writer to write about the "best" technology for an electric generator, the result in *Alaska v. EPA* was also the "best" brief that the Justices had ever seen.[1]

So how did Roberts do it?

At least 30 techniques distinguish his writing from the norm. Here are **five of the easiest ones to use** in your own writing.

1. Let your facts "show, not tell."

The facts in a brief should read like narrative nonfiction, a bit like something you'd read in *The Atlantic* or *The New Yorker*.

Or perhaps in *A River Runs Through It*. Watch how Roberts explains the way the Red Dog Mine, the accused polluter in the case, got its name:

> For generations, Inupiat Eskimos hunting and fishing in the DeLong Mountains in Northwest Alaska had been aware of orange- and red-stained creekbeds in which fish could not survive. In the 1960s, a bush pilot and part-time prospector by the name of Bob Baker noticed striking discolorations in the hills and creekbeds of a wide valley in the western DeLongs. Unable to land his plane on the rocky tundra to investigate, Baker alerted the U.S. Geological Survey. Exploration of the area eventually led to the discovery of a wealth of zinc and lead deposits. Although Baker died before the significance of his observations became known, his faithful traveling companion—an Irish Setter who often flew shotgun—was immortalized by a geologist who dubbed the creek Baker had spotted "Red Dog" Creek.

Now why would Roberts mention an Irish Setter? What does a shotgun-flying dog have to do with the Clean Air Act or administrative law? Is the passage just a flourish of elegant writing that ultimately wastes everyone's time?

Not at all. Roberts is litigating a classic federalism fight between the states and the federal government. And who knows how a mine fits into the community better than the local and state officials close to the ground?

You'll find the same technique elsewhere when Roberts "shows" you why the Red Dog Mine plays a vital economic role without "telling" you what to think by shoving that conclusion down your throat:

> Operating 365 days a year, 24 hours a day, the Red Dog Mine is the largest private employer in the Northwest Arctic Borough, an area roughly the size of the State of Indiana with a population of about 7,000 . . . . Prior to the mine's opening, the average wage in the borough was well below the state average; a year after its opening, the borough's average exceeded that of the State.

2. Add speed through short and varied transitions.

Do you want an easy way to jump-start your prose and streamline your logic? Start your sentences with short, punchy words.

Here Roberts does so three times in a row as he explains why the Alaska agency's decision about the Red Dog Mine's technology should withstand EPA scrutiny:

> **But** the EPA cannot claim that ADEC's decision was "unreasoned." **Nor** can the EPA assert that ADEC's determination in any way results in emissions exceeding national standards or permitted increments. **How** to control emissions within those standards, without exceeding available increments, was for the State to decide.

You'll see other speedy openers peppering the rest of the brief:

> **Yet** instead of addressing the most pertinent legislative history . . . .
>
> **And** the asserted reason for compromising the bright-line rule in the Act . . . .

Also vary the logical links you use. Most lawyers stick to eight or so of the tried-and-true—*moreover*, *accordingly*, *however*.

A great advocate might use 50 or more "signposts" to help the judge track the brief's internal logic. Roberts uses such varied signals as *at bottom*, *also*, *under that approach*, *in short*, *to this end*, *because*, *then*, *for example*, *in each case*, *nowhere*, *in any event*, *of course*, *instead*, *to begin with*, *indeed*, and *thus*, just to name a few.

Finally, instead of just sticking these transitions at the beginning of your sentences, place them closer to the verbs, where they are often more effective and interesting:

> The EPA **thus** regards the state review process as the means by which . . . [NOT *Therefore*, the EPA]
>
> Congress **also** established a preconstruction review and permitting process . . . [NOT *Additionally*, Congress established]
>
> The court **then** went on to hold that the EPA had not acted arbitrarily or capriciously . . . . [NOT *Subsequently*, the court went on to hold]

3. Add elegance and clarity through parallel constructions.

Also on the style front, look for ways to use more parallelism in your writing. It's not just a stylistic trick. It's a way to streamline information and make your points stick.

Sometimes, you can create a streamlined parallel list:

> The Red Dog Mine is the largest private employer in the Northwest Arctic Borough, where geography and the harsh environment **pose** unique employment challenges, **offer** few employment alternatives, and **limit** any concern about other industrial development . . . .

Other times, you can compare or contrast two concepts or parties by using a semicolon, as Roberts does here when he contrasts the federal government and the States:

> In clean air areas, **the federal government determines** the maximum allowable increases of emissions for certain pollutants; **the States decide** how to allocate the available increments among competing sources for economic development and growth.

And here when he contrasts two ways of finding the "best" way to control pollution:

> **Deciding that a more stringent and more costly control is "best"** for a particular source may reflect a judgment that the economic benefits of that particular expansion are worth consuming only so much of the available increment; **deciding that a less stringent and less costly control is "best"** for a different source may reflect a different judgment about the value of that specific project.

4. Add interest through short sentences, examples, and figures of speech.

Variety is another way to ensure a standout brief.

After all, nothing is more tedious than an endless series of medium-long sentences that follow predictable and repetitive patterns.

Here are three Roberts-esque ways to spice up your prose.

First, like most lawyers, you probably try to avoid long sentences. But how often do you include a **short sentence**—say, twelve words or fewer:

> The basic division of responsibilities carried through to the PSD program.
>
> The EPA, however, had no authority to do so.
>
> Of course, that is just the point.
>
> So too here.

Second, as in the earlier car analogy, **an example** is often a terrific way to bring an abstract legal point to life.

Consider this series of examples. This time, Roberts is claiming that what's "best" for one state (such as Alaska) might not be best for another—a new variation on the Ferrari versus Volkswagen theme:

> For example, one State—experiencing little economic growth in the pertinent area and concerned about the impact of increased costs on a critically important employer—may select as BACT for that employer a less stringent and less costly technology that results in emissions consuming nearly all of (but not more than) the available increment for growth. Another State—experiencing vigorous economic growth and faced with many competing permit applications—may select as BACT for those applications a more stringent and more costly technology that limits the impact of any particular new source on the increment available for development. A third State—in which ecotourism rather than more industrial development is the priority—may select as BACT an even more stringent and more costly technology, effectively blocking any industrial expansion.

Third, a well-chosen **figure of speech** can be priceless—as long as you're using it to explain a complex legal point and not to take a pot shot at the other side:

> The awkwardness of considering whether the EPA was arbitrary or capricious in deciding that the State was arbitrary or capricious should be **the canary in the mine shaft**, signaling that something is very much amiss.

5. End with a bang.

As with any good novel or essay, the last sentence in your argument section should crystallize your message and offer the judges a parting thought:

> When it came to BACT, however, Congress had a different idea, and left that determination—"on a case-by-case basis"—to the States.

Roberts's "best" brief stands out for many other reasons as well, and not all of them can be reduced to a technique. But as the preceding excerpts suggest, the mystical world of high-level written advocacy may be closer than you think.

---

1. Roberts's brief: www.legalwritingpro.com/briefs/alaska-epa.pdf

Five Ways to Write Like Elena Kagan

The nation's first female Solicitor General signed her name to some first-rate briefs.

One of her best is in *United States v. Stevens*.[1] The case began when Congress decided to ban the distribution of "crush videos," which appeal to fetishists who enjoy watching high-heeled women stomp small animals to death. Congress couldn't resist going further, though, and banned the distribution of any depiction of animal cruelty already banned by law.

Enter Mr. Stevens, a pit-bull aficionado who'd distributed films of his beloved animals fighting. Under the new statute, those films earned him more than three years in prison.

Not surprisingly, he challenged the statute on First Amendment grounds.

In her quest to defend the statute, Solicitor General Kagan has faced tough adversaries in Pattie Millett and Tom Goldstein, whose own brief makes Mr. Stevens sound more like a puppy-loving PETA member than an animal-hating fetishist.[2]

Millett and Goldstein may win more than just the image wars: At oral argument, the Justices appeared skeptical of the government's position, wondering if bullfighting might be covered, too.

Even so, Kagan's writing should make any taxpayer proud.

Here are five techniques she uses.

1. Parade those horribles.

The government has a problem: Its morality play needs an animal hater, but Stevens doesn't appear to fit the bill. Many

people—and perhaps many Justices—might even sympathize with him, wondering why a pit bull lover should be thrown in prison under an animal cruelty statute aimed at stamping out an obscure fetish.

So Kagan does what many great advocates do when they need more emotional pull: she draws on what Tenth Circuit Judge Stephen Anderson calls "a parade of horribles or ultimate absurdity, unworkability, or untenability."

In Kagan's case, those horribles are as horrible as can be: in what is likely a Supreme Court first, she invokes serial killers Jeffrey Dahmer, Ted Bundy, and David Berkowitz—who she helpfully explains, for those too young to remember, is the "Son of Sam" killer.

Why do Jeffrey Dahmer and Ted Bundy make cameos in the government's brief? Because, Kagan says, this trio of serial killers "all committed acts of violence against animals before moving on to human victims."

Kagan claims that she's making the serial killer link to show the government's compelling interest in banning animal cruelty. But don't you think the government also wants you to imagine the viewers of Mr. Stevens's videos lurking in your neighborhood ten years down the road?

And that's the beauty of the horribles parade.

2. Rise above the fray.

If Kagan ratchets up the imagery in invoking bogeyman Jeffrey Dahmer, she ratchets down the rhetoric in attacking her true adversary—in this case, the Third Circuit.

As with most of the top advocates' briefs, you'll never hear that an adversary's argument is "preposterous on its face" or that a court's reasoning is "specious in the extreme"—phrases that former judge Patricia Wald has called common "no-nos."

In place of such tiresome bursts of shock and awe, Kagan uses the less titillating—but more convincing—technique of saying that the other side is simply "wrong" or that the court's holding is "incorrect":

> [T]he court **incorrectly believed** that Church of the Lukumi Babalu Aye, Inc. v. City of Hialeah, 508 U.S. 520 (1993), resolved that issue.
>
> The court of appeals' holdings that the depictions are protected speech and that the statute is facially unconstitutional are **wrong**.
>
> [T]he court suggested that the statute cannot constitutionally be applied to depictions of animal cruelty when the underlying acts were legal where they were performed. **That is incorrect.**

3. Hurry up and wait.

Most litigators' sentences are top-heavy. Here's a typical one: "Defendant's reliance on said promise should have been illustrative of Defendant's intent to enter into the formation of a binding agreement."

Kagan's sentences are the opposite: they start with a bang. In these three passages, every sentence—and every clause—starts with a one-syllable word (I've cut the citations).

> **Like** obscenity, the depictions appeal to viewers only at the basest level and "offend[ ] the sensibilities" of most citizens. **Also like** obscenity, the images Section 48 covers are "specifically defined by" law and are created for "ensuing commercial gain," rather than for any educational, scientific, or other useful purposes. **And of course**, the exceptions clause in Section 48 is an expanded version (excluding more material from the Section's coverage) of

one part of *Miller*'s obscenity test. **To be sure**, only some of the material here appeals to sexual cravings or depicts sexual conduct, as all legally defined obscenity does. **But if** non-sexual obscenity were possible—**if** obscenity were to retain some of its original, colloquial meaning as depraved and loathsome to the senses—**then** this material surely would qualify.

Each unprotected category created by the Court over the decades shares certain characteristics, **but** each also has its own distinct scope. **So**, for example, in *Ferber*, the Court rejected the view that child pornography must fit into the existing definition of obscenity to fall outside the First Amendment's protection. **In** that case, the court of appeals had assumed that the material at issue must qualify as obscene, **but** this Court disagreed, explaining that the First Amendment does not prohibit a State from "going further" than obscenity so long as "the evil to be restricted so overwhelmingly outweighs the expressive interests, if any, at stake." **Thus**, whether a specific category of speech lacks First Amendment protection is governed by the analysis initiated in *Chaplinsky*, **and** does not depend on whether the speech to be regulated is equivalent or strictly analogous to an existing "low-value" category.

And even if some of the depictions reached by Section 48 do express some sort of idea—for example, that gratuitous cruelty to animals is tolerable or appropriate—**they** may be prohibited because of the way the idea is expressed. **As** this Court has explained, certain narrow categories of speech are unprotected not because "they constitute 'no part of the expression of ideas,'" **but** because they constitute "'no *essential* part of any exposition of ideas'"; "their content embodies a particularly intolerable (and socially unnecessary) *mode* of expressing *whatever* idea the speaker wishes to convey." **So**, for example, child pornography may express an idea about the appropriateness of certain sexual

behavior with children, **but** the Court nonetheless has declined to extend First Amendment protection to such material.

4. Count 'em.

Many litigators use lists to good effect in introductions, for example, when listing reasons their client should prevail. But the best writers use lists in less obvious settings as well, say, when they're distinguishing a case or, as here, explaining a dense point of statutory construction.

> Four features of the statute narrowly circumscribe the statute's reach.
>
> First, the statute covers only those depictions "of conduct in which a living animal is intentionally maimed, mutilated, tortured, wounded, or killed" . . . .
>
> Second, the statute only applies to depictions of illegal conduct . . . .
>
> Third, Section 48 encompasses only those images that are "knowingly create[d], s[old], or possesse[d]" with the specific "intention of placing that depiction in interstate or foreign commerce for commercial gain" . . . .
>
> Fourth, Congress exempted from the statute's reach any depictions with "serious religious, political, scientific, educational, journalistic, historical, or artistic value."

I like this list so much that I'll overlook the syntax glitch in the second item ("only" should come after "applies," not before it).

Kagan includes another impressive list, this time a three-part list of interests supporting the challenged criminal statute, each one in parallel form.

> [T]hree principal interests support Section 48. **First, the government has an interest in reinforcing** the prohibitions of animal cruelty in state and federal law by removing a financial incentive to engage in that egregious, illegal conduct. **Second, the government has an interest in preventing** the additional criminal conduct that is associated with the torture and mutilation of animals underlying the production and distribution of those materials. **Third, the government has an interest in protecting** public mores from the corrosively anti-social effects of this brutality.

5. Add a dash of style.

Top literary agent Noah Lukeman wrote a terrific book called *A Dash of Style*. It's about how great writers—from Ernest Hemingway to Emily Dickinson—use punctuation to add elegance and flair.

Like the Chief Justice, Kagan has a knack for such creative punctuation. Take her liberal use of the em dash.

Many times in her brief, she uses a pair of dashes to highlight an elaboration:

> Because the depictions at issue feature—**and in some instances, themselves cause**—acts of illegal animal cruelty that are difficult to prosecute directly, Congress chose to target these depictions as a way to deter the underlying conduct.
>
> And even if some of the depictions reached by Section 48 do express some sort of idea—**for example, that gratuitous cruelty to animals is tolerable or appropriate**—they may be prohibited because of the way the idea is expressed.

You can also use a dash to end a sentence with a final gloss, as Kagan does to great effect here:

> [The prohibited material] also includes videos of dogfights, hog-dog fights, and cockfights—bloody spectacles of vicious animals forced to fight to the point of exhaustion or death.

Speaking of final glosses, no matter how Mr. Stevens and his pit bulls fare, I'll keep digesting Kagan's briefs—and now her opinions, too.

———

1. Kagan's brief: www.legalwritingpro.com/briefs/us-stevens-kagan.pdf

2. Millett's brief: www.legalwritingpro.com/briefs/us-stevens-millett-goldstein.pdf

Five Ways to Write Like *The Economist*

When I fly both in the U.S. and abroad, I often spot the Blackberry-and-Bluetooth set poring over *The Economist* from the comfort of their airplane seats.

Does the writing in that lauded publication offer any secrets about how to appeal to your client base? Here are five reasons the answer may be yes. Let's look at some examples from one issue on everything from the Irish debt crisis to Prince William's engagement.[1]

1. Magician's Mark

In his book *A Dash of Style*, top literary agent Noah Lukeman calls the colon the "magician" of punctuation, "one of the most powerful tools" in a writer's arsenal.[2]

Yet other than when introducing lists and quotes, most attorneys do not use the colon as often as they could. Whenever you feel like writing "due to the fact that," "as a result," "therefore," "for that reason," "accordingly," or even "because," consider using a colon instead to make the reader ask "why."

But spam is still a menace: blocked at the email inbox, spammers post messages as comments on websites and increasingly on social networks like Twitter and Facebook.

The principle was absolutely right: unless default is a possibility, bond investors have no reason to distinguish between good and bad credits.

If growth recovers, the hole left by years of serial tax cutting and overspending can be plugged: you need to find spending cuts or tax increases equal only to 2% of GDP to stabilise federal debt by 2015.

2. Zinger Verbs

Should we lawyers also "take advantage of" the opportunity to "include" vivid verbs in our sentences? Or should we **seize** the chance to **pepper** our sentences with such verbs?

Try swapping the underlined language for some visual and evocative action words.

Before

America's tax system is riddled with exemptions that sustain an industry of advisers but undermine economic energy.

The criminal businesses behind spam are competitive and creative. They circumvent technical fixes as fast as the hurdles are erected.

Although Japanese society is growing older faster than anywhere else in the world, plenty of others are not particularly far behind it.

The [Republicans and Democrats] have little time to ponder before a freight train descends upon Capitol Hill.

After

America's tax system is riddled with exemptions that **feed** an industry of advisers but **sap** economic energy.

The criminal businesses behind spam are competitive and creative. They **vault over** technical fixes as fast as the hurdles are erected.

Although Japanese society is growing older faster than anywhere else in the world, plenty of others are **shuffling along** behind it.

The [Republicans and Democrats] have little time to ponder before a freight train **thunders into** Capitol Hill.

3. That Reminds Me

For any nonfiction writer, evocative examples and analogies are priceless. Like the bylined writers at *The Wall Street Journal*, the anonymous writers at *The Economist* are adept at using such devices to seduce you into reading about a dry topic. See how the first lines of an article on the European bond market draw you in.

Groucho Marx memorably said that he did not wish to belong to any club that would have him as a member. Some of Europe's more embattled economies may now feel the same about the euro.

Another way to use an example is to give a number that makes an otherwise abstract concept concrete.

All that means that America can sensibly aim for a balance between spending cuts and higher taxes similar to the benchmark set by Britain's coalition government. **A ratio of 75:25 is about right.**

Of course, the most impressive examples are so creative that they make a point stick in your mind long after you've finished reading. Note how *The Economist* uses a clever analogy to link the problems of fighting spam to a misunderstanding of the Internet.

Public behaviour still treats the internet like a village, in which new faces are welcome and antisocial behaviour a rarity. **A better analogy would be a railway station in a big city, where hustlers gather to prey on the credulity of new arrivals.** Wise behavior in such places is to walk fast, avoid eye contact and be brusque with strangers. Try that online.

4. Starting Gate

Great writers, legal or otherwise, learn to start their sentences with some speed. See if you can quicken the openings of these five sentences.

Therefore, Ireland has long been flirting with a debt crisis of its own. However, it has not been helped by the other euro-zone members. As a threshold matter, the rescue of Greece was a botch: it fudged the obvious issue that Greece will never fully be able to repay its debts on time. Additionally, the temporary support scheme cobbled together for the rest of the euro zone was equally flawed: in particular, it was too easy on private creditors. Nevertheless, notwithstanding the fact that all this was troubling, Angela Merkel's attempt to fix it has been spectacularly clumsy.

Here's what *The Economist* actually wrote:

So Ireland has long been flirting with a debt crisis of its own. **But** it has not been helped by the other euro-zone members. **To begin with,** the rescue of Greece was a botch: it fudged the obvious issue that Greece will never fully be able to repay its debts on time. **And** the temporary support scheme cobbled together for the rest of the euro zone was equally flawed: in particular, it was too easy on private creditors. **But although all this was troubling,**

Angela Merkel's attempt to fix it has been spectacularly clumsy.

Feeling lighter and faster? Your readers will as well.

5. Parallel Lives

The knack for parallel construction is a hallmark of great legal writing in any specialty. Here are some choice models from *The Economist*.

First, parallel construction in a pair of related sentences about futile efforts to detect spam:

> The anti-spam industry has done laudable work in saving e-mail. But it is always one step behind. **When filters blocked missives** with tell-tale words such as "Rolex" or "Viagra", spammers misspelled them (Vi@gra, anyone?). **When filters blocked mail** from suspect network addresses, the spammers used botnets (networks of hijacked computers) instead.

Second, parallel construction through antithesis, the rhetorical device that highlights contrasts:

> But the real question for Europe is **whether** it wants a slow succession of Greeces and Irelands—or **whether** it is ready to move beyond governmental rescues and focus on growth.

Third, parallel construction in a list about spammers and links:

> To the spammer, it is moot whether the link is **emailed**, **tweeted**, or **liked**.

Fourth, parallel construction in a list about the aging Japanese population:

> Deregulation [in Japan] would help, **by making** it easier to sell services (such as residential care) to the elderly, **by freeing** up finance to allow them to make better use of their savings, **and by encouraging** more competition in the domestic economy so that it can withstand the inevitable shocks to external trade.

Note that repeating the "by" each time makes the list stronger and clearer.

And finally, parallel construction in a list about Kate Middleton, Prince William's then-future bride:

> **That her forebears include** Northumbrian miners and her mother was formerly an air stewardess, **that her parents made** their own money, **and that she met the prince** at university rather than a stately home, can only do her good.

If these five techniques help you write a bit more like *The Economist*, you could make your readers as happy as we hope Prince William and Kate Middleton will be.

———

1. *The Economist,* Nov. 20, 2010.
2. Noah Lukeman, *A Dash of Style: The Art and Mastery of Punctuation* (New York: Norton, 2006).

Tools for Litigators

Write a Brief Like the Chief—And 49 Other Top Advocates

If you're an ambitious golfer, you might analyze the swing of Phil Mickelson or Annika Sorenstam. If you want to appear on *Top Chef*, you might devour books by Julia Child or Thomas Keller. But what if you aspire to be a first-rate brief writer? Who does it best—and how?

Here's one way to answer those questions: dig into the work of the profession's most sought-after writers, unearth how they write differently from others, and then turn those differences into techniques that you could apply yourself.

To test out this approach, let's take a lawyer who is more revered for his advocacy skills than perhaps any other lawyer alive: Chief Justice John Roberts. After all, even Justices Kagan and Ginsburg and Democratic senator Chuck Schumer have all stated publicly that Roberts may be the greatest advocate alive.

And let's pick not just any old John Roberts brief, but a brief that the Justices said at the time was the best they'd seen in decades—the one Roberts filed for Alaska in a high-stakes environmental case against the EPA.

At issue was who gets to decide which technology is "best" for controlling air pollution: the state of Alaska, as Roberts claimed, or the EPA, as the federal government claimed. Arguing for the state, Roberts suggested in a now-famous passage that determining the "best" technology for fighting air pollution was bit like asking people to pick the "best" car:

> Mario Andretti may select a Ferrari; a college student a Volkswagen Beetle; a family of six a mini-van. A Minnesotan's choice will doubtless have four-wheel drive; a

> Floridian's might well be a convertible. The choices would turn on how the decisionmaker weighed competing priorities such as cost, mileage, safety, cargo space, speed, handling, and so on.

I have shared this passage with lawyers all over the world. "Brilliant," exclaim some. "Look how he gets his point across," say others. But they all agree on one thing: "Writing like that is an art."

And yet there's plenty of craft behind that art. In fact, when I unpack Roberts's famous car passage, I see at least three concrete writing techniques that he and other top advocates use time and again—techniques that you can use as well.

1. That Reminds Me

When most lawyers discuss regulations, they fall into an abyss of detail. Roberts, by contrast, offers up the familiar analogy of choosing a car. Why is this car analogy so effective? First, it's **concrete** and even memorable—everyone understands how your car preferences change as you age and move. Second, it plays into Roberts's **theme** of deferring to the states: it's no coincidence that in a brief about how the "best" technology might be different in Alaska than it would be in California, Roberts contrasts a Minnesotan's "best" car with a Floridian's "best" car. And third, the analogy is **provocative**: it's hard for you to avoid thinking about your own favorite car.

Advocates with a knack for coming up with analogies like this tend to be generous with examples as well. Roberts is no exception. When most lawyers use an abstract phrase like "competing priorities," they stop there. Roberts, on the other hand, adds examples of competing priorities, like "cost" and "cargo space," so you can identify with his point right away, nodding your head in agreement.

Such techniques are priceless for getting points across. But what if another goal is to write varied and compelling

sentences that inspire the court to keep reading? Here, too, the Chief Justice has much to teach us.

2. Parallel Lives

Let's consider Roberts's sentence structure. How would most lawyers join "Mario Andretti may select a Ferrari" and "a college student a Volkswagen Beetle"? By chopping up their point into two sentences and starting the second one with "However." Not Roberts: He highlights the contrast by using a semicolon to join the parallel clauses into a single sentence.

In the list of various "best" cars, he also drops words like "and" and "select," creating a rhythmic effect through techniques known as conjunction deviation and verb phrase ellipsis. You can hear how adding these words back in would kill the effect:

> Mario Andretti may select a Ferrari; a college student *may select* a Volkswagen Beetle; *and* a family of six *may select* a mini-van. A Minnesotan's choice will doubtless have four-wheel drive *and* a Floridian's might well be a convertible.

Sentence-level techniques like Roberts's add variety and elegance to the prose, making the writing engaging and even memorable.

3. What a Breeze

Finally, the Roberts passage stands out at the word level: he favors fast and crisp words when other lawyers would pick slow and soggy ones. Case in point: How many lawyers would write "the choices would *turn on how*," as Roberts did? Most of us would type something flat and dreary like "the choices would *be contingent upon the manner in which*." But as with many of the techniques Roberts uses, the results don't just fall from the sky. They happen when you condition yourself to make different writing choices and to employ ever-more-specific techniques.

The Brief Writer's Credo

Resolve to make brief writing more of a science and less of an art. Use these ten principles as a starting point for your work.

1. Each heading gives the judge a reason to do what is in the caption.

2. Each paragraph begins with a reason the judge should endorse the heading.

3. Each paragraph opening follows logically from the first sentence of the paragraph before.

4. Each paragraph opening flows smoothly from the end of the paragraph before.

5. The remaining sentences in the paragraph develop the first sentence logically.

6. Each case discussion explains no more and no less than what the judge needs to know to understand why he or she should do what you're asking for in the current motion or brief.

7. Each sentence contains the fewest number of words needed to make the point.

8. No point is made more than once in each section.

9. Each sentence begins with something the judge understands from the previous sentence so the paragraphs flow logically and smoothly.

10. Abstract doctrines and rules are linked to one of the following four actors: the parties, a class of parties such as plaintiffs or defendants, the Court, or courts.

Making Your Point: A Special Question & Answer Session About Effective Advocacy, with Ross Guberman

John Dean, Verdict*, Interview with Ross Guberman, June 18, 2012*

Getting Into the Teaching of Legal Writing

JD: How did you find yourself working in this area of the law and develop your expertise?

RG: I drifted into law school on the later side, but that had its advantages. I arrived armed with two humanities graduate degrees, a book under my belt, and a lot of experience in editing, translating, and publishing. During law school, I focused on writing and advocacy, working as an articles editor and even writing briefs for a major firm during the school year. After practicing for a few years, I also worked as an investigative journalist and taught advanced writing at GW law school.

JD: Have you studied rhetoric, logic, dialectics—those classic areas of argumentation, because much of that work seems implicit in your approach, albeit in a much less esoteric and identifiable (and far more digestible) form?

RG: I was exposed to rhetoric and logic during my graduate work at the Sorbonne and then later at Yale. I really enjoy translating difficult or dry writing concepts into an understandable form. That's probably why I so appreciate lawyers who do the same thing with the law.

JD: Any estimate of the number of students to whom you have given instruction? How many classes do you typically hold each year?

RG: I conduct between 150 and 200 workshops a year around the world, with audiences ranging from a handful to several hundred. I also speak at many retreats, conventions, and judicial conferences. All told, I've probably worked with about 15,000 people, from law students to senior partners and federal judges. About the same number have read (or at least bought) my book *Point Made*. The variety in topics, venues, and audiences keeps me stimulated and motivated!

The Impact of Good Writing

JD: Can a well-written brief or motion significantly assist an advocate with a weak case or position in influencing a judge? Any examples of situations where well-crafted writing made the difference?

RG: Many lawyers win with lousy briefs or lose with great ones. At a certain point, the law and the facts dominate. And yet even Chief Justice Roberts has said that in close cases, the writing really matters. At the trial level and at the state level, when judges are generally swamped and tend to shun oral argument, the writing may matter even more.

JD: Do you have any way to determine if your instruction is working? Any examples of your students' work having been noticed or recognized for its writing cogency, prowess, or professionalism?

RG: I've received a lot of appreciative notes and letters over the years. Some focus on process, thanking me for helping them enjoy writing or helping them write more efficiently. Others focus on results, telling me that after using one of my techniques, they won praise from judges or clients. The patterns can be interesting: My least appreciative audiences tend to be summer associates or new attorneys. And some of my most enthusiastic followers are at the top of their game: say, federal judges or titans of the Supreme Court bar.

Book Versus Course

JD: Did you develop your book, *Point Made: How To Write Like The Nation's Top Advocates*, based on your experience in teaching? What is the difference between attending one of your classes and reading your book?

RG: My workshops are practical: In a few short hours, I try to give participants as many concrete techniques as possible to improve their legal writing. I think that *Point Made* is practical, too, but it also had a quasi-scientific bent: I sought to tease out the differences in writing style between the average litigator and those at the very top of their game.

JD: I found your fifty selected advocates intriguing—a real Who's Who at the bar. I know several of them well, and I could not agree more that their work is exemplary. But how do you know they actually wrote the briefs you cite, rather than relying on, say a former Supreme Court law clerk working for their firm, if not one of your former students, for producing the final product? Or does their name on the brief, and top quality work they've signed off on, qualify them?

RG: I thought about this recently, after the *New York Times* published an op-ed about the supposed sin of having clerks write the first drafts of judicial opinions. When my own book came out, I received a fair number of communications from people claiming that they had "proof" that they were the "true" authors of a certain sentence or two in my book. I found myself scratching my head, as if I were being to ask to conduct some sort of CSI for brief writers. Of course, we all know that motions and briefs are written by teams. After all, John Roberts probably wasn't writing memos summarizing cases while drafting his brief in *Alaska v. EPA* as a top partner at Hogan. The bottom line, though, is that when you sign a brief, you are giving it your imprimatur. I've also learned that some of these big names do a lot more line editing than is commonly believed.

JD: How do you analyze a brief or motion for its writing professionalism? Do you have a checklist that you employ, say the fifty techniques you have developed for your instructions?

RG: I cannot tell you how many motions or briefs I skimmed in preparing this book! Many times, I came out empty-handed. Let's face it: there aren't a lot of beautifully written motions in limine out there. Usually, I know if a brief is a winner after just a few lines.

JD: What are the most common writing mistake lawyers make in drafting and presenting their arguments?

RG: Let me give you three. First, not spending enough time on the introduction, challenging yourself to distill your dispute down to its essence and to enumerate for the court several specific reasons you should win. Second, spending too much time on the obvious point that you think your opponent is generally wrong, wrong on the facts, wrong on the law, and wrong in its interpretations of individual cases. Nothing is less surprising in litigation than your view that you are right and your opponent is wrong. Cut to the chase. Third, failing to include a short sentence on every page or so. People have no idea how much readers appreciate the occasional crisp sentence or paragraph.

JD: Do you have an audio or video version of your course?

RG: I'm no Luddite, but I have no plans to offer Webinars or to use other passive technologies. I do, however, allow simultaneous videoconferencing or Webcasting of my live programs.

JD: Is there any software that can (or, in fact, does) assist in improving legal writing?

RG: The best software is free: the readability statistics available in Grammar Options in Microsoft Word. You can find out the average number of words per sentence, the average

number of sentences per paragraph, the average number of syllables per word, and the percent of sentences written in the passive voice. All of these are combined into an index ranging from 0-100 (try to top 30). (Editor's Note: Nowadays, try BriefCatch!)

Not Just Advocates

JD: I understand you're working on a book about well-written judicial opinions. I don't want you to scoop yourself, but are you going to have fifty of the best judges in the business, just as you have fifty of the best advocates in *Point Made*? And will they be all living, or will some be deceased?

RG: Some things will be different. I'm looking for the best writers in the judiciary, not necessarily the best judges. I'm going international this time. And yes, I'm looking at deceased judges as well as living ones.

JD: Do you conduct courses for judges as you do for advocates? If you do, what are some of the key differences between a well-written brief or motion versus a well-written judicial decision or ruling?

RG: I do conduct workshops for judges, both here and abroad. The main difference, it seems to me, is this: with a brief or motion, you know you're writing for a judge. With a judicial opinion, it's an open question. If I ask a room full of judges whom they think of when they write, I'll get lots of different answers: the winning party, the losing party, counsel for the parties, other lawyers in the bar, casebook writers, academics, the press. So it's much easier for me to explain how to write a great preliminary statement than to explain how to write a great introduction to an opinion. That aside, when it comes to sentence-level style and the fundamentals of structure, great brief writers have a lot in common with great opinion writers.

JD: Finally, I have noticed in the reviews of *Point Made* that a number of non-lawyers have praise for your work, and found it helpful. Any suggestions as to how a non-lawyer might best use your book? Do you offer a course for non-lawyers?

RG: Part 4 of my book is filled with 17 specific style techniques—I think that section is the most fun for non-lawyers. Some non-lawyers also appreciate Part 2, on writing about facts. I do present to non-lawyers regularly, both in-house and at conferences, and I get a lot of satisfaction out of teaching business writing. In fact, one day I hope to write a book on that subject as well.

———

John Dean, "Making Your Point: A Special Question & Answer Session About Effective Advocacy, with Ross Guberman," *Verdict: Legal Analysis and Commentary from Justia* (Jun. 18, 2012): http://verdict.justia.com/2012/06/18/making-your-point

Ask the Author:
Interview with Ross Guberman

Conor McEvily, SCOTUSBlog*, Interview (Excerpt) with Ross Guberman, March 24, 2011*

CM: There are a lot of books about legal writing out there; what separates this one [*Point Made: How to Write Like the Nation's Top Advocates*] from the others?

RG: The book focuses on what goes right, not what goes wrong. It crystallizes 50 concrete writing techniques through hundreds of bite-sized, timely, and diverse examples from recent high-profile cases and appeals. It ferrets out how the most in-demand advocates write differently from other lawyers. Finally, it's styled as a trade book, so it's written as a one-on-one conversation with what I hope is a personal touch.

CM: In your book, you use both appellate briefs and trial motions to provide examples of good writing and the tools that good legal writers use. Is persuasive writing at the appellate and trial level pretty much the same thing? If not, what are the primary differences that distinguish them?

RG: From a pure writing standpoint, the skill set is similar: streamlined introductions, fact sections that are more persuasive than argumentative, varied sentence structure, liberal use of examples and analogies, clean transitions between points, eye-pleasing formatting, and smooth integration of authorities.

The main difference, frankly, is in overall quality. The top appellate and Supreme Court advocates finesse every word and turn of phrase—their prose is great writing, not just great legal writing. But with few exceptions, you just won't find that level of attention to detail in even the greatest lawyers' trial motions

in even the most high-profile cases. For trial filings, I had to dig deeper to find excellent examples.

CM: What makes persuasive writing so hard?

RG: To succeed, you have to imagine a highly skeptical, highly impatient reader who will never care as much about your case or appeal as you do—and then ask yourself how you can somehow grab that reader's attention and sustain it page after page.

I just don't think that most advocates—legal or otherwise—imagine an actual person reading their work, let alone think about how to sway that person to their cause. That may be one of the reasons briefs used to be better when lawyers dictated them. Dictation is at least one step closer to actual communication.

You also have to channel whatever passion you feel into clarity and creativity, not into the anger and self-righteousness that drive so many motions and briefs.

Finally, the apparatus of brief writing—the citations, record cites, defined terms, footnotes, and case discussions—can easily mask flaws in the prose and in the logic itself.

CM: In your book, you write that advocates should "show, not tell," in their facts statement, letting choice details speak for themselves. Why is it important to let the reader come to her own conclusions about the facts?

RG: The people who read lawyers' work—judges and other lawyers—are highly educated and often cynical. If your fact section sounds like argument, they'll dismiss it as spin. Fiction readers don't want to be *told* that March 1 was a warm day in Washington, DC. They want to be *shown* that the plaintiff's clothing stuck to his skin just seconds after he stepped outside his apartment. Judges are similar. They don't want to be *told* in a fact section that the defendant engaged in dilatory tactics

throughout discovery. They want to be *shown* that four times, defendant missed a discovery deadline and then provided incomplete responses requiring weeks of further delay.

Bottom line: We are inclined to believe our own conclusions, but we resist conclusions that someone else is trying to shove down our throat.

CM: Apart from using the writing techniques you share in your book, what other things can advocates do to become better writers?

RG: A great exercise is to take an editorial that cuts against your politics and write a rebuttal based on pure logic, with no rhetoric or name-calling or "meta-commentary" on how flawed the editorial is. So liberals might pen a response to the *Wall Street Journal*, conservatives to the *New York Times*.

Another useful tool: Take a typical BigLaw "client alert" on a hot legal or regulatory issue, and then see how the writers at the *Journal* or the *Times* or *The Economist* address that same issue. I'll let you decide which is more compelling and evocative and why, but when I travel, I see businesspeople reading a heck of a lot more *Wall Street Journal* articles than law-firm client alerts.

I would also play around with the readability statistics I discuss in one of the book's Interludes.

CM: You provide a very comprehensive list of excerpts from outstanding legal writing, but what about non-lawyers? Are there any journalists or essayists whose style you particularly admire, and who might have something to teach advocates?

RG: Certainly. James Stewart, Dahlia Lithwick, Stuart Taylor, Linda Greenhouse, Adam Liptak, Jeffrey Toobin, and others all write about the law in a fresh and vivid way.

As for general-interest publications, I'd recommend analyzing the writing in *The New Yorker*, *The Economist*, the *Wall Street Journal*, the *New York Times*, and *The New Republic*.

If you're willing to look at op-eds as writing and not as polemics, I'm always impressed by the *Washington Post*'s Eugene Robinson and Charles Krauthammer here in my hometown of Washington, DC. The *Times*'s Maureen Dowd and David Brooks are worth a read as well, though their writing styles couldn't be more different.

CM: Has legal writing changed over the years? And if so, for the better or for the worse?

RG: I hate to mythologize the past, but legal writing is changing for the worse. The advent of technology has ushered in an era of cutting-and-pasting that makes the finished product often read like a patchwork quilt, or as what Judge Ruggero Aldisert famously called a "promiscuous uttering of citations."☐

Of course, I think that many of the great examples in my book are exceptions that prove that rule!

CM: As a writing instructor, what is the biggest problem you see with legal writing today?

RG: Psychologically, the biggest roadblock is that lawyers hear "legal writing" and think it's all about eliminating legalese and the passive voice. To begin with, that advice is too simplistic: You need to distinguish between legalese and terms of art, and you also need to know when the passive voice is appropriate, if not preferred. But more important, so many other writing skills and techniques make a lawyer a standout advocate; avoiding legalese wouldn't even make my Top 10.

As for the finished product, at the upper echelons of the profession, the biggest problems are (1) on the strategy side, a failure to explain the dispute as a clash between competing

views and (2) on the style side, choppy transitions between sentences, paragraphs, and thoughts. I'm about to run some workshops with judges, so I'll add that the same observations hold for many judicial opinions as well.

CM: At several points in your book, you note that lawyers are prone to convoluted syntax and confusing prose. Why are lawyers so bad at "plain talk"?

RG: Probably because we think that the only way to make the law understandable is to dumb it down, and then the reader will think less of us. The opposite is true: If you want readers to think you're smart, make your readers feel smart. That reminds me of one of my favorite bits of writing advice: "If it reads easy, it wrote hard." And vice versa.

CM: Part 4 of your book exhaustively lists devices that can "liven up your style." But are judges really all that susceptible to these persuasive techniques? Can't they see through persuasive writing methods and easily assess the merits of your argument?

RG: In an ideal world, I supposed that style wouldn't or shouldn't matter. But in the real world, it does.

Most lawyers overestimate how much time and effort that judges and even clerks can devote to deciphering the many briefs that cross their desks each week.

So here's what judges will tell you off the record: although they may not assess style consciously, when the word choice is precise and evocative, the sentences are vivid and varied, and the writer shows some personality or pizzazz, the arguments become all that much easier to understand—and to accept.

———

Conor McEvily, *Ask the Author: Interview with Ross Guberman*, SCOTUSblog (Mar. 24, 2011, 4:37 AM), http://www.scotusblog.com/2011/03/ask-the-author-interview-with-ross-guberman/.

Writing to Persuade: Author Ross Guberman on What Professionals Need to Know

Nell Minow, CBS MoneyWatch*, Interview (Excerpt) with Ross Guberman, March 21, 2011*

Punch it up

NM: Many of your techniques are designed to make written communications more vivid and concrete, even when they deal with abstract policy or legal issues. Why is that important?

RG: The best writers know that even the most pressing policy matters can daze and confuse: "important" doesn't always translate into "interesting."

Great writers know that, and so they do whatever they can to evoke concrete images in their readers' minds. I hate to quote Stalin here, but he was on to something when he said, "One death is a tragedy; a million is a statistic." That insight is why the crack writers at the *Wall Street Journal* often start complex business or policy stories with a vivid anecdote or a catchy turn of phrase.

Let me share a quick legal example with you. In a nasty dispute over Calvin Klein jeans, a team led by Brendan Sullivan [lawyer for Lieutenant Colonel Oliver North and for the late Alaska senator Ted Stevens], claimed in a brief that Calvin Klein had for a long time been content to profit from royalties it had earned from sales of its jeans at Sam's Club and other discount retailers.

In Sullivan's rendition, Calvin Klein "was only too happy to pocket" those royalties. Through just that one word "pocket,"

the star-studded Sullivan team conjured up an image that made an abstract accounting move sound suspect or worse.

NM: Are those sorts of choices what people mean by "punchy" writing?

RG: Yes. Punchy writing, legal or otherwise, is long on vivid verbs, parallel constructions, varied sentence structure, sharp contrasts, one-syllable sentence openers, smooth transitions, concrete examples, and evocative analogies, and other techniques that great nonfiction writers have used for centuries.

NM: So when is it appropriate to use vernacular in written communications? How do we balance enough formality to be respectable and credible with enough informality to be engaging?

RG: Pick up the *New York Times*, *The New Yorker*, the *Wall Street Journal*, *The New Republic*, or *The Economist*. Those publications get the balance just right. The writers and editors meet twin goals: to appeal to busy and impatient readers with fresh prose—but without dumbing down the language or condescending to their audience.

As I always tell lawyers, if you want to find the gold standard in professional writing, look at what your busy clients are reading on the airplane. When those clients want to know the latest in derivatives regulation, they pick up the *Wall Street Journal*, not some big law firm's latest client alert.

Why good lawyers are bad writers

RG: Of course, some lawyers do get the balance just right. A simple but telling example: In a brief that has become legendary, Chief Justice John Roberts once wrote that "the choices would turn on how the decision-maker weighed competing priorities." I'm not saying that his turn of phrase deserves a Pulitzer Prize, but most lawyers would have written

something like this instead: “the resulting choices would be contingent on the manner in which competing priorities were weighed by the decision-maker.” Both versions mean the same thing, but the second one falls flat. Small tweaks make a big difference.

So the right tone is direct but not sarcastic, conversational but not casual, clear but not patronizing. Imagine looking a smart but impatient reader in the eye, and engaging the reader so effectively that the reader is nodding after every sentence. That’s the image you want.

NM: That brings me to another question. Why are so many good lawyers such bad writers?

RG: Those are fighting words! But I’m sure you’ve noticed that when people say, “You write like a lawyer,” they always mean it as an insult, not a compliment.

I can think of many reasons the insult may be warranted, at least in part.

First, the law is dense and dry, and even in a single paragraph, lawyers often cull their information from several sources. All that makes for choppy, muddy prose unless you have an arsenal of writing weapons at your disposal.

Second, when lawyers think and talk about writing, they mostly discuss “legalese” and “Plain English”—in other words, whether the profession should continue to use words like “heretofore” or whether recitals in contracts should still begin with the word “whereas.” To me, the legalese discussion is a red herring. Far more important are classic writing skills like flow, structure, conciseness, varying sentence structure, integrating authorities, and using creative examples and analogies. These get short shrift.

Third, and I'm just reporting the news here, just as most Americans think they're above-average drivers, most lawyers think they're above-average writers.

The fourth reason is a dirty little secret I've learned in my training and consulting business: many otherwise brilliant law students graduate with honors from elite law schools with a weak command of grammar and with little experience writing professional-quality prose. Law students are graded and recruited based on exam-taking skills, not based on writing skills or other practical abilities.

NM: You use Barack Obama as one of your examples of excellence in advocacy. What made him effective as a lawyer?

RG: One aspect of Obama's life has received surprisingly little attention: his work during the 1990s at a prominent Chicago civil-rights firm. While there, he signed several briefs in Voting Rights Act disputes and in other cases related to his academic focus at my alma mater, the University of Chicago Law School. As the junior member of the team, he presumably did much of the drafting, and although I can't prove that he wrote every word, I recognize some style traits from his book *Dreams from My Father*.

I included in my book a few excerpts from one of those briefs. That particular filing is on an issue dear to Obama's academic heart, the Voting Rights Act, and he makes great use of hypotheticals, the rhetorical device known as "antithesis," and other techniques that I thought would be useful to Obama-lovers and Obama-haters alike.

NM: Can you give some good and bad examples of the use of graphics?

RG: I'd be happy to, and my advice here will be nonpartisan.

The good: Tables, charts, lists, bullet points, graphs, or timelines—when in doubt, use 'em. For some great advice on

such issues as fonts, spacing, and margins, check out Matthew Butterick's new book *Typography for Lawyers*. I'm sure Matthew won't mind my saying that it's full of great advice for all professionals, not just lawyers.

The bad and the ugly: Avoid underlining and italicizing for emphasis. Don't use too many fonts in any one document. And avoid all-caps in headings or anywhere else.

Words and sentences to ban

NM: Are there some words or sentence structures you would ban forever?

RG: You better shut me up on this one, Nell, or I'll go on for days. Here are a few ideas for you:

Words and phrases to avoid: "egregious," "clearly," "notably," "as such," "the fact that," "provided that," "attached please find" ("enclosed please find" was considered old-fashioned even in the pre-computer era!).

Sentence structures to put to rest:

First, try not to start too many sentences and clauses with "however." So not "I am hungry; however, I don't have time to get a snack" (a favorite construction of lawyers) but "I am hungry, but I don't have time to get a snack" or "Even though I'm hungry, I don't have time to get a snack." In his terrific new book on sentences, *How to Write a Sentence: And How to Read One*, Stanley Fish devotes an entire chapter to this sort of "subordinating sentence" pattern and offers many helpful examples.

Second, avoid this horribly common pattern as well: "The Court did not address the merits of the case. Additionally, the Court did not indicate when it would." Try "The Court did not address the merits of the case. Nor did it indicate when it

would" or "The Court did not address the merits of the case, nor did it indicate when it would."

NM: What's the most important priority for organizing an argument?

RG: To start with something newsworthy rather than circular. Let me explain. Many people start a letter with something like "I am writing to explain why I think the settlement offer is in your best interest." And then the writer is off and running. But if you are skeptical of an offer, hearing that someone thinks it is in your "best interest" isn't going to help you or budge you one bit: the writer is assuming what must be proved.

Far more effective would be to start by acknowledging the reader's skepticism and committing to addressing it in concrete ways: "Although I know you're skeptical about this offer, I believe it's in your best interest for these three reasons." Then you list those reasons in a row before breaking them down and supporting them in detail.

In the legal world, a Supreme Court advocate named Maureen Mahoney (famous for winning the Michigan affirmative action case and for reversing the Arthur Andersen conviction) is one of the best at frontloading arguments with such detailed and thoughtful lists.

In day-to-day correspondence, one way to organize your arguments in this way is to ask yourself, "What three things do I want the reader to do, believe, or understand by the end of this letter or document?" Then list those three things up front.

NM: How do the techniques of legal advocacy apply to other forms of business communication like memos and presentations?

RG: They apply very well. Of the 50 techniques in my book, for example, 17 focus on how to have more interesting, varied, and flowing sentences—a goal of almost all writers.

Writers of memos and presentations can exploit other techniques related to introductions, narrating facts, and organizing complex arguments.

In the end, great legal writing is simply great writing that happens to be about the law.

———

Nell Minow, "Writing to Persuade: Author Ross Guberman on What Professionals Need to Know," *CBS MoneyWatch* (Mar. 21, 2011):

http://www.cbsnews.com/8301-505123_162-48140120/writing-to-persuade----author-ross-guberman-on-what-professionals-need-to-know/?tag=contentMain;contentBody

Ross Guberman Critiques the Government's Health Care Brief

Kali Borkoski, SCOTUSBlog*, Interview with Ross Guberman, April 11, 2012*

Ross Guberman of Legal Writing Pro and the author of Point Made: How to Write Like the Nation's Top Advocates *has explored the federal government's brief on the merits on the constitutionality of the individual mandate and made 140 comments on the legal writing techniques employed in the brief. Below, Ross answers a few questions about the briefing on both sides of the health care cases.*

KB: What do you see as the biggest challenges that the federal government faced in crafting this brief, and what techniques it use particularly well to overcome them?

RG: A brief defending an ambitious statute needs a sense of urgency—a sense of the problem the statute needed to solve. Through a slew of statistics buttressed by economic analysis and health-care policy points, the government does a terrific job of proving that we have a health-care crisis. Unfortunately, though, Mr. Clement's side does not claim otherwise, so that part of the brief has limited persuasive value. The oral arguments made clear that the fight is about the best ways to solve these problems, not about the gravity of those problems.

The government also needed to counter Mr. Clement's efforts to make the individual mandate sound un-American, if not otherworldly. Without swagger or overkill, the government effectively wove in several pro-mandate quotations from conservative-leaning think tanks like the Heritage Foundation. The government also highlighted some choice quotations from the well-respected and Republican-appointed Judge Jeffrey

Sutton, who voted to uphold the mandate when it was before the Sixth Circuit. As "Show, Not Tell" advocacy goes, all these references are home runs.

Finally, although coverage of the case has veered toward the dramatic and the political, the Justices will eventually have to grapple with their Commerce Clause case law. On that front, I thought that the government deftly marshaled the best Scalia quotations from *Raich* while exploiting distinctions drawn in *Lopez*. In fact, in molding and shaping the Commerce Clause case law, the government bested Mr. Clement hands down.

But the government's brief fell short in several respects. Compared with Mr. Clement's brief, the style is wonkish and a bit stiff: after a while, even the most assiduous reader might find it tough going. The passages on health-care financing, for example, have a cobbled-together, cut-and-pasted feel, almost as if they were written by a graduate student rushing to meet a deadline.

More important, the government never quite musters up enough passion for its strongest legal arguments: that all sweeping reforms are "unprecedented" by definition; that it's not for the Supreme Court to second-guess Congress in these matters; and that even if it were, the Court has already approved similar efforts to regulate similar activities.

Put another way, whether you agree with Mr. Clement or not, he has a robust theme: the Affordable Care Act is both "unprecedented and unbounded," as he puts it. From the first line to the last, that theme seeps into every sentence of his brief and serves as its narrative anchor. The government needed to develop a stronger counter-theme.

The biggest missed opportunity, though, is that the brief lacks the preemptive strikes that might have deflated Mr. Clement's most seductive examples. Mr. Clement—with his parade of horribles about regulating burial insurance, dental care, and

the car industry—won the image and sound-bite wars, and apparently inspired many of the Justices' toughest hypotheticals. The government, for its part, did not come to battle equipped with enough vivid examples of its own or with a crisp enough narrative about why the cost shifting in health care makes it so different from other parts of the economy.

KB: In your markup of the federal government's brief, you noted many fine points of legal writing, including properly and improperly split verb phrases, jarring and smooth transitions, and word choice issues. How important do you think these fine points are to the overall persuasiveness of the brief?

RG: I marked up the SG's brief to help practicing lawyers with their own writing, not necessarily to critique the brief. Some things I flagged can thus seem hyper–technical, if not downright geeky.

But the style of a brief often reveals the story of that brief. Take these two sentences.

First, from the government's brief:

"The practical operation of the minimum coverage provision is as a tax law."

Second, from Mr. Clement's brief:

"But that argument is another dead end because the penalty plainly operates as a penalty, not a tax."

Similar point, though made in defense of opposite positions. But note how awkward and clunky the government's sentence is, and how fresh and confident Mr. Clement's is. That's not happenstance. Perhaps unwittingly, the government's unwieldy sentence reflects its ambivalence about whether the mandate functions as a tax or as a penalty.

Don't get me wrong: the government's brief is first-rate. But it's just not as smooth and polished as many of the other briefs that the Office of the Solicitor General has produced. It's informative and hard-hitting in many respects, but unlike Mr. Clement's brief, it's not a joy to read. It sings but never soars.

There's another story behind the style here. Who really wrote this brief? Unlike the briefs filed during Elena Kagan's short tenure, for example, the finished product here just doesn't hold together. The tentative quality of some of the writing suggests that the government might have struggled over the substantive strategy it should adopt as well.

KB: Was there anything striking to you in the construction of Paul Clement's response brief that illuminates a particular strength or weakness in the mechanics of the federal government's brief?

RG: If you read nothing else in these briefs, read Mr. Clement's page-and-a-half-long Introduction. What a masterpiece of succinct, catchy, and even memorable analysis. Forgoing an introduction, the government began its brief with the statutory background and the history of health-care reform. That dry, cerebral opening set the tone for the rest.

KB: What makes Paul Clement's writing so "phenomenal"?

RG: I can think of at least five reasons (*See* "Five Ways to Write Like Paul Clement," page 66.)

First, he managed to return to his theme of "unprecedented and unbounded" across the entire document, from the introduction through the facts and on to the final sentences.

Second, he skillfully contrasts his view of the mandate and the case with that of the government, forcing the Justices to choose between two options that he alone gets to frame.

Third, he conjures up many vivid examples—burial insurance, retirement contributions—of what he claims the government will be allowed to regulate if the mandate goes unchecked.

Fourth, as I mentioned earlier, his style is both punchy and elegant.

And fifth, he's a whiz at transitions and rhetorical constructions. In other words, he's a great writer, not just a great legal writer.

———

Kali Borkoski, "Ross Guberman Critiques the Government's Health Care Brief," *SCOTUSblog* (Apr. 11, 2012, 10:47AM): http://www.scotusblog.com/2012/04/ross-guberman-critiques-the-government%e2%80%99s-health-care-brief/

Little Things That Bug Judges

Whether in books, articles, speeches, or interviews, judges never hesitate to tell us what bothers them about the motions and briefs they read.

From local trial judges to Ruth Bader Ginsburg, the gripes are consistent. But are we listening? In almost every brief I review, I catch something that drives judges crazy.

Here are some of the most common complaints.

- Lawyer who write briefs that reach the page or word limit
- Lawyers who put text into footnotes to meet the page limit
- The word *clearly*
- The word *egregious*
- The phrase *pursuant to*
- *Supra* and *infra*
- Self-evident shorthand: "International Business Machines, Inc. (hereinafter, 'IBM')"
- Parenthetical numbers: "There are three (3) parties"
- Bold text
- Underlining
- Small font
- Footnotes used to take potshots at opponents
- Name-calling
- Referring to parties by procedural status ("cross-appellant")
- Dates that don't matter

Pennsylvania Judges Speak

I recently surveyed judges in the Western District of Pennsylvania. Here is some of what I found.

Preliminary statements

Nearly all said that an introduction is "essential" or "somewhat important."

Sample comment:

> If the introductory paragraphs start out as boilerplate statements (e.g., the standard for summary judgment) and don't tell me what counsel believes the issue is and how it should be resolved, I skip the brief and look at the exhibits because the brief has already failed in its purpose: to help me decide what the important facts and applicable law are.

Footnotes

Nearly all said footnotes "can be helpful in moderation for side points."

Case citations

Almost no judges want the citations within the sentence or in the footnotes.

Almost all want them as a separate sentence following the sentence mentioning the decision.

Tone

All agreed that these two sentences were acceptable in a brief: "Plaintiff is wrong" and "Plaintiff misstates the facts."

All agreed that these two sentences were unacceptable: "Plaintiff is dishonest in presenting the facts" and "Plaintiff's argument is preposterous on its face."

Organizing opposition and reply filings

Most judges said it was better to focus on why you are right.

About 22 percent disagreed, saying it's better to restate the adversary's arguments in order to preserve the structure.

Best ways to shorten a brief

1. Less repetition in the argument (63 percent)
2. Fewer irrelevant facts in the fact section (50 percent)

Interesting contrarian comment:

> In general I don't think shorter is better and I don't think counsel need to worry about the length of briefs. Boring presentations and pointless arguments recycled from the last client's brief are problems in short briefs as often as in long ones.

Best way to emphasize a word or phrase

Most endorsed the use of bold.

Sample comment:

> Truthfully, emphasis is overdone to the point that the brief writers seem to be yelling at the Court.

Influence of pragmatic and equitable concerns

Some judges admitted to being influenced by their "equitable sense of what party is more deserving."

Almost no judges admitted to being influenced by economic considerations, the balance of power between the parties, or the parties' conduct in the litigation.

Sample comments:

> Relative power can be an influence in a contract or business type case, i.e., franchise issues, but not an injury case. I try very hard not to take into account the lawyers' conduct (usually don't see the parties much) but if I know that they are obstreperous and fight about anything, I tend to give less credence to their arguments in a situation where the law is not clear.

> Counsel who want us to adopt their position should make it easy by adopting our style. That is, write in the language of "the law compels this result," not "this result is important to my client." We already know both that 18 years in prison is bad news for a defendant and will keep him off the street for a long time. As judges, we quickly adjust to knowing at least half the courtroom will think we were wrong no matter what we do. So telling us the decision is important or hard really doesn't help: we want to know why we must or must not impose that 18-year sentence.

We read briefs like we settle civil cases: we look for common ground and points agreed on much more eagerly than we want to pick out points of conflict. Therefore, the more impartial counsel can sound without giving away anything important, the better.

Four Motion Mistakes

A federal judge in Florida recently "corrected" dozens of errors in a routine motion.[1]

He mainly fixed typos, but he also marked up several types of errors that many excellent writers make. Here are four examples. (The sample sentences are from the judge's corrected version.)

1. Faulty capitalization of *Order* and *Motion*

Throughout the judge's markup, he changes the capitalization of "order" and "motion."

What gives?

The convention is to lowercase these words when they are used generically to describe a category of actions or papers:

> Defendant in this action has filed a motion to dismiss.

but to capitalize the words when they describe a specific document:

> As indicated in Plaintiff's response to Defendants' Motion to Dismiss . . .
>
> Plaintiff hereby files this Response to the Court's Order . . .

2. Faulty capitalization of *Plaintiff*, *Defendant*, and *Court*

This judge knows his capitalization rules.

The rule here is like the rule for orders and motions.

Capitalize *Plaintiff*, *Defendant*, and *Court* if (1) they are the plaintiff, defendant, or court in the case you're litigating, or (2) you are using Court to refer to the U.S. Supreme Court.

> Defendant was not Plaintiff's employer.
>
> The Court subsequently denied Defendant's motion.

But lowercase *plaintiff*, *defendant*, and *court* if (1) they are the plaintiff, defendant, or court in a case you're citing, or (2) if you're referring to plaintiffs, defendants, and courts generically.

> Plaintiff filed this action against the wrong defendant.

3. Faulty punctuation of quoted material

This judge is no Anglophile. He insists that his lawyers follow American usage rules for punctuating quoted material. And that means you must put periods and commas inside the closing quotation marks.

> . . . sought relief against the "Good Samaritan Society," that being a fictitious name for Defendant.

And no, there's no exception for a single word—or even a single letter.

> See Exhibit "A."

(Note that here the lawyer didn't need the quotation marks in the first place.)

4. Faulty use of ordinal numbers

Unless you're writing a date in the "1st of January, 2010" format, always spell out ordinal numbers.

That's why the judge objected to "7th Judicial Circuit." As he suggests, it should be "Seventh Judicial Circuit."

———

1. *Nault v. Evangelical Lutheran Good Samaritan Found.* [http://abovethelaw.com/_old/2009/09/21/Nault%20v%20Evangelical%20Lutheran%20Full.pdf]

The Lowdown on Footnotes

"Judges are not like pigs, hunting for truffles buried in briefs."

Footnote-averse judges love to cite that condemnation from *United States v. Dunkel*. Others quote Noël Coward:

"Having to read a footnote resembles having to go downstairs to answer the door while in the midst of making love."

Are your footnotes worth the hunt, let alone a trip downstairs?

Footnotes That Help

- String cites, when appropriate
- Fifty-state surveys or surveys of appellate courts, when appropriate
- Footnotes used "to supplement or authenticate statements in the brief" (Third Circuit Judge Ruggero Aldisert)

Footnotes That Hurt

- Jabs and stabs at your opponent
- Tangential issues that will not affect the court's decision
- "Demonstrations by the author of the research he has done (which, unfortunately, has proven unnecessary) or his erudition" (Federal Circuit Judge Dan Friedman)
- Any substantive footnote that runs longer than one or two paragraphs
- More than five substantive footnotes in a single document

Considering Adding a Footnote?

When in doubt, don't. In the words of Mark P. Painter, judge on the U.N. Appeals Tribunal, "If you make your document look like a law review article, it will be just as unreadable!"

Talk to Yourself:
The Rhetorical Question

I used to think that rhetorical questions in briefs were pompous, if not offensive. I shuddered at the thought of a lawyer penning this rhetorical question from Justice Scalia's dissent in *PGA v. Martin*, the case about whether the disabled golfer Casey Martin should be allowed to use a golf cart during tournaments:

> I am sure that the Framers of the Constitution, aware of the 1457 edict of King James II of Scotland prohibiting golf because it interfered with the practice of archery, fully expected that sooner or later the paths of golf and government, the law and the links, would once again cross, and that the judges of this august Court would someday have to wrestle with that age-old jurisprudential question, for which their years of study in the law have so well prepared them: **Is someone riding around a golf course from shot to shot really a golfer?**

I've since done an about-face. I still don't think you should try to be as sarcastic and funny as Justice Scalia, but I've seen many advocates use rhetorical questions to great effect.

Many of the most biting questions put the court on the defensive, suggesting that unless the judge can answer the rhetorical question posed, he or she has to find for the lawyer's client. Here are two examples to consider.

Kathleen Sullivan, *SEC v. Siebel Sys.*

> [T]he Complaint asserts that Mr. Goldman's "body language was positive" during the meeting on April 30. **Would the**

[SEC] have interpreted negative body language—crossed arms and a furrowed brow perhaps—to constitute a violation as well?

Maureen Mahoney,
Arthur Andersen v. United States

Under the Government's interpretation, therefore, § 1515(a)(6) would have to provide a defense for someone who accidentally lies to a witness even if their purpose is to impede agency fact-finding. But telling the truth to impede agency fact-finding would remain criminal. **So a defendant who thinks he is telling the truth to impede an official proceeding has committed a crime if he is right, but not if—entirely unbeknownst to him—he happens to be wrong?**

A Parenthetical Aside

In connection with my book *Point Made*, people often ask me about the use of parentheticals when citing authorities.

Judges appear to be in favor, sometimes wildly so.

Senior Third Circuit Judge Leonard Garth:

> The single, easiest way to make a good brief better is by the judicious use of parentheticals following case citations.[1]

Justice Ruth Bader Ginsburg:

> [A first-rate brief] doesn't cite cases without offering the reader a clue why they are there; instead, it furnishes parenthetical explanations to show the relevance of the citation.[2]

Senior Third Circuit Judge Ruggero Aldisert:

> In recent years, the parenthetical has become very popular, and I strongly recommend its use.
>
> If a case is cited to show resemblances or differences in the facts, a parenthetical disclosing the material facts of the cited case will be very effective: *Fisher & Sons v. Gilardi*, 345 F.4th 666, 678 (9th Cir. 2012) (holding that the reuse of burial caskets differs from the reuse of funereal urns under the statute).

> The parenthetical can also be used to state the reasons that supported the conclusion of the cited case: *Gandolfini v. HBO, Inc.*, 543 F.4th 123, 126 (2d Cir. 2004)("Where a party has not performed to a substantial extent of the contract, the other party is entitled to damages for the missing degree of performance.").
>
> The parenthetical also may be used to state the legal rule that constitutes the holding: *Upton Sinclair Muckraking Indus. v. Jimmy Dean Co.* ("Where the parties agreed to sell and purchase a specific number of dressed hogs as promised, there was not substantial performance of the contract and the purchaser is entitled to damages for the missing degree of performance.").[3]

And here's a good example from the renowned constitutional lawyer Kathleen M. Sullivan:

> Courts have rejected such consumer survey shortcuts in other trademark cases, reasoning that a finding of likelihood of confusion with respect to one product provides no basis for a similar finding with respect to another product of different design. Courts have done so even where, unlike here, a survey tested the defendant's own unrelated product as a stimulus. *See, e.g.*, *Smith v. Walmart Stores, Inc.*, 537 F. Supp. 2d 1302, 1322 (N.D. Ga. 2008) (concluding that "test results from one Walocaust or Wal-Qaeda t-shirt provide no data upon which to estimate consumer confusion regarding another Walocaust or Wal-Qaeda t-shirt); *Sketchers U.S.A. v. Vans, Inc.*, 2007 WL 4181677 (C.D. Cal. Nov. 20, 2007) (criticizing and rejecting plaintiff's post sale consumer confusion survey and expert

attempting to extend test results among defendant's shoes, stating "any extrapolation from this shoe to other Sketchers shoes is suspect.").

---

1. Leonard I. Garth, *How to Appeal to an Appellate Judge*, 21 Litig. 20, 24-66 (Fall 1994).

2. Ruth Bader Ginsburg, *Remarks on Appellate Advocacy*, 50 S.C. L. Rev. 567, 568 (1999).

3. Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Advocacy* 263-64 (2d ed. 2003).

Tools for Transactional Attorneys

Warren Buffett, Writing Trainer?

Fretting over plain English?

Just pick up Warren Buffett's latest annual report for Berkshire Hathaway. Buffett's clear, fresh style is one reason the SEC invited him to write the preface to its *Plain English Handbook*.

In a speech at the National Press Club, former SEC chair Arthur Levitt explained how he once asked Buffett to translate a passage from a mutual fund prospectus into clear, cogent English.

The Original

> Maturity and duration management decisions are made in the context of an intermediate maturity orientation. The maturity structure of the portfolio is adjusted in the anticipation of cyclical interest rate changes. Such adjustments are not made in an effort to capture short-term, day to day movements in the market, but instead are implemented in anticipation of longer term, secular shifts in the levels of interest rates (i.e., shifts transcending and/or not inherent to the business cycle). Adjustments made to shorten portfolio maturity and duration are made to limit capital losses during periods when interest rates are expected to rise. Conversely, adjustments made to lengthen maturation for the portfolio's maturity and duration strategy lies in analysis of the U.S. and global economies, focusing on levels of real interest rates, monetary and fiscal policy actions and cyclical indicators.

Buffett's Version

We will try to profit by correctly predicting future interest rates. When we have no strong opinion, we will generally hold intermediate-term bonds. But when we expect a major and sustained increase in rates, we will concentrate on shorter-term issues. And, conversely, if we expect a major shift to lower rates, we will buy long bonds. We will focus on the big picture and won't make moves based on short-term considerations.

All-Knowing: A Hot Case on Adverb Construction

In 2008, we saw the Million-Dollar Comma Case.

And 2009 may have been the Year of the Adverb, and not just because the Chief Justice shifted *faithfully* in the Presidential Oath of Office.

In a decision handed down that year, whether an accused identity thief faced two years in prison depended on how the Supreme Court construed the adverb *knowingly*.

As soon as Justice Breyer used the words "a transitive verb has an object," I knew the opinion would be a writing consultant's dream.

But it also offers lessons for drafters of all stripes.

The Problem

An immigrant made up a social security number to get a job. The government wanted to prosecute the immigrant for identity theft. To prevail under the statute, which carries a mandatory two-year prison term, the government had to prove that the immigrant "knowingly . . . used . . . a means of identification of another person."

So did the immigrant need to know that the false number he used belonged to someone else—or was it enough simply that the immigrant used a false number?

The Decision

In ordinary English, said Justice Breyer, an adverb such as *knowingly* applies not just to the verb ("used") and not just to the verb's immediate object ("means of identification"). Instead, the adverb applies to the verb's entire object ("means

of identification of another person"). That reading here meant victory for the immigrant.

Breyer's example: "Smith knowingly transferred the funds to the account of his brother." According to Breyer, this sentence suggests that Smith knew he was transferring money to his brother's account, not just that he knew he was transferring money. The same applies, Breyer says, to "John knowingly discarded the homework of his sister," even though the government claims that this example is ambiguous: Did John really know that the homework belonged to his sister?

Scalia's and Alito's Concurrences

Scalia mainly objected to the use of legislative history to support the Court's new Adverb Rule.

Alito, for his part, thought that Breyer's rule was too broad: An adverb such as *knowingly* need not modify the entire object. His example: "The mugger knowingly assaulted two people in the park—an employee of company X and a jogger from town Y." Alito claims that in this sentence, the mugger didn't necessarily know where the victims worked or lived. (Although Alito is probably right about what the mugger didn't know, his example doesn't disprove Breyer's rule: The *employee* and *jogger* phrases are not the objects of *assault*.)

Lessons Learned

To avoid these kinds of disputes, consider repeating your adjectives and adverbs:

- "entire principal and interest" = "entire principal and entire interest"

- "We have not knowingly represented that we have a debt that is not securitized" = "We have not knowingly represented that we have a debt that we know is not securitized."

Are "Indemnify" and "Hold Harmless" the Same?

Drafting reformers hate couplets. They say, for example, that "terms and conditions" means just "terms."

But can couplet aversion go too far? Take "indemnify" and "hold harmless." Double trouble—or a distinction with a difference?

At least one authority claims that "hold harmless" protects against losses and liabilities, while "indemnify" protects against losses alone.[1]

Yet not all courts agree. *Black's Law Dictionary* treats the two as near synonyms. And some experts even suggest cutting "hold harmless" and leaving just "indemnify."

A Couplet to Love

My advice: Leave "indemnify and hold harmless" intact. If anything, you should add to this phrase, not subtract.

You can include language that clarifies what the indemnifying party promises to indemnify: "Seller shall hold harmless and indemnify Buyer against any losses, liabilities, and claims arising out of or relating to this transaction."

You can also spell out when the seller must indemnify the buyer: When the buyer incurs a loss or a liability? Thirty days after the buyer gives notice? After the claim is resolved?

Defend Yourself

If the seller intends to defend the buyer against claims, you could also add "and defend." Thus, "Seller shall hold harmless, indemnify, and defend Buyer."

You Are Hereby Absolved

Some courts suggest that "hold harmless" is broader than "indemnify" because it prevents a seller from, for example, holding a buyer responsible for claims arising out of the buyer's own negligence.[2]

But do you really want to rely on this distinction? Just state whether the seller intends to indemnify claims arising from the buyer's own negligence.

Want More?

For more on indemnification and other key boilerplate provisions, I highly recommend Tina L. Stark's *Negotiating and Drafting Contract Boilerplate* (2003).

---

1. *Mellingkoff's Dictionary of American Legal Usage* 286 (1992).
2. *See, e.g.*, *Rooz v. Kimmel*, 55 Cal. App. 4th 573, 582 (1997) (explaining that defendant not seeking indemnification but relying on "the general 'hold harmless' provision . . . to prevent plaintiff from directly recovering against defendant for damage he incurred from defendant's own negligence").

Million-Dollar Commas

Grammarians of the world, unite! Lawyers of all punctuation persuasions are discovering the revolutionary potential of the humble comma.

How would you resolve these three recent disputes?

Guns n' Commas

When the D.C. Circuit struck down the District's gun-ban law under the Second Amendment, America's usage mavens got busy.

According to Judge Laurence Silberman, because the Amendment's second comma divides the Amendment in two, the first half is just throat-clearing language. What remains—the second half—reflects the "right of the people," which Silberman considers an individual right:[1]

> "A well regulated Militia, being necessary to the security of a free State**,** the right of the people to keep and bear Arms, shall not be infringed."

Not so fast on the trigger, counter the gun-ban's proponents. When the Constitution was drafted, commas were more popular than they are now. And when some states ratified the Second Amendment, their version contained only two commas, not three.

Both sides can give the Supreme Court plenty of ammunition as it resolves this comma conundrum. Will the Justices resurrect the English-law principle that punctuation doesn't matter in statutes, or perhaps even in constitutions? If not, the Court will face a grammar dispute even more enticing than its recent spat over how to make words ending in *s* possessive.

Canada's Million-Dollar Comma

In a recent Canadian contract dispute over stringing utility poles, the stringer—Aliant, Inc.—wanted out of the deal after the price of pole stringing skyrocketed. Under the contract, the stringer first had to give a year's notice—but could it give notice before the contract's first term ended?

More than $2 million Canadian were at stake. And, you guessed it, the case turned on a single comma.

According to Aliant, the following provision gave either party the right to terminate at any time as long as it first provided a year's notice:

> This agreement shall be effective from the date it is made and shall continue in force for a period of five (5) years from the date it is made, and thereafter for successive five (5) year terms**,** unless and until terminated by one year prior notice in writing by either party.

Aliant argued that because the highlighted comma set off the second five-year term, the notice provision applied to both five-year terms—not just the second. The other side, Rogers Communications, countered that, like it or not, Aliant was stuck with at least five years of pole-stringing duty.

In the resulting tumult, the parties parried punctuation rules against the Rule of the Last Antecedent and other canons of construction. Also weighing in were drafting guru Kenneth Adams, who filed a 69-page pro-Rogers affidavit that was mostly about commas, and Lynne Truss of *Eats, Shoots & Leaves* fame, who sided with Aliant.

In the end, an appellate body resolved the dispute in an Only-in-Canada Moment: It relied on the French version of the contract and found for Rogers.[2]

The Explosive Alabaman Comma

When Alabama reprinted its state code several years ago, an editor added a serial comma to the state's definition of "gasoline." This seemingly innocent gesture sparked yet another million-dollar dispute.

Consider the reprint, in which I've highlighted the new comma:

> **Definition of gasoline.** "Gasoline, naphtha**,** and other liquid motor fuels or any device or substitute therefor commonly used in internal combustion engines . . ."

A taxpayer pounced on the change: He would owe an extra $1 million in taxes if all naphtha were taxed rather than only the naphtha used in combustion engines. So he argued that the original comma-free version should apply. The dispute wound up at the Alabama Supreme Court, which reverted to the original version but read in the serial comma all the same:

> The section defines "gasoline" in three parts:" [1] gasoline, [2] naphtha and [3] other liquid motor fuels or any device or substitute therefore commonly used in internal combustion engines."[3]

Not to ignite more controversy, but this case provides fuel for those of us who believe that serial commas can help avoid ambiguity.

---

1. *Parker v. District of Columbia*, 478 F.3d 370 (D.C. Cir. 2007).
2. Telecom Decision C.R.T.C. 2007-75, [2007] Reference: 8662-R28-200612326 (Aug. 20, 2007).
3. *Ex parte State Dep't of Revenue*, 683 So. 2d 980 (Ala. 1996).

When Are "Best Efforts" Enough?

Contracts often require parties to use their "best efforts" to execute obligations. But judges and lawyers disagree about the term and its variants.

Can you rank these terms according to the burden they impose?

- reasonable efforts
- reasonable best efforts
- best efforts
- good-faith efforts
- diligent efforts
- commercially reasonable efforts

Unsure? You're not alone. Although some authorities claim these terms fall into a neat order, case law suggests otherwise. Consider this "best efforts" provision, which came before then-judge Samuel Alito and his Third Circuit colleagues:

> Meridian and NDPS agree to use their best efforts to achieve satisfaction of the conditions to Closing set forth in the Agreement and to consummate the Closing on the terms and subject to the conditions set forth in this Agreement.[1]

Under this agreement, NDPS promised to buy Meridian's credit card business. Either party could terminate the agreement if the parties failed to close by a certain date. Four days before the deadline, Meridian decided to pursue another deal. To avoid closing, Meridian just "let the clock run," as Alito put it, despite ongoing negotiations, and then terminated the agreement.

NDPS sued. It claimed that because Meridian had failed to exercise its "best efforts" to close the deal, it had breached the agreement.

Most lawyers would agree: they'll tell you that "best efforts" means every conceivable effort short of measures that would create insolvency. But Alito and his colleagues held that "best efforts" did not require all possible efforts—even Meridian's wait-and-see approach was effort enough. Nor was Alito bothered by Meridian's failure to remind NDPS of the approaching deadline.

A few courts have even given up on "best efforts" and its variants; one Illinois court called the phrase "too vague to be fairly intelligible and too lacking in certainty to be enforceable." Yet another court held that "best efforts" requires merely a "reasonable effort."[2]

If negotiations allow, one solution is to create a defined term that conveys what "best efforts" entails or that cites industry standards as a benchmark. As one New York court advised, "the agreements [should] contain clear guidelines against which to measure such efforts."[3]

---

1. *Nat'l Data Payment Sys., Inc. v. Meridian Bank,* 212 F.3d 849 (3d Cir. 2000).
2. *NBC Capital Mkts. Grp., Inc. v. First Bank*, 25 F. App'x 363, 365-66 (6th Cir. 2002).
3. *Strauss Paper Co. v. RSA Exec. Search*, 260 A.D.2d 570, 571 (2d Dep't 1999).

Transactional Nits

Have you ever wondered whether the nuances of transactional language matter? Consider Judge Dennis Montali's seven-page analysis of a liquidation plan and disclosure statement in the Heller Ehrman bankruptcy.[1]

Many of his criticisms are substantive, but he also flags some common attention-to-detail problems in transactional documents. Here are five of them.

1. Capitalizing common nouns that are never defined

> The judge speaks: "Settlement Agreement" is not a defined term. "Self Insured Retention Amount" is not a defined term. "Dissolution Plan" is not a defined term.

Action plan: Review your agreements for capitalized words that are neither proper names nor defined terms.

2. Inconsistencies between defined terms

> The judge speaks: The definition in (ii) conflicts with the Disallowed Claim definition in 1.50.

Action plan: Cross-reference all definitions embedded in other definitions (or, better yet, don't use a definition to define a separate term).

3. Inconsistent treatment of operative provisions

> The judge speaks: Is the use of different but similar terms ("five per cent (5%) per annum" and "five percent simple interest") intentional or inadvertent?

Action plan: Create a simple style sheet for key parties, currencies, and formulas.

4. Faulty cross-referenced paragraph numbers

> The judge speaks: "5.15" should be "5.23"; "5.27" should be "5.28."

Action plan: Few mistakes are more common than this one. Toward the end of your review, make sure all cross-referenced paragraph numbers are still accurate. Or use Word to insert cross-references that automatically update, and even hyperlink.

5. Inconsistent formatting

> The judge speaks: "6" should be "VI."

Action plan: If you haven't installed software to catch such glitches, check your section and subsection headings, and also review for consistent treatment of margins.

One last tip: Use my ten-point checklist for reviewing transactional documents:

Ten Questions for Every Transactional Document

1. Have I spelled the parties' names correctly and used their proper corporate form?

2. Have I triple-checked all dates, numbers, and figures?

3. Have I included key boilerplate provisions (severability, merger, notice, dispute resolution, choice of law, indemnity, counterparts, assignment)?

4. Have I used all defined terms at least twice?

5. Have I done a global search for client names that appeared in the precedent?

6. Have I verified that all cross-referenced paragraph numbers are still accurate?

7. Have I labeled exhibits and schedules consistently?

8. Have I labeled cross-referenced paragraphs consistently?

9. Have I used a consistent format for numbers and currencies?

10. Have I been consistent with margins, line spacing, and paragraph spacing?

———

1. Judge's memorandum in Heller Ehrmann LLP bankruptcy (2009) [http://www.legalwritingpro.com/pdf/bankruptcy-judge-letter-to-heller-lawyers.pdf]

Tools for Judges

Kagan vs. Scalia: Who Won Round One?

The Left has long wanted a Supreme Court Justice who could "stand up to Scalia." Now that Kagan has written her first opinion, with Scalia the lone dissenter, how did our newest Justice fare?

The case: *Ransom v. FIA Card Services*.

The prize: Whether a Chapter 13 debtor can claim as an "ownership cost" an allowance for a car that he has already paid off, thus reducing what he has to pay to creditors.

The winner on the merits: Kagan, against the debtor, Mr. Ransom, and thus for the credit card industry. The opinion incorporates much of the reasoning in the first-rate brief by MoFo's Deanne Maynard.[1]

The winner on the writing: a draw. Kagan holds her own against Scalia, and she even inserts some Scalia-like zingers into her decision on this dry but important issue. Using my *Point Made* as a guide to persuasive-writing strategies, I've pitted the two Justices against each other below

Don't Be Fooled

Kagan

Kagan draws a line in the sand here between the debtor's claim that Congress wanted to encourage paying off loans and what Kagan says was Congress's more neutral purpose:

> **But the choice here is not between thrifty savers and profligate borrowers, as Ransom would have it.** Money is fungible: The $14,000 that Ransom spent to

purchase his Camry outright was money he did not devote to paying down his credit card debt, and Congress did not express a preference for one use of these funds over the other.[2]

Scalia

Like Kagan, Scalia sharpens the dispute into a clash, this time between competing views on how to construe "applicable" in the disputed Code provision:

> **The canon against superfluity is not a canon against verbosity.** When a thought could have been expressed more concisely, one does not always have to cast about for some additional meaning to the word or phrase that could have been dispensed with.[3]

That Reminds Me

Kagan

A time-tested way to use examples persuasively is through the classic parade of horribles:

> On Ransom's view, for example, a debtor entering bankruptcy might purchase for a song a junkyard car—"an old, rusted pile of scrap metal [that would] si[t] on cinderblocks in his backyard"—in order to deduct the $471 car-ownership expense and reduce his payment to creditors by that amount.[4]

Scalia

Realizing the impact of Kagan's example if left unchecked, Scalia one-ups her "imagined horrible" with a "horrible" example of his own:

> As for the Court's imagined horrible in which "a debtor entering bankruptcy might purchase for a song a junkyard car," that is fairly matched by the imagined horrible that, under the Court's scheme, a debtor entering bankruptcy might purchase a junkyard car for a song plus a $10 promissory note payable over several years.[5]

The Starting Gate

Kagan

Starting more sentences with short conjunctions like "but" or "yet" is one of the easiest ways to speed up your prose. All the more compelling is starting the occasional sentence with an uncommon conjunction like "so":

> **So** an expense amount is "applicable" within the plain meaning of the statute when it is appropriate, relevant, suitable, or fit.[6]

Scalia

Starting with the conjunction "for" here, Scalia is channeling a favorite technique of Justice Stevens's:

> **For** the Court's more strained interpretation still produces a situation in which a debtor who owes only a single remaining payment on his car gets the full allowance.[7]

A Dash of Style

Kagan

Dashes are an easy way to add some elegance and variety to your prose. Here, Kagan uses one to elaborate:

> If a below-median-income debtor cannot take a deduction for a nonexistent expense, we doubt Congress meant to provide such an allowance to an above-median-income debtor—**the very kind of debtor whose perceived abuse of the bankruptcy system inspired Congress to enact the means test**.[8]

Scalia

And here, Scalia uses a dash to set off an example:

> Section 707(b)(2)(A)(ii)(I) itself authorizes deductions for a host of expenses—**health and disability insurance, for example**—only to the extent that they are "actual . . . expenses" that are "reasonably necessary."[9]

Good Bedfellows

Kagan

Many lawyers and judges needlessly fear semicolons. They are a great tool for drawing stark contrasts, as Kagan does here:

> The word "applicable" is not necessary to accomplish that result; it is necessary only for the different purpose of dividing debtors eligible to make use of the tables from those who are not.[10]

Scalia

And as Scalia does here, giving his own spin on a contrast Kagan drew:

> [The Court's] opinion does not, it says, find [the Standards] to be incorporated by the Bankruptcy Code; they simply

"reinforc[e] our conclusion that . . . a debtor seeking to claim this deduction must make some loan or lease payments."[11]

Take Me by the Hand

Kagan

Like all great writers, the Supreme Court Justices are generous, even creative, in their use of transition words and phrases. Here Kagan uses "as against all this" to make Ransom's position look inconsistent with what came before:

As against all this, Ransom argues that his reading is necessary to account for the means test's distinction between "applicable" and "actual" expenses.[12]

Scalia

And here, Scalia uses "true enough" as an alternative to the more common "to be sure":

True enough, the opinion says that the Bankruptcy Code "does not incorporate the IRS's guidelines," but it immediately continues that "courts may consult this material in interpreting the National and Local Standards" so long as it is not "at odds with the statutory language."[13]

---

1. Respondents' brief in *Ransom v. MBNA Am. Bank, N.A.* (2010). [http://www.americanbar.org/content/dam/aba/publishing/preview/publiced_preview_briefs_pdfs_09_10_09_907_Respondent.authcheckdam.pdf]

2. *Ransom v. FIA Card Servs.*, 562 U.S. ___ (2011); slip op. at 17. ["Kagan opinion"].

3. *Id.* (Scalia. J., dissenting), slip op. dissent at 2. ["Scalia dissent"].

4. Kagan opinion at 16-17 (internal citation omitted).

5. Scalia dissent at 4.

6. Kagan opinion at 7.

7. Scalia dissent at 4.

8. Kagan opinion at 8 n.5.

9. Scalia dissent at 3.

10. Kagan opinion at 12.

11. Scalia dissent at n.*.

12. Kagan opinion at 13.

13. Scalia at dissent n.*.

The Supremes Soar

One of the highlights of my summer was speaking to the Eighth Circuit Conference right after Justice Alito. My topic: writing highlights from the last Supreme Court Term.

Here are seven of those highlights, Oscars-style.

1. Best verb (tie)

Samuel Alito, *Snyder v. Phelps*, dissent:

And as far as culpability is concerned, one might well think that wounding statements uttered in the heat of a private feud are less, not more, blameworthy than similar statements made as part of a cold and calculated strategy to **slash** a stranger as a means of attracting public attention.

Elena Kagan, *Arizona Christian School Tuition Organization v. Winn*, dissent:

The majority **shrugs off** these decisions because they did not discuss what was taken as obvious.

2. Best wit

John Roberts, *FCC v. AT&T Inc.*, opinion:

Adjectives typically reflect the meaning of corresponding nouns, but not always. Sometimes they acquire distinct meanings of their own. The noun "crab" refers variously to a crustacean and a type of apple, while the related adjective "crabbed" can refer to handwriting that is "difficult to read," Webster's Third New International Dictionary 527 (2002); "corny" can mean "using familiar and stereotyped formulas believed to appeal to the unsophisticated," *id.*, at 509, which has little to do with "corn," *id.*, at 507 ("the seeds of any of the cereal grasses used for food"); and while "crank" is "a part of

an axis bent at right angles," "cranky" can mean "given to fretful fussiness," *id.*, at 530.

3. Best hypothetical

Elena Kagan, *Arizona Christian School Tuition Organization v. Winn*, dissent:

Consider some further examples of the point, but this time concerning state funding of religion. Suppose a State desires to reward Jews—by, say, $500 per year—for their religious devotion. Should the nature of taxpayers' concern vary if the State allows Jews to claim the aid on their tax returns, in lieu of receiving an annual stipend? Or assume a State wishes to subsidize the ownership of crucifixes. It could purchase the religious symbols in bulk and distribute them to all takers. Or it could mail a reimbursement check to any individual who buys her own and submits a receipt for the purchase. Or it could authorize that person to claim a tax credit equal to the price she paid. Now, really—do taxpayers have less reason to complain if the State selects the last of these three options? The Court today says they do, but that is wrong. The effect of each form of subsidy is the same, on the public fisc and on those who contribute to it. Regardless of which mechanism the State uses, taxpayers have an identical stake in ensuring that the State's exercise of its taxing and spending power complies with the Constitution.

4. Best short sentences (tie)

Antonin Scalia, *Wal-Mart Stores, Inc. v. Dukes*, opinion:

[The dissent] criticizes our focus on the dissimilarities between the putative class members on the ground that we have "blend[ed]" Rule 23(a)(2)'s commonality requirement with Rule 23(b)(3)'s inquiry into whether common questions "predominate" over individual ones. **That is not so.** We quite agree that for purposes of Rule 23(a)(2) "'[e]ven a single

[common] question'" will do. We consider dissimilarities not in order to determine (as Rule 23(b)(3) requires) whether common questions *predominate*, but in order to determine (as Rule 23(a)(2) requires) whether there is "[e]ven a single [common] question." **And there is not here.**

Samuel Alito, *Snyder v. Phelps*, dissent:

Nor did [the Westboro Baptist Church Respondents] dispute that their speech was "'so outrageous in character, and so extreme in degree, as to go beyond all possible bounds of decency, and to be regarded as atrocious, and utterly intolerable in a civilized community.'" Instead, they maintained that the First Amendment gave them a license to engage in such conduct. **They are wrong.**

5. Best rhetorical question

Stephen Breyer, *AT&T Mobility LLC v. Concepcion*, dissent:

What rational lawyer would have signed on to represent the Concepcions in litigation for the possibility of fees stemming from a $30.22 claim?

6. Best eerily identical transition sequence

Clarence Thomas, *Brown v. Entertainment Merchants Association*, dissent:

To be sure, the Court has held that children are entitled to the protection of the First Amendment, and the government may not unilaterally dictate what children can say or hear. **But** this Court has never held, until today, that "the freedom of speech" includes a right to speak to minors (or a right of minors to access speech) without going through the minors' parents. **To the contrary**, "[i]t is well settled that a State or municipality can adopt more stringent controls on communicative materials available to youths than on those available to adults."

Antonin Scalia, *Wal-Mart Stores, Inc. v. Dukes*, opinion:

To be sure, we have recognized that, "in appropriate cases," giving discretion to lower-level supervisors can be the basis of Title VII liability under a disparate-impact theory—since "an employer's undisciplined system of subjective decisionmaking [can have] precisely the same effects as a system pervaded by impermissible intentional discrimination." **But** the recognition that this type of Title VII claim "can" exist does not lead to the conclusion that every employee in a company using a system of discretion has such a claim in common. **To the contrary**, left to their own devices most managers in any corporation—and surely most managers in a corporation that forbids sex discrimination—would select sex-neutral, performance-based criteria for hiring and promotion that produce no actionable disparity at all.

7. Best tongue-in-cheek ending

John Roberts, *FCC v. AT&T Inc.*, opinion:

We reject the argument that because "person" is defined for purposes of FOIA to include a corporation, the phrase "personal privacy" in Exemption 7(C) reaches corporations as well. The protection in FOIA against disclosure of law enforcement information on the ground that it would constitute an unwarranted invasion of personal privacy does not extend to corporations. We trust that AT&T will not take it personally.

Nits and Tricks

Five Grammar Myths

For scams and urban legends, we have snopes.com. But what about the grammar myths that fill the air at so many workplaces? Are these five myths holding you back—or making you crazy?

If you think you can't start a sentence with "but" or "because" or would rather get a root canal than split an infinitive, prepare to be liberated.

Myth One: You can't start a sentence with a coordinating conjunction like *and*, *yet*, or *but*.

What it would mean if true: All nine Supreme Court Justices would be incompetent writers.

Who says it's a myth:

- *Chicago Manual of Style,* 16th ed.: This myth has "no historical or grammatical foundation"; "a substantial percentage [often as many as 10 percent] of the sentences in first-rate writing begin with conjunctions" (5.206).

- *American Heritage Guide to Contemporary Usage and Style*: Starting sentences with conjunctions is "rhetorically effective" (p. 70).

- Joseph Williams, *Style*: "Just about any highly regarded writer of nonfictional prose begins sentences with *and* or *but*, some more than once a page" (p. 182).

- *Garner's Modern American Usage*: "It is a gross canard that beginning a sentence with *but* is stylistically slipshod" (p. 121).

- *Fowler's Modern English Usage,* 2nd ed.: "That it is a solecism to begin a sentence with *and* is a faintly lingering superstition. The OED gives examples ranging from the 10th to 19th c.; the Bible is full of them" (p. 29).

- Wilson Follett, *Modern American Usage*: "A prejudice lingers from a by-gone time that sentences should not begin with and. The supposed rule is without foundation in grammar, logic, or art. *And* can join separate sentences and their meanings just as *but* can both join sentences and disjoin meanings" (p. 27).

- *Merriam Webster's Dictionary of English Usage*: "Everybody agrees that it's all right to begin a sentence with *and*, and nearly everybody admits to having been taught at some past time that the practice was wrong. . . .Few commentators have actually put the prohibition in print; the only one we have found is George Washington Moon (1868)" (p. 93).

Myth Two: You can never split an infinitive.

What it would mean if true: The Star Trek writers should have rewritten this famous sentence: "To boldly go where no man has gone before."

Who says it's a myth:

- *Chicago Manual of Style,* 16th ed.: "It is now widely acknowledged that adverbs sometimes justifiably separate an infinitive's *to* from its principal verb" (5.106).

- *The Elements of Style,* 4th ed.: "Some infinitives seem to improve on being split," as in "I cannot bring myself to really like that fellow" (p. 113).

- *American Heritage Guide to Contemporary Usage and Style*: "[T]he split infinitive is distinguished [by both] its length of use and the greatness of its users . . . noteworthy splitters include . . . Abraham Lincoln, George Eliot, Henry James, and Willa Cather" (p. 441).

- Barbara Wallraff, *Word Court*: "Splitting an infinitive is preferable both to jamming an adverb between two verbs . . . and to 'correcting' a split in a way that gives an artificial result" (p. 99).

- *Fowler's Modern English Usage,* 2nd ed.: "We admit that separation of *to* from its infinitive is not in itself desirable," but "we will split infinitives sooner than be ambiguous or artificial" (p. 581).

Myth Three: You can't split a verb phrase.

What it would mean if true: You would have to write "he usually will take an extreme position," not "he will usually take an extreme position."

Who says it's a myth:

- *Chicago Manual of Style,* 16th ed.: "There is no rule against adverbial modifiers between the parts of a verb phrase. In fact, it's typically preferable to put them there" (5.168).

- *Garner's Modern American Usage*: "[M]ost authorities squarely say that the best place for the adverb is in the midst of the verb phrase" (p. 23).

- Wilson Follett, *Modern American Usage*: "With a compound verb—that is, one made with an auxiliary and a main verb—the adverb comes between auxiliary and main verb (He will probably telephone before starting)" (p. 18).

- *Merriam Webster's Dictionary of English Usage*: "This bugaboo, commentators agree, seems to have sprung from fear of the dread split infinitive" (p. 36).

- *Fowler's Modern English Usage,* 2nd ed.: "It is probably a supposed corollary of the accepted split-infinitive prohibition; at any rate, it is entirely unfounded. . . . There is no objection whatever to dividing a compound verb by adverbs" (pp. 464-65).

Myth Four: You can't end a sentence with a preposition.

What it would mean if true: You would have to mimic Winston Churchill, who famously mocked the alleged rule by saying, "This is the type of arrant pedantry up with which I shall not put."

Who says it's a myth:

- *Chicago Manual of Style,* 16th ed.: "an unnecessary and pedantic restriction" (5.176).

- *Garner's Modern American Usage*: The rule is "spurious" (p. 654).

- Patricia O'Connor, *Woe Is I*: "This idea caught on, even though great literature from Chaucer to Shakespeare to Milton is bristling with sentences ending in prepositions" (p. 183).

- *Fowler's Modern English Usage,* 2nd ed.: "It was once a cherished superstition that prepositions must be kept true to their name and placed before the word they govern in spite of the incurable English instinct for putting them late" (p. 473).

Myth Five: You can't start a sentence with *because*.

What it would mean if true: Emily Dickinson made a mistake when she wrote, "Because I could not stop for Death, / He kindly stopped for me."

Who says it's a myth:

- *American Heritage Guide to Contemporary Usage and Style*: Starting a sentence with "because" is "perfectly appropriate" (p. 53).

- Mark Davidson, *Right, Wrong, and Risky*: Starting a sentence with "because" is "fully accepted" (p. 105).

- Joseph Williams, *Style*: "[T]his particular proscription appears in no handbook of usage I know of" (p. 181).

- *Garner's Modern American Usage*: This is an "odd myth [that] seems to have resulted from third-grade teachers who were trying to prevent fragments" (p. 92).

- *Merriam Webster's Dictionary of English Usage*: "This rule is a myth. *Because* is frequently used to begin sentences," often "for greater emphasis" (p. 171).

Eight Grammar Gripes—
And How to Avoid Them

1. **Misuse of commas.** Tip: If you have *and* or *but* in the middle of a long sentence, check what follows. If it's a person or thing, put a comma before the *and* or *but*. If not, do not use a comma. Examples: "He deposited the check, but the client forgot to record the payment" versus "He deposited the check but forgot to sign it."

2. ***I* versus *me* versus *myself*.** Tip: *Myself* and *herself* and *himself* are almost always wrong, as in "Please contact Jane Doe or myself" and "The team was led by the client and myself." (You need *me* in both cases.)

3. ***Who* versus *whom*.** Tip: Recast the sentence by inserting *he* or *him*. If *he* works, use *who*. If *him* works, use *whom*. So in "He is someone whom I once thought would go to prison," the *whom* should be *who*: "I thought *he* would go to prison," not "I thought *him* would go to prison."

4. **Tense-sequence errors in a sentence or provision.** Tip: Stick to the present tense when possible. In condition-consequence constructions, use present tense for the condition clause and *will* for the consequence clause: "If employment is terminated, all benefits will terminate."

5. ***Since* versus *because*.** Tip: Use *since* only for time. For cause and effect, use *because*: "I haven't heard from her since Friday. Because I haven't heard from her, I assume she will reject the proposal."

6. ***Fewer* versus *less*.** Tip: If you can count it, use *fewer*: "Our client has received fewer complaints than usual this year."

7. **Using *their* with a singular collective noun such as a client, party, or law firm.** Tip: In American English, unlike in British English, these words take *it* or *its*, not *their*: "The Bank has been known to underreport its liabilities."

8. **Errors with possessive apostrophes.** Tip: Watch for common typos with words like *Debtors'*, *Debtor's*, and *Debtors*. Also decide how you will make the possessive form of a word ending in an *s* like *Ross*.

Parallel Universe

My book *Point Made: How to Write Like the Nation's Top Advocates*, features hundreds of examples of stellar writing by 50 influential lawyers, from David Boies to Elena Kagan.

But even the best attorneys make mistakes. Ready to match wits with some of these superstars?

Let's find and fix some classic examples of faulty parallel structure.

Either . . . or

Take this example from a voting rights cert petition signed by none other than Barack Obama:

> [T]he circuit courts have uniformly recognized that plaintiffs can challenge a redistricting plan under §2 **either on the ground that** the plan is intended to deny a minority group equal opportunity **or that** it has that result.

Either comes before "on the ground that," but *or* comes before just "that." A classic parallelism problem.

To avoid that problem, Obama might have repeated "on the ground" before the second "that." But here's a more concise solution that puts *because* after both *either* and *or*:

> [T]he circuit courts have uniformly recognized that plaintiffs can challenge a redistricting plan under §2 **either because** the plan is intended to deny a minority group equal opportunity **or because** it has that result.

See if you can spot similar errors in the sentences below.

Both . . . and

Do you see why *both* is in the wrong place in this trial brief from a sexual harassment suit against Isiah Thomas and Madison Square Garden?

> This punitive damages award is excessive, **both** under New York law and the United States Constitution, and it should be reduced below the Title VII cap of $300,000.

Both is a common parallelism minefield. When you write *both X and Y*, make sure that X and Y match up.

In the sentence above, X is "under New York law" but Y is just "the United States Constitution." To create a parallel construction, slide *under* before *both*:

> This punitive damages award is excessive, under **both New York law** and **the United States Constitution**, and it should be reduced below the Title VII cap of $300,000.

Not only . . . but

A third source of faulty parallels is *not only-but*. Do you see what's wrong with this sentence from a brief in a securities case?

> [A] corrective disclosure must **not only** notify the market that the statement turned out to have been wrong, **but** that it was actually *wrong when made*.

Not only precedes "notify the market," while *but* precedes "that." We're teetering on the balance. Here's what the lawyer could have written instead:

> [A] corrective disclosure must notify the market **not only that** the statement turned out to have been wrong, **but also that** it was actually *wrong when made*.

As these *not only-but* sentences get more complex, keeping the clauses parallel gets harder, as you'll see in this sentence from *eBay v. MercExchange*:

> eBay was **not only well aware** of MercExchange's patent, **but eBay tried** to purchase that patent before it started infringing.

In the original, *not only* is before "well aware," a modifying phrase, while *but* is before "eBay tried," a noun-verb combination. Feeling shaky?

Both *not only* and *but* should precede a noun-verb combination here:

> **Not only was eBay** well aware of MercExchange's patent, **but eBay tried** to purchase that patent before it started infringing.

Lists

Another common source of parallelism problems is lists.

Do you see what's wrong with this sentence plucked from a fight over Calvin Klein jeans?

> Both these purported counts depend on the same law, same facts, and have the same defects.

To create a parallel list, make sure that all items on your list are the same part of speech. In this list, the first and third

items are verbs (*depend*, *have*), but the second is a noun (*facts*).

Consider either of these revisions:

> Both these purported counts share the **same law**, **same facts**, and **same defects**.

> Both these purported counts **depend on** the same law, **share** the same facts, and **suffer from** the same defects.

Bottom line: You can find trouble in paradise in even the greatest legal writers' prose. Remember these four key parallelism traps—*either-or*, *both*, *not only-but*, and lists—and your own sentences will regain the balance and tranquility that help put readers at ease.

Capitalization Cheat Sheet

1. **Headings**. Avoid ALL CAPS unless court rules require them. Instead, uppercase every word unless it is a preposition that has fewer than five letters (*of, with*), a conjunction (*and, or*), or an article (*a, an,* or *the*). Also uppercase an article, conjunction, or preposition if it is the first word or the last word, or if it follows a dash or a colon.

2. **Party affiliations**. Lowercase words like *defendant, plaintiff,* and *appellant* unless you're referring to the parties in the current dispute. Either way, skip the articles when you're talking about the parties in your own dispute: "Defendant has failed to show . . . ," not "The Defendant . . ."

3. **Courts**. Lowercase the word *court* unless you're referring to the U.S. Supreme Court or to the court you're addressing in your document.

4. ***Federal*, *state*, and *commonwealth***. Lowercase these words unless the word they modify is capitalized (*Federal Reserve*), they are part of a title (*Commonwealth of Virginia*), or you're referring to a party. You should thus lowercase *state law* and *federal law*.

Feeling Possessive?

When the Supreme Court reviewed *Kansas v. Marsh* in 2006, the justices didn't just split over whether to uphold a Kansas death penalty statute. They also disagreed over a usage issue that has driven many lawyers to blows: whether to write "Kansas' statute," as Justice Thomas did in his majority opinion, or "Kansas's statute," as Justice Souter did in his dissent.

Battle of the "Esses"

Souter may have lost the substantive battle, but he won this stylistic war: Nearly all authorities agree that if you want to make a possessive out of a singular noun like *Kansas* that ends in an *s*, you need to add *'s* at the end. Just call it "Ross's Rule."

Better yet, remember it as Strunk and White's "First Rule," which it's been since that classic's first edition:

> Form the possessive singular of nouns by adding *'s*.
>
> Exceptions: Classical or biblical names, such as *Moses*, which take only an apostrophe: *Moses'*.

The Weight of the Authorities

I know some of you are still skeptical, so here's where some well-known authorities stand.

1. **The Souter approach**. Add *'s* unless biblical or classical.

- Strunk and White, *The Elements of Style*
- *The Chicago Manual of Style*
- Bryan Garner*, A Dictionary of Modern Legal Usage*
- *Fowler's Modern English Usage*
- *U.S. Government Printing Office Style Manual*

2. **The Thomas approach**. Add only an apostrophe.

- *The Associated Press Stylebook*

3. **The Libertarian approach**. Either way is fine.

- Wilson Follett, *Modern American Usage*

So at a minimum, Souter gets a 5–1 vote on the usage question. But he probably fares even better: When it comes to legal writing, the *AP Stylebook* holds little sway.

Unexpected Passions

Even if you're on board here, don't expect an easy ride. "Feelings on [forming singular possessives] sometimes run high," notes the *Chicago Manual of Style*. Indeed, you'll find partisans on all sides of the debate.

During the Chief Justice's confirmation hearings, for example, the *Washington Post* published an article titled "The Case of Roberts's Missing Papers." The writer received many emails, "some more polite than others," correcting his supposed "error." (In case you're wondering, the *Post* style guide endorses the final *s*.)

The Third Way: Scalia and the *New York Times*

I should add that Justice Scalia offers a more nuanced approach. He uses the possessive *s* in general but appears to cut it if he wouldn't pronounce it: He writes "Justice Stevens' contention," for example.

In making such distinctions, Scalia is like the writers at the *New York Times*, of all places. Just try to decipher this excerpt from the *Times* style manual.

> "[O]mit the *s* after the apostrophe when a word ends in two sibilant sounds (the ch, j, s, sh, ts, or z sounds) separated only by a vowel sound: Kansas' Governor; Texas' population; Moses' behalf. . . ."
>
> "When a name ends with a sibilant letter that is silent, [however,] keep the possessive *s*: Arkansas's; Duplessis's; Malraux's."

As for me, I'll take the Strunk-White-Garner-Chicago-Fowler-Government approach any day. To sum up, unless your clients have biblical or mythological names, use that final *s* with pride.

Five Easy Changes

A good editor is like Pavlov's dog. Here are five expressions that should make you salivate—for all the wrong reasons.

1. *Regarding, concerning*

You know you're talking to a lawyer when you hear things like "Do you have any thoughts **regarding** where we should go for dinner?" or "I have a serious issue **concerning** the way she wants to structure the spin-off."

Pavlov's dog says: "on," "about," or "with."

2. *To the extent, to the extent that*

Few things scream "lawyer" louder than "**To the extent that** you have any questions, please feel free to call" or "**To the extent** the Court does find standing, the Court must still deny Count 3 on the merits." Almost as loud: "in the event" and "in the event that."

Pavlov's dog says: "if" or "even if."

3. *Namely, i.e.*

Another annoying lawyer-ism: "The prosecution cannot prove a key element of insider training, **namely**, the purchase or sale of a security" or "**i.e.**, the purchase or sale of a security."

Pavlov's dog says: Use a colon or a dash.

Try this: "The prosecution cannot prove a key element of insider trading: the purchase or sale of a security."

4. *Due to*

A grammatical minefield, this phrase is better put to rest. So don't write "We were forced to file this motion **due to** your stubborn refusal to respond to our requests." To make matters worse, this clumsy phrase is often paired with "the fact that," as in "We were forced to file this motion **due to the fact that** you have stubbornly refused to respond to our requests."

Pavlov's dog says: "because," "from," or rephrase.

Try this: "We were forced to file this motion **because of** your refusal" or "By refusing to respond to our requests, you forced us to file this motion."

5. *Specifically*

A bad-habit "sentence adverb" that you should almost always avoid. So don't write "Seller's conduct in these negotiations has been reprehensible. **Specifically**, Seller misrepresented . . . ."

Pavlov's dog says: Enumerate—or just cut to the chase.

Try this: "Seller's conduct during these negotiations has been reprehensible. **First**, Seller misrepresented . . . ."

What Partners Hate: Ten Wounding Words and Phrases—with Alternatives

Many partners have a fingernails-on-the-chalkboard reaction to at least some of these ten constructions. I've suggested alternatives for each.

Aforesaid, *aforementioned* ("the")

As such ("thus"—and move it later in the sentence)

Said, *such* ("the" or "this")

Inasmuch as ("because")

Given that ("because")

The instant case ("here" or cut)

Set forth (cut)

As to ("on" or "about")

Respectfully submit (cut except in closing formulas)

To the extent that ("if")

Stop Cutting "That"

When I ask my audiences which words or phrases they like to cut from their drafts, someone often mentions the word "that."

Not so fast, I suggest.

Read this sentence to see why:

> After an evidentiary hearing, the court found Buffalo Wild Wings was not a fast-food restaurant and, hence, was not covered by the restrictive covenant.

I plucked this example from the first pages of an Illinois Court of Appeals opinion[1] on Buffalo Wild Wings and on trailing modifiers in restrictive covenants (don't ask).

In this sentence, and in millions more just like it, cutting "that" does more harm than good.

After all, the Buffalo Wild Wings restaurant wasn't lost, so the court didn't "find" it, despite what the court suggests.

Incidentally, we should also change "hence" to "thus" and cut the pair of commas.

So we end up with something like this:

*After an evidentiary hearing, the court found **that** Buffalo Wild Wings was not a fast-food restaurant and **thus** was not covered by the restrictive covenant.*

Other sentences in the opinion need similar fixes.

> The court found the action was to determine the consequences of future action: in the event Reed returned the dozer, would Roland be obligated to accept it and return the purchase price?

The court didn't find a lost action here; it found that the action had an aim.

> Lopax appeals the court's decisions (1) the restrictive covenant covered only fast-food restaurants serving primarily chicken, (2) the declaratory-judgment action was not barred by the doctrine of nonliability for past conduct, . . .

Lopax, for its part, didn't appeal a "decision the restrictive covenant covered" (whatever that might mean); it appealed from a decision *that* the covenant covered a certain kind of restaurant.

Bottom line: give "that" a break. By doing so, you'll be following the lead of our Supreme Court.

Anthony Kennedy, *Citizens United v. Federal Election Commission*, opinion:[2]

> *Austin* had **held that** Congress could prohibit independent expenditures for political speech based on the speaker's corporate identity.

John Paul Stevens, *Citizens United v. Federal Election Commission*, dissent:[3]

> Yet in a variety of contexts, we have **held that** speech can be regulated differentially on account of the speaker's

identity, when identity is understood in categorical or institutional terms.

We have long since **held that** corporations are covered by the First Amendment, and many legal scholars have long since rejected the concession theory of the corporation.

And our new Solicitor General:

Donald B. Verrilli, Jr., *FCC v. Fox Television Stations*, merits brief:[4]

Fox **contends that** past Commission orders involving those words could not have alerted it that the Billboard Music Awards broadcasts would be considered indecent because the prior orders involved the "repeated[ ]" use of the expletives.

Moreover, many programs are not rated at all, and even for rated programs, a recent study **found that** "only 5% of parents felt that television ratings were always accurate."

While **acknowledging that** its own standards "generally do not permit" broadcast of the F-Word or S-Word, Fox **contends that** those standards are "irrelevant to the vagueness analysis."

Donald B. Verrilli, Jr., *HHS v. Florida*, merits brief:[5]

In particular, Congress **found that** without a minimum coverage provision, "many individuals would wait to purchase health insurance until they needed care," taking advantage of the Act's guaranteed-issue and community rating provisions, thereby driving up costs in the non-group market (and, indeed, threatening the viability of that market).

And even the *Wall Street Journal*:

> The Georgia Supreme Court's unanimous ruling **concludes that** the 1994 state law "restricts speech in violation of the free speech clauses" of the U.S. and Georgia constitutions.[6]

> In congressional testimony on Thursday, Fed Chairman Ben Bernanke **acknowledged that** low rates penalize savers.[7]

Just to be clear, I'm not suggesting that you never cut "that." I'm simply suggesting that confusing the reader even for a second is far worse than including one short four-letter word. So while "The court found the bank" can mislead, "I suggest you call him" cannot.

And that's enough of "that."

———

1. *Regency Commercial Assocs., LLC v. Lopax, Inc.*, opinion (2007) [http://www.state.il.us/court/opinions/appellatecourt/2007/4thdistrict/may/4060332.pdf]

2. *Citizens United v. Fed. Election Comm'n*, opinion (2010) [http://www.supremecourt.gov/opinions/09pdf/08-205.pdf]

3. *Citizens United v. Fed. Election Comm'n*, dissent (2010) [http://www.supremecourt.gov/opinions/09pdf/08-205.pdf]

4. *FCC v. Fox Television Stations*, petitioners' brief (2011) http://www.justice.gov/osg/briefs/2011/3mer/2mer/2010-1293.mer.rep.pdf

5. *HHS v. Florida*, petitioners' brief (2011) [http://www.justice.gov/osg/briefs/2011/3mer/2mer/2011-0398.mer.aa.pdf]

6. *Wall Street Journal*, "Georgia Court Overturns Law Restricting Assisted Suicide," Feb. 6, 2012.

7. *Wall Street Journal*, "Itchy Investors Ramp Up the Risk," Feb. 6, 2012.

You and Your Brand

Client Alert or Client Asleep?

Many law firms market themselves by sending out "client alerts" about the latest hot case or regulation.

Here's a secret: These client alerts leave most clients cold.

Why? Because they fail the "So what?" test.

A Typical Alert

A typical client alert starts like this:

> In *Verzini v. Potter*, No. 03-1652 (3d Cir. 2004), the court discussed the relationship between two defenses that employers can use under the Americans with Disabilities Act ("ADA"). The Court considered both the "direct threat" defense and the "business necessity" defense. The Plaintiff, a postal worker, told his supervisor that his neighbors were peering into his windows while he slept. The supervisor was concerned that the employee was not fit for duty and ordered him to be examined by a psychiatrist. The psychiatrist diagnosed the employee with chronic paranoid schizophrenia. The Postal Service eventually fired him. Plaintiff sued for disability discrimination, but the Postal Service insisted that it had a "business necessity" to fire him because it had to ensure workplace safety. . . .

Any clients still reading are tapping their pens.

A Better Approach

Start by telling your clients what they can or should do now. Only then discuss the case or regulation—and only to highlight the "So what?" factor.

Try something like this:

> Under a recent Third Circuit ruling, if an employer fires an employee to preserve workplace safety, the employer need not prove that the employee has directly threatened anyone. In that case, for example, the court allowed the Postal Service to fire an employee who was "unfit for duty" simply because he had refused treatment for paranoid schizophrenia. Although this case appears to allow employers to fire an employee for legitimate business needs alone, employers should take the following steps before doing so. . . .

Stand Up and Stand Out: Attorney Bios

Imagine you're an executive next to me on a plane. "So what do you do for a living?" you ask. "I'm a legal writing consultant," I respond.

At this point, you hide politely behind your *Wall Street Journal*.

But say I respond like this: "I help lawyers write better."

Now the questions flow, and you lean in to hear more.

The same goes for practicing lawyers: You can get people interested in your work, but only if you make them see how they could benefit.

Here are four examples of attorneys describing their practices in the ordinary way. After each example, I'll suggest how those attorneys could have done more to entice a potential client or employer.

(Hint: No matter how dry you think your work may be, you help clients *save* money, *win* disputes, or *grow* their businesses.)

1. *Not this*: "Researched case law related to personal jurisdiction and subject matter jurisdiction."

   But this: "Advised clients on when, where, and how they could sue defendants."

2. *Not this*: "Drafted and distributed deal documents in several large transactions; incorporated parties' written and verbal comments; and organized and monitored the closing process for each such transaction."

But this: "Helped clients acquire target companies and advised them on how to structure deals to reach their long-term business goals."

3. *Not this*: "As part of the firm's Labor and Employment Law team, Mr. Jones has researched, drafted, and filed a number of successful Motions for Partial Summary Judgment and Memorandums in Support of Motions to Dismiss under Federal Rule of Civil Procedure 12(b)(6)."

   But this: "In several multimillion-dollar discrimination cases, Mr. Jones has persuaded courts to stop cases from going to a jury and to block complaints from moving forward."

4. *Not this*: "Ms. Smith's robust tax practice involves continued monitoring of domestic and international tax decisions and the application of those decisions to transactions of varying type and complexity."

   But this: "In serving her tax clients, Ms. Smith identifies opportunities for companies to seize on recent changes in domestic and international tax law and advises them on how to structure transactions to minimize the risk of a taxable event."

Now go back to that firm bio or resume and read it from the perspective of a potential employer or would-be client. Do your eyes glaze over—or do you reach to pick up the phone?

Electronic Bliss: Write Better Emails

How many emails are sent in the United States each year?

2.3 trillion.

How many emails does a typical large law firm see in a day?

500,000.

How often does one of those 500,000 emails make you pull out your hair?

Only you can tell.

I've been working with clients to help both lawyers and non-lawyers write more effective emails, save time and money, and avoid email etiquette blunders.

Here are two tips from my "Electronic Bliss" workshop.

1. ***Transform bland subject lines into newsworthy headlines.***

Compare your morning newspaper with your morning inbox. Most newspaper headlines entice you to read more or at least convey the bottom line. Most email subject lines do neither. Instead, they're often generic, stale, or nonexistent.

Make your subject lines more like newspaper headlines: enticing, informative, and timely. You'll get more people to read your emails and help your firm run more efficiently.

2. ***Apply the "Three-Sentence Solution" to long emails.***

One of the biggest gripes at law firms is that people send long, rambling emails laden with detail and off-topic chatter. Sound familiar? Avoid piquing your colleagues' ire, and start your

next email by answering the three questions on every reader's mind:

1. Why are you writing to me?
2. What's the gist of your message?
3. What do you want me to do after I read your email?

Only then go into detail. Chances are no one will get that far. But if you'd written your email in the classic style—aimless and rambling—no one would have read your email at all.

Build Your Brand

Business-development experts recommend using verbs like these when you describe your professional experience.

Advised
Boosted
Created
Helped
Inspired
Originated
Outranked
Overhauled
Pioneered
Probed
Resolved
Restored
Restructured
Saved
Solved
Spearheaded
Streamlined
Tackled
Uncovered

Tongue-Tied

Dear Legal Writing Pro (or is that "Hi Legal Writing Pro"?),

My colleagues and I constantly argue about email greetings and closings. Do we need them? Is "Dear" better than "Hi"? Commas or colons? Does any of this even matter?

My Response

Dear Tongue-Tied,

Yes, it matters! According to one New Zealand study,[1] happy workplaces and unhappy workplaces favor different email greetings and closings.

Type of workplace	Most common greetings	Most common closings
High morale, Warm	Hi, Ross,	Regards, Ross Thanks, Ross
Low morale, Cold	no greeting	no closing just "Ross"

These findings mirror "emotional intelligence" teachings as well as Dale Carnegie's famous insight that the sweetest sound is the sound of your own name. They also support the conclusions I've drawn from the many (and often contradictory) email authorities in print and on the Web.

Best greetings for a single recipient

Hi, Ross,
Hi Ross, (technically wrong without the comma after "Hi" but very widely used and considered idiomatic)
Dear Mr. Guberman: (for strangers in formal settings)

Best greeting for multiple recipients

Greetings,

Best closings

Regards, Ross
Best regards, Ross
Kind regards, Ross
Thanks, Ross
Best wishes, Ross

Worst greetings

no greeting
Ross,
Ross:

Worst closings

no closing
Ross
Sincerely, Ross

Thanking you and sending you the kindest and best regards,
Ross

1. Joan Waldvogel, "Greetings and Closings in Workplace Email," *Journal of Computer-Mediated Communication*, Jan. 2007. [http://jcmc.indiana.edu/vol12/issue2/waldvogel.html]

Match Wits with the Best

The *Ricci* Majority: Five Wrong Answers

Ricci, the blockbuster case of the 2008–2009 Supreme Court Term, involved a test for New Haven firefighters, so I thought it only fair to subject the Justices to a test of my own—a grammar test, of course. The good news: The Justices have a sterling command of the subjunctive mood, and they place the word *only* with great care.

Overall, then, they get an A. But as with any test, there's always room for improvement. The majority opinion has five glitches that we should all try to avoid.

1. All's not well.

The great authority H. W. Fowler called it "absurd." Other usage experts find it simply inelegant. I'm talking about following *both* with *as well as* rather than *and*, something Justice Kennedy does here:

> Title VII prohibits *both* intentional discrimination (known as "disparate treatment") *as well as,* in some cases, practices that are not intended to discriminate but in fact have a disproportionately adverse effect on minorities (known as "disparate impact").[1]

Justice Kennedy should have replaced his *as well as* with *and*.[2]

2. Shall I compare thee to a rose?

When you compare your house *to* a junkyard, you're suggesting that your house is like a junkyard—messy and unorganized. But when you compare your house *with* a junkyard, you're considering how they're the same, how they're different, or both.

The *Ricci* majority got the *to-with* distinction wrong. By using *to* with *compare* in the following sentence, Justice Kennedy appears to suggest that minority firefighters perform differently when people say that they are just like white firefighters:

> All the evidence demonstrates that the City chose not to certify the examination results because of the statistical disparity based on race—*i.e.*, how minority candidates had performed when *compared to* white candidates.[3]

Let's sum up: When, as here, you are noting similarities and differences between two things, you need *with*, not *to*: "how minority candidates had performed when *compared with* white candidates."

3. However, wherever.

Like Strunk and White and many others, the current Court avoids starting sentences with *however*.

But if the Justices want to put *however* in the middle of a sentence, they need to place it with surgical precision. Kennedy's hand is shaky here:

> "Petitioners would have us hold that, under Title VII, avoiding unintentional discrimination cannot justify intentional discrimination. That assertion, *however,* ignores the fact that, by codifying the disparate-impact provision in 1991, Congress . . . ."[4]

A midsentence *however* goes after the word or phrase that contrasts with the previous point. Kennedy isn't contrasting the assertion with itself. Instead, he's contrasting what the assertion claims with what it ignores, so *however* belongs after *ignores*, not after *assertion*.

Even better, he could have cut the opening and jumped right in: "Yet when Congress codified the disparate-impact provision in 1991, it . . . ."

4. Strange bedfellows.

When you use more than one adjective before a noun, you separate the adjectives with commas only when each modifies the noun independently. So you'd write "a tall, wide building" but "a dark red building." As clear as that distinction may sound, the *Ricci* Court got it wrong several times. Consider this series of adjectives from the majority opinion:

> "Applying the strong-basis-in-evidence standard to Title VII gives effect to both the disparate-treatment and disparate-impact provisions, allowing violations of one in the name of compliance with the other in *certain, narrow circumstances*."[5]

Kennedy means *certain narrow circumstances*.

Tip: In a series such as this one, put a comma between your adjectives only if you could put the word *and* between those adjectives. Although you can't say "certain and narrow circumstances," you can, for example, say "provable and actual violation," which is why Kennedy is correct when he writes "provable, actual violation" on the opinion's next page.

5. Stiff upper lip.

Good writers like Justice Kennedy sometimes engage in grammatical overkill, almost as if they're trying to be the teacher's pet.

In the next two excerpts, Kennedy uses the possessive gerund, a form that is often correct: We should write "I appreciate *your* coming today" rather than "I appreciate *you* coming today." In

other constructions, though, using a possessive gerund is stiff, if not incorrect

In the first excerpt, Kennedy is discussing something the New Haven Civil Service Board might do but hadn't done, making his use of the possessive gerund suspect at best:

> "[An expert witness testifying at the hearing] outlined possible grounds for the CSB's refusing to certify the results."[6]

Kennedy should have just written that the witness "outlined possible grounds for the CSB to refuse to certify the results."

In the second excerpt, the possessive gerund is awkward, and it also suggests that the two distinct events were near-simultaneous:

> "[U]pon the EEOC's issuing right-to-sue letters, petitioners amended their complaint to assert that the City violated the disparate-treatment prohibition contained in Title VII . . . ."[7]

A stylist with a lighter touch might have written something like this: "After the EEOC issued right-to-sue letters, petitioners amended their complaint . . . ."

---

1. *Ricci v. DeStefano* (07-1428), 557 U.S. ___, 17 (2009).
2. You'll find another *as well as* glitch on page 28: "The [Civil Service Board] heard statements from Chad Legel (the IOS vice president) *as well as* city officials outlining the detailed steps IOS took to develop and administer the examinations . . . ." Kennedy means "from Chad Legel and city officials." *Id.* at 28.
3. *Id.* at 19.

4. *Id.* at 20–21.
5. *Id.* at 23.
6. *Id.* at 7.
7. *Id.* at 15.

The *Ricci* Dissent: Five Wrong Answers

Even if you disagree with the *Ricci* majority, don't get testy on the grammar front: The dissenters made several errors as well. Here are five.

1. Don't give me my due.

In the following sentence, Justice Ginsburg uses *due to* as a synonym for *because of*—a no-no in many grammar circles:

> In keeping with Congress' design, employers who reject such criteria *due to* reasonable doubts about their reliability can hardly be held to have engaged in discrimination "because of" race.[1]

She means "employers who reject such criteria *because of* reasonable doubts." This error also made me scratch my head: Why miss the chance for a parallel with "'because of' race"?

Tip: Either avoid *due to* or use it only when you mean "attributable to": "My debt is due to overspending."

2. Unparallel universes.

Many constructions require parallel structure: *neither-nor*, *either-or*, *not only-but also*, and *not-but*.

In criticizing Justice Alito here, the dissent is not in tandem with itself:

> A reasonable jury, [Justice Alito] maintains, could have found that respondents were *not actually motivated by concern* about disparate-impact litigation, *but instead sought* only "to placate a politically important [African-American] constituency."[2]

Motivated and *sought* are different verb forms here, so the parallel just isn't working. I think Ginsburg meant something like this: "respondents were motivated *not by a concern* about disparate-impact litigation *but by a desire* 'to placate a politically important constituency.'"

3. The case of the headless infinitive.

Who's doing the "stating" in the following sentence?

> These stark disparities, the Court acknowledges, sufficed to state a prima facie case under Title VII's disparate-impact provision.[3]

Disparities can't "state" a case, though the missing-in-action parties could. To avoid this mistake, make sure to attach your infinitives to their rightful subject.

4. Double trouble.

Notice an inconsistency between these two sentences:

> Its investigation revealed grave cause for concern *about the exam process itself and the City's failure* to consider alternative selection devices.[4]
>
> Hornick's commonsense observation is mirrored *in case law and in Title VII's administrative guidelines*.[5]

If you saw the problem, you probably stay awake at night wondering whether to repeat the preposition in compound constructions such as these.

I can relate. Here, for example, I think the dissent might have it backwards.

The best practice is to repeat the preposition if you need to for clarity. So in the first sentence, because "the City's failure" sounds as though it might be something else the investigation revealed, I believe that Justice Ginsburg should have repeated the preposition: "concern about the exam process itself and *about* the City's failure to consider."

The second sentence is a closer call. The construction is shorter and simpler, so the second *in* was probably optional: "mirrored in case law and Title VII's administrative guidelines."

Either way, I'd like to see some guidance from the High Court on when to repeat.

5. Dangling by a thread.

For many reasons, we should avoid long introductory clauses such as this one:

> Never mentioned by Justice Alito in his attempt to show testing expert Christopher Hornick's alliance with the City, the [Civil Service Board] solicited Hornick's testimony at the union's suggestion, not the City's.[6]

These long introductions often bury the subject and confuse the reader. Here, the problem is even bigger: Justice Ginsburg is dangling her modifier. It's the soliciting of testimony, not the Civil Service Board, that was "never mentioned."

And finally, a personal plea: I know emotions get raw in these hot-button cases, but could the Court try to present a united front on the possessive form of *Congress* and other words that end in *s*? Justice Kennedy writes *Congress's*, while Justice Ginsburg insists on *Congress'*. This usage split is hardly new: In a death penalty case a few years ago, the Court engaged in another stealth grammar battle over the possessive form of *Kansas*.

1. *Ricci v. DeStefano* (07-1428), 557 U.S. ___, 19 (2009).
2. *Id.* at 33.
3. *Id.* at 5.
4. *Id.* at 26.
5. *Id.* at 27.
6. *Id.* at 35.

The Winning Wal-Mart Brief: 6 Sales

In finding for Wal-Mart in *Wal-Mart v. Dukes*,[1] Justice Scalia argued that a class action needs "glue" for it to hold together. So does a great brief. Use these six techniques from the winning Wal-Mart brief to help make your own arguments stick.

1. Parallel Lives

In this sweeping opening sentence, Ted Olson and Ted Boutrous of Gibson Dunn hit the Justices with a parallel sequence of three vivid verbs that sum up why they should reverse the Ninth Circuit:

> The Ninth Circuit's decision allowing this class action to proceed **contradicts** Federal Rule of Civil Procedure 23, **departs** from this Court's precedent, and **endorses** an approach that would abrogate the substantive and procedural rights of both Wal-Mart and absent class members.

A similar parallel sequence caps the same introduction. This one showcases why decertifying the class would be a good idea, not just a legally sound one (what I call the "Why Should I Care?" technique in *Point Made*):

> The certification order is harmful to the rights of everyone involved. It **distorts** basic principles of class-action and anti-discrimination law, **eviscerates** fundamental procedural protections for class-action defendants, and **allows** three class representatives to extinguish the rights of millions of absent class members **without even telling them about it**.

Note how the homespun phrase "without even telling them about it" aims to align Wal-Mart with the little guy.

I immediately recalled a similar passage from another Ted Olson brief—which also sought to reverse the Ninth Circuit—in *MGM v. Grokster*, the file-sharing case:

> The Ninth Circuit's decision **eviscerates** intellectual property rights. It **frustrates** those who have invested substantial resources in creating an original work, only to see the fruits of their labors snatched away. It **rewards** those, like Respondents, who unjustly profit by designing tools to enable the theft of private property. And it **stifles** innovation by depriving citizens of the incentive to create works of art or music or literature that can be enjoyed by people ages hence.

Back to Wal-Mart. The attorneys also exploit parallelism in the argument itself:

> As shown below, the evidence, at most, indicates that Wal-Mart's pay and promotion system *could* possibly result in individual disparities—not that it was designed to **do so**, was intended to **do so**, or would inevitably **do so** with respect to every single female employee around the country.

One suggestion: Shun the oddly beloved phrase "with respect to." Here, it also ruins the rhythm of the sequence: "for every single female employee" would have worked just fine.

2. Zinger Words

Class action doctrines are dry and abstract, so they need some zesty language to come to life. "Distorts" and "eviscerates" aren't the only catchy words in Wal-Mart's winning brief.

Try picturing a "broad array of diverse claims" or an "amalgam of unrelated claims." Not much comes to mind, right?

Now picture a "kaleidoscope" of claims instead. Those scattered bits and specks of color are just the image the Gibson Dunn lawyers want you to conjure up when you think of the Wal-Mart class action:

> This **kaleidoscope** of claims, defenses, issues, locales, events, and individuals makes it impossible for the named plaintiffs to be adequate representatives of the absent class members.

(It's no surprise that the kaleidoscope made a cameo in the Supreme Court brief; Ninth Circuit Chief Judge Kozinski used the same word in his dissent below.)

"Untethered" is another zinger:

> The district court rejected Wal-Mart's objections that Drogin's statistics were **untethered** to plaintiffs' store-level theory of discrimination on the ground that it would "engage the Court in a merits evaluation of the expert opinions."

And "sidestepped" is a novel twist on the usual suspects for claiming error:

> The Ninth Circuit majority **sidestepped** this critical issue, erroneously opining that "[t]he disagreement" between Drogin and Haworth regarding the appropriate level of aggregation "is the common question."

Two quick thoughts: A disagreement isn't "regarding" something, it's "over" something. In fact, I would avoid both "regarding" and "concerning" as much as possible. And how

about affixing "erroneously" to "opine"? Even if a court can "erroneously opine," "sidestepped" already makes it clear that the Ninth Circuit erred. Once is enough.

3. Starting Gate

I have long noted that the greatest writers, legal or otherwise, prefer such short transitions as "and" or "but" or "nor" to clunky ones like "additionally" or "however." The Gibson Dunn team is no exception.

> **Nor** can the certification order be reconciled with the requirements of Rule 23(b)(2), which is limited by its terms to claims for "injunctive relief or corresponding declaratory relief."
>
> Plaintiffs seek billions of dollars in individual monetary relief, **yet** seek to evade the additional procedures required for fair adjudication of monetary claims, including notice and opt-out rights for absent class members.
>
> **And** they take no issue with the "consensus among the circuits," holding that courts are not only authorized but obligated to resolve such disputes at the certification stage relating to Rule 23 factors.
>
> **But** because this case, properly analyzed, does not meet the prerequisites imposed by Rule 23(a), a trial on the merits would be completely unmanageable and unfair.

4. Ebb and Flow

Here's a trick from the Wal-Mart brief that will help you add speed to your prose: Move words like "thus" and "therefore" closer to the verb so they don't weigh down the start of your sentences.

Read the beginning of this version and see how slowly it moves: "Therefore, Plaintiffs' bid for affirmance of the class certification order rests on a fundamental—and quite radical—remaking of Title VII law." Now look at what the Wal-Mart team wrote instead:

> Plaintiffs' bid for affirmance of the class certification order **thus** rests on a fundamental—and quite radical—remaking of Title VII law.

And now imagine swapping "Accordingly, Plaintiffs failed to establish that . . ." for this sentence from the actual brief:

> Plaintiffs **thus** failed to establish that a crucial element of their prima facie case could be proved on a classwide basis.

5. Size Matters

Another way to distinguish your writing is to start a paragraph with a short sentence. This paragraph opener has just five words:

> Title VII codifies certain defenses.

Sprinkled throughout the brief are these other short sentences that contrast with the inevitable long ones:

> Yet plaintiffs could find no such practices.
>
> That should have ended the inquiry.
>
> This too was error.

6. Classy Marks

In almost all great nonfiction writing, you'll find thoughtful uses of the dash, colon, hyphen, and semicolon—four punctuation marks that give many lawyers heartburn.

The **dashes** here highlight the intervening phrase and emphasize the repeated word "different":

> The class members—potentially millions of women supervised by tens of thousands of different managers and employed in thousands of different stores throughout the country—assert highly individualized, fact-intensive claims for monetary relief that are subject to individualized statutory defenses.

Also underused is the **colon**. When swapped for "because" or "due to the fact that," a colon lets the reader know that an explanation is on the way:

> This is a failure of proof at the most basic **level:** Plaintiffs challenge decisions by individual store managers, but failed to adduce any statistical evidence of discrimination (or even disparities) at the store level.

How about the **semicolon**? Try one out the next time you want to highlight a contrast:

> But, regardless of the strength of Wal-Mart's statistics, **it is *plaintiffs'* burden** to produce "significant proof" of a company-wide discriminatory policy**; plaintiffs failed to meet that burden** by failing to offer any proof of gender-based disparities at the store level.

Finally, **hyphenating** phrasal adjectives can make your writing clearer and more professional:

Plaintiffs' **disparate-impact claim** requires them to prove "a particular employment practice that causes a disparate impact" on a prohibited basis.

_____

1. *Wal-Mart Stores, Inc. v. Dukes*, petitioners' brief (2010). [http://www.impactfund.org/documents/cat_95-100/WMSCOTUSOpeningBrief.pdf]

The Winning Wal-Mart Brief: 6 Returns

The authors of the winning Wal-Mart brief[1] deserve their fame as both superb writers and crack appellate advocates. Even so, here are a few sticking points.

1. Adverb Angst

Do you remember when the Chief Justice flubbed "will faithfully execute" in President Obama's Oath of Office? Many other lawyers are also afflicted with adverb angst, a condition that causes otherwise great writers to put an adverb anywhere except where it needs to go.

Take this sentence from the Wal-Mart brief:

> This novel concept, which **commonly is known** as "structural discrimination," challenges widely accepted corporate structures as creating a "conduit for gender bias to potentially seep into the system."

If "commonly is known as" sounds strange, it's because it is. But these are hardly the only lawyers who subscribe to the myth that you cannot split a phrase like "is known." Many lawyers even claim that you can't put an adverb after the "is" here because then you'd be splitting an infinitive. As I've recently explained (See "Five Grammar Myths," page 165), these are not infinitives but verb phrases, and you're free to split them. (Or is that "you entirely are free to split them?")

In the end, the Constitution is correct: it's "will faithfully execute," not "faithfully will execute." And it's "is commonly known as," too.

Here's another slip-sliding adverb:

> As a result, Bielby's testimony **affirmatively** does not support, but affirmatively defeats, any finding of commonality in this case.

Like "commonly" in the example above, "affirmatively" is yearning for the verb it modifies—"support," not "does"—and belongs right before "support" so it can complete the parallel contrast with "but affirmatively defeats."

2. If Only

"Only" is a tough word to place. Here it's in the wrong spot, muddying Wal-Mart's point about punitive damages:

> Punitive damages may be awarded **only** in disparate-treatment cases, if the plaintiff proves that the employer acted "with malice or with reckless indifference to the federally protected rights of an aggrieved individual."

"Only" should go after "cases," not after "awarded." Why? Because we're not trying to say that the only time in life you can get punitive damages is in a disparate-treatment case. We're trying to say that in disparate-treatment cases, you can get punitive damages only if you establish malice or reckless indifference.

Here's an easier way to get "only" right here and elsewhere: Put "only" wherever you'd put "but only." The plaintiff can get punitive damages in disparate-treatment cases BUT ONLY if the plaintiff proves . . . ." "Only" goes in the same place.

3. Fact Free

Strunk & White were wise to shun "the fact that." I've yet to see a sentence that wouldn't read better without that phrase. And that's a fact.

Take this example:

> **The fact that** plaintiffs are seeking monetary relief in the form of backpay, as opposed to compensatory damages, does not alter the conclusion that the request for monetary relief predominates.

The idea that "a fact does not alter a conclusion" muddies the main point, which appears to be something like this: "Even if Plaintiffs seek monetary relief in the form of backpay and not compensatory damages, their request for monetary relief still predominates."

4. This and That

Some of the biggest stumbling blocks in legal writing are sentences beginning with "This" or "That." If you don't know what "this" or "that" refers to, you have to go back and read the previous sentence again. You can get away with a stray "this" here and there. But two times in a row is too much:

> **This** is a failure of proof at the most basic level: Plaintiffs challenge decisions by individual store managers, but failed to adduce any statistical evidence of discrimination (or even disparities) at the store level. **This** is critically important because courts have uniformly recognized in multi-facility employment cases that discrimination must be shown in each facility or other decision-making unit.

Even more confusing is the "that" below. Does it refer to the departures or to the requirement to treat people differently?

> Plaintiffs' suggestion that liability can be premised on aggregated disparities, if accepted, would require employers to treat people differently despite the absence of any

previous departures from legal requirements. **That** is contrary to Congress's express instruction in Title VII (42 U.S.C. § 2000e-2(j)), and this Court therefore already has rejected such an approach to Title VII.

The use of "and" to join the two clauses, with a confusing "therefore" slid into the second one, doesn't help matters either.

The solution is to follow the same lawyers' lead in the examples below. Note how they follow each "this" with a solid and specific reference.

A class may not be certified unless "there are questions of law or fact common to the class." Fed. R. Civ. P. 23(a)(2). **This requirement** ensures that the class representatives possess the same interests . . . .

This showing was not rebutted by plaintiffs, who offered no store-by-store analysis of their own, and confirms the lack of commonality.

5. Of Note

I have long found that trying to cut the word "of" can do wonders to legal writing.

Few phrases are more popular in this profession than "despite the absence of" and "despite the presence of" and "despite the existence of." Here's an example:

Plaintiffs' suggestion that liability can be premised on aggregated disparities, if accepted, would require employers to treat people differently **despite the absence of any previous departures from legal requirements**.

Yet who exactly is responsible for the lack of departures? The employers? Then perhaps something like this would be clearer: ". . . would require employers to treat people differently even if those employers had never flouted any legal requirements."

Also obscuring the lawyers' point is the "of" phrase in this next sentence, especially when combined with a vague "with respect to" and a wide gap between "probative value" and "could possibly be."

> Because Bielby conceded that he could not conclude whether sex-based animus was responsible for all of the employment decisions at Wal-Mart or none of them, **it is unclear what the probative value of his testimony, with respect to the Rule 23 prerequisites, could possibly be**.

A rhetorical question might work here: "How could Bielby's testimony have any probative value on the Rule 23 prerequisites?" Or if that's too much for you, try just "his testimony would have no probative value on the Rule 23 prerequisites."

Lofty language is often imprecise, creating a writing double whammy. In the sentence below, decisions themselves can't "constitute" the "antithesis of" anything, let alone a "common policy."

> Millions of discretionary decisions by tens of thousands of individual managers **constitute the *antithesis* of** a common policy that affects everyone in the same manner.

The best thing to do in these cases is to express your thoughts out loud in direct and natural language. I believe the point is

something like this: How can a company like Wal-Mart have a "common policy" when tens of thousands of its managers make millions of discretionary decisions?

How about one more "of" cut. In this sentence, the "dispensed with only on the consent of" language is confusing:

> Like the right to a jury trial, the second stage of a *Teamsters*-bifurcated proceeding may be dispensed **with only on the consent of both parties**.

If we cut the "of," we might end up with something like this: "The second stage of a *Teamsters*-bifurcated proceeding may be avoided only if both parties consent."

6. Led Astray

I'm a fan of using participial phrases to add interest and variety through what's known as a "leading parts" sentence. So instead of "The court recognized X. Therefore, the court held Y," you can say "Recognizing X, the court held Y."

But proceed with caution. If you shove the -ing phrase in the middle of the sentence, you'll separate the subject from the verb and likely confuse your readers.

> The lower courts, **recognizing that allowing Wal-Mart to present the defenses ordinarily available to employers in Title VII cases would undo the cohesiveness necessary for aggregated adjudication of plaintiffs' claims**, elected to deny Wal-Mart the right to defend itself.

By the time we get to "elected," for all we know we're talking about politics.

Of course, you can put a phrase like this one at the beginning of the sentence, giving yourself a way to leave "the lower courts elected" intact. But consider putting it at the end sometimes as well.

"The lower courts elected to deny Wal-Mart the right to defend itself, recognizing that allowing Wal-Mart to present the defenses ordinarily available to employers in Title VII cases would undo the cohesiveness necessary for aggregated adjudication of plaintiffs' claims."

———

1. *Wal-Mart Stores, Inc. v. Dukes*, petitioners' brief (2010). [http://www.impactfund.org/documents/cat_95-100/WMSCOTUSOpeningBrief.pdf]

The State of the Union Dissected: Five Highs, Five Lows

Obama's State of the Union address[1] prompted partisan reactions to its content and delivery, but surely we can unite over the writing itself.

I'll do my part by sharing five winning passages—followed by five that didn't fare so well.

Let's start with some high notes.

1. You're Out

One of the best lines boasted a rhyming triplet:

> It's time to apply the same rules from top to bottom: **No bailouts, no handouts, and no copouts**.

2. JFK Redux

Nor did it hurt for the ghost of JFK to make an appearance:

> Tonight, my message to business leaders is simple: **Ask yourselves what you can do to bring jobs back to your country, and your country will do everything we can to help you succeed.**

Clunky, sure, but the reference did the trick.

3. Whole Greater Than Sum

Champions of the regulatory state must have smiled at this burst of detail, a good display of what's known as the additive style in writing:

> I'm confident a farmer can contain a milk spill without a federal agency looking over his shoulder. But I will not back down from making sure an oil company can contain the kind of oil spill we saw in the Gulf two years ago. **I will not back down from protecting our kids from mercury pollution, or making sure that our food is safe and our water is clean. I will not go back to the days when health insurance companies had unchecked power to cancel your policy, deny you coverage, or charge women differently from men**.

(The last bit should have read "differently *than*," but I'll save that one for another day.)

4. Ask Away

Obama also posed some provocative rhetorical questions:

> Now, you can call this class warfare all you want. **But asking a billionaire to pay at least as much as his secretary in taxes?** Most Americans would call that common sense.

5. Fast Lane

I also enjoyed this series of "Starting Gate" sentences, as I call them in *Point Made*—sentences beginning with one-syllable words that add speed and lilt to the prose:

> **And** in Syria, I have no doubt that the Assad regime will soon discover that the forces of change can't be reversed, and that human dignity can't be denied. **How** this incredible transformation will end remains uncertain. **But** we have a huge stake in the outcome. **And** while it is ultimately up to the people of the region to decide their fate,

we will advocate for those values that have served our own country so well.*

Now let's turn to five off-notes:

1. Either . . . Or

A parallelism error turned a taut contrast into mush:

> We can **either** settle for a country where a shrinking number of people do really well, while a growing number of Americans barely get by. **Or** we can restore an economy where everyone gets a fair shot, everyone does their fair share, and everyone plays by the same set of rules.

"Either-or" constructions need parallel structure, as much for rhetorical force as for grammar. In Obama's rendition, "either" preceded "settle for," while "or" preceded "we restore." In short, a mess.

Here's one solution:

***Either we** settle for a country where a shrinking number of people do really well while a growing number of Americans barely get by, **or we** restore an economy where everyone gets a fair shot, contributes a fair share, and plays by the same set of rules.*

2. Apples to Apples

The next glitch reflects another common error.

What's being compared to what here?

We've brought trade cases against China **at nearly twice the rate as** the last administration—and it's made a difference.

Comparisons are perilous: You have to make sure that you're comparing apples to apples.

So in the sentence above, after "twice the rate as," we needed another rate. Instead, we got the Bush Administration.

One fix would be to replace "as" with "of":

*We've brought trade cases against China **at nearly twice the rate of** the last administration—and it's made a difference.*

Another option is to compare the rates directly:

*We've brought trade cases against China **at nearly twice the rate that the last administration did**—and it's made a difference.*

3. Dangle It

A third glitch was no "oops" moment, either, but it's still worth our attention.

Since Reagan, presidents have singled out "regular people" during the State of the Union address. This year was no exception: Besides introducing us to Warren Buffett's secretary, Obama let us peer into the life of furniture-maker Bryan Ritterby:

When Bryan Ritterby was laid off from his job making furniture, he said he worried that at 55, no one would give him a second chance.

We understand the point, but who just celebrated his fifty-fifth birthday? Was it "no one," as the sentence suggests? No, it was Mr. Ritterby himself. To fix this dangler, try the following:

*He worried that at 55, **he** would never get a second chance.*

4. One or More?

Even in the best writing, you'll find a lot of subject-verb agreement errors with collective nouns like firms, companies, and countries. Here's one such error from Obama's speechwriters:

> For less than one percent of what our Nation spends on education each year, **we've convinced nearly every State in the country to raise their standards** for teaching and learning—the first time that's happened in a generation.

The states are treated singularly here, so we need "its standards," not "their."

5. Impactful

Finally, if you ever needed proof that you should avoid using "impact" as a verb, that ship has now sailed:

> Let's limit any elected official from owning stocks in industries they impact.

The "they" makes it sound as though the stocks are doing the impacting, but it turns out that the would-be impactors are the elected officials themselves. "Impact," in any event, is at once bureaucratic and vague. And don't we limit someone "to," not "from"?

We could try to fix these *impactful* issues as follows:

*Let's **keep** elected officials from owning stocks in the industries they **regulate**.*

While we're at it, let's keep those same officials—and their speechwriters—honest on the writing front as well.

———

* Strangely enough, President Obama's Syria passage sounded a bit like Chief Justice Roberts's brief in *Alaska v. EPA*:

> **But** the EPA cannot claim that ADEC's decision was "unreasoned." **Nor** can the EPA assert that ADEC's determination in any way results in emissions exceeding national standards or permitted increments. **How** to control emissions within those standards, without exceeding available increments, was for the State to decide.

———

1. President Barack Obama, State of the Union address, Jan. 24, 2012. [http://www.nytimes.com/interactive/2012/01/24/us/politics/state-of-the-union-2012-video-transcript.html]

Train Better

The Value of Games

I attended a seminar by Thiagi, the guru of using games to spice up training. Here was the grand prize: Thiagi's belief that everything—from a firm's sexual harassment policies to the inner workings of the Bankruptcy Code—should be taught through an activity.

Would you bet a chip that he's right? If so, the next time you'd like to turn a tedious lunchtime lecture into an interactive free-for-all, light up your speaker's content with one of the buzz-inducing games that follow.[1]

Just in case you're thinking that lawyers won't like games, I've simplified and adapted these games to suit a skeptical legal audience.

1. **"Essence."** Ask the participants, either individually or in teams, to reduce the speaker's content to exactly 32 words. Then have them read their summaries out loud and vote for the most effective one. Now have them do the same thing again—but this time, they get only 16 words. If all goes well, try it one more time with an 8-word limit. Note: I've found that lawyers love playing this game.

2. **"Confusion."** Midway through the training, have each participant write an anonymous question on an index card. Ask the participants to stand and exchange their cards with as many other participants as possible. At that point, each participant either answers the question for the group or turns to the speaker for guidance.

3. ***"Intelligent interruptions."*** For this one, you need a timer. Set it for a certain number of minutes. When it goes off, the speaker calls on a random participant. At that point, the participant must (1) make a comment, (2) challenge something the speaker said, (3) ask a question, or (4) share a relevant experience. Reset the timer and start again.

   Twist: If you don't want to call on participants at random, distribute a deck of cards and then keep drawing from a separate deck until you get a match with one of the participants' cards.

4. ***"Quiz show."*** A subject-matter expert—either the speaker or a knowledgeable participant—speaks rapidly for two or three minutes about a technical aspect of the topic at hand. Each group of four to seven participants then develops questions based on the lecture and uses the questions to try to stump the other groups.

5. ***"Thirty-five," or, as modified by me, "Fourteen."*** To get things rolling or to test key points, jot down a prompt for the participants. For example, "How does the SEC view short selling?" or "What are the three main things to remember when filling out your time sheets?" or "How can our firm make this merger succeed?" Give each participant five minutes to answer the question on one side of an index card.

   Now ask the participants to stand up and give them 30 seconds to exchange their cards with as many other participants as possible. Next, ask them to pair up with another participant and review the two cards they are holding. Tell each pair to distribute 7 points between the two cards based on quality and effectiveness. So, for example, they could give 6 points to one card and 1 to the other, or 4 points to one card and 3 to the other. Repeat the exercise one more time and total the score for a possible

grand total of 14 points. (Thiagi recommends doing this five times, for a possible grand total of 35 points, but I think the exercise is just as effective in two rounds.)

Read the winning card and have the writer stand up. Ask the participants why they think their colleagues chose the answer on the winning card.

Bonus round: "Are you sure?" Before the training, prepare multiple-choice questions related to the subject matter. On a separate sheet of paper, include a row for each question. After answering each question, participants can bet a certain number of points based on their confidence level. If they get the answer wrong, they lose that number of points. The highest overall score wins.[2]

---

1. Sivasailam Thiagarajan, *Thiagi's Interactive Lectures* (2005).
2. Submitted by Andy Beaulieu in Elaine Biech, *90 World-Class Activities by 90 World-Class Trainers* (2006).

Competencies Without Tears: Thoughts from a Trainer in the Trenches

Do you want to see people look both passionately committed and anxiously unsure?

Just bring up competency models at a professional development conference.

I exaggerate for effect, but let's face it: One day competencies feel like a lighthouse in a storm—and the next day they feel like rearranged deck chairs on the *Titanic*. This sea change is rocking everyone, as PD practitioners, lawyers, and trainers all struggle to right the ship.

Speaking of trainers, I thought you might be interested in some perspective from a consultant who spends his days working with associates on their writing, one of the key skills that competencies are designed to measure.

Here are four thoughts on the subject.

1. Know that hard data supports your push toward competencies.

I often hear that partner evaluations are "subjective," if not downright "arbitrary." In response, I've spent more than a year developing a standardized way to gauge an attorney's writing skills and abilities. Nearly 1,000 partners and associates have taken various versions of my assessments.

I have some good news for lockstep supporters: Partners as a group beat senior associates, who, in turn, trounce junior associates. And attorneys sent to me with writing problems nearly always underperform their class-level peers.

But I have even better news for the pro-competency crowd. Many associates do much better (or worse) on the assessment than their class year would suggest. And sometimes, a first-year associate even beats the average partner.

So at least when it comes to technical writing skills, one of the few competencies that can be measured objectively, the numbers suggest that lockstep undervalues or overvalues many associates.

2. Purge your competencies of adjectives, adverbs, and corporate-speak.

What's the greatest challenge when trying to help associates? Translating partner evaluations like "Her writing is pretty good, but she doesn't analyze as effectively as she could" into specific behaviors that the associate can change.

Since partners develop the competencies, it's no surprise that many of the ones I've seen are loaded with similar modifiers: "negotiates *effectively*," "writes with *clear and concise* prose," "has *sophisticated* knowledge of cutting-edge real estate issues."

Therein lies the problem. Are "effectively" and "clear" any more objective—or less political—than the "excellent" or "very good" from evaluations past? How much of an improvement is it to suggest, say, that "Level 2 writing skill means clear work product, which means not-unclear work product that needs some editing but not all that much."

After a while, you can start to empathize with associates who submit blog entries like this one, defending lockstep and expressing fears that competencies will be unfair when applied: "[Evaluations will be] cast in vague performance evaluation language that makes subjective criteria sound more objective than they really are."

Nor am I sold on what might be called "do-it-yourself" competencies:

> *Level One: Can defend a deposition with supervision.*
> *Level Two: Can defend a deposition with minimal supervision.*

Level Three: Can defend a deposition with little or no supervision.

Here's the typical associate's take on that ladder: "Thanks, but I already knew that as people get more experienced they generally need less supervision. Here's my question: What exactly am I supposed to do when I defend a deposition so the partners can trust me to fend for myself?"

You should also watch for Corporate America lingo such as "team player" and "taking ownership" and "self-starter." Associates may have a point when they complain that those fluffy phrases are just a smokescreen for "I like you" or "I don't like you."

Purging modifiers and slogans in this way will get you closer to what Hildebrandt's Larry Richards has called the ideal competency: "If the competency is well defined, five independent individuals observing an associate doing a specific task should be able to come pretty close to agreeing on what levels of performance that associate has achieved by referring to the competency description." If Richards is right, "effective" and "self-starter" just aren't going to cut it.

So now that your competencies are modifier-free, what should you use to replace them? Read on . . . .

3. Push your partners to develop "micro-competencies" linked to your firm's model work product.

So everyone agrees that competencies should reflect specific agreed-upon behaviors, but what does that mean for you?

Let's say you hire a consultant to develop competencies for your litigation associates. I can promise you that when the consultant and the litigation partners consult, they will all agree that an "advanced" associate should be able to draft a clear and persuasive motion.

"Consensus!" the consultant declares with a smile, leaving well enough alone for fear of provoking dissent.

But if you challenge your firm to think about what "clear and persuasive" really means, you will have a terrific opportunity to give your associates more guidance while helping the firm generate better and more polished work product to boot.

To that end, you might engage your partners in a conversation about how to draft the headings in such a motion. Or how to distinguish adverse case law. Or how to introduce a dispositive pleading.

Now we're talking about specific behaviors tailored to your firm's practice. And you'll probably find a lot more agreement than you'd expect.

You might even start to think of such "micro-competencies" as the Next Generation.

4. Create training programs that give associates actionable feedback from neutral observers.

Many firms have promised enhanced training as part of their new models. As much as I love the idea of more training, I agree that firms shouldn't offer training unless it's tied to their associates' competencies and long-term development.

So here's the challenge: How do you create stand-alone training that (1) enhances specific competencies, (2) measures skills based on predefined criteria, and (3) generates individualized feedback from neutral observers that associates can use to gauge their progress and to take their skills to the next level?

Here are three ideas for a half-day experiential training program that meets those lofty goals.

The first comes from Akina's Tracy LaLonde, one of the best trainers on the business development front.

> *A firm would like its senior associates to conduct sales meetings with potential clients that could result in a relationship advance or new business. The trainer provides a case study that involves preparation and a role play. The trainer gives the associates a "preparation framework" that they complete to prepare for the meeting and then gives them feedback on how well they completed it. The associates then conduct a role play with partners playing the role of the potential client. Based on the associate's performance, the partners decide if the associate gets a relationship advance, wins the business, or gets nothing (as in "thanks and we'll get back to you").*

The second one, for presentation skills competencies, is from Jay Sullivan of Exec Comm.

> *Provide the attorneys with a brief description of an upcoming pitch the firm will be making to a potential client or to a trade association. Give them the firm's marketing material or other content. The attorneys then craft a five-minute talk using real content, with a specific audience in mind. They deliver that talk in front of a half-dozen people in the program. The observers will use a checklist of skills tied to the firm's competency model. They will provide the speaker with comments on what he or she did well, and on how to improve. Each person will learn to solicit feedback from colleagues on specific points in their next few talks after the program.*

Finally, here's a motions-drafting challenge from me.

> *A firm identifies a motion to dismiss that represents its best work. The trainer then creates a rubric of specific competencies displayed in the work product such as "Can draft a heading that gives the judge a non-obvious reason to choose one side over the other" or "Can transition between paragraphs without bumps in logic." The trainer then rewrites a section of the motion to include common stylistic and structural*

flaws. Each associate gets two hours to edit the revised motion. Both the trainer and an anonymous partner then compare the edit with the objective rubric. The trainer holds a one-hour debriefing session, and the associates receive their scored rubrics with suggestions for improvement and other resources.

Here's to competencies in the coming year!

———

Ross Guberman, "Competencies Without Tears: Thoughts from a Trainer in the Trenches," *Professional Development Quarterly*, Feb. 2010.

Dare to Measure: Can Objective Assessments Predict and Change Performance?

Gaye Mara, Professional Development Quarterly*, Interview with Ross Guberman, January 14, 2011.*

GM: What persuaded you to develop a multiple choice writing assessment in the first place?

RG: Well, the most pressing reason was that I needed a peer-reviewed work product to get my certification from ASTD! But I had several other key goals as well.

In legal circles, great writing is often treated as something subjective and hard to pin down—a bit like what Justice Potter Stewart said about pornography: "I know it when I see it."

I have always been skeptical of the idea that great legal skills are in the eye of the beholder, but I wanted to test out my hunch. So one of my goals in designing the assessment was to learn whether there's some sort of "X factor" in writing that distinguishes strong performers from weaker performers, regardless of idiosyncratic style preferences.

Another goal was to give lawyers the objective feedback on their writing that many crave. I wanted to make sure that the lawyers got not just an overall "score" but also a sense of their writing strengths and weaknesses. In part, I thought a well-designed assessment could inspire attorneys to chart a strategy that would help them make real progress.

With the recent competency craze, I was also curious to see how much overlap I'd find between attorneys at different class levels. Here's a provocative question: How many associates have better technical writing skills than the average partner? From another perspective, are firms missing opportunities to identify superstars early on, to nurture them with especially

challenging writing assignments, and to exploit their superior skills to the firm's benefit?

Finally, although recruiting and PD professionals (my client base) know all too well that writing is a frequent stumbling block, I wanted to figure out exactly why it is that some associates have so much more trouble with this core competency than others. Put another way, I thought it would be great to develop an assessment that required no filtering—rather than measure associates' writing by asking partners what they think, why not figure out a way to measure the skill directly?

GM: Have any of the results surprised you?

RG: As the test has evolved and as so many people have taken various versions of it, one thing I've learned is that the way people treat the assessment itself reflects something about their work habits— beyond their writing skills. At one firm, for example, after an entire summer associate class took the assessment, I was happy to learn that the summer associates' rank order on the assessment predicted how well they did on their research and writing projects. But what really surprised me was that, putting aside the scores themselves, the summer associates who waited until the last possible minute to take the assessment just so happened to be the same summer associates who had trouble all summer meeting deadlines and being organized.

At another firm, I learned that the associates who used little of the allotted time on the assessments were often the very same associates who rushed through their work and did not show great attention to detail.

Here's one hypothesis: The test is frankly very hard and probably tedious to some of the test takers even though the content of the questions is fairly interesting. Part of being a good lawyer, of course, is having sustained attention while focusing intensely on details. Though I never expected to measure anything besides writing, people who do well on the

test appear to have at least some of what it takes to succeed overall.

GM: Does that mean the test is working—that it's predicting how these attorneys or summer associates would actually perform on the job?

RG: After a couple of years of number-crunching, I now have enough data to say yes, the assessment does predict how people perform 'in real life." Of course, a test can do only so much: even when you look just at legal writing, superior performance means more than just great technical writing skills. On the other hand, I have yet to see a single example of someone scoring low on the assessment and yet "in real life" writing cleanly, tightly, and effectively. In other words, the skills that the assessment measures are necessary, but perhaps not sufficient, if the attorney wants to be a standout writer.

I have even tried to create a "warning zone" when it comes to the overall score. If someone takes the assessment and scores below 37 percent, for example, in my experience they have about a 90 percent chance of encountering problems at a major law firm, no matter what law school they went to or what other paper credentials they might have.

I have also tried to compare the performances of different groups to better understand why some associates run into trouble while others prevail. For example, I've noticed that associates sent to me for writing coaching consistently answer certain questions incorrectly far more often than do associates in general. Another interesting finding: Summer associates at elite firms do much better on some questions than do law students as a whole—but no better on other questions.

Some people find it hard to believe that a multiple-choice writing test that takes less than an hour can predict performance, especially since attorneys don't choose between four predefined choices when writing at work. But if you think about it, this link really shouldn't really surprise anyone. After all, in general a law student's LSAT score, which measures such things as whether you can assign people to days of the

week based on certain rules, predicts law school performance better than the student's four-year undergraduate record does.

GM: It's rare for law firms to do any sort of lawyer testing. How are firms and others in the profession reacting to this new test, especially given the recent focus on competency models?

RG: I have often thought about how what I do fits into the recent embrace of competency models. At conferences and in my interactions with PD professionals, I've noticed a lot of enthusiasm for figuring out what it takes to be a successful attorney, less enthusiasm for measuring those skills, and even less enthusiasm for looking an attorney in the eye and saying, "Unfortunately your skills are not where they need to be." So resistance to the idea of an objective skills test with right and wrong answers is really, to my mind, a symptom of a broader issue: We can have all the competency models we want and hold summit after summit discussing what it takes to succeed; but, in the end, none of it's going to work unless people are willing to admit that some attorneys have below-par skills—and then figure out how to help them narrow the gap.

I fervently believe that the skills tested on this assessment can be improved with enough dedication. But the longer the skills gap persists, the harder it is to fix. Many talented associates are sent to me for coaching late in their careers—after years of getting extremely vague feedback like "your writing is OK but needs improvement." As painful as a low score on this assessment can be, that pain pales in comparison with having your career derailed over something that you could have fixed.

GM: What exactly does the test measure?

RG: The questions test a broad range of writing skills: syntax, parallelism, word choice, elegance of expression, transitions, and grammar, just to name a few. The average attorney gets 50 percent of the questions right, and the results follow the classic bell curve: Most attorneys are good at some of these things and less good at others, and thus get an "average" overall score. Relatively fewer attorneys get consistently high scores on all the subtests—or consistently low scores.

GM: How do test takers react if they get a lower score than they expected?

RG: When people get their results, their first question is not "How can I improve my writing?" but "Can I see the questions and answers?" Although I completely understand their curiosity, that question misses the point. The point is not to do well on this assessment for its own sake, but to use the results to chart a strategy. After all, whatever strengths or weaknesses are exposed on this assessment reflect years—if not decades—of writing experience by the test takers and are not going to change in either direction overnight.

Of the low scorers, some attorneys are defensive, but many others are in some ways relieved to have a sense of what exactly they need to do to improve.

GM: How do you respond to someone who disputes the "right" answer to a question?

RG: The answers I've chosen reflect much more than just my own views on writing. In fact, I long ago threw out all questions that didn't "work" as a statistical matter. In other words, unless people who do well on the assessment overall consistently choose the "right" answer to a particular question far more often than do the people who score poorly overall, I don't include that question no matter how sure I am that it measures something important about attorneys' writing skills.

GM: How did you create the questions and how many are there?

RG: As I developed the questions, I tracked the kinds of subtle errors and glitches I saw in writing samples from extremely talented lawyers who still had writing problems. I created questions that tested whether attorneys would avoid these subtle errors.

From a completely different perspective, I also took sentences written by some of the greatest legal writers alive and altered

them slightly—three more times, to be exact—to see if lawyers could pick from the four alternatives the one written by the renowned writer. One of the things I've found is that attorneys said to have unusually good flow or punch in their writing consistently choose the right version, while less adept attorneys choose versions that may convey the same meaning but do so less effectively.

I've played around with about 300 potential questions. From that initial pool, I have whittled the test down to the 75 best ones. For every one of those questions, I can say with confidence that one group answers that question much better than another: Partners get all these questions right more often than associates, associates identified as superstars get them right more often than other associates, and summer associates at elite firms get them right more often than do law students in general In statistical terms, the assessment is internally reliable—people who do better on one section tend to do better on the others—and also valid for its intended purpose because it predicts real-world performance.

I can vary the length and the difficulty of the assessment by choosing different questions. But there's a core group of about 30 questions that appear on every version.

GM: Any last insights?

RG: In the end, I'd like people to see objective assessments like this one as a positive force for change— to help attorneys reach their potential and realize that much of their fate remains within their control. Such assessments are also a way to make the evaluation process fairer and less subject to individual whims.

———

Gaye Mara, "Interview with Ross Guberman," *Professional Development Quarterly*, Jan. 2011.

Are Your Legal Writing Competencies Snooze—or News?

Imagine that you want to become a better cook, so you invite a local chef to your home. She follows you into your kitchen, watches you slice and dice, broil and serve and then takes a bite of your prized dish, stuffed quail.

"The quail's not bad," she says, "but you need to make it taste even better next time." "And while you're at it," she adds, "Try to make it look more appealing on the plate as well."

You wait to hear more, but she walks out: "Thanks for the free dinner, and I take either cash or Visa."

You're steamed. The chef may have arrived fresh from the Food Network, but her advice didn't merit the free quail, let alone your hard-earned money. What you needed were specifics on how to angle your knife and season your shallots, not happy talk about how the secret to cooking better is, well, making your food taste better and look better.

Now I bet I can read your mind: "But my firm's competency model is far more helpful and specific than that chef's advice." Maybe so. Yet are the phrases that pepper those models—"consider your client's business objectives" and "speak effectively at meetings" and "take ownership for matters" and "write concisely and clearly"— all that different from "make your food tastier and look better?"

From a management perspective, such "snooze" benchmarks are no doubt useful: They can help with evaluations and promotion, identify skill gaps, and explain why some attorneys make it and others don't.

But if you're an individual attorney trying to succeed, you need a roadmap for how to improve, not just what to improve.

Take legal writing. After all, it figures on every competency model I've seen.

You'll find familiar "snooze" elements in all writing competencies such as "write clearly and effectively" and "adapt your writing to the intended audience." Or my favorite: "Draft documents that can be filed with few changes." Doesn't that sort of assume what we have to prove?

To give attorneys some "news" about how to achieve these benchmarks, I recently created a list of 100 specific writing skills based on four sources—all sources you can use defining writing competencies and other practice competencies as well. At the end of this piece I'll offer a sampling of the 100 skills.

News Source One: "I'm a partner, hear me roar"

Many firms survey their partners for what they consider vital in effective legal writing. But the questions barely scratch the surface of what these seasoned professionals know. For example, if you ask partners to describe the writing of a skilled associate, they'll rattle off "snooze" words like "concise" and "effective" and "client-ready." If you press them on what they mean by "concise," they'll likely quote Strunk & White, responding that "associates need 'to omit needless words.'" That's a bit more useful, but only if you think that associates type words they don't need on purpose. So let's keep pressing. Ask your partners what sorts of "needless" words they see most often. "Adverbs," you'll often hear. That's much more helpful. But even better: "So can you explain when to use adverbs and when to cut them?" Now you have valuable "news" to share.

News Source Two: May the Best Lawyer Win

Another approach: Rather than trying to ask senior lawyers to explain what they're doing after the fact, how about doing some investigative reporting yourself?

All competency models cite "effective presentation skills," for example. But what do your firm's best presenters do? When they start, do they use anecdotes? Statistics? Quotations? A joke? And when do they use PowerPoint, and how?

It is through observations like these (partners vs. associates, nationally prominent advocates vs. generic partners) that I've generated many of my own lists of writing competencies. I have identified, for example, techniques that the best practitioners use in drafting introductions and preliminary statements. Such information is catnip for all ambitious attorneys.

News Source Three: Put 'em to the Test

For another data gold mine, consider administering objective assessments for such skills as speaking, writing, and negotiating—or even for knowledge of, say, the securities laws. Such assessments are fairer than any other existing evaluation system.

For my part, I've created a 75-question objective writing test that uses loads of data to predict, say, which associates will run into trouble and which will excel. I can share with you, for example, that attorneys of all levels who are sent to me for coaching nearly always have trouble on my test with choosing the right transition phrase: Is it "put another way" or "that said"? Life imitates the test. In these attorneys' "real life" writing, their skill gap often leads to choppy and repetitive prose. So I refer them to my list of 110 transition words and phrases, and soon they're replacing "furthermore" and "however" with "even so" and "true enough."

Objective assessments can also help track the skills progression from law students to senior partners, one of the hottest topics in professional development today. Take grammar. Fill in the blank in this sentence: "If you have any questions, please feel free to contact John or_____." Is it "I"? "Myself"? "Me"? And should John's name go first or second? About 51 percent of law students know the answer. 68 percent of associates do. And 93 percent of partners do. So the assessment allows me to tell associates that if they want to write like partners, here are the 25 grammar rules they'll need to master.

News Source Four: The "Deciders"

A final source of data on the "how" rather than the "what": the end users of your attorneys' product. Ask your clients, or even judges and regulators, what impresses them.

A simple case study: Writing and circulating "client alerts" takes up a lot of attorney time that might otherwise go toward billable work. Most client alerts never get read, I've learned. So I have often asked executives what makes them read one of these pieces rather than heading for the "delete" key. I share their responses with partners and associates alike, helping them not just write better client alerts but also develop more business.

So here's the bottom line: the "snooze" approach to competencies—listing things that people already know intuitively—has its uses, and it improves on the vague models of the past. But if you want to usher in "Competencies 2.0," unearth some specific strategies that will generate some "news" that your attorneys can use to attain their long-term goals.

Sample Writing Competencies

Junior and Midlevel Associates

- Understands and customizes standard boilerplate provisions (severability, merger, notice, dispute resolution, choice of law, indemnity, counterparts, assignment) (transactional)

- Incorporates enumerated lists in introductions and preliminary statements that give the court three or four fact-laden reasons the client should prevail (litigation)

- Understands the "which" vs. "that" rule; punctuates "which" and "that" properly

- Distinguishes commonly confused words (further/farther, assure/ensure, less/fewer, number/amount)

- Keeps average sentence length < 25 words

Senior Associates and Partners

- Understands the rules for hyphenating phrasal adjectives ("car-allowance expense" vs. "properly deducted expense")

- Keeps parallel structure in "not only… but also" constructions

- Incorporates at least 20 different transition words and phrases in a typical complex filing or document

- In advocacy writing, avoids such clichés as "blatantly disregards," "proves too much," "specious," "bald assertion," "slippery slope," "desperate attempt," "incentivize," "threshold matter," "egregious," and "proves beyond cavil."

- Is familiar with major UK vs. US style and grammatical differences in both prose and transactional drafting

———

Ross Guberman, "Are Your Legal Writing Competencies Snooze—or News?" *Equipping Our Lawyers* eNewsletter, ACLEA, September 29, 2011.

Writing Sample Blues

Many clients tell me they're overwhelmed by the never-ending flood of candidate writing samples.

Here are three ways to get more value out of those samples while making things easier for both you and your firm.

1. Apples to apples.

As you know, many samples have been "edited" by professors, friends, family members, and others.

It's also hard to compare an intra-office memo with, say, the second draft of a law review article.

Solution: In the spring, every first-year law student in the country drafts an appellate brief. Ask all of your candidates to submit this brief—and ask them to submit the same version they submitted to their professor.

2. Less is more.

Make your reviewers' task easier: Give them the introduction and the first major section from the argument of each candidate's brief. The excerpt will run about five pages—enough to evaluate the candidate's skill, but not so much that reviewers will be tempted to procrastinate.

3. Is "good" good enough?

Avoid asking reviewers to classify the candidates in generic categories such as "excellent," "good," or "poor."

Such categories are not always fair to candidates; some reviewers grade much higher than others. These terms can also be hard for reviewers to apply.

Instead, try either of these two approaches.

A. Ask your reviewers to compare the sample with the work product they get from junior associates:

    1. Much worse than what I get from junior associates.

    2. Somewhat worse than what I get from junior associates.

    3. About the same as what I get from junior associates.

    4. Somewhat better than what I get from junior associates.

    5. Much better than what I get from junior associates.

B. Give your reviewers several specific categories with specific benchmarks. If you had a "style" category, for example, you could ask reviewers to choose one of the following:

    1. Sentences are hard to understand and are riddled with errors, ambiguities, or both.

    2. Mostly clean sentences but choppy transitions and some ambiguities.

    3. Smooth prose that reflects rigorous self-editing.

Extending an Olive "Branch" With Videoconferenced Programs

In a world filled with kids chatting on iPhones and adults buying tickets to Mars, videoconferenced training programs can seem like a throwback to the Dark Ages.

You've no doubt winced at scenes like this yourself: the branch office attorneys are squinting at screens they can't see while mouthing "We can't hear you" to a speaker who can't read lips. Meanwhile, back at the ranch, the "live" attorneys are tapping their feet, irritated that what was touted as a firmwide training program has descended into an obstacle course for the IT department.

We can and must do better. From my perch as a trainer who has conducted hundreds of such programs in all sizes and shapes, I've seen what works and what doesn't, so let me offer a few practical tips.

1. Tell the IT department that the program starts thirty minutes before it really does. In half the programs I do, the beleaguered IT folks show up exactly two minutes before the program is set to begin. When the attorneys enter the room, the mood is panicky, setting exactly the wrong tone. To top things off, the program starts late.

2. In introducing the program or speaker, don't apologize for "making" people attend by video, and avoid well-intentioned comments like "I know it's going to be really hard to stare at a screen for four hours." People already know that videoconferencing is tough, and reminding them only saps their energy. It's best to avoid stating the obvious and strike a happy, upbeat tone instead.

3. If you provide food or snacks for the attorneys in the live office, do the same in the branch office, even if that office has just one or two attendees. This small gesture will go a long way.

4. Share the presenter's email address and contact information with the branch-office attendees before the program. Even if the attendees are reluctant to speak up during the course, they can often relay their questions or concerns that way.

5. Discourage or ban the use of BlackBerrys and iPhones, which make focusing even harder than it would otherwise be. If you need a cover story, mention that such devices hinder the firm's technology and create interference noise—both of which happen to be true.

6. Keep introductions as short as possible and avoid reading anything word for word. The only logistical item worth mentioning is that as much as everyone loves to hear firm gossip and personal revelations, the attorneys in the branch offices should always mute themselves.

7. If the number of attendees in a branch office is close to the number expected in the "main" office, consider hosting the program in the branch office. This switcheroo is great for branch-office morale; the home-base attorneys, for their part, should get a chance to see what it's like to watch presentations by video.

8. Think of ways for the videoconferenced attorneys to ask questions and contribute. Online chat functions help, as does having a "spokesperson" in each branch office collect and relay colleagues' questions.

9. At the same time, don't go overboard in expecting or demanding interaction with branch offices. It's awkward, if not downright ridiculous, to be forced as a trainer to say things like "So Chicago, what's your position on this comma?" "And Denver, do you agree?" "Now maybe we should check in with the New York office as well: comma or no?"

10. Set the camera so the speaker's head fills up most of the branch-office attendees' screen. They don't need or want to see the walls—or, for that matter, the speaker's torso.

11. And here's one I've had to learn myself: when the inevitable technical glitches arise, call a break in the program.

With these eleven tips, the videoconferenced program may still not win an Oscar, but at least you'll see more smiles on your screens.

———

Ross Guberman, "Extending an Olive 'Branch' With Videoconferenced Connections," *Capital Connection*, Capital Chapter, Association of Legal Administrators®, Nov. 2010.

Ten Tips for Your Intern's Summer at the Screen

As a writing trainer for dozens of the nation's top law firms, I've learned firsthand where summer associates go wrong and how to help them succeed.

Here are ten tips to share with your summer interns.

1. Take a deep breath.

Despite the vagaries of the legal market, the basics haven't changed: The partners want you to succeed. You wouldn't have been hired unless you had the legal skills to handle your projects this summer. And unlike the economy, the way you write is within your control.

2. Where am I going?

In this BlackBerry age, supervisors often forget to relay key information when assigning a project. Avoid such misconnects by getting answers to these five questions before you start: (1) What format do you want it in? (2) How long should the final document be? (3) How much time should I spend on it? (4) Can you point me to a document I can use as a model? and (5) What will you do with my project after I submit it?

3. Cover your . . . bases.

Each time you get an assignment, send your supervisor an email summing up your understanding of the project. Attorneys are text people, so seeing your write-up might help your supervisor steer you onto the right track before it's too late.

4. Come out of your shell.

For many summer associates, the anxiety they feel about the legal market makes them want to hide under a table. Avoid this trap. In fact, after you've worked on a project for several hours,

call or email your supervisor to explain where things stand and what questions remain. You'll enjoy the interaction, and you'll likely get excellent advice as well.

5. Get down to brass tacks.

If you feel overwhelmed by a project, turn off your computer and take out a piece of paper. Write—by hand—four sentences about whatever issue you need to address. Your writer's block will disappear—and your big-picture structure will appear in its place.

6. Don't get sidetracked.

Sure, partners have their individual writing quirks. But resist the temptation to throw up your hands and say, "They can't agree, so why bother?" Partners may have different styles on the margins, but they all value the same core writing traits.

As I travel the country, I hear four criticisms again and again: (1) The sentences are too long, (2) many phrases could be cut to one word or none, (3) too many sentences are in the passive voice, and (4) the diction is too lofty or pretentious. If you focus on these Big Four, your work product will shine.

7. Return to Earth.

Summers often stuff their drafts with their newfound legal lexicon. But you don't want to produce a parody of legal writing—lots of "heretofores," "ipso factos," and "well-settled threshold principles"—that obscures your practical analysis and persuasive prose. If you try to impress partners with words and phrases new to you but all too familiar to them, you'll become the summer associate version of the law school applicant who writes an essay on the pros and cons of the Common Law.

8. Take a stand.

In drafting memos and letters, avoid too much "on the one hand, on the other hand" navel gazing. Also avoid announcing

that many courts or agencies have addressed an issue, summarizing what each said, and then concluding that the issue is complicated. If nothing else, explain why things might go one way or another, even if you're not sure which way will prevail.

9. Trim is in.

Block out time to cut needless words, phrases, and constructions. In my own programs, I suggest 30 productive cuts such as redundant adverbs and "there is" phrases—and those are just two of the ways we lawyers are wordy. If you're stuck, try to cut one word in every sentence.

10. Hear yourself think.

You'll be amazed at how often you spot embarrassing mistakes and awkward phrases if you read a draft aloud. A good rule of thumb: If you have trouble breathing when you read a sentence, it's too long. Break the sentence in two. Use concrete examples to explain abstract issues. Or look away from your computer and talk your way through your point until you can say it in one breath.

Mentor Better

Helping Associates Improve Their Writing Skills—Interview with Marcia Pennington Shannon

MPS: Is it true that law firm associates don't know how to write? Associates' writing skills are frequent targets in their evaluations, no matter how high associates themselves may rate their on-the-job prose. Why the disconnect, and what can be done about it? A legal writing expert answers these questions and others.

Our expert, Ross Guberman, conducts hundreds of writing programs a year for many of the nation's top law firms, governmental agencies, and bar associations. Guberman, who is the president of Legal Writing Pro and a former practicing lawyer, holds degrees from Yale, the Sorbonne, and the University of Chicago School of Law. He is also an award-winning journalist. The following are excerpts from my conversation with him.

Why is there such a difference between how law firm partners and associates view associates' writing skills? Associates often say writing is their greatest strength, while partners often view it as their greatest weakness.

RG: This disconnect is an interesting mystery of law firm life. For associates, writing is the one legal skill they've worked on developing ever since they entered the educational system. More recently, they took the mandatory first-year legal research and writing course, and they wrote papers and exam essays all through law school. And for many, writing is personal—something that strikes at the core of their self-

worth. So if you tell associates they need deposition or negotiation training or need to brush up on the Sarbanes-Oxley Act, they'll agree. But tell them their writing needs improvement and many are offended.

On the supervisor's side, for many partners "feedback" means either marking up a document so much that an associate can't make sense of it or providing comments so vague that they only make the associate anxious.

MPS: So is it true that many associates lack the legal writing skills they need to succeed?

RG: Unfortunately, many drafts get a poor reception from the higher-ups because the writer doesn't meet the reader's needs. Take the typical research memo. The associate often tries to use the memo to display intelligence, exhaustiveness, and creativity—while the partner just wants to give advice to a client. When you write about the law, crisp, clear, uncluttered prose doesn't exactly come naturally. Without finely developed style and structure skills, it's all too easy to produce a muddled mess of disjointed thoughts and citations.

Across the country and among various sized firms, the complaints are consistent. I recently surveyed law firm partners in selected major firms and asked, "What are the three writing problems you see most often in associate work product?" These were the most popular answers, in order:

- Poor structure/rambling organization
- Passive voice/awkward sentences/ambiguous clauses
- Clutter/wordiness
- Grammar/usage/proofreading/attention to detail
- Ineffective use of authorities

MPS: Are there solutions that supervisors can immediately implement that make a difference?

RG: Absolutely. First, firms should ban characterizations. When partners tell associates to write more clearly or simply, those comments may hurt more than they help. No associate tries to ramble or confuse, so these labels just make people resentful. Instead, when partners give feedback, they should be as specific as possible, so that a remark such as "It needs to be clearer" becomes "Every heading must be linked to the caption," "Cut adverbs," or "Here are three ways to warm the tone." The feedback should be about improving an associate's writing, not labeling it.

I recognize that it is much easier to describe than it is to come up with examples of how an associate can improve, but over time, a more creative, future-oriented approach will pay dividends.

MPS: So generalizations cannot by themselves develop an associate's writing abilities where specifics can be integrated into the learning process. I would also imagine that while labeling or characterizations can be taken personally by a lawyer, giving specifics can be viewed more as a developmental process.

RG: That's right. If you frame your advice neutrally and practically, the associate is much more willing to hear the message and use it to improve. If you want a partner analogy, it's the difference between "Your business development skills are weak" and "Here are three ideas I have for how you can better market your practice."

Another solution, in my experience, is to do a better job distinguishing between your stylistic preferences—the infamous "happy to glad" changes that drive associates nuts versus the make-or-break changes that truly affect the quality of the work product. Changing every word for purely stylistic reasons can destroy associates' morale. When they receive such mark-ups on their document drafts, they often feel their

work is not valued and wonder why they should even bother editing their drafts in the first place.

A third solution is something that can avoid a lot of problems up front. When delegating an assignment, a partner should make sure to address the following, no matter if the associate verbalizes the questions:

- What do you plan to do with the work product I submit? (Answering this question also shows the associate that the work is important, and that the associate is not just a cog in the wheel.)
- What models should I follow?
- How much time should I spend on the project?
- What length should it be and in what form?

MPS: I can see how putting these suggestions into action can affect associates. How about training, though? What's your top advice on how firms can make writing programs most effective?

RG: Writing programs must be practical. Theoretical musings just won't work. The program should include specific tips and examples that have an immediate effect on an associate's writing. For example, the presenter might include a list of grammar and usage references, key phrases to cut, or effective transition words. The program should give the associates hands-on experience in writing and editing excerpts relevant to their practice areas.

_____

"Helping Associates Improve Their Writing Skills," *Law Practice Magazine:The Business of Practicing Law,* Vol. 34, No. 1 (Jan. 2008).

Defining, Measuring, and Developing Legal Skills

Do you want to see people look both passionately committed and anxiously unsure?

Just bring up competency models at a professional development conference. I exaggerate for effect, but let's face it: One day competencies feel like a lighthouse in a storm—and the next day they feel like rearranged deck chairs on the *Titanic*. This sea change is rocking everyone, as PD practitioners, lawyers, and trainers all struggle to right the ship.

To help you navigate these choppy waters, I've listed some pros and cons of 22 approaches to defining, measuring, and developing core competencies.

Some Pros and Cons of 22 Approaches

Define Better: Five Approaches

1. "Adjective" competency

("effective," "clear," "cooperative")

Pros

- Easy to achieve consensus
- Benchmarks are uncontroversial (Who wouldn't want an associate to be "clear" and "effective" and a "team player"?)
- The resulting evaluations force comparisons with other associates (need to avoid Lake Wobegon world in which all associates are "above average")

Cons

- Vague and thus highly subjective

- When applied to actual behaviors, invites argument among both supervisors and associates ("How can you say that my work on this deal wasn't effective?")
- Forced comparisons make competencies competitive and normative, not skills that anyone can learn

2. "Do-it-yourself" competency

(based on the associate's need for supervisor guidance or intervention)

Pros

- Tied to real-world decisions and client service
- Reflects attorneys' perceived value: Partners give associates discretion only if associates are up to the task

Cons

- Some partners are much more "hands-on" than others
- Some projects require guidance only because they are difficult or high-stakes or both
- Subjects associates to partner biases

3. "Descriptive"/ behavioral competency

(Clarifies what an "effective" motion reads like. Suggests how to make a speech "persuasive." Descriptions might include "no typos," "average of 18 words or fewer per sentence," and so on.)

Pros

- Great for associates: explains what to do, not just what goals to strive for
- Great for partners: prompts them to think about why they do things the way they do

Cons

- Harder to achieve consensus
- Firm management may resist the difficult task of translating qualities into behaviors

- May limit creativity and flexibility
- Requires in-depth thought and discussion

4. Work product / model

(various departments settle on a model draft or a model videotaped client presentation)

Pros

- Provides more concrete guidance than vague descriptions do
- Satisfies associates' desire for objective models

Cons

- Models less helpful if they're not annotated or explained: Does eating at a great restaurant make you a better cook?
- Partners may not agree on "gold standard"
- May encourage gamesmanship: "I did it the way you said!"

5. Limit competencies to a checklist of experience

(successfully argue three motions in court, make two speeches at major conferences)

Pros

- Provides a concrete road to advancement
- May encourage firms to provide pro bono or other opportunities so that associates can get prescribed experience

Cons

- Requires robust management of work assignments
- Is being a lawyer a check-the-box exercise?
- Hard to code and track experiences: What does "Worked on a major M&A deal" mean?
- Emphasizes quantity over quality
- May be difficult for firm to provide prescribed experiences

Measure Better: Eight Approaches

1. Associate self-evaluation

(Not "Do you think you're great?" but "What is your strongest skill and what is your weakest skill?") Give associates a list of skills; they rank their aptitude for each. Can be part of associate's formal or informal professional-development plan.

Pros

- Gives associates a role in their own measurement
- Can provide insights into the associate's motivation and learning style to help future development efforts
- Can help bridge the partner-associate communication gap
- Partners may be able to help associates if they admit their challenges

Cons

- Many associates are not self-aware
- Example: Many associates think writing is their strength, but partners often think that writing is most associates' main weakness
- Some associates project deficiencies onto others
- Associates are afraid to admit flaws ("Fake it until you make it.")

2. Peer evaluation

(either reputational ("Other than yourself, which associates do you think are the best at ____?") or a measure of which associates other associates seek for career guidance)

Pros

- Plays to organizational theory suggesting that workplace reputations are accurate
- A single disgruntled supervisor can't play an outsized role
- May reward senior associates for being good mentors

Cons

- May encourage pandering, manipulation, and self-promotion
- May breed even more competitiveness

3. Supervisor evaluation

(work product)

Pros

- Supervisors are in the best position to know how well associates perform on their assignments
- Clients care about work product more than about "skill" in the abstract

Cons

- Requires controlling for how hard the partner "grades" and how representative the work product is
- A single partner can derail an associate's career
- Subject to supervisor's ability to provide feedback

4. Anonymous partner evaluation

(work product)

Pros

- Makes the process apolitical
- Hard for associate to be defensive if associate identity is anonymous

Cons

- Time-intensive
- To make proper comparisons, the same partner would have to review many associates' work product
- How do you bill for it?
- Work product may not be representative

5. Anonymous partner evaluation

(work sample—controlled: give everyone 30 minutes to edit three paragraphs or to draft an indemnification provision)

Pros

- Objective
- Fair: everyone does the same thing

Cons

- Tedious to "grade"
- Work sample takes time to develop, administer, and review
- May be difficult to test all skill sets
- Time pressure may skew results

6. Consultant evaluation

(work product)

Pros

- Can compare associate with dozens or even hundreds of other associates
- No axe to grind

Cons

- Expensive
- Consultant may not understand individual partners' priorities and complaints

7. Consultant evaluation

(work sample—controlled)

Pros

- Objective
- Fair: everyone does the same thing
- Can turn the process into a training event
- Consultants better than most partners at giving specific feedback and not just evaluating

Cons

- Can be expensive, especially if consultant designs work-sample prompts
- Risky to make decisions based on 30-minute sample
- Consultants may not want to be involved in hiring and firing

8. Consultant evaluation

(objective test)

Pros

- Test can seek to measure many skills at once
- Test results can be predictive if correlated with performance
- Multiple-choice format is fair and objective
- Inexpensive to administer
- Immediate feedback

Cons

- Objective tests can measure only so much
- Associates are often anxious about objective assessment
- Associates might fear that the test would be used to fire people

Develop Better: Nine Approaches

1. Sink-or-swim

Pros

- Traditional; favored by senior partners and management
- Appealing in bad economic times
- May avoid favoritism: no one gets extra help
- Inexpensive

Cons

- Unpopular with associates

- Suggests no commitment to associate development
- May promote favoritism: "favorites" will get help anyway
- May be bad for diversity efforts
- Firms are not level playing fields
- Firm may lose undeveloped talent

2. Guided self-direction

(you help associate create plan, buy books)

Pros

- Inexpensive
- Puts onus on associate to solve problems

Cons

- Ineffective unless associate is highly self-motivated and disciplined
- Bad habits may become ingrained
- Reading books a waste of time unless lessons are put into practice

3. Informal coaching from supervisors

(help them get more feedback)

Pros

- Encourages dialogue
- Tied to work product and thus client service

Cons

- Partners often have trouble explaining what they don't like about work product
- Dialogue stilted: associate defensive; partner wants to avoid confrontation
- Not uniform or consistent

4. Formal coaching (internal)

(non-supervisor partner "buddy" reviews projects)

Pros

- Nonthreatening
- Outsider view (but from someone who knows practice) very useful

Cons

- Time-consuming
- Associate may not want other partners to know about "problems"
- As with mentoring in general, often starts strong but then fizzles

5. In-house formal training by partners

Pros

- Encourages interaction in a more relaxed setting
- Partners get CLE credit
- Partners have great expertise and institutional knowledge
- Associates get to know more partners in their group and other groups

Cons

- Not all partners are great presenters or teachers (reading slides is common)
- Some are interesting (war stories, and so on) but offer no practical solutions
- Partners often underestimate prep time
- Some partners cancel on short notice

6. Public CLEs

Pros

- Inexpensive
- Required in most jurisdictions
- National speakers are a good option for small firms that can't afford in-house programs

Cons

- Audiences large and diffuse
- Many come just to get CLE credits
- Quality varies widely
- Travel time and logistics eat into attorney's day

7. Consultant formal training in-house

Pros

- Consultants usually develop elaborate programs and take-away materials
- No wasted travel time
- Professional speakers can add interest and value
- Encourages in-house interaction across departments and even offices

Cons

- Can be expensive
- Some programs too generic and not tailored to law firm life
- Quality varies

8. Consultant coaching (firm pays)

Pros

- Associate can get ongoing feedback
- Firm shows substantial commitment
- Can be highly effective; sometimes consultant finds "missing link," resulting in dramatic progress
- Consultant can advise firm and provide objective view
- Underused tool for superstars, not just for those having trouble

Cons

- Requires significant commitment on associate's part
- Associate may not want to deal with weaknesses
- Expensive, especially if no follow-through
- Many associates see coaching as a stigma or as "remedial"

9. Consultant coaching (associate pays all or part)

Pros

- All of the above
- Associate more likely to follow through (Freud required his patients to pay for their own psychotherapy)
- Associate shows own commitment to tackling skills
- Firm saves money; no need for partner buy-in

Cons

- Asking associates to pay for external coaching may breed resentment unless it's the firm's official policy to do so

How to Help Associates Who Don't Even Know They Need You

Based on a speech I gave to law librarians at the PLL's 2009 Annual Meeting in Washington, DC.

When people say, "You write like a lawyer," why is it always taken as an insult? After all, I doubt you'd be offended if someone accused you of researching like a librarian.

These jabs are nothing new, of course. Decades ago, in fact, a law professor named Fred Rodell said, "There are two things wrong with almost all legal writing. One is its style. The other is its content."

I bet you'd agree today as well. But what can you do about it?

For starters, you'll need to think of creative ways to capitalize on today's slashed training budgets, fidgety partners, and ever-demanding clients.

In some respects, you may have to do more to market the value you've already been adding. In other ways, you may want to consider taking on new roles that you may have never imagined before.

So let's brainstorm a bit. Take what I call the five-stage life cycle of the typical law firm assignment. Can you become indispensable during each stage? Let's take them one by one.

Stage one: Should I be writing?

At so many firms I visit, on any one day I see two memos from two associates on precisely the same research issue. Yet no firm wants to waste its attorneys' time, and no client wants to be billed for the same assignment twice.

"Knowledge management" is all the rage these days, but I bet you were engaging in it long before it became so trendy. Now you may not have the budget for an expensive, high-tech formal KM system. But you can draw on your institutional

knowledge to help associates find internal experts—and avoid reinventing the wheel altogether.

Stage two: How do I begin the research?

In the next few years, expect to face generations of associates who cannot find their way around a legal reference book or even an online treatise. Now more than ever, you can do much to save your firm money—and your attorneys' time—by redoubling your efforts to introduce associates to the wealth of secondary sources and digests that to them may seem so passé.

Stage three: How do I structure the document?

Attorneys at all levels suffer over structure and organization. The main problem: thinking about how you want to structure the letter or motion misses the point. What makes for good structure is having an imaginary conversation with a reader who isn't there.

So here's a priceless gift you can give associates: as they begin to structure their document, ask them questions from the reader's perspective. Serve as a proxy for the judge, client, or partner—and then play up your role as a generalist with common sense and a bit of judgment to boot.

Remember that the best legal documents are structured around answers to the reader's predicted questions and concerns, so by engaging in this sort of conversation, you can help associates craft a big-picture structure without their even knowing it.

Stage four: How do I integrate the authorities?

What do you get when you combine computers, time pressure, and wobbly analysis? An epidemic of cut-and-pasted block quotes and blindly summarized facts from cases considered "relevant" or "distinguishable."

Help associates escape from this morass: For every case or statutory cite they want to include, ask them to explain—in

their own words—how the authority proves that their overall point is true. Encourage them to use that link as the focal point of their discussion. Only then should they consider cutting, pasting, or summarizing.

Stage five: How do I proof and polish?

When's the last time you offered to proof a document? Or shared some of your favorite proofreading techniques? Trust me; both services are in huge demand these days.

And another thing: remember that many associates are grammar-phobic, and more than a few have no idea how to get answers to their most persnickety usage questions. One great way to help is to share your favorite online and hard-copy style resources, and perhaps offer to research some of their questions yourself.

So there you have it—a few ideas to get you thinking about better ways to market what you already do and new ways to add value during these troubling times. I'm jaded enough to know that before you can act on these suggestions, associates first need to be open to your assistance. But think of it this way: If you can make them see you as an ally at each of these five junctures, they—and their firm—may be sold for life.

More than anything else, though, do whatever you can to impart the love for words and language that brought you to your profession in the first place. In the end, simply caring about the sound of prose can do wonders to make an associate's writing sing. And who knows—if you shake things up enough, perhaps one day, hearing that "you write like a lawyer" will have become a compliment at long last.

How to Get Memos That Help, Not Hurt

I recently asked some associates during a seminar why they thought partners assigned memos.

For the first time that morning, the associates were silent. Finally, about 20 seconds later, one woman whispered:

“Because the partner wants to learn more about the law?”

Not quite. But her response helps explain why supervisors find many memos rambling, wishy-washy, and pedantic.

Young attorneys and their supervisors are working at cross-purposes here. A partner asks for the memo to help make a decision. But the associate wants to avoid making any decision, particularly a wrong one, and thus hedges at every turn.

An Alternative Approach

To get around this impasse, try the following approach.

1. When you assign a memo, tell the attorney exactly what you plan to do after you read it. Are you advising a client or plotting internal strategy? How will the memo affect the course you take? Many associates tell me they have no idea what their memo is for.

2. Remind young attorneys that memos are practical tools that must drive toward a yes or no decision. Readers crave confident executive summaries and short answers that distill all the details the writer has uncovered. Concluding that “the law is all over the place” is not useful. Nor is a mini law review article filled with “on the one hand, on the other hand” pontifications.

3. Encourage attorneys to do more than summarize cases and string cites. Even if you need an exhaustive look at the legal landscape, ask the attorney to organize the case law logically. What are the key holdings? How do they relate to one another? How does each case cited help explain the trend in the law?

4. Suggest the following self-test for attorneys about to submit a memo: Is this memo written for you, the writer—or is it written for me, the reader? Are you trying to "show your work" and memorialize your own research and thought processes—or are you trying to tell me what I need to know to make an informed decision? If the attorney can certify that everything in the memo is geared to the reader and decision maker, you'll have a happy supervisor and an even happier client.

Five Resolutions for Supervisors

1. **Predict the future.** When you assign a project, cover the questions that other supervisors forget to address but associates always need answered: What models should I follow? How much time should I spend before first getting back you? What do you plan to do with the work product I submit?

2. **Look them in the eye.** Ask newer attorneys to meet with you for five minutes after each major assignment to address big-picture writing issues. Reviewing suggestions about specific sections—or even just one paragraph—is far better than spouting such generalities as "your writing needs improvement" or "you need to be clearer."

3. **Start soft.** Having trouble finding something positive to say? Ask yourself what you'd like to hear from a client who was dissatisfied with your work or with the disposition of a dispute. Compliment even the most misguided intentions: "It looks as though you tried to be comprehensive and thorough here."

4. **Turn the tables.** Help newer attorneys identify and solve their own writing problems. "What was your goal in framing the issue this way?" "How does this provision protect our client's interests in the deal?" "What would you say if I asked you to sum up this document over the phone?"

5. **Prioritize.** Distinguish between your key writing goals and your idiosyncratic preferences. Before you make a change, ask yourself if it's a fix that all senior attorneys would make or if reasonable minds could disagree.

Newer attorneys often see style quirks as proof that they shouldn't even bother trying since you're going to rewrite everything anyway. Focus on what matters most.

When Feedback Falls Flat

I often work with attorneys who are several years into their careers. They've received lots of feedback, but why hasn't it generated the results their supervisors intended?

Attorneys often resist feedback because they don't understand what's behind it.

Explain your advice so your attorneys will more likely heed your suggestions.

1. *You say:* "Be more concise."

   They think: "If I cut things from my writing, I might lose something important."

   You need to explain: "Cutting clichés, legalese, and longwinded phrases allows more space, not less, for what's important: the law and the facts."

2. *You say:* "Write more clearly."

   They think: "I don't want my writing to seem dull or simplistic."

   You need to explain: "If readers don't understand your sentences, they won't find your prose 'interesting' or 'complex.' They'll assume you are a poor writer or, worse, a poor thinker. By contrast, if readers feel smart when they read your writing, they'll think you are smart. No partner or judge has ever said, 'Terrific brief. I see the issues clearly and understand how to resolve them. I just wish the attorney had used bigger words and more complicated sentences.'"

3. *You say:* "Your argument is hard to follow."

   They think: "The law is always complicated."

   You need to explain: "Home in on a few key messages so the reader doesn't get lost in the details. Outlines can help if they focus on answering the reader's likeliest questions, but not if they simply retrace the steps of your research."

4. *You say:* "You need to say more about your authorities."

   They think: "What do you mean? I have paragraph after paragraph describing various cases."

   You need to explain: "Describe less and analyze more. Explain how the cases help make your argument, not what the parties did or even what the court 'stated' about each issue. Move beyond copying and summarizing; connect your authorities to your argument so the reader doesn't have to do it for you."

The Flip Side of Associate Feedback

When young lawyers submit work to partners, they long for constructive feedback. In return, many insist, all they get is "blood"—red ink splashed seemingly over every word of their draft.

"It's hopeless," I often hear. "Why even bother?"

But is the problem so one-sided?

Let's face it: most partners don't have time to sit down with an associate to pore over a revised draft. Yet they do care deeply about developing every associate's writing skills.

How to Receive Feedback

Young attorneys need to do what they can to generate their own feedback as they work through partners' edits.

1. No one likes to see their work ripped to shreds, but don't fall back on the excuse that legal writing is all "subjective." Most edits are worth taking seriously. At every firm I work with, the partners agree on which associates are the strongest writers. Buried in the mass of edits you see before you is a message about how to join them. If nothing else, be happy when the partner or senior associate returns your draft all marked up—it means your draft was a good start.

2. When you review partners' edits, try to separate minor stylistic quirks from basic writing techniques. Too many associates obsess over which partners like the word "clearly" and which hate sentences that start with "However." Too few associates obsess over how to generate what all partners want to read—clear, concise prose that's

well supported and easy to follow. It's much easier for a partner to adorn your draft with her favorite expressions than it is for her to restructure it from scratch.

3. When a stylistic edit makes sense, add it to a working list—either a list you keep for a particular partner or a master list for all future assignments. Many partners complain to me that they make the same edits again and again.

4. Ask partners for general suggestions or observations on your writing. You may be surprised how much guidance you get. It's not that partners don't want to give you feedback; it's that they barely have time to get your document out the door. At that point, discussing yesterday's news is far from their minds—unless you prompt them first. Partners and associates are all on the same team, but sometimes even the best intentions must cede to client demands.

5. If all else fails, exchange drafts with your colleagues to get feedback, something few associates ever think to do.