

2023

# ASSOCIATE GUIDE

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STRATEGIES, TIPS,  
AND BEST PRACTICES  
FOR POLISHED  
LEGAL WRITING SKILLS



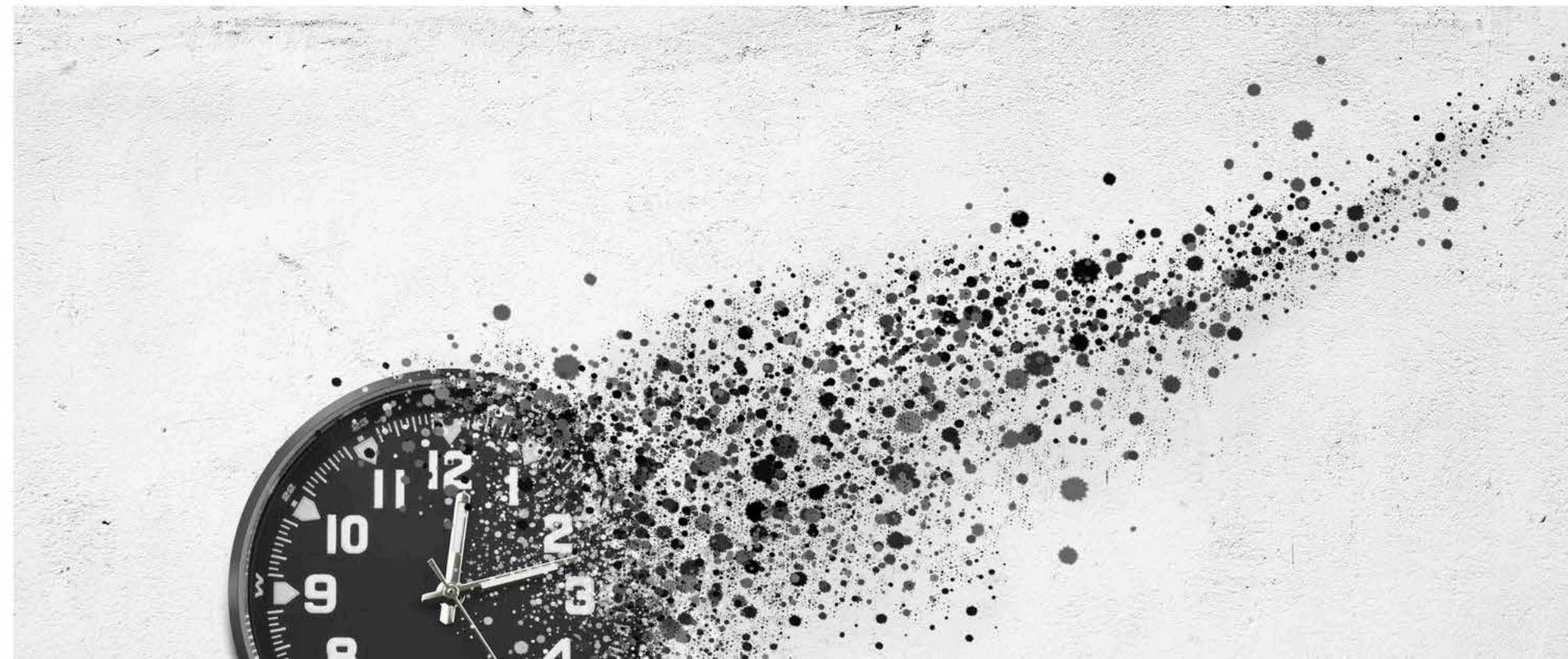
# 25 Ways to Write Like Chief Justice Roberts

*Originally Published on June 27, 2020*

Who doesn't need some inspiration these days?

On the writing front, consider Chief Justice Roberts's opinion in [Buck v. Davis](#). Here are 25 ways to write like him. Or do so [automatically](#).

## A Sense of Time





# Five Ways to Write Like John Roberts

## The Brief-Writer—*Alaska v. EPA*

When Chief Justice John Roberts was a lawyer, he once wrote 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.”

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 briefwriter. Nor was the car analogy plucked at random: According to two Supreme Court insiders, when Alaska hired the nation’s “best” briefwriter 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.

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.”



# Case Study: *Allen v. Cooper*—Five Ways to Write Like Justice Kagan

*Originally Published on March 29, 2020*

It's hard to get lawyers and judges to agree on much these days, but here's one exception: that Justice Elena Kagan is a terrific writer. Take her majority opinion in [Allen v. Cooper](#). Kagan's opening facts might already reel you in:



## I

In 1717, the pirate Edward Teach, better known as Blackbeard, captured a French slave ship in the West Indies and renamed her *Queen Anne's Revenge*. The vessel became his flagship. Carrying some 40 cannons and 300 men, the *Revenge* took many prizes as she sailed around the Caribbean and up the North American coast. But her reign over those seas was short-lived. In 1718, the ship ran aground on a sandbar a mile off Beaufort, North Carolina. Blackbeard and most of his crew escaped without harm.

But don't be fooled. It's still a case about sovereign immunity in copyright actions. How does Justice Kagan pen such beautiful prose on such a dry issue?

**Here are five ways—all techniques to try at home.**



# Five Ways to Write Like George Conway III

*Originally Published on March 31, 2020*

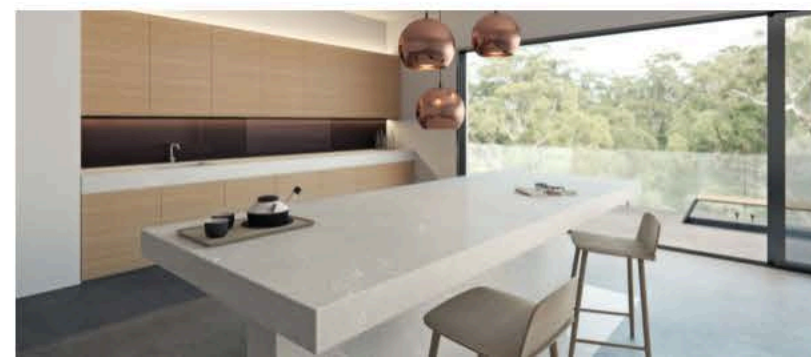


When you hear the name George Conway III, do you think “Kellyanne” or “That Twitter Guy”? My goal is to make the association “Peerless Securities Litigator” or “Crack Legal Writer.”

Let's take two routine briefs Mr. Conway signed at Wachtell: **a reply brief** in a case about quartz countertops and **a motion to dismiss** for Lionsgate.

And now let's turn his work into five great writing takeaways.

## 1. Order Out of Chaos



With readers more impatient than ever, what's easy on the eyes is all the rage: tables, pictures, bullet points, numbering, oversized fonts, and headings and subheadings galore. Yet if you go too far, you can make readers dizzy: Who wants to slog through subheadings "A," "B," and "C" in just the first few paragraphs?



# Five Grammar Myths Debunked

*Originally Published on April 9, 2021*



For scams and urban legends, check [snopes.com](https://snopes.com). But what if grammar myths are getting you down?

If you're afraid to start a sentence with "but" or "because" or would rather get a root canal than split an infinitive, help is on the way.

**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 current Supreme Court Justices would be incompetent writers.

**Who says it's a myth:**

***Chicago Manual of Style, 17th 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."

***Grammar Girl Quick and Dirty Tips:*** "It's fine to start a sentence with a coordinating conjunction. . . . being able to do so occasionally allows you more flexibility and control over the tone of your writing, and allows more variety."

***Benjamin Dreyer (author, *Dreyer's English*):*** "[D]o begin a sentence with 'And' or 'But,' if it strikes your fancy to do so. Great writers do it all the time."



# What Partners Hate: Eight Grammar Gripes—And How to Avoid Them

Although law-firm partners have too many grammar-specific issues to detail them all in one article, I touch on eight of the most common issues below:

## 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, no comma.

**Use Comma:** "He deposited the check, but the client forgot to record the payment"

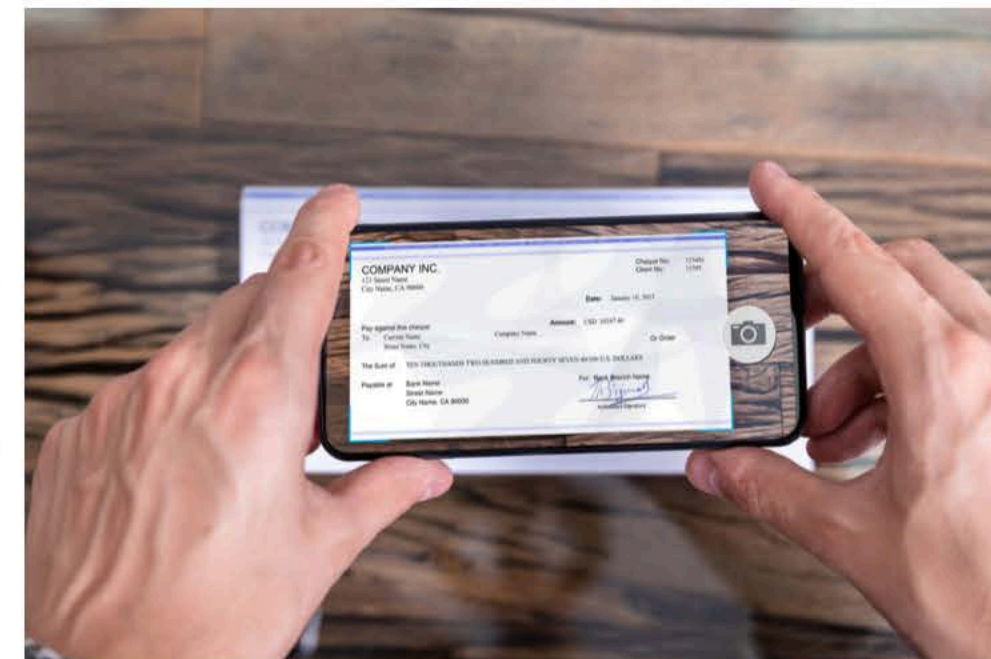
- **No Comma:** "He deposited the check but forgot to sign it."

If your issue is the serial comma, [click here](#) instead.

## 2. I, Me, or Myself

**Tip:** *Myself*, *herself*, or *himself* are **almost always wrong**, as in

- Please contact Jane Doe **or myself**.
- The team was led by the client **and myself**.





# Preliminary Statements and Introductions: Checklists and Models

*Originally Published on May 4, 2021*

Craft a concise, effective, and persuasive introduction in little time by looking at your dispute through these **four lenses**:

- The **Narrative** Lens. Begin with a paragraph or two that covers what many attorneys never explain at all: **who** the parties are; **when, where**, and **how** the dispute arose; **what** question the dispute is over and **why** your client is in the right (in my book, *Point Made*, I refer to this as the Brass Tacks approach).
- The **Logical** Lens. List **three or four specific points** you would make to a judge who gave you just 60 seconds to explain what you want and why you should get it.
- The **Pragmatic** Lens. Give the court a reason to **feel good** about ruling in your favor—or to **feel bad** about ruling in your opponent's.
- The **Contrasting** Lens. Draw a **line in the sand** between the two competing views of your dispute.

## Narrative Models

**Tip:** Interview yourself, answering the key questions you would have if you were reading about your case online: *Who* are





# A BigLaw Paragraph Meets BriefCatch: A Case Study

*Originally Published on January 29, 2018*

“Throat-clearing”—starting sentences with phrases like “it is inconceivable that”—is a big problem in briefs filed by even the best firms. Take this paragraph from a recent [emergency petition for stay](#) of a Pennsylvania redistricting order:

Similarly, the Pennsylvania Supreme Court’s ostensible criteria of “non-political” districts also amount to legislation, not interpretation. It is untenable that the Pennsylvania Constitution’s Free Speech provisions, which have been in existence since 1776, were intended to incorporate a ban on partisan gerrymandering—which existed long before 1776 and, in fact, can be traced “back to the Colony of Pennsylvania at the beginning of the 18th Century.” Vieth v. Jubelirer, 541 U.S. 267, 274 (2004). It is similarly inconceivable that the Pennsylvania Constitution’s Equal Protection provisions were understood by the lawmakers who ratified them to confer the rights the court has now divined. It is therefore not surprising that, in every instance prior to this case, the Pennsylvania



# Poker Face: Concede Bad Facts But Put Them in Context

With legal disputes, rarely does every fact favor the prevailing party. To present a compelling case while maintaining credibility, nod to bad facts and then neutralize them by controlling how they appear in context.





# Adverbs on Trial: Guilty, Innocent, or It Depends?

*Originally Published on May 13, 2021*

Several years ago, a *Wall Street Journal* legal columnist put [adverbs on trial](#).



## **Witnesses for the prosecution:**

Stephen King (“The adverb is not your friend,” says he), a host of anti-adverb judges, and legions of legal writing teachers.

## **Witnesses for the defense:**

Famed adverb fan Justice Scalia, an academic “legal anthropologist,” and the author of the article, who claims that adverbs “wield power” in the American legal system, critics who “look askance” be damned.

If these Adverb Wars make you scratch your head a bit *quizzically*, help is on the way. *Immediately*.

**I issue below a mixed verdict:** An “innocent” finding on two types of adverbs, but a “guilty” verdict on three others.



# Client Alert or Client Asleep?

Many law firms market themselves by sending out “client alerts” about the latest hot case or regulation. But how successful is the typical client alert?

**Newsflash:** These client alerts leave most clients cold.

**Why?** Because they fail the “So what?” test.

**“So what” can I do differently?** Read and compare the two examples below for some perspective!



## 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



# Just Say No!

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





# Still Saying No!

Just like its sister article [Just Say No](#), this article adds to our list of quick style fixes.

## 1. *Provides That*

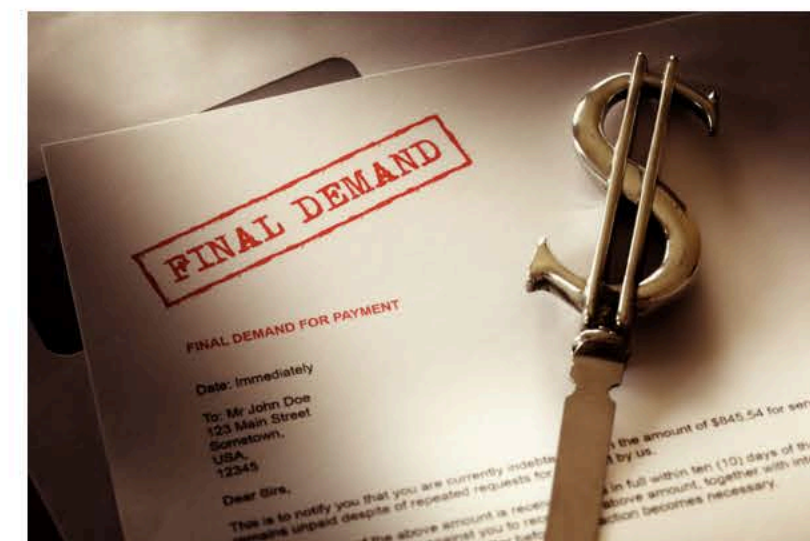
Replace this heavy phrase with *under* and a comma. That way, you focus on the parties, not on the case name or statute.

- **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 & White call the fact that a “debilitating expression.” **You rarely need it.**

- **Before:** “**The fact that** you failed to raise the issue at trial is tantamount to your



A grayscale photograph of a desk. In the foreground, a white notepad with horizontal lines is open, and a silver pen lies across it. The background is blurred, showing what appears to be a computer monitor and other office equipment. The overall tone is professional and clean.

# **The Attorney Toolkit**

By

**Ross Guberman**

President, Legal Writing Pro

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# About Ross Guberman

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**ROSS GUBERMAN** has conducted thousands of top-rated writing and editing workshops on three continents for prominent firms, agencies, and courts.

With degrees from Yale University and The University of Chicago Law School, Ross is the author of best-selling books, the judiciary's choice to train new federal judges, an expert witness, a former lawyer at a top firm, a former law school adjunct professor, a popular conference speaker, and a frequent commentator for The New York Times and other publications. Ross created BriefCatch to solve countless legal-writing challenges. He uses the product every day.

Ross's [Point Made: How to Write Like the Nation's Top Advocates](#) is an Amazon bestseller that reviewers have praised as "a tour de force" and "a must for the library of veteran litigators." Ross also wrote [Point Taken: How to Write Like the World's Best Judges](#), which Court Review called "the best book . . . by far . . . about judicial writing." And he coauthored [Deal Struck: The World's Best Drafting Tips](#) with Gary Karl and created the online contract editor ContractCatch.

Ross's newest product, [BriefCatch](#), is a first-of-its-kind editing add-in. Its devoted users include lawyers and law firms, judges and courts, and corporations around the world. [BriefCatch](#) was named one of TechnoLawyer's Top 10 Products of 2019.

Ross has presented at many other judicial conferences and for the Association for Training and Development, the Professional Development Consortium, the Appellate Judges Education Institute, and the Corporate Counsel Summit, among others.

Ross is a founding "Trusted Adviser" for the Professional Development Consortium and consults for Caren Stacy's OnRamp Fellowship. He is often quoted in such publications as the *New York Times* and *American Lawyer*.

Ross won the Legal Writing Institute's 2016 Golden Pen award for making "an extraordinary contribution to the cause of good legal writing." He was also honored as one of the 2016 Fastcase 50 for legal innovators, and his feed has been named to the ABA's Best Law Twitter list.



# Models

## Model Brief

A model brief focuses on the judge’s likely concerns and concisely marshals authority to explain why the law supports the result you want.

I’ve included below a revised version of a section from Paula Jones’s summary-judgment opposition in *Jones v. Clinton*.

Original	Revision
<p><b>2. The Essential Elements of Plaintiff’s Claim Under Section 1983 Are Not the Same as Those of a Claim Under Title VII and Do Not Include Proof of Tangible Job Detriment</b></p> <p>Even as to the “sexual harassment” form of gender-based discrimination, “tangible job detriment” is <i>not</i> an essential element of proof in an action under Section 1983 for denial of equal protection rights. Mr. Clinton’s argument incorrectly assumes that every essential element of a sexual-harassment claim under Title VII is also an essential element of a sexual-harassment claim under Section 1983. This argument reflects a basic misunderstanding both of equal protection law (as explained in this section) and of Title VII (as explained in the following section).</p> <p>In <i>Bohen v. City of East Chicago</i>, 799 F.2d 1180 (7th Cir. 1986), the court contrasted a claim of sexual harassment under the equal protection clause with a claim of sexual</p>	<p><b>2. As a Section 1983 Plaintiff, Jones Need Not Prove Tangible Job Detriment<sup>1</sup></b></p> <p>Under Jones’s Section 1983 equal-protection action, she must prove intentional discrimination but not “tangible job detriment,” so the President cannot obtain summary judgment by claiming that he did not adversely affect her job status under Title VII.<sup>2</sup> In arguing otherwise, the President confuses a constitutional claim for a statutory one.</p> <p>The federal courts have long distinguished Section 1983 claims such as Jones’s from Title VII claims. Under Section 1983, “[t]he ultimate inquiry is whether</p>

<sup>1</sup> A good heading is self-contained and mixes law and fact; here, the relevant “fact” is the regime under which Jones filed.

<sup>2</sup> The first sentence of each section should focus on the client’s specific case rather than wallow in platitudes or abstractions about the law.



harassment under Title VII. In an equal protection case, the court said, “[t]he ultimate inquiry is whether sexual harassment constitutes intentional discrimination.” 799 F.2d at 1187. “This differs from the inquiry under Title VII as to whether or not the sexual harassment *altered the conditions of the victim’s employment*. That standard comes from the regulations promulgated under Title VII.” *Id.* (emphasis supplied). Thus, a finding that the harassment altered the conditions of the victim’s employment is *not* an essential element of an action under Section 1983 for violation of the right to equal protection. *See also Andrews v. City of Phila.*, 895 F.2d 1469, 1482, 1483 & n.4 (3d Cir. 1990) (“Section 1983 and Title VII claims are complex actions with different elements”).

Correct application of these principles is illustrated in *Ascolese v. Southeastern Pennsylvania Transportation Authority*, 925 F. Supp. 351 (E.D. Pa. 1996). *Ascolese* involved a claim by a female police officer who alleged three different forms of gender-based discrimination, one of which was sexual harassment. The harassment allegedly occurred during a medical examination by a male physician employed by the same agency. 925 F. Supp. at 354, 358-

sexual harassment constitutes intentional discrimination.” But under Title VII, the inquiry is “whether or not sexual harassment altered the conditions of the victim’s employment.”<sup>3</sup> *Bohen v. City of East Chicago*, 799 F.2d 1180, 1187 (7th Cir. 1986); *see also Andrews v. City of Phila.*, 895 F.2d 1469, 1482, 1483 & n.4 (3d Cir. 1990) (“Section 1983 and Title VII claims are complex actions with different elements.”).

Because of this distinction,<sup>4</sup> when public officials such as the President have cited the Title VII standard when seeking summary judgment in Section 1983 sexual-harassment cases, courts have denied the motion.<sup>5</sup> *See, e.g., Ascolese v. Se. Pa. Transp. Auth.*, 925 F. Supp. 351 (E.D. Pa. 1996) (denying summary judgment for state physician in Section 1983 case who claimed that conduct did not constitute “hostile work

<sup>3</sup> The legal analysis should begin with what courts do rather than with what happened in a given case. The reader is much less interested in individual cases than in trends in the law.

<sup>4</sup> Try to bridge concepts and ideas from one paragraph to the next by using connecting words or by repeating key concepts: here, “distinguish” . . . “distinction.”

<sup>5</sup> Judges are concerned about being reversed. Show explicitly what other courts have done in similar circumstances.



59. The physician, who was named as a defendant, moved for summary judgment on the ground that the single medical examination could not have constituted a “hostile work environment” as defined by Title VII jurisprudence. The court rejected the defendant’s argument specifically holding that the standard for actionable sexual harassment under Section 1983 is different from the standard for sexual harassment under Title VII:

The present claim is brought under section 1983, and is therefore subject to a different analysis from the Title VII claim at issue in *Bedford [v. Southeastern Pennsylvania Transportation Authority]*, 867 F. Supp. 288 (E.D. Pa. 1994). The focus of the analysis under section 1983 is on “whether the sexual harassment constitutes intentional discrimination,” not on whether the “sexual harassment altered the conditions of the victim’s employment,” the standard under Title VII. In order to demonstrate that she has been subjected to sex discrimination under section 1983, Ascolese must show that she was treated differently than a similarly situated person of the opposite sex would have been. Moreover, the sex discrimination at issue in this case is discrimination by a public official in the course of performing his duties (in this case, a medical examination), rather than discrimination at Ascolese’s

environment” under Title VII and finding “no need to consider the alleged discrimination in the context of [plaintiff’s] entire work experience, as there would be under Title VII . . . ; the relevant context is only that of the examination itself.”<sup>6</sup> *Id.* at 359–60 (citations omitted).

<sup>6</sup> This parenthetical is long but does the trick. Eliminate articles and short prepositions in parentheticals and begin with an “-ing” word such as “holding” or “finding.” Or simply quote a single key sentence from the case in your parenthetical. Note what’s been deleted from the original: the huge block quote and case summary.



workplace generally. Thus, there is no need to consider the alleged discrimination in the context of Ascolese's entire work experience, as there would be under Title VII . . . ; the relevant context is only that of the examination itself.

925 F. Supp. at 359-60 (citations omitted). Thus, the plaintiff in *Ascolese* was not required to prove that the acts of harassment had "altered the conditions of [her] employment," 925 F. Supp. at 359, but only that her one encounter with the defendant physician was "hostile" or "abusive." *Id.* at 360.

The same principles apply here. Paula Jones is not required to prove that Governor Clinton altered the conditions of her employment (although she can and will do so), but only that, in the context of Plaintiff's public employment, Mr. Clinton, acting under color of state law, intentionally discriminated against Plaintiff because of her gender. Viewing the evidence in the light most favorable to Mrs. Jones (as is the Court's duty at this juncture), a jury might reasonably find—and indeed would likely find—that Governor Clinton's conduct was intentional, that it was based on Plaintiff's gender, and that it was both "hostile" and "abusive."

Here,<sup>7</sup> then, the "relevant context"<sup>8</sup> is what the President did to Jones, not, as the President suggests, Jones's "entire work experience." *Id.* To prevail, Jones need not prove that the President's acts of harassment have "altered the conditions of [her] employment," but only that her encounter with the President was "hostile" or "abusive." *Id.* Put another way, to defeat summary judgment, Jones need only proffer evidence that the President intentionally discriminated against her because of her gender.<sup>9</sup>

<sup>7</sup> Favor simple words such as "here" rather than "in the instant case" or "in the present case."

<sup>8</sup> Another bridge: "relevant context."

<sup>9</sup> This paragraph merges the legal standard into the facts of Jones's case.



As supposed authority for the proposition that Plaintiff absolutely cannot recover under Section 1983 unless she proves every element of “sexual harassment” within the meaning of Title VII, Mr. Clinton’s counsel cites two Seventh Circuit cases (and no Eighth Circuit cases), *Trautvetter v. Quick* and *King v. Board of Regents of the University of Wisconsin System*. See MEMORANDUM at 4. In fact, these cases make no such definitive pronouncement; to the contrary, they refute Mr. Clinton’s suggestion that the essential elements of sexual harassment in a suit under Section 1983 are well defined to be identical to those in a suit under Title VII. In *King*, the court wrote: “We have held that sexual harassment is a violation of equal protection, *Bohen*, 799 F.2d at 1185, although the precise parameters of this cause of action have not been well defined.” And in *Trautvetter* the court wrote: “The parameters of a cause of action alleging sexual harassment as a violation of the equal protection clause have not been precisely defined. We have noted, however, that such a claim generally follows the contours of a Title VII allegation of sexual harassment.” 916 F.2d at 1149 (citing *King*). Saying that sexual harassment under Section 1983 “generally follows the contours of” sexual harassment under Title VII is a far cry from saying that the required elements of proof are identical. Thus both cases explicitly note

Even if some cases suggest that Title VII sexual-harassment claims and Section 1983 sexual-harassment actions “generally follow the same contours,” that hardly means that the two actions share the same elements.<sup>10</sup> Cf. Memorandum at 4, citing *Trautvetter v. Quick*, 916 F.2d 1140 (7th Cir. 1990); *King v. Bd. of Regents of Univ. of Wis. Sys.*, 893 F.2d 533 (7th Cir. 1990). Both *Trautvetter* and *King* distinguish, in fact, between the two types of claims. See *King*, 893 F.2d at 536 (noting that unlike with Title VII sexual-harassment actions, “the precise parameters of [Section 1983 sexual-harassment actions] have not been well defined”); accord *Trautvetter*, 916 F.2d at 1149. Both cases even cite *Bohen* with approval in this regard, confirming that courts distinguish Title VII actions from Section 1983 actions.

<sup>10</sup> In confronting counterargument, try to stay on message. Here, the message is that Section 1983 and Title VII are different actions with different elements. Your goal is to finesse the adverse quotation while building on the distinction between the two regimes.



that the requirements for a sexual-harassment action under Section 1983 are *not* well defined. More importantly, both cases cite with approval *Bohen v. City of East Chicago*, wherein the same circuit court of appeals held that the elements of a sexual-harassment suit under Section 1983 are not the same as those in a suit under Title VII. 799 F.2d at 1187.

Based as it is on a misreading of the two Seventh Circuit cases, the second premise of Mr. Clinton’s argument is false. Significantly, Mr. Clinton has directed the Court to no Eighth Circuit or Supreme Court cases holding that every element of a quid pro quo harassment claim under Title VII must be proven to maintain an action under Section 1983 for gender-based discrimination in the form of quid pro quo sexual harassment. More specifically, there is no Eighth Circuit or Supreme Court authority for the proposition that “tangible job detriment” is an essential element of a Section 1983 action based on quid pro quo sexual harassment.

For all these reasons, the President cannot seek summary judgment here by forcing Jones’s Section 1983 claim into Title VII. What the President did to Jones is enough to sustain her claim.<sup>11</sup>

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<sup>11</sup> Try not to be too academic or long-winded in your conclusions. A fresh iteration of a key point is more effective.



## Transactional Model

Original	Revision
<p><b>1.6 Conflicts of Interest.</b> It is agreed that any direct or indirect interest in, connection with, or benefit from any outside activities, particularly commercial activities, which interest might in any way adversely affect Company or any of its affiliates, involves a possible conflict of interest. In keeping with Employee's fiduciary duties to Company, Employee agrees that Employee shall not knowingly become involved in a conflict of interest with Company or any of its affiliates, or upon discovery thereof, allow such a conflict to continue. Moreover, Employee agrees that Employee shall disclose to Company's General Counsel any facts which might involve such a conflict of interest that has not been approved by the Company's Board of Directors (the "Board of Directors"). Company and Employee recognize that it is impossible to provide an exhaustive list of actions or interests which constitute a "conflict of interest." Moreover, Company and Employee recognize there are many borderline situations. In some instances, full disclosure of facts by Employee to Company's General Counsel may be all that is necessary to enable Company or its affiliates to protect its interests. In others, if no improper motivation appears to exist and the interests of Company or its affiliates have not suffered, prompt elimination of the outside interest will suffice. In still others, it may be necessary for Company to terminate the employment relationship. Employee agrees that Company's determination as to</p>	<p><b>1.6 Conflicts of Interest.</b></p> <p><b>1.6.1. Definition.</b> A conflict of interest is any connection with any outside activities that may adversely affect Company.</p> <p><b>1.6.2. Company's right to identify conflicts.</b> Company reserves the sole right to determine whether a conflict exists.</p> <p><b>1.6.3. Employee's duty to avoid conflicts.</b> Under Employee's fiduciary duties to Company, Employee shall not knowingly engage in a conflict of interest with Company.</p> <p><b>1.6.4. Employee's duty to report and remove conflicts.</b> If Employee discovers a conflict, he shall remove the conflict. As part of that duty, Employee shall disclose to Company's General Counsel any facts that might involve a conflict of interest that the Company's Board of Directors has not yet approved.</p> <p><b>1.6.5. Employee's right to remove conflict without reporting conflict to Company.</b> If Company has suffered no harm, Employee may eliminate the outside interest without reporting the conflict to Company.</p> <p><b>1.6.6. Company's right to eliminate conflicts and to invoke remedies.</b> Company reserves the right to take such actions that, in its judgment, will end the conflict, including, but not limited to, terminating the employment relationship.</p>



**Original****Revision**

whether a conflict of interest exists shall be conclusive. Company reserves the right to take such action as, in its judgment, will end the conflict.



# Checklists

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## 135 Transition Words and Phrases

### *To provide another point*

Additionally	As well (as)	Moreover
And	Besides	Nor
Along with	Further*	To X, Y adds Z
Also	Furthermore*	What is more
Another reason	In addition	

### *To conclude*

Accordingly*	In conclusion	Then
All in all	In short	Therefore
Consequently	In sum	Thus
Hence*	In summary	To summarize
In brief	In the end	

### *To extract the essence*

At bottom	In effect	In the end
At its core	In essence	The bottom line is that
At its root		

### *To show cause and effect*

And so	For	That is why
And therefore	For that reason	To that end
And thus	In consequence*	To this end
As a result	On that basis	With that in mind
Because	So	

### *To draw an analogy or comparison*

As in X, Y	In each case	Likewise
As with X, Y	In like manner	Similarly
By analogy	In the same way	So too here
By extension	Just as X, so Y	So too with
Here	Like X, Y	

\* Use cautiously, as these can make prose heavy or plodding.



### *To draw a contrast*

At the same time	Instead	Not
But	However	Rather
By contrast	In contrast	Unlike (in)
Despite	In the meantime	Yet
For all that	Nevertheless	

### *To give an example*

As an example	For one thing	Say
As in	Imagine (as the first word of a sentence)	Such as
By way of example*	Including	Suppose (as the first word of a sentence)
First, second, third, etc.	In that regard	Take (as the first word of a sentence)
For example	Like	To illustrate*
For instance		

### *To concede a point or to preempt a counterargument*

All of that may be true, but	Even so	Otherwise
All the same	Even still	Still
Although	Even though	That said
At least	Even under	Though some might argue
At the same time	For all that	To be sure
Even assuming	Of course	True enough
Even if	On the other hand	

### *To redirect*

At any rate	In all events	In any event
(Even) more to the point		

### *To emphasize or expand*

Above all	Even more (so)	Indeed
All the more because	If anything	Not only X, but (also) Y
All the more reason	In effect	Particularly
All the more X because of Y	In fact	Put another way
By extension	In other words	Put differently
Especially	In particular	Simply put

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\* Use cautiously, as these can make prose heavy or plodding.



## Eight Questions for Every Writing Project

1. What is the jurisdiction? What's the procedural status?
2. Would you like me to consult other attorneys, review any specific work product, or refer to an internal document bank?
3. When should I first check in with you? After researching? After finding adverse authority or facts? After 20 hours? After the first draft?
4. How long do you expect the final product to be, and what should the format be?
5. How many hours do you expect the project to take?
6. Do you prefer the authorities to be printed out or in electronic form? Do you want unpublished opinions? Secondary sources?
7. What's the deadline? Is it fixed or flexible?
8. What will likely happen with the finished product? Would it help if I knew who might eventually read it and in what format?

## Writing Memos

1. **Stay focused.** A good memo is a springboard to a decision about client advice or internal strategy, not a navel-gazing thought piece. Every word of the memo should help the supervisor make a decision and feel confident in doing so.
2. **Apply the first-page rule.** If the supervisor read just the first page of your memo, would she get the gist of the problem and grasp your solution? Many memos fail that test.
3. **Don't show your work.** No one wants to read a law review article. Erudition for its own sake won't win praise. Supervisors want to learn how the key points of the law affect their clients' fate.
4. **Cut the self-reference:** "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." Just explain which issues matter—and then tackle each one succinctly.
5. **Jump off the fence.** Many associates conclude that the answer to the question posed is "unclear." But anything you're asked to predict is unclear by definition. Take a stand and back it up based on your best understanding of what a court or party or adversary would likely do. If you spot a counterargument—and you always should—address it head-on and explain why it should not prevail. If the cases are so confusing that you're overwhelmed, at least try to explain what's behind the confusion.



6. **Distill the law.** The biggest flaw in most memos is excessive reliance on case summaries. Readers don't want to wade through dozens of paragraph-long case summaries in which each case is analogized or distinguished methodically in a vacuum. Instead, use your judgment to distill the takeaways from all the cases you've digested. If you can't draw a line in the case law, you probably haven't analyzed the authorities enough.
7. **Distill the issue.** Make sure that your "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 the issue will be resolved. Avoid assuming legal conclusions: "He was negligent because he failed to meet the standard of care."



## Better, Saner, and Safer Email

1. Warm your tone to avoid misunderstandings and resentments. Add the person's name, a "hello," a personal message, and a "thanks."
2. Build in time for reflection: draft emails before addressing them.
3. Transform drab, stale subject lines into up-to-the-minute "headlines."
4. Use the "Three-Sentence Solution":
  - Why are you writing to me?
  - What's the gist of your message?
  - What do you want me to do?
5. Use breaks, numbers, and bullets to make your emails easier to read. After about five lines of text, skip a line and start a new paragraph.
6. Avoid ALL CAPS. Also, avoid all lowercase.
7. Don't get too personal: shun smileys, colors, fonts, and quirky signatures.
8. Watch out for the three great grammar gaffes:
  - Its, it's
  - Their, there, they're
  - Your, you're
9. Before you click "reply all," stop and think. Then stop and think again.
10. Just say no to chain letters, urban legends, jokes, politics, and religion. The risks always exceed the benefits.
11. When replying, rephrase the inquiry in your answer.
12. Set aside time slots during the day to work through non-urgent emails.
13. Keep your inbox clear except for pending tasks.
14. Send different emails for different tasks. Otherwise, the recipient will likely do the first task (or answer the first question) and then forget the rest.
15. If you have to write, "Do not forward," you shouldn't send the message. Likewise, remember that emails are discoverable and can never be destroyed.
16. Remember the lessons of many recent corporate scandals: even a short email can bring down a company.
17. If you regret sending an email, follow up to clarify, but never tell the recipient to delete it.



18. When discussing internal employee matters, avoid humor, sarcasm, and self-criticism.
19. Consider never sending a Word document outside the firm unless it's to co-counsel or a client who is working on the document with you; only send PDFs. Even within the firm, check Word documents for metadata and tracked changes before you send it, in case there are things you don't want the recipient to see.
20. Avoid sending non-password-protected or unredacted attachments that include personal data.



# Templates

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## Writing to Supervisors

Use these questions to organize the discussion section of an internal memo.

¶	Question	Answer
1	What are the main reasons the law would go one way?	
2	What are the main reasons it would go the other way?	
3	Which outcome is more likely and why?	
4	What should we do next?	
5	What should we tell the client to do in the meantime?	

## Writing to Clients About a Legal Development

Use these questions to organize the paragraphs in a client communication.

¶	Question	Answer
1	How would the change affect me? (How will it help me make more money, avoid litigation, or avoid governmental scrutiny or negative publicity?)	
2	How is the law different now from how it was before?	
3	Can you tell me only what I need to know about the change so I can see how it could affect me?	
4	What should I look for next? (Who will support or oppose the change and why?)	
5	What should I do next and why do I need you to help me? (the “Call to Action”)	



## Preliminary Statements

Use these questions to organize your preliminary statement or introduction.

¶	Prompt	Answer
1	How did the conflict arise?	
2	Why should you win the conflict?	
3	Why should I care about your conflict?	
4	What are the two competing views of the law or the facts?	

## Advocacy Writing

Use these questions to organize a section of an advocacy piece.

¶	Question	Answer
1	What standard should I apply?	
2	How does the standard work?	
3	Will I be reversed if I adopt your version of the law?	
4	How does the law apply here?	
5	What about the other side's points?	
6	So what's the bottom line?	



## Transactional Drafting

Use these questions to organize a complicated contract provision.

¶	Question	Answer
1	Who needs to do what?	
2	Who reserves the right to do what?	
3	How would a breach occur?	
4	What are each party's rights after a breach?	
5	What are each party's duties after a breach?	
6	What are each party's remedies after a breach?	



## Capitalization

### Capitalizing headings (title case)

- In general, capitalize all words, including short verb forms like *is*, *are*, and other forms of *to be*.
- Lowercase articles (*a*, *an*, *the*) and conjunctions (*and*, *but*, *for*, *or*, *nor*).
- Lowercase prepositions (*on*, *in*, *of*) unless the prepositions are five letters or more (*about*, *among*, *between*).
- Capitalize prepositions that are part of an idiomatic expression (Start Off, Wind Down).

### Capitalizing *court*, *defendant*, and *plaintiff*

- Capitalize *court* only if (1) you are addressing the court that you're in or (2) you are referring to the U.S. Supreme Court.
- Capitalize *plaintiff*, *defendant*, *petitioner*, *respondent*, *debtor*, and *creditor* only if you're referring to a party in your own litigation or transaction.

### Capitalizing *federal* and *state*

- Not capitalized unless part of an official state (so "federal law," "state law").



# URL Shorteners; Avoiding Link Rot

## URL shorteners

Whether you call it a URL (Uniform Resource Locator), a web address, or a hyperlink, pasting a long one into your document is an invitation for trouble. The hyperlink can break and become electronically inoperable at paragraph breaks. And if your readers are reading from a printed version of your work, they are never going to type a long address into their browser.

Both problems are solved when you instead use a shortener available from websites such as

<a href="#">Bit.ly</a>	<a href="#">Rebrand.ly</a>
<a href="#">Bl.ink</a>	<a href="#">TinyURL.com</a>
<a href="#">Perma.cc</a> *	<a href="#">Tiny.cc</a>

Notice the broken hyperlink in this brief filed in a state supreme court? The long hyperlink spilled into two lines and you can tell that the link is broken by the partial link that appears during a mouseover.

and he repeated that testimony at trial, again testifying under oath that he never identified either Sammons or Ramsey (01/21/2016 Trial Tr 130:23-25, App 37a). On cross examination by Mr.

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<sup>2</sup> The Court should take judicial notice of the fact that, according to MDOC OTIS, Mr. Sammons weighed 150 pounds. Available at: <https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=675508>.

[https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdoc](https://mdocweb.state.mi.us/otis2/otis2profile.aspx?mdocNumber=675508)

In this example, the court was asked to take judicial notice of something when (a) the long hyperlink does not work when selected and, (b) no jurist reading from paper will type that long address into their browser.

The problem could have been avoided if the attorney had visited a URL shortener such as <http://bit.ly> and pasted the long URL into the site to create the shortened link <http://bit.ly/2kJVmut> for pasting into the document.

## Avoiding link rot

To eliminate the real risk of your letter or brief's linked webpage being changed, moved, or disabled, consider creating an account with [perma.cc](#).\* Its site explains "Perma.cc is a service that helps prevent link rot. Use it to preserve the online sources you cite and to make those records accessible to your readers."



## Commonly Used Microsoft Symbol Codes

Here are Microsoft codes for some of the commonly used symbols. Adding this as a note on your desktop for easy reference can shave off minutes you'd otherwise spend searching for the symbols through the Symbols menu.

Note that these functions also work when typing into Twitter, Facebook, and LinkedIn from your desktop or laptop.

—	alt 0151	em dash
-	alt 0150	en dash
...	alt 0133	ellipsis
“	alt 0147	opening double quote
”	alt 0148	closing double quote
¶	alt 0182	paragraph mark
§	alt 0167	section mark
™	alt 0153	trademark
®	alt 0174	registered trademark
©	alt 0169	copyright
÷	alt 0247	division sign
×	alt 0215	multiplication sign
¢	alt 0162	cent sign



## P-cubed: Possible Participles for Parentheticals

Consider these ways to begin explanatory parentheticals.

acknowledging	finding
addressing	granting
admitting	holding
adopting	identifying
affirming	interpreting
applying	invalidating
approving	listing
arguing	naming
assessing	noting
authorizing	objecting
awarding	observing
balancing	ordering
cautioning	outlining
characterizing	pointing out
charging	prohibiting
citing	providing
collecting	quoting
conceding	recognizing
concluding	refusing
conferring	reinstating
considering	rejecting
declining	relying
deferring	renouncing
defining	requiring
denying	responding
describing	reversing
discussing	ruling
dismissing	stating
distinguishing	striking
emphasizing	summarizing
equating	supporting
excluding	taking
explaining	upholding
extending	vacating



# Judges Speaking Softly

## What They Long for When They Read

ROSS GUBERMAN

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The author is the president of Legal Writing Pro, the author of *Point Made: How to Write Like the Nation's Top Advocates*, and the creator of the legal-editing tool BriefCatch.

Do you ever stay up nights wondering what judges want? At least in briefs and motions?

I recently surveyed more than a thousand state and federal judges, both trial and appellate. Respondents ranged from state trial-court judges to U.S. Supreme Court justices.

The good news: Judges agree on much more than many litigators might think, and I found no major differences based on region or type of court. More good news: When judges are surveyed anonymously, they're blunt and sometimes even funny.

The bad news: Other than the briefs by the brightest lights of the appellate bar, almost every filing I see violates the wish lists of the judges I surveyed.

Here is some guidance, along with some choice anonymous quotations about what judges want but too often don't get.

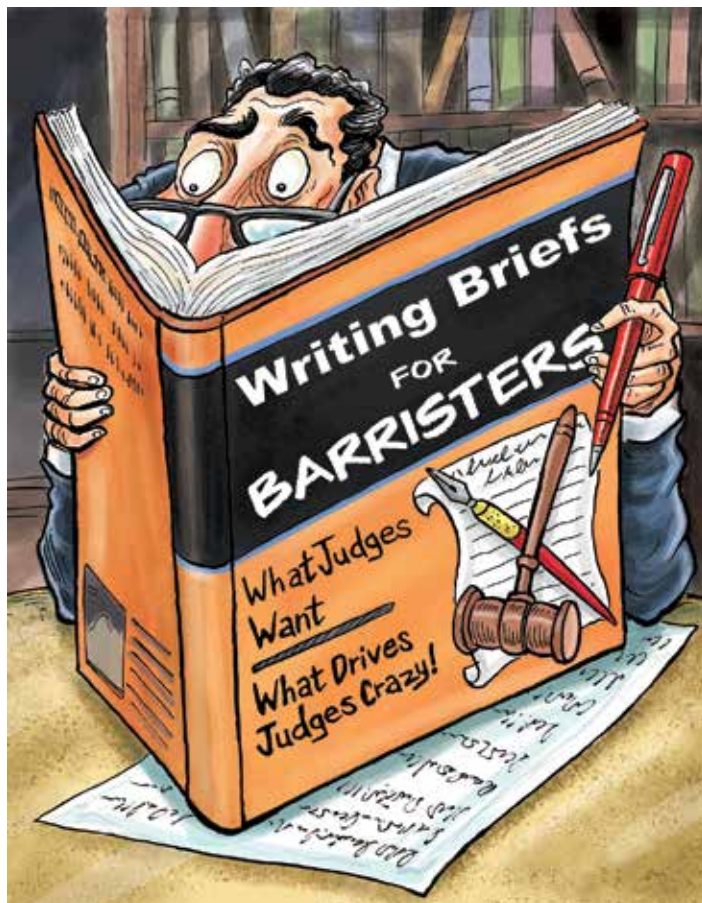
For starters, watch how you name names. Use the parties' names rather than their procedural affiliation. Prefer words to unfamiliar acronyms, even if the word or phrase is longer. Avoid defining obvious terms like "FBI" and "Ford Motor Company." And for the terms you do define, put the defined term in quotation marks and then get out of Dodge.

All four of these techniques make "legal writing" feel more like "writing."

- "I absolutely detest party labels (plaintiff, debtor, creditor, etc.). Name names, for God's sake!"
- "Don't use 'plaintiff,' 'defendant,' 'appellant,' or 'appellee' in the brief because we may forget who's who. Instead, use names for individuals and business titles for companies."
- "Avoid defining obvious terms. If a party is Apple Computer Corp., why include the parenthetical ('Apple')? If the plaintiff's name is Henry Jackson and he's the only Jackson in the case, why the need to identify him as Henry Jackson ('Jackson')? If the case is about one and only one contract, when first identifying it, why the need for (the 'Contract')?"
- "I truly dislike acronyms. I would much rather have 'North River Insurance Cooperative' referred to as 'the insurer' or 'the cooperative' or 'North River' than as 'NRIC.'"
- "'Hereinafter defined as' (or anything like it) is pretty awful."
- "Avoid defined terms ('terms') altogether."

Keep your language choices classy. As if on cue, almost all litigators and appellate lawyers are happy to endorse a ban on emotional or hyperbolic rhetoric. The problem is that those same lawyers often grant themselves an exemption, as if their opponents are so singularly awful or imbecilic that even the snarkiest





tone is warranted. In fact, lawyers often tell me that they absolutely must point out how disingenuous their opponent is, because otherwise the court won't see it. Solution: Show, don't tell.

- “‘Disingenuous’ is a perfectly fine word that the legal profession has turned into the wild card disparagement of the other side’s argument.”
- “Don’t use ‘specious.’”
- “Avoid phrases and sentences that reflect a lack of civility. Don’t belittle the other side’s arguments but rather focus on your own strengths.”
- “I hate ‘speciously,’ ‘frivolously,’ ‘disingenuously,’ and other shots at counsel or the other party.”
- “Don’t write ‘ridiculous.’”
- “I hate ‘laughable.’”
- “Words such as ‘clearly,’ ‘plainly,’ ‘obviously,’ ‘absurd,’ ‘ridiculous,’ ‘ludicrous,’ ‘baseless,’ and ‘blatant’ are crutches intended to prop up arguments that lack logical force. They can never make a weak argument credible or a strong argument even stronger. So why bother with them?”

Oliver Wendell Holmes Jr. once said that you should strike at the jugular and let the rest go. If you write motions and briefs for a living, you can manifest Holmes’s maxim many times a

day. Start by cutting stuffy introductory formulas beset with such archaic language as “by and through undersigned counsel.” Reduce well-trodden standards and tests to their essence. Hack away at needless procedural detail. And then, at the sentence level, slash windups and throat-clearing.

- “Avoid long introductions such as ‘Plaintiff, by and through undersigned counsel, hereby submits its Reply Memorandum in response to \_\_\_\_\_. This Reply is accompanied by the following Memorandum of Points and Authorities.’ I know that counsel is filing the brief on behalf of his or her client. I can see in the caption that the filing is a reply, and I can also see that there is a memorandum of points and authorities.”
- “Avoid grammatical expletives (‘there is,’ ‘it is’).”
- “‘It should be noted that,’ ‘it is beyond doubt that,’ and the like waste space.”
- “Writing numbers out twice seems particularly useless.”
- “Is it really necessary to devote a page or more or even half a page to discussing the standard of review for summary judgment or a motion to dismiss for failure to state a claim?”
- “The procedural history does not need to go back to the Creation. Just summarize what is relevant to the issue specifically before the court.”
- “Most sentences are dramatically improved by omitting testimony references: ‘Smith [testified that he] went to the scene the following day.’ While some discussion of trial testimony is necessary when you are talking about hearsay or impeachment, those discussions are best left to highlight after you’ve told the story the reader needs to understand.”
- “There’s a real danger in stuffing factual sections with crud.”

With judges becoming ever more impatient readers, looks do matter. Out: long, uninterrupted blocks of text. In: timelines, maps, graphs, diagrams, tables, headings and subheadings, and generous margins.

- “Sometimes a timeline is clearer than an essay format.”
- “I ALWAYS appreciate a clear timeline of events and I am happy to have that in the text of the fact section or as an exhibit. I want one place where I can see when everything happened in the case if it’s not a singular event.”
- “Just as I don’t like scrolling down to find authority in a footnote, I don’t like flipping through clerks’ papers or exhibits to find a key piece of documentary evidence that is discussed in a brief. The use of pictures, maps, and diagrams not only breaks up what can be dry legal analysis; it also helps us better understand the case as it was presented to the trier of fact (who undoubtedly was permitted to see an exhibit while it was discussed).”

Illustration by Chad Crowe



- “When a case involves analysis of a map, graph, or picture, I would like to see attorneys include a copy of the picture within the analysis section of the brief.”
- “I like fact sections broken down with headings and even subheadings. Define chapters in the facts or the ‘next’ relevant event.”

I was surprised that the judges I surveyed were more open to bolding and italics than judges used to be. Perhaps this evolution stems from their desire not to wade through paragraphs that look and feel the same. Or maybe the internet has accustomed all of us to formatting bells and whistles. That said, even judges who don’t mind emphasis want it in small doses. And although the judiciary may be split on emphasis, every judge in the country appears to hate all caps, and few are fans of underlining.

- “Party names should not be in all caps.”
- “Headings in all caps are difficult to read.”
- “All caps are completely beyond the pale.”
- “If a lawyer feels that emphasis is needed, I always prefer italics to boldface type. Boldface signals to me ‘Just in case you’re too stupid to recognize what’s important.’”

Let’s move on to specific language choices. One question on my survey simply asked judges to list words and phrases they dislike. Few responses surprised me, but it was amusing to see how easily many judges could rattle off language choices that drive them crazy. They must have lots of exposure!

As the list below suggests, many lawyers are unaware of how often they use these words and phrases. Never confuse knowing that you should avoid a term with actually implementing that knowledge in your writing.

- “Death to modifiers!”
- “I don’t like any clunky legalese like ‘For the foregoing reasons,’ ‘heretofore,’ etc.”
- “‘Wherein,’ ‘heretofore,’ ‘aforesaid,’ ‘to wit’: they all should go the way of the dodo bird.”
- “Don’t use ‘at that time’ for ‘when.’”
- “Don’t use anything like ‘s/he.’”
- “I dislike formalistic terms that people don’t really use in ordinary life like ‘wherefore’ and ‘arguendo,’ unnecessary phrases like ‘[party] submits,’ and derogatory terms like ‘asinine’ used to describe the opposing party’s argument.”
- “Don’t use ‘prior to’ for ‘before’ or ‘subsequent to’ for ‘after.’”
- “I dislike ‘notwithstanding,’ ‘heretofore.’”
- “Don’t use words like ‘wherefore,’ ‘heretofore,’ ‘hereinafter’ that aren’t commonly used in everyday language.”
- “Don’t write ‘Pursuant to.’”

- “I believe ‘hereby,’ ‘hereinafter,’ ‘foregoing’ and other arcana have no place in modern legal writing.”
- “I do not care for ‘the instant’ anything.”
- “Tell them to stop writing ‘In the case at bar’!”
- “I don’t like unnecessary Latin phrases like ‘inter alia.’”
- “Get rid of the formalisms from the Middle Ages such as ‘Comes now Plaintiff, by and through his undersigned attorneys.’”
- “‘Aforesaid,’ ‘heretofore,’ etc. are all pretty much empty and add nothing. Same with ‘said,’ as in the ‘said contract was signed at the said meeting.’”
- “I loathe the word ‘utilize.’”
- “I do not like when lawyers tell me what I ‘must’ do. Just say that the court ‘should’ do something.”
- “‘Unfortunately for appellee’ (or for any party) should never appear in briefs.”

Another category of language irritation: Many lawyers are surprised when I tell them that judges really don’t find “respectfully submits” and “respectfully requests” to be, well, respectful. Cloying is more like it. And my survey results were right in line with my anecdotal experience.

- “Don’t write ‘Defendant respectfully requests.’ I prefer it if you just say what you want to say. I’ll know if it’s respectful or not!”
- “‘Respectfully submits’ or ‘it is our position that’ are wasted words: they communicate nothing, except potential insecurity about the argument that follows.”
- “Avoid ‘with all due respect.’”
- “Avoid phrases such as ‘respectfully submits that’ that can be stated in one word like ‘contends.’”

On the less-is-more theme, you’ll rarely if ever hear judges complain that sentences or briefs are too short. And yet, sometimes short is, in fact, too sweet. Two offenders: random “this” and “that” references such as “this proves” or “that explains.” Also, especially for traditionalist judges in the Justice Scalia mold, avoid contractions.

- “I do not like indefinite references and see the word ‘this’ used too often. It should be used in conjunction with another word such as ‘this argument’ or ‘this logic.’”
- “I REALLY dislike contractions. They make the argument sound like casual conversation and they give the writer an arch voice.”

When it comes to usage as opposed to word choice, American judges fall into three categories: (1) those who understand the finer points of usage and care (these are the judges who ask me in workshops about “pleaded” versus “pled,” predicate nominatives,



and the counterfactual subjunctive); (2) those who understand the finer points of usage but either don't notice or don't care, and (3) those who don't know enough about usage to notice mistakes.

- "I despise the use of 'impact' as a verb."
- "Learn to differentiate between 'that' and 'which.'"
- "I cannot stand 'As such' used as a synonym for 'Therefore.'"
- "Learn to use the subjunctive!"

Now let's talk about fact sections, and in particular dates. Whenever I relay judges' irritation with needless dates, someone in the audience retorts that some dates really matter. Well, that's why judges object to *needless* dates. And it's not as if you face a binary choice between a full date and nothing at all. Sometimes a word or phrase will do the trick.

- "It helps to vary how the passage of time is described. Instead of 'on May 26, 2016,' it's refreshing to read 'the next week' or 'two months later.'"
- "Dates are rarely essential and often overused. If I see a date, I assume it is important. If it's not, you have interrupted the flow of your argument for no good reason."
- "I HATE specific dates that have no relevance. I keep thinking the 24th day of September must really be important, for example, and then when it isn't, I'm unhappy I've spent brainpower waiting for writer to tell me why it was critical!"
- "Sometimes it's enough to refer to an event as 'mid-2015' rather than a specific date."
- "If two parties entered into a contract, and it makes no difference to the claim whether they did so on January 22, 2014, or March 6, 2015, leave the date out."

Now let's talk a bit about the beginning of motions and briefs. Don't short the introduction. Judges find strong introductions invaluable. They help lawyers hone their theory of the cases, and they help shape the fact section and legal argument to come.

- "Explain why you should win on the first page. 'The Court should deny Defendant's Motion for Summary Judgment for the following three reasons.'"
- "I've had briefs in fairly involved cases without executive summaries. I've likened reading them to putting together a jigsaw puzzle without having the cover of the box to know what the puzzle is supposed to look like when it's done."
- "I do appreciate a good 'statement of the case' section, particularly in complex civil appeals, in which, in a non-argumentative manner, the lawyer sets the stage for what issues the court is called upon to decide. That helps me focus on what facts and portions of the record will be most relevant to those issues."

How about cases and other authorities? Busy judges have become increasingly irritated with the way many litigators handle case law. Facile shorthand: "Too many and too much." But it's a bit more complicated than that. One common complaint is that many litigators appear to search case law databases for choice language even if a given case doesn't quite fit and even if the case doesn't come down procedurally the way the lawyer wants the current case to.

- "The main issue I run across is probably a function of Boolean searches: citations to 'blurbs' or quoted phrases within published decisions where the actual ruling, or the analysis, or the posture of the case is completely distinguishable (or even adverse) to the point the party is trying to make. I am much more persuaded by one or two authorities that are carefully analyzed and applied than by a sprinkling of quotations lifted from a dozen cases that are strung together."

It's also surprising how many cases some lawyers cite for a proposition that their opponents would never challenge, such as the summary judgment standard, the *Daubert* standard, or the standard of review.

- "For well-established law, such as the standard of review, I prefer only a single cite."
- "Cite just enough cases and not all cases. One controlling case is enough. For non-controlling cases, if there aren't any contrary or many contrary cases, cite two or three non-controlling cases, preferably the two or three most recent. If there are two contrary groups of cases and none is controlling, then it might be appropriate to cite one from each jurisdiction supporting the writer's side."

Once you know which cases to cite and how many, what should you do with them? On the one hand, most judges rail against including too many facts and too many quotations when it would be more effective to use a concise parenthetical or a pithy quoted phrase merged into a sentence about your own case. On the other hand, for complex or dispositive cases, some judges find that lawyers use a parenthetical when a fuller textual description would be more apt. Ask yourself this question: "If I were being asked to endorse proposition X, what would I need to know about case Y to be comfortable doing so?" And then don't write one more word.

- "Skip the long description. Just state the damn proposition, cite the damn case, and be done with it."
- "Long discussions of the facts of cited cases are often not helpful."
- "For the most important case, cover the important points in text, not in an explanatory parenthetical. But it's okay to use



explanatory parentheticals for the cases that support the main one.”

- “I prefer citation to one or two cases with a short, pertinent explanation in a parenthetical. I prefer a full paragraph for distinguishing an adverse authority. I don’t prefer distinguishing adverse authority in a footnote.”
- “I prefer that briefs directly address contrary authority organized by argument, not by case name.”

That brings me to the block-quote question. Most lawyers defend block quotes by insisting that they convey pivotal information that can’t be paraphrased. That may be true, but here’s the bad news about that “pivotal information”: If it’s presented in a block quote, judges are likely to skip it entirely. So meet judges halfway: Use block quotes only when the language of the text itself adds value. Use block quotes as little as possible. And introduce block quotes substantively and persuasively, focusing less on who said what and more on why the reader should care.

- “Do not block quote more than three lines. After that, I may stop reading.”
- “Don’t write ‘As follows:’ before quotes. Just use the colon; the ‘as follows’ is implied.”
- “Fold quotes into text if possible.”
- “Huge block quotes are terrible. It’s much more persuasive to paraphrase the reasoning and then quote only the crucial language.”
- “When quoting, do not overuse brackets—I call them punctuational potholes. If you’re quoting from a case, start the quote after the part of the sentence that makes you want to use a bracket. The same for quotes from the record. For example, instead of “The officer stated, “[i]f [we] catch [you] in [the area] again, if [you] don’t have something, [I]’ll make sure [you] have something,” put “The officer said that if Smith were ever caught in the neighborhood again and did not “have something,” the officer would make sure he did have something.”

One last issue. Even after Justice Scalia’s passing, the debate over where to put citations rages on. But with so many judges reading briefs on iPads or on other devices that require scrolling to see footnotes, 78 percent of the judges in my survey prefer to see citations in the text, the old-fashioned way. You should still try to avoid putting citations at the beginning or in the middle of your sentences. And, of course, some judges (12 percent in my survey, with the other 10 percent neutral) do love to see citations in footnotes, but those judges nearly always make their views known.

- “This is a show-your-work gig, and I need to see your work there—not go hunting for it. This is a bigger deal now, I think, since we all read electronically.”

- “We want to process the citation as we read. When a litigant makes a point, it matters if he or she is citing to a Supreme Court case, a circuit opinion, a treatise, etc. I don’t want to have to stop reading and look down and find the citation in the footnote or endnote. I understand the reasons some endorse it, but it is not practical for briefs and opinion writing, and everyone I work with hates that style of writing.”
- “I find citations in footnotes to be distracting. It also makes the case more difficult to read online such as in Westlaw.”

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## Shoot for strong, compelling, yet concise introductions; a restrained use of case law; and modern diction.

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Here’s the bottom line: Just as many associates in law firms think that knowing individual partner preferences is all there is to writing, many seasoned litigators think the same about knowing the preferences of individual judges.

Sure, there’s something satisfying about finding out whether a given judge likes the Oxford comma. (Since I brought it up, 56 percent of the judges I surveyed said they do, 21 percent said they don’t, and 23 percent said they don’t care). And it’s all too tempting to make brief writing mostly about rules and formatting preferences. But I suggest that both litigators and appellate advocates spend most of their energies developing the core persuasive writing skills that would make almost all judges much happier.

So shoot for strong, compelling, yet concise introductions; a restrained use of case law, with quality over quantity; a readable treatment of party names and industry lingo; helpful lead-ins to block quotations; a confident and professional tone; modern diction; and more white space, headings, and visual aids.

In a word, show empathy for the reader. And for those of you thinking that judges should practice in their opinions what they preach to lawyers about their briefs, that topic will have to be for another article! ■

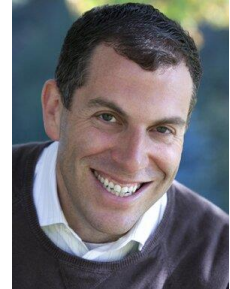


## 9 Writing Tips From The Justices' Opinions Last Term

By **Ross Guberman** (October 21, 2022)

The U.S. Supreme Court's current ideological divide may be the sharpest we've seen in a long time. Yet the justices do unite in one key respect: The current court boasts some of the best opinion writers in American legal history.

Take the opinions from the tumultuous last term. From those ashes, I extract nine tips and nine examples that can jump-start your own writing.



Ross Guberman

### **1. Follow complex analysis with a pithy summary paragraph aimed directly at the reader.**

Most attorneys include a conclusion at the end of an entire document or long section. But readers also appreciate wrap-ups along the way.

In *Vega v. Tekoh*, for instance, Justice Samuel Alito "boils down" his own points about why *Miranda* rules are merely prophylactic:

What all this boils down to is basically as follows. The *Miranda* rules are prophylactic rules that the Court found to be necessary to protect the Fifth Amendment right against compelled self-incrimination. In that sense, *Miranda* was a "constitutional decision" and it adopted a "constitutional rule" because the decision was based on the Court's judgment about what is required to safeguard that constitutional right.[1]

### **2. Explain why the result you seek makes sense.**

Especially when your client seeks a result that isn't intuitive or appealing, share a less-than-obvious benefit. You can avoid pure policy rationales or squishy interpretations while allowing the court to feel good doing what you're asking for.

As then-U.S. Circuit Judge Richard Posner put it in a 1999 article titled "Convincing a Federal Court of Appeals From the Bench," explain "what if anything turns on the outcome, either for the parties or for some larger community."

Take your cues from *George v. McDonough*, in which Justice Amy Coney Barrett stresses the need for finality even if it means refusing to revisit a denial of disability benefits to a Vietnam vet:

And while *George* suggests otherwise, there is nothing incongruous about a system in which this kind of error — the application of a since-rejected statutory interpretation — cannot be remedied after final judgment. On the contrary, and as the lower courts have explained, the VA's longstanding approach is consistent with the general rule .... That limitation serves important interests in finality, preventing narrow avenues for collateral review from ballooning into "substitute[s] for ordinary error correction through appeal."[2]

### **3. Emphasize what a line you've drawn in the law still allows.**



Slippery-slope arguments often invite guffaws, but they can still pack a punch. Conceding that your points have limits can stymie your opponent's plans to alarm the court with a parade of horrors.

A plaintiff asking for big damages can explain why they're not infinite. And a defendant asserting that there's no breach of contract can conjure up a set of facts that would suggest otherwise.

Take now-retired Justice Stephen Breyer's opinion in *Torres v. Texas Department of Public Safety*. Sure, he could have stopped at "you can't sue a nonconsenting state." But by revealing three other ways to sue a state, he makes the restriction on citizens seem more reasonable:

Basic tenets of sovereign immunity teach that courts may not ordinarily hear a suit brought by any person against a nonconsenting State. ... States still remain subject to suit in certain circumstances. States may, of course, consent to suit. ... Congress may also enact laws abrogating their immunity under the Fourteenth Amendment. ... [and] States may be sued if they agreed their sovereignty would yield as part of the "plan of the Convention." [3]

#### **4. Improve flow by starting a new paragraph with a nod to the end of the one before.**

With so much legal writing copied and pasted and reordered these days, getting long passages to flow cohesively is tough. Sprinkling in logical signposts like "even so" or "in any event" can help. So can numbering and bullet points.

But one of the best ways to improve flow is to begin a paragraph not with a brand-new point but with something the reader will recall from the paragraph before.

Justice Neil Gorsuch is especially good at this technique. In *Kennedy v. Bremerton School District*, for example, he begins the second paragraph below with a question he imagines the reader might have had at the end of the first. And then in the third paragraph he uses the phrase "a different understanding" to sharpen the contrast he is about to draw:

[T]he District argues that its suspension of Mr. Kennedy was essential to avoid a violation of the Establishment Clause. ... The Ninth Circuit pursued this same line of thinking, insisting that the District's interest in avoiding an Establishment Clause violation "'trump[ed]" Mr. Kennedy's rights to religious exercise and free speech. ...

But how could that be? It is true that this Court and others often refer to the "Establishment Clause," the "Free Exercise Clause," and the "Free Speech Clause" as separate units. ... A natural reading of that sentence would seem to suggest the Clauses have "complementary" purposes, not warring ones where one Clause is always sure to prevail ....

The District arrived at a different understanding this way. It began with the premise .... [4]

#### **5. Imagine speaking to your reader, adding logical cues and even using second-person direct reference.**

In an interview at Harvard Law School a few years ago, Justice Elena Kagan distinguished



between conversational writing, which she strives for, and informal writing, which she says goes too far.[5]

If conversational writing is our beacon, it means more than just relaxing word choice. It also means simulating a dialogue with a reader that you must conjure up. It should remind your readers of a professor who keeps even restless students engaged and enthusiastic.

Unlike many who wax poetic about writing, Justice Kagan follows her advice. Here, in *Becerra v. Empire Health Foundation, For Valley Hospital Medical Center*, her style is so conversational that she even speaks to us directly:

In any event, Empire is too quick to claim that those who (on its view) are tossed from the Medicare fraction for non-income-based reasons would still wind up in the Medicaid fraction. Recall here the role Empire says the phrase "(for such days)" plays. ... According to Empire's ultimate argument, that phrase is what converts the ordinary statutory meaning of "entitled to benefits" (i.e., qualifying for Medicare) to a special meaning (i.e., actually receiving payments). So where the phrase "(for such days)" does not appear, the usual meaning of "entitled" should govern. Now look again at the description of the Medicaid fraction. ... In that description, "for such days"....[6]

## **7. Use numbering to organize, explain and deflate your opponent's arguments.**

Many trial lawyers and appellate advocates try to make advocacy less a tennis match than an individual sport. Some believe that if you simply ignore your opponents, call them names, or refer to their points as a hot mess, you'll prevail by default.

That might work if you're lucky enough to have a slam dunk. The rest of the time, gain credibility and reinforce your message by helping the court understand your opponent's counterarguments and then shooting them down one by one.

Justice Brett Kavanaugh offers an excellent model in *Oklahoma v. Castro-Huerta*. See how he enumerates counterarguments, distills them, and then explains why they shouldn't carry the day:

To overcome the text, Castro-Huerta offers several counterarguments. None is persuasive.

First, Castro-Huerta advances what he describes as a textual argument. He contends that the text of the General Crimes Act makes Indian country the jurisdictional equivalent of a federal enclave. To begin, he points out that the Federal Government has exclusive jurisdiction to prosecute crimes committed in federal enclaves such as military bases and national parks. ...

Castro-Huerta's syllogism is wrong as a textual matter.[7]

## **7. Favor short, concise, direct, modern words.**

On the pure wording front, people sometimes overhype three problems: legalese, passive voice and long sentences. Sure, avoiding these matter. But superb style means more than just staying away from "hereto," rewriting "the lie was told by the plaintiff," and shunning 300-word sentences.



Take the passage below, from Chief Justice John Roberts' opinion in *Biden v. Texas*. It has no legalese, passive voice or long sentences.

Yet imagine if instead of beginning with "in short," he used "by way of summary."

In short, we see no basis for the conclusion that section 1252(f)(1) concerns subject matter jurisdiction. It is true that section 1252(f)(1) uses the phrase "jurisdiction or authority," rather than simply the word "authority." But "[j]urisdiction ... is a word of many, too many meanings." ... And the question whether a court has jurisdiction to grant a particular remedy is different from the question whether it has subject matter jurisdiction over a particular class of claims. ... Section 1252(f)(1) no doubt deprives the lower courts of "jurisdiction" to grant classwide injunctive relief. ... But that limitation poses no obstacle to jurisdiction in this Court.[8]

Also consider the effects of the following substitutions:

- "Utilizes" instead of "uses";
- "In lieu of" instead of "rather than";
- "Nevertheless" instead of "but" at the start of the third sentence;
- "Furthermore" instead of "and" at the start of the fourth sentence;
- "Whether or not" instead of "whether";
- "Regarding a particular class of claims" instead of "over a particular class of claims";
- "Doubtlessly" instead of "no doubt";
- "But such limitation" instead of "but that limitation."

Point made?

## **8. Deepen your advocacy by contextualizing public law, the common law, or both.**

The example above from Justice Barrett shows the value of explaining why and how a result makes sense. But it can be just as effective to explain the basis for the governing law itself.

In *Concepcion v. United States*, for example, Justice Sonia Sotomayor highlights the links between a particular statute — the First Step Act — and a particular approach to sentencing that she seek to invoke. With that context in mind, she's able to frame the act in a way that bolsters the broader arguments she's about to make:

There is a longstanding tradition in American law, dating back to the dawn of the Republic, that a judge at sentencing considers the whole person before him or her "as an individual." ... In line with this history, federal courts today generally "exercise a wide discretion in the sources and types of evidence used" to craft appropriate sentences. ... [W]hen a defendant's sentence is set aside on appeal, the district court at resentencing can (and in many cases, must) consider the defendant's conduct and changes in the Federal Sentencing Guidelines since the original sentencing. ...



Congress enacted the First Step Act of 2018 against that backdrop.[9]

**9. Highlight a concession and then explain confidently why it doesn't hurt your cause.**

As the examples from Justice Breyer and Justice Kavanaugh suggest, strong advocates — and yes, judges are advocates — embrace concessions and counterarguments with aplomb. From that perspective, your arguments will emerge stronger if you concede a potential weakness in your analysis and then explain why it just doesn't matter.

In our final example, from *New York State Rifle & Pistol Association Inc. v. Bruen*, Justice Clarence Thomas offers a model of how to do so. He uses a two-step pattern I've seen from many top brief writers as well.

First, write a "to be sure" concession. Or if you can't stand that phrase, try "of course" or "it is true that."

Then add a "but" or "yet" sentence that pours water on the fire you just lit:

To be sure, "[h]istorical analysis can be difficult; it sometimes requires resolving threshold questions, and making nuanced judgments about which evidence to consult and how to interpret it." ... But reliance on history to inform the meaning of constitutional text — especially text meant to codify a pre-existing right — is, in our view, more legitimate, and more administrable, than asking judges to "make difficult empirical judgments" about "the costs and benefits of firearms restrictions," especially given their "lack [of] expertise" in the field.[10]

With the current Supreme Court term promising even more tension and controversy than usual, the justices can always bask in their shared talents for crafting choice turns of phrase. While they sort all their differences out — and feel free to send them your best wishes — at least the rest of us have these nine ways to profit from their writerly abundance.

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[1] [https://www.supremecourt.gov/opinions/21pdf/21-499\\_gfbh.pdf](https://www.supremecourt.gov/opinions/21pdf/21-499_gfbh.pdf).

[2] [https://www.supremecourt.gov/opinions/21pdf/21-234\\_2b8e.pdf](https://www.supremecourt.gov/opinions/21pdf/21-234_2b8e.pdf).

[3] [https://www.supremecourt.gov/opinions/21pdf/20-603\\_o758.pdf](https://www.supremecourt.gov/opinions/21pdf/20-603_o758.pdf).

[4] [https://www.supremecourt.gov/opinions/21pdf/21-418\\_i425.pdf](https://www.supremecourt.gov/opinions/21pdf/21-418_i425.pdf).

[5] <https://www.youtube.com/watch?v=uykBVLnWd9Q>.



- [6] [https://www.supremecourt.gov/opinions/21pdf/20-1312\\_j42l.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1312_j42l.pdf).
- [7] [https://www.supremecourt.gov/opinions/21pdf/21-429\\_8o6a.pdf](https://www.supremecourt.gov/opinions/21pdf/21-429_8o6a.pdf).
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- [10] [https://www.supremecourt.gov/opinions/21pdf/20-1650\\_3dq3.pdf](https://www.supremecourt.gov/opinions/21pdf/20-1650_3dq3.pdf).



# The Best Briefs

## What AI Can Teach Us About That “Short and to the Point” Feeling

ROSS GUBERMAN

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The author is the president of Legal Writing Pro, the author of *Point Made: How to Write Like the Nation's Top Advocates*, and the creator of the legal-editing tool BriefCatch.

Imagine the best brief-writer you know. You can feel free to imagine yourself.

Now give your gut answer to these questions: Does that lawyer write shorter sentences than average? Use the passive voice less often? Include more analogies? Use fewer adverbs? Discuss more case law? Write fewer words? Use fresher language?

Perhaps the answers seem obvious. But what comes first, the perception of “great legal writing” or the answers to those questions?

You can tackle the challenge of defining “great legal writing” in many ways. I recently surveyed thousands of judges to get their take on briefs, for example, and I will keep soliciting and sharing similar insights.

But I wanted to try something different. Besides asking judges what they think distinguishes the good brief-writers from the bad, why not identify a group of exceptional brief-writers and then use artificial intelligence to figure out what they do differently from the rest of us? After all, judges might all agree that short sentences are hot while the word “clearly” is not, but wouldn’t it be great to see data backing that up? That is, unless that “short and to the point” feeling is really a proxy for something more meaningful but harder to pin down.

Here’s what I did: I created two universes of briefs and motions to help develop the five BriefCatch scores I’ve devised for legal documents.

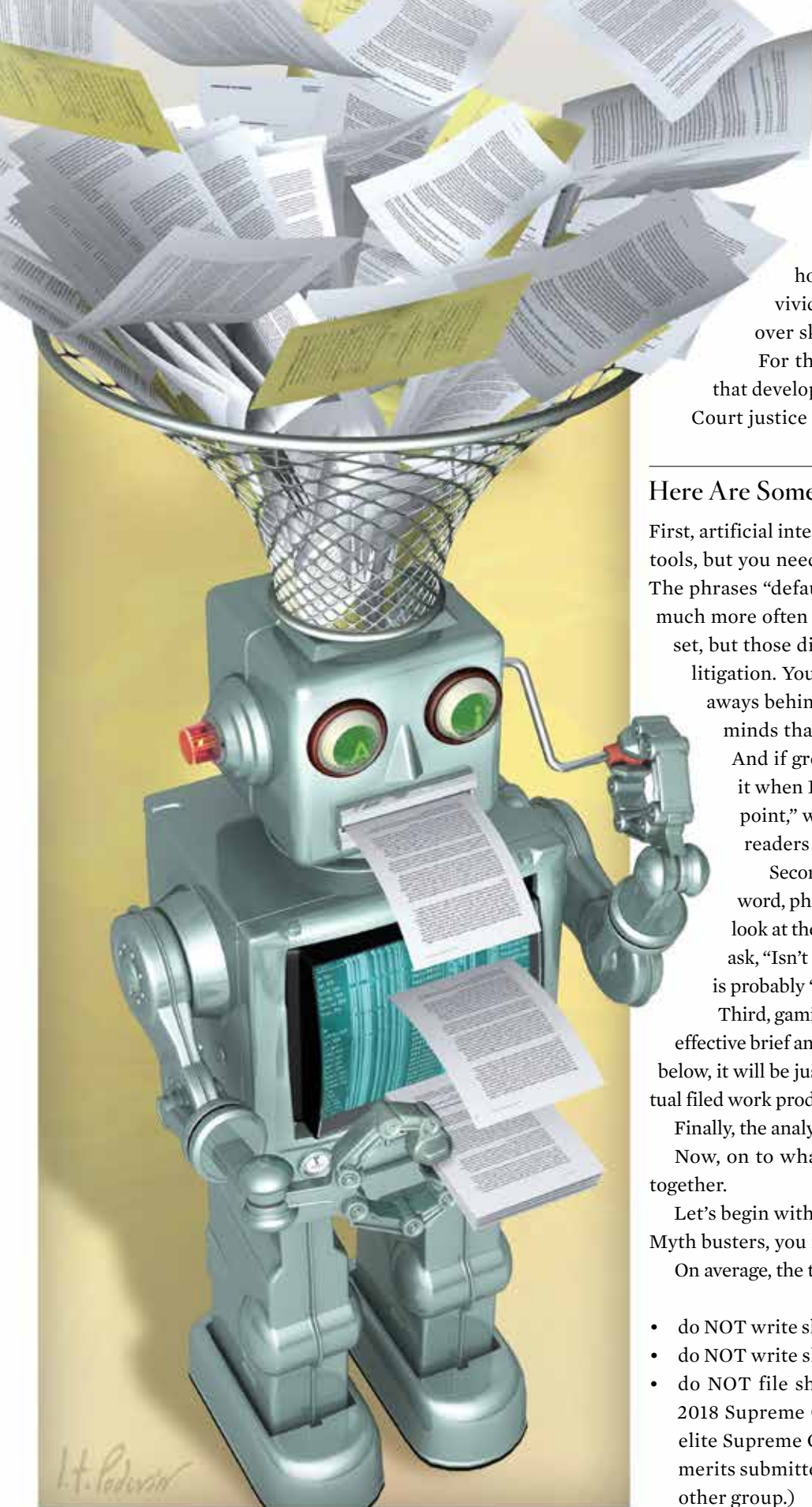
The first set consisted of tens of thousands of pages of motions and briefs signed by dozens of top-rated lawyers. To remove my opinions from the equation, I relied mainly on Chambers and Partners’ rating of top litigators and appellate advocates. For diversity, I did add briefs from the Solicitor General’s Office across several administrations, briefs that had won Green Bag awards for “exemplary legal writing,” and briefs that judges had singled out as exceptional, either publicly in opinions or privately.

The second set: the same number of randomly selected motions and briefs of similar types.

It’s fair to question my selection method as arbitrary or elitist. If it were arbitrary, though, we wouldn’t have found so many significant differences in writing between the two sets of briefs. The same goes for the objection that “these bigwigs didn’t really write these briefs themselves.” I worry about elitism, too. But to believe that the selection method colored the results, you’d have to believe that equally good briefs from other lawyers are “good” in a vastly different way from the ones we did look at. And that the writing choices of the top performers in our study reflect their credentials more than their writing.

You could also ask why I didn’t focus on who prevails in court rather than on reputation. The truth is that I’ve done that, too, and our number crunching has yielded intriguing insights on predicting which party will win. But writing savvy





is only a sliver of what dictates outcomes. What's more, lawyers stuck with bad law, bad facts, or both are less likely to win and more likely to feel forced into writing choices that could muddy the pool of losing briefs. Think of how Supreme Court justices often write more vividly in dissents than when they have to win over skeptical colleagues.

For the data analysis, I retained part of a team that developed an algorithm to predict which Supreme Court justice wrote an opinion.

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## Here Are Some Ground Rules

First, artificial intelligence and machine learning are fantastic tools, but you need human expertise too. A simple example: The phrases “default judgment” and “trust assets” appeared much more often in the random set than in the heavy-hitter set, but those differences reflect the subject matter of the litigation. You also need expertise to ferret out the take-aways behind the data. What's going on in the lawyers' minds that draws them to the best writing choices? And if great legal writing is more than just “I know it when I see it” or even just “Write short and to the point,” what do the data suggest you can do to make readers happier—and more persuadable?

Second, relative rates are what matters. Almost any word, phrase, or device can work sometimes. So if you look at the right-hand columns in the tables below and ask, “Isn't such-and-such OK when you . . . ?” the answer is probably “yes.” Again, it's all relative.

Third, gaming the system doesn't work. If you take an ineffective brief and sprinkle in some “good” words and devices below, it will be just ineffective. The analysis applies only to actual filed work product that grapples with real facts and real law.

Finally, the analysis doesn't consider quoted language.

Now, on to what artificial intelligence and I discovered together.

Let's begin with some conclusions that might surprise you. Myth busters, you might call them.

On average, the top brief-writers, both trial and appellate . . .

- do NOT write shorter sentences.
- do NOT write shorter paragraphs.
- do NOT file shorter briefs or motions. (In the October 2018 Supreme Court term, for example, members of the elite Supreme Court bar who ultimately prevailed on the merits submitted *longer* merits briefs on average than any other group.)

Illustration by J.F. PODEVIN



- do NOT fare better on traditional readability metrics like the Flesch index or grade-level score.
- do NOT vary their sentence length more than other lawyers do (though they are likelier to follow an unusually long sentence with an unusually short one).
- do NOT use the word “that” at a lower rate—in fact, they do so at a higher rate.
- do NOT use shorter words (but see below).
- do NOT use more active voice (but see below).
- do NOT use fewer adjectives and adverbs (but see below).

Before you denounce the data as sacrilege, consider that what readers experience as overly long sentences could be the occasional gargantuan sentence (writers like Chief Justice Roberts draft those, too) floating amid a turgid document. And when readers admire short, crisp, declarative sentences, they’re probably not counting words, computing means, and diagramming syntax.

Clarity and conciseness are still worthy goals, of course. It’s just that if you believe in data and want to induce that “short and to the point” sensation, the best brief-writers have more nuanced and productive ways to break the mold.

Let’s start with substance. Language analysis can yield insights into what kinds of arguments lawyers make and how, not just into what words they use to do so:

TABLE 1	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Reasoning	Use language like “for example” or “for instance” to introduce examples.  Address the court in the second person: “Consider,” “Suppose,” and so forth.  Use language like “it is true that” or “to be sure” to concede a point.	Write “the Court must.”
Case Law	Use a parenthetical for a single-sentence quotation.  Quote from authorities within sentences rather than as a full sentence or a block quote.  Include language like “some courts” or “many courts” to synthesize case law.	Have a high ratio of cases cited per word.  Use “ <i>id.</i> ”  Use <i>See also</i> or other signals introducing similar cases on the same point.

Also bridging style and substance: data on headings, defined terms, parts of speech, types of words, and even punctuation.

TABLE 2	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Punctuation	Use em dashes to expand on a point.  Use colons to explain a point.	Use slashes.  Use semicolons to join two clauses.
Conventions	Include headings (though they’re no more likely to include subheadings).	Define parties in more than one way, as in “Defendant” or “Employer”.  Use acronyms.
Parts of Speech	Use pronouns like “it,” “she,” and “they” (but not “he” or “him”).  Include the relative pronoun “that” after a verb.  Use verbs.  Use adjectives and adverbs (but see below).	Use prepositions, especially “at,” “by,” and “of.”

Now let’s turn to pure writing style—what you can most readily adapt. Here’s how I broke down the style data:

- Analyzed the relative rates of unigrams (a single word or punctuation mark) along with bigrams and trigrams (combinations of two or three).
  - Looked for meaningful differences between the two sets.
  - Looked for patterns in those differences and then grouped them into nine coherent factors.
- Here are the nine factors.

### Factor 1: Speed Up

The legal-writing punditry has focused so much on fighting “legalese” (see below) that it sometimes neglects the many bureaucratic, heavy-handed, or cumbersome terms that belong to modern English but can drag down a document.

To that end, this factor consists of 176 correct-but-ponderous terms that are less common in top-notch briefs.

TABLE 3	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Cumbersome Sentence Structure	Follow a semicolon with a conjunctive adverb like “however” or “therefore.”  Start sentences with wind-up, throat-clearing phrases like “It is apparent that.”
Wordy Phrases	Use wordy expressions like “with respect to,” “the fact that,” “are obligated to,” “exists to,” and “in the event that.”
Long Words	Use long words that have shorter alternatives like “absence,” “characteristic,” “initiated,” and “regarding.”



Factor 2: Verb Surge

Powering up this factor: 720 verbs that top brief-writers use more often—and another 90 that they use less often. The verbs fall into three patterns.

TABLE 4	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Length		
Quality	Use vivid verbs like “alter,” “erodes,” “falter,” “hoodwink,” “override,” “pinpoints,” “refutes,” and “stymies.”	Use vague verbs like “indicate.”
Diction	Use familiar verbs like “expect,” “mimics,” “signaled,” and “try.”	Use bureaucratic or pretentious verbs like “anticipate,” “effectuate,” and “impacting.”

Factor 3: Passive-Aggressive

Rates of the passive voice itself do not differentiate the two sets very well. On the other hand, many of those who decry the passive voice can’t really define it, and I’ve learned that, like the phrase “short and simple,” “passive voice” is more a feeling the reader has than the product of linguistic analysis.

Some passive constructions are as popular with top brief-writers as they are with the rest of us: “achieved by,” “undermined by,” and “represented by,” to name a few.

Yet others are much less common in the great-briefs set, as you’ll see below. Because the real issue with the passive voice is that it makes it harder to see what’s happening, I include over-used nominalizations in this factor, too.

All told, this factor includes 177 cases in which the better brief-writers get active.

TABLE 5	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Passive Constructions		Use passive constructions when the focus should be on the actor: “employed by,” “relied upon by,” “caused by,” “permitted by,” “noted by,” and “produced by.”
Nominalizations	Use active verbs like “achieves,” “alters,” “compiles,” and “modifies.”	Use nominalizations rather than active verbs, like “achievement,” “alteration,” “compilation,” and “modification.”

TABLE 6	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .
Punchy Words	Use vivid, conversational words like “afield,” “array,” “beforehand,” “bulwark,” “chance,” “core,” “gap,” “signs,” and “track.”
Punchy Sentence Openers	Start sentences with crisp openers like “But,” “Few,” “Let,” and “Only.”
Punchy Phrases	Use elegant phrases like “and thus to,” “far more than,” “in turn,” “let alone,” “need not,” “nor did the,” “the same way,” and “to do so.”

Factor 4: Punchiness and Pizzazz

Like all professional writing, legal writing can be spare and concise, yet flat and dull.

To that end, we’ve identified another 428 terms—loosely defined as “punchy”—that you’re more likely to see in the top brief-writers’ work.

What unites these 428 terms? Language you’d read in elegant essays or hear in compelling speech. See **Table 6** above.

Factor 5: Lawyered Down

I was especially curious to see how “legalese” fared. It’s easy to lament. It’s harder to define. And it’s avoided more in theory than in practice.

We did find meaningful differences in use rates for 165 terms that I’ll divide into two categories: pure legalese, as in “heretofore,” on the one hand, and “normal” words and phrases—like “regarding” or “pursuant to”—that many lawyers and judges simply love too much, on the other.

TABLE 7	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Pure Legalese	Use language like “aforementioned,” “foregoing reasons,” “forthwith,” “herein,” and “instant case.”
Lawyerisms	Use language like “contingent upon,” “i.e.,” “namely,” “prior to,” “proximity,” “pursuant to,” “slippery slope,” “to the extent (that),” and “with respect to.”

Factor 6: A Slight Modification

Bans on adjectives and adverbs are as popular as they are unworkable. The adjective “disguised” matters in “she used a disguised voice,” just as the adverb “rarely” is key to “courts rarely require.”

That said, we did identify 100 modifiers that the best writers use less often than average—and another 100 that they use more often. You want “quality” modifiers, so to speak. See **Table 8** on the next page.



TABLE 8	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Adjectives	Use language like “candid,” “inapt,” “mistaken,” “rare,” “tiny,” and “unsettled.”	Use language like “actual,” “fanciful,” “inexcusable,” “infamous,” and “optimal.”
Adverbs	Use language like “elsewhere,” “partly,” “precisely,” “sooner,” “thoroughly,” and “worse.”	Use language like “alternatively,” “comparably,” “contemporaneously,” “inordinately,” and “unequivocally.”

### Factor 7: Tone Police

How about tone? Are better brief-writers more civil, more logical, less aggressive in making their points, as so many judges contend? The answer: Yes, but the distinctions are slight.

Legal writing professors can take a victory lap over the data on “clearly” (we ignore “clearly erroneous”). But only a short lap: “Clearly” appears slightly less often in top briefs, though still far more often than many realize—including in the briefs of many appellate stars who decry “clearly” in public.

We include two types of tone differences below.

TABLE 9	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Intensifiers	Use language like “entirely.”	Use language like “clearly,” “completely,” “drastically,” “utterly,” and “wholly.”
Judgmental Modifiers	Use language like “incorrect,” “mistaken,” and “wrong.”	Use language like “blatantly,” “deceptively,” “disingenuous,” “draconian,” “egregious,” and “flagrantly.”

### Factor 8: Gushing Flow

The greatest difference of all relates to internal logic. How well does the lawyer massage disparate points into a cohesive whole? How well does the lawyer create order out of chaos? How well does the lawyer push the reader forward? How well does the lawyer avoid needless interruptions? See **Table 10** above right.

### Factor 9: Lighter Than Air

Because our analysis included punctuation and capitalizations, we could crunch data on how sentences start and end.

I was curious to see a pattern I hadn’t noticed before: Perhaps because they have a good ear and want to end sentences elegantly, the best brief-writers are much likelier to end sentences crisply. See **Table 11** to the right.

Speaking of endings, let’s close with an image of you as the data-backed ideal brief-writer. Your secret is not that you re-cite “Concise. Clear. Organized.” before you go to bed while your

TABLE 10	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Sentence Openers: Lightness	Start sentences with language like “As for,” “After all,” “If,” “Indeed,” and “Those.”	Start sentences with language like “Consequently,” “Regarding,” and “Subsequently.”
Sentence Openers: Logical Precision	Start sentences with language like “At the same time,” “Put another way,” and “To begin with.”	Start sentences with language like “Additionally,” “Also,” and “Furthermore.”
Midsentence Logical Moves	Use language like “and so,” “by extension,” “for that reason,” “likewise,” “more to the point,” and “not only because.”	Use language like “and, therefore.”
Numbered Lists	Include numbered lists with language like “Second,” “Third,” and “Fourth.”	
Comparisons	Use language like “than any,” “than that,” and “than those.”	
Time References	Use language like “days later,” “weeks later,” and “months later.”	Include complete dates.
Sentence Adverbs		Start sentences with language like “More specifically,” “Notably,” and “Significantly.”

TABLE 11	TOP BRIEF-WRITERS ARE MORE LIKELY TO . . .	RANDOM BRIEF-WRITERS ARE MORE LIKELY TO . . .
Final Word of Sentence	End sentences with words like “before,” “change,” “course,” “enough,” and “like.”	End sentences with words like “entirety,” “exclusion,” “inapplicable,” “justified,” and “thereafter.”

colleagues don’t. But it’s not an ephemeral art, either. You discuss fewer cases for the same points while interspersing more pithy quotes from the ones you do cite. You add the occasional dash or colon to elaborate or explain. You’re not afraid to concede a point outright, and you try to synthesize as much case law as you can.

On the wording front, you strike wordy phrases. You freshen up your draft with punchy language. You replace dull verbs with vivid ones. Rethink your modifiers. Apply a light touch to sentence openers and endings. And add headings, numbered lists, and logical connectors.

I forgot to mention: And do all that while getting the law right, the record mastered, and the deadlines met.

It’s not easy. But it’s still much more science than art. ■





# DEAL STRUCK

THE WORLD'S BEST  
DRAFTING TIPS

ROSS GUBERMAN  
PRESIDENT, LEGAL WRITING PRO  
& GARY KARL



# DEAL STRUCK:

The World's Best  
Drafting Tips

ROSS GUBERMAN  
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& GARY KARL



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# The Big Picture



## The Heart of the Deal

Good journalism often begins by answering six questions: Who? What? When? Where? Why? How? Use a similar set of questions to help draft the recitals as well as the substantive provisions that strike at the core of a business deal:

- *Why* are the parties entering into this agreement?
- *Who* is obligated to *whom*?
- *What* are those parties' respective rights and obligations?
- *When, where, and how* will the parties perform those obligations and enforce those rights?
- *What* will happen if the parties fail to perform a particular obligation?
- If an obligation involves paying money, *how much* is due, and from *whom*? *How* is it calculated?
- *How* can events outside the parties' control thwart the deal, and *what* will be the result if they do?
- *When* do the parties' respective obligations begin and end?
- If a dispute arises, *when, where, and how* will it be resolved?



## The Core Four

Use your responses to the questions on the previous page to generate these “Core Four” provisions common to all contracts:



Elsewhere in this guide, we cover other aspects of drafting, ranging from discretionary rights to boilerplate provisions.



# The Heart of the Agreement



## Shall We? Affirmative and Negative Obligations

The Golden Rule of drafting is that you should use each word or phrase consistently to convey only one meaning throughout the document.

Use *shall* for a party's affirmative obligations: acts that a party is obligated to perform to avoid breaching the agreement.

● Use **shall** for a party's affirmative obligations.

- If you can replace *shall* with "is obligated to" or "has a duty to," *shall* is always an acceptable choice.

EXAMPLE: "Buyer *shall* reimburse Seller for all reasonable accounting fees."

As an empirical matter, most practicing transactional lawyers in the United States, Canada, and the United Kingdom use *shall* when drafting obligations.

While some commentators seek to purge the drafting world of *shall*, other than in countries like Australia, only a fraction of drafters consistently use *will* or *must* instead of *shall*.

Inertia is one reason that this reform hasn't taken off. Other reasons are more practical and substantive. For one thing, many lawyers and clients find *must* to be bossy in feel. For another, using *must* for obligations raises the question of how you would draft conditions. And finally, using *will* for obligations raises the question of how you would draft consequences that arise upon satisfaction or failure of a condition or of another future contingency. (See *Will Power*.)



▲ Replacing **shall** with **must** or **will** is no panacea when it comes to avoiding disputes.

● Use **shall not** for a party's negative obligations.

■ Avoid **may not**, **only may**, and **may only**.

▲ **Must not** and **will not** should be used for negative obligations only if you consistently use **must** and **will** for affirmative ones.

Although it's true that *shall* is often litigated, commentators have been too quick to conclude that *shall* reflects sloppy drafting rather than just old-fashioned diction. Most *shall* cases are statutory. And even in the contractual *shall* cases, the issue is often that the parties have failed to clarify who must perform the obligation or what the affirmative obligation even is. Changing *shall* to *will* or *must* might make contracts sound more modern, but it will not necessarily avoid disputes.

Use *shall not* for a party's negative obligations: acts that if performed would breach the agreement.

EXAMPLE: "Executive *shall not* withdraw these funds from the Account prior to January 1, 2016."

Avoid using these phrases for negative obligations:

- May not
- Shall not have the right to
- Only may
- May only
- Cannot
- Must not (unless you consistently use *must* for affirmative obligations)
- Will not (unless you consistently use *will* for affirmative obligations)



## Will Power:

### When “Will” Will Do Just Fine

Assuming that you use *shall* rather than *will* for a party’s affirmative obligations, *will* plays a discrete role in drafting.

Use *will* rather than *shall* to establish future consequences of events and circumstances that do not obligate the parties:

- “If the Closing does not occur by December 31, 2014, then this Agreement *will* terminate.”
- “If Employee is convicted of any felony, then this Agreement *will* terminate.”
- “Any purported transfer of the Shares in violation of this Agreement *will* be void.”
- “Performance of the obligations under this Agreement *will* not conflict with...”

Many drafters would, by tradition, use *shall* in the above examples, but then *shall* has to fulfill a function beyond expressing the parties’ obligations. Remember the Golden Rule: one word, one meaning. (See *Shall We?*)

By contrast, when the future consequence **does** obligate a party, use *shall*, not *will*.

- “If Employee becomes aware of a potential conflict, Employee *shall* report that conflict to the Board of Directors.”

● Use **will** rather than **shall** to establish future consequences of events and circumstances that do **not** obligate the parties.

▲ Many drafters use **shall** to express future consequences, but then **shall** fulfills a function beyond expressing the parties’ obligations.

● When the future consequence does obligate a party, use **shall**, not **will**.



## Within My Rights: May I?

● Use **may** for “reserves the right to.”

■ Avoid **shall have a right to**.

■ Avoid ambiguous expressions like **may not**, **may only**, and **only may**.

● Use **might** rather than **may** for possibility.

Use *may* for “reserves the right to” and in place of these phrases:

- *May in its discretion* (acceptable but redundant)
- *Shall in its discretion* (common but nonsensical)
- *Shall have a right to* (common but requires that *shall* be read as *will*)

But if one party wants unfettered discretion, *may, in its sole discretion*, is appropriate. That said, courts will not necessarily enforce “sole discretion” language if it would conflict with common-law duties of reasonableness, good faith, and fair dealing.

Avoid *may not*. It’s often ambiguous. For negative obligations, use *shall not*. (See *Shall We?*)

Also avoid *may only* and *only may*. Both can be ambiguous.

And avoid *may* for possibility. For possibility, use *might*.

- Use “patents that *might* be granted,” not “patents that *may* be granted.”



## Escape Hatches and Bated Breath: Conditions

Conditions reflect what must, or must not, happen before a party is obligated to perform some or all of its obligations under a contract. A condition might be an action that a party is obligated to take, a state of facts that must exist, or an event that's outside a party's control.

Take, for example, a contract for the purchase and sale of a home. The contract typically lists some routine conditions: the buyer need not pay the purchase price unless the seller executes and delivers an acceptable deed; the seller, for its part, need not transfer title unless the buyer pays the purchase price. The conditions thus outline what will happen at the closing.

But the buyer's obligation to close might also be subject to another obligation on the seller's part (such as to repair or replace a broken door), to facts that must exist (clear title, for example), or to an event that must occur (say, the lenders must give the buyer a mortgage, or the closing must occur on or before a "drop-dead date").

If any of these conditions isn't met, then the buyer need not complete the purchase. And the buyer suddenly gains some new options:

Waive the condition and close the deal anyway;

Wait to see if the condition can be satisfied later;

Transform the condition to closing into a post-closing covenant to be performed by the seller;

Renegotiate the deal on presumably more favorable terms.



Conditions can thus create an “out” or an “escape hatch” from obligations that a party would otherwise have to perform.

Because a condition is an all-or-nothing proposition—for example, failure of a closing condition can torpedo the deal—courts are reluctant to find that a contract term is a condition. Instead, courts prefer to construe a supposed condition as an obligation and then remedy the breach by awarding damages rather than terminating the contract altogether.

Follow these steps if you want to draft a condition:

● When you express conditions, be as specific as possible about what must happen.

● Use **subject to, unless, on the condition that, if, or only if** to distinguish conditions from obligations.

■ Avoid **shall** for conditions.

■ Avoid using **provided that** or other provisos to express conditions.

Be as specific as possible about what must happen.

- “Buyer’s obligation to close is conditioned on Buyer’s obtaining financing for the purchase price.”

Use *subject to, unless, on the condition that, if, or only if* to distinguish conditions from obligations.

- *In the event* and *in the event that* are wordy but not incorrect.
- *In the event of* is appropriate before a noun, as in “In the event of default.”

Avoid *shall* for conditions. Reserve *shall* for covenants (what the party has a duty to do). (See *Shall We?*) In fact, using *shall* to express a condition might suggest an obligation.

- CONDITION OR OBLIGATION?: Jones *shall* submit any dispute notice within 30 days after receipt of the working-capital calculation, or he shall be deemed to have accepted the calculation.
- CONDITION: *Unless* Jones submits a dispute notice within 30 days after the date Smith delivers the working-capital calculation, Jones will be deemed to have accepted the calculation.

Avoid using *provided that* or other provisos to express conditions, because provisos can be read to suggest an obligation instead. (See *On Second Thought.*)

- CLEAR: Jones may submit a dispute notice only within 30 days after receipt of the working-capital calculation, after which date



he will be deemed to have accepted the calculation.

- **AMBIGUOUS:** Jones may dispute the working-capital calculation; *provided that* he submits a dispute notice within 30 days after receipt of the calculation.

Also avoid *to the extent* or *to the extent that* for conditions unless you intend to create a sliding scale of consequences between two events.

- **RIGHT:** *To the extent that you pay off your principal, less of your monthly payment will go toward interest.*
- **WRONG:** *To the extent Borrower does not pay in full, Lender may declare default.*
- **RIGHT:** *If Borrower does not pay in full, Lender may declare default.*

When possible, avoid subjective conditions, because they can turn a contract into little more than an option, leaving the other party with no affirmative obligations that it has to perform.

- **TOO SUBJECTIVE:** Buyer shall have obtained financing for the transaction on terms and conditions *satisfactory to Buyer*.

That said, subjective conditions like *satisfactory to Buyer* can appeal to parties with greater leverage. So if you can't negotiate the other party's subjective conditions out of the contract, at least qualify the subjective condition with an objective component. In the example above, for instance, specify the steps the Buyer must take to obtain financing within a particular time frame or the parameters the Buyer must deem acceptable (such as loan amount, repayment terms, or interest rate).

Of course, depending on your jurisdiction, the parties might already have common-law duties of reasonableness, good faith, fair dealing, and so forth that might affect how a court interprets a condition.

■ Avoid **to the extent** or **to the extent that** for conditions unless there's a sliding scale of consequences between the two events.

▲ Subjective conditions can turn a contract into little more than an option, leaving the other party with no affirmative obligations that it must perform.

▲ Depending on your jurisdiction, the parties might already have common-law duties of reasonableness, good faith, fair dealing, and so forth that can affect how a court interprets a condition.



# The State of the World



# “I Solemnly Swear”: Representations and Warranties

Representations and warranties, which we refer to here as “reps,” are the material facts that are relevant to a party’s decision to enter into a deal and that must be accurate if the party is to get the benefit of its bargain.<sup>1</sup>

The parties themselves are often the best authorities on what these facts should be from a business perspective. The relevant facts vary depending on the identity of the parties as well as the nature and circumstances of their transaction. That said, consider these potentially important facts that often slip past one’s radar screen.

Are any of the parties entities? If so, draft reps establishing the facts that reflect the party’s ability to perform its obligations under the contract. In particular, specify that the entity

- Exists;
- Has the necessary power to make and perform the contract;
- Is duly authorized as a matter of entity governance to make and perform the contract;

● Draft reps establishing the facts reflecting the party’s ability to perform its obligations under the contract.

<sup>1</sup> The drafting literature brims with debates about whether *representation and warranty* could be cut to simply *representation*. Although we have considered the merits of these arguments, we see no basis to use just *representation* in the US, and in some jurisdictions the use of *representation* alone might have adverse consequences. In the UK, by contrast, many practitioners use just *warranty* to try to avoid statutory tort damages, but the courts there generally ignore the nomenclature in any event. Indeed, in both the UK and the US, courts appear to consider the equities at least as much as they defer to the parties’ word choices: Would it be fair to allow a party to avoid tort damages simply by characterizing its false statement as just a warranty and not a representation? See, e.g., *CBS Inc. v. Ziff-Davis Publ’g Co.*, 75 N.Y.2d 496 (1990); *Sycamore Bidco Ltd. v. Breslin & Anor* [2012] EWHC 3443. See also Uniform Commercial Code § 2-313: “It is not necessary to the creation of an express warranty that the seller use formal words such as ‘warrant’ or ‘guarantee’ or that he have a specific intention to make a warranty....”

▲ We see no basis to use just **representation** in the US, and in some jurisdictions the use of **representation** alone might have adverse consequences.



● Consider whether any party is subject to special requirements before it is eligible to perform its obligations under the contract.

● For individuals, draft reps that attest to their legal capacity.

- Can make and perform the contract without conflicting with any of the following:

*Its governing documents,*

*Its other existing contracts,*

*Applicable law, and*

*Applicable judgments and orders*

- Has duly executed and delivered a contract that is enforceable against that entity.

Is any party subject to special requirements before it is eligible to perform its obligations under the contract? Consider such requirements as these:

- Financial condition /creditworthiness
- Regulatory status, especially for regulated industries requiring licenses like the following:

*Insurance*

*Banking*

*Financial advisory and management*

*Health care*

*Telecommunications*

*Public utilities*

*The professions (law, medicine, accounting, engineering, architecture)*

- Any other regulatory status essential to the transaction:

*Accredited investor status under securities laws*

*Prohibited transaction status under ERISA*

Are any of the parties individuals? If so, draft reps clarifying that the party has the legal capacity to enter into the agreement and to consummate the transaction either as an individual or as an agent.



Are the reps made as of the relevant time or times?

- When a transaction has a closing, the parties will want to ensure that the reps haven't changed before the closing, so they will "bring down" the reps at closing. In this sense, they are creating another condition that must be met: the "brought down" reps are still accurate at the time of closing. (See also *Risky Schemes*.)
- When the contract creates an ongoing relationship between the parties (say, a lease, license, credit agreement, or employment agreement), the relevant time period is often throughout the life of the contract, so the parties might need to agree to inform each other of any material changes to their reps post-signing.

● Parties will want to ensure that the reps haven't changed between signing and the closing, so they will "bring down" the reps at closing.

● When the relevant time period is throughout the life of the contract, the parties might need to agree to inform each other of any material changes to their reps post-signing.



## Spill the Beans: Exceptions to Representations and Warranties

To ensure accuracy, broad, or “blanket,” reps must often include exceptions that disclose facts.

EXAMPLE: Seller has not impermissibly released any Hazardous Materials on the Property, *except for a petroleum spill on April 1, 2014.*

● Exceptions often appear in separate “exception schedules” or “disclosure schedules.”

Although you can note any exceptions in the text of the reps themselves, in M&A and in other complex transactions, exceptions often appear in separate “exception schedules” or “disclosure schedules.” (Example: “Buyer represents and warrants that there is no pending litigation against Buyer except as set forth on Schedule 2.1.”) Schedules are a more convenient alternative:

Including long exceptions in schedules makes for a more cohesive and readable contract.

By tradition, deal lawyers expect to find exceptions in schedules.

Typically, the party responsible for producing the schedules is not the party responsible for producing the related agreement. (In the M&A context, for example, Seller’s lawyers usually generate the schedules, while Buyer’s lawyers generate the purchase agreement.) Logistically, then, it is easier to include any exceptions in a separate schedule.

▲ Exceptions mostly disclose facts that are negative and require action or attention.

Exceptions mostly disclose facts that are negative and that require action or attention. In the spill example above, for instance, counsel for Buyer can protect the client’s interests in several ways:



Asking for additional reps about the disclosed fact.

EXAMPLE: How extensive was the spill? Were the authorities notified? What clean-up efforts were made?

Obligating the disclosing party to do something about the disclosed fact.

EXAMPLE: a covenant to clean up the spill.

Making the disclosing party responsible for any costs related to the disclosed fact.

EXAMPLE: requiring Seller to indemnify Buyer for any damages arising from the spill.



## Risky Schemes: Mitigating Against Misrepresentations

If you want to protect your client from the risk that another party's reps prove to be inaccurate, you can do so in several ways.

● If the transaction has a closing, consider whether to include a covenant obligating the maintenance of status quo and to make the accuracy of reps a condition to closing.

● As appropriate, clarify whether a breach triggers an event of default. Include an indemnity that allows recovery of damage if the rep is inaccurate.

If the transaction has a closing (as in a Purchase and Sale Agreement), consider whether to

- Include a covenant obligating the other party to maintain the status quo between signing and closing and
- Make the accuracy of the reps a condition to closing, so that inaccurate reps provide grounds to get out of the deal.

Provide that the reps survive the closing to preserve recourse for an inaccuracy that might not be discovered until after the closing.<sup>2</sup> If the contract creates an ongoing business relationship post-signing (as in a lease, license, credit agreement, or employment agreement), clarify whether an inaccurate representation (or breach of a warranty) triggers an event of default, and, if so, provide a meaningful remedy.

In either case, include an indemnity that allows recovery of damages if the rep is inaccurate. (See also *Not My Problem*.)

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<sup>2</sup> Survival of reps post-closing is common in M&A transactions involving private companies, but it is rare in other contexts like real estate. Buyer wants as long a survival period as possible in order to spot—and then seek redress for—suspected inaccuracies in Seller's reps; Seller wants as short a survival period as possible.



# Troublesome Language and Common Errors



**assure, ensure, insure**

- Avoid *assure* for binding obligations, though the noun form (*provide assurances that*) is safe. *Assure* can be construed as nonbinding.
- *Ensure* is universally correct for binding obligations.
- *Insure* is also correct for binding obligations in the UK.
- ▲ In the US, though, reserve *insure* for insurance and indemnification.

**attorney fees, attorneys fees, attorney's fees, attorneys' fees**

- Favor *attorney's fees* or *attorneys' fees*
- Avoid *attorney fees* and *attorneys fees*

**by and between, by and among, between, among**

- Because the parties to a contract have binary relationships, a contract is *between* them, not *among* them, regardless of how many parties are on each side.
- ▲ The *by and* language is archaic but not wrong.
- ▲ That said, debating "between the parties" versus "among the parties" is not constructive.

**days notice vs. days' notice**

- In notice provisions, *days* and *months* take apostrophes when modifying the word "notice": "one day's notice," "30 days' notice," "two months' notice."

**the earlier of, the earliest of, the greater of, the greatest of**

- Use *or* to join the listed options. The construction is a variation on "X or Y, whichever comes first."
- ▲ Many careful drafters do use *and* in these constructions, and that choice is certainly defensible.
- Use the comparative (*earlier* or *later*) for two choices, and use the superlative (*earliest* or *latest*) for three or more.



### **Includes, including, including without limitation**

In everyday communication, *includes* and *including* mean that the list that follows is partial and illustrative, also known as “nonexhaustive.”

- “The places I’d like to visit *include* France and Germany” suggests that you’d like to visit other places, too.

But *include* can also reflect a complete or “exhaustive list” (“His name *includes* two words derived from Spanish”), and it can signify that one element is simply a component of another (“The device *includes* a lever”). Some courts have construed *includes* and *including* in this way.

- Many drafters thus add “without limitation” or “but not limited to” after *includes* and *including*.
  - Make sure to insert commas around “without limitation” and around “but not limited to.”
  - ▲ Also consider simply defining *includes* and *including* to mean “*includes (or including)* without limitation” to avoid having to repeat this cumbersome construction.

### **principal / principle**

If you can replace the word with *rule*, spell it with **-le**:

- *according to this tax principle*

Otherwise, spell it with **-al**:

- *principal and interest*
- *principal and agent*
- *principal basis for our advice*
- *principal place of business*

### **pursuant to, under, in accordance with, according to**

- Use *pursuant to* and *under* interchangeably for binding obligations: “Under the agreement, you shall reimburse us for all out-of-pocket expenses.”
- *Pursuant to* is old-fashioned but not incorrect.



● Use *in accordance with* to explain the basis for past or future conduct:

- “In accordance with federal law, we declined to give the company access to our proprietary records.”
- “Subject to adjustment in accordance with..., the Purchase Price will increase by 10 percent.”

■ Avoid *according to* for binding obligations. Instead, reserve it for authorities.

- NONSTANDARD: “According to the indemnification provision ...”
- RIGHT: “According to the country’s leading expert on international tax ...”

### **respectively**

Use to link individual items in one list with their counterparts in another list in the same sentence.

RIGHT: Subsidiary 1, Subsidiary 2, and Subsidiary 3 shall not make capital expenditures in any fiscal year in excess of \$5 million, \$1 million and \$3 million, *respectively*.

WRONG: Subsidiary 1, Subsidiary 2, and Subsidiary 3 *respectively* hereby guarantee Parent’s obligations under this Agreement.

### **serial comma / Oxford comma**

In a series of three or more items, most drafters around the world, and particularly in countries that favor British English, do not include a comma before the final element. Example: “You shall not transfer right, title and interest” is more common than “You shall not transfer right, title, and interest.”<sup>11</sup>

In the rare case when the lack of a comma could render the list ambiguous, rephrase or use romanettes.

EXAMPLE: “I bequeath these funds to (i) Smith, (ii) Jones and (iii) Cameron and Cameron’s wife.”

<sup>11</sup> Here we are simply noting customary practice and are thus declining to enter into the well-worn and never-ending debate about serial commas. This book, for example, is written in American English and thus uses the serial comma. We note, however, that although the serial comma is often referred to as the “Oxford comma,” English lawyers are among those least likely to use it. The same is true in much Commonwealth writing, whether legal or otherwise.



# Checking It Twice



## A Baker's Dozen Questions for Every Agreement

1. Have I spelled the parties' names correctly and consistently, and used their proper corporate form?
2. If I am using an older draft as a model, have I scoured the new draft for the previous parties' names and searched for any metadata?
3. Have I ensured that my draft captures all the terms in the term sheet or letter of intent outlining the deal?
4. Have I triple-checked all dates, numbers, and figures?
5. Have I included or affirmatively rejected key boilerplate provisions and made sure that they reflect the parties' intentions? (Note that the main boilerplate provisions are listed in this guide's table of contents.)
6. Have I used all defined terms at least three times and deleted all unnecessary definitions?
7. Have I removed from each definition any embedded obligations, deal terms, or other language that is not part of the definition?
8. Have I verified the accuracy of all cross-referenced section numbers?
9. Have I labeled exhibits and schedules consistently?
10. Have I formatted cross-references, numbers, and currencies consistently?
11. Have I formatted margins, section numbers, line spacing, and paragraph spacing consistently?
12. Have I used articles before defined terms consistently (say, *the Bank* versus *Bank*)?
13. Have I styled numbers consistently (written out twice—*three (3)*—or, preferably, just once—*three*)?



# Modernizing Transactional Language



One of the key premises of this guide is the distinction between “must-haves” and “nice-to-haves” in contract drafting. Unless you are particularly autonomous (or draft subject to readability or Plain English rules), drafting traits like brevity and modern diction are simply “nice-to-haves.” That said, for those readers who do seek to modernize, streamline, simplify, or otherwise strive for Plain English ideals, we offer the following alternatives.

BEFORE	AFTER	BEFORE	AFTER
at the present time	now (or cut)	in an effort to	to
at the time when	when	in order to	to
attached thereto, hereto	attached	in respect of (UK)	on, for, about
because of the fact that	because	in the event (that)	if
by means of	by	<i>inter alia</i>	among other things
by reason of	because	notwithstanding (the fact) that	although, even though
covenant	shall	now, therefore	(cut)
covenant and agree	agree, shall	prior to	before
despite the fact that	although, even though	pursuant to	under
during such time as	while	said, such, same	this, that
each and every	each	subsequent to	after
endeavor	attempt, seek, try	therein, thereto	(cut)
for the purpose of	to, for	until such time as	until
for the reason that	because	whereas	(cut)
herein/hereto	(cut)	with a view toward	to
hereinafter	(cut)	with respect to	on, for, about
hereinafter defined as	(cut)	witnesseth	(cut)





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