2023

ASSOCIATE GUIDE

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

BriefCatch

25 Ways to Write Like Chief Justice Roberts

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

1. Replace full dates with phrases.

- **Two months later,** Buck returned to federal court . . .
- **Within days**, the Texas Attorney General, John Cornyn, issued . . .
- **By the close of 2002,** the Attorney General had confessed error . . .
- **In 2006,** a Federal District Court relied on that failure . . .

Spice of Life

2. Include the occasional metaphor or other figure of speech.

> [T]he impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. **Some toxins can be deadly in small doses.**

3. Include some very short sentences.

- In June 2000, the Court did so.
- Not, however, in Buck's.
- But the converse is not true.
- These were remarkable steps.
- But one thing would never change: the color of Buck's skin.
- And it was potent evidence.

4. Add interest through the occasional dash, colon, question mark, or semicolon.

- The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then**—if it is—**an appeal in the normal course.
- **And for good reason: At the time** Buck filed his § 2254 petition . . .
- **Would he do so again?**
- The question for the Court of Appeals was not whether Buck had shown that his case is **extraordinary; it was whether** jurists of reason could debate that issue.

5. Add interesting and varied transitions.

- **It follows that** the Fifth Circuit erred in denying Buck . . .
- **But then again**, these were—as the State itself put it at oral argument here —"extraordinary" cases.
- Dr. Quijano's report said, **in effect**, that the color of Buck's skin made him more deserving of execution.
- The Fifth Circuit, **for its part**, failed even to mention . . .
- **To be sure**, the State has repeatedly . . .
- **True,** the jury was asked to decide two issues . . .

- **Indeed**, in one recent case . . .
- **Of course,** when a court of appeals properly applies . . .
- **To that end**, the court observed that a change in decisional law . . .

6. Use parallelism and repetition for effect.

- Our law punishes people **for what they do, not who they are**.
- Dr. Quijano's opinion **coincided precisely with** a particularly noxious strain of racial prejudice, **which itself coincided precisely with** the central question at sentencing.

Wording Wonders

7. Don't fear "that."

- The first, Dr. Patrick Lawrence, **observed that** Buck had . . .
- From this he **concluded that** Buck "did not present any problems in the prison setting."
- We have **held that** a litigant seeking . . .
- Buck **contends that** his attorney's introduction . . .

8. Change "regarding" and "with respect to" to "on" or "about."

- Buck's attorney called a psychologist, Dr. Walter Quijano, to offer his opinion **on** that issue.

- [T]he prosecution's questions **about** race and violence on cross-examination . . .
- A defense lawyer navigating a criminal proceeding faces any number of choices **about** how best to make a client's case.

9. Change "further" to "also."

- Buck **also** argued that the State's decision to treat him differently from the other defendants . . .
- The court **also** dismissed the contention that the nature of Dr. Quijano's testimony argued for reopening the case.

10. Change "despite the fact that" to "although."

- **Although** we may reach the issue in our discretion . . .
- **Although** the State attempts to justify its decision to treat Buck differently from . . .

11. Change "Moreover" and "Additionally" at the beginning of a sentence to "And."

- **And** the court had already concluded that . . .
- **And** in this case, the State's interest in finality deserves little weight.

12. Change "due to the fact that" to "because."

- **Because** Buck had . . .
- **Because** Buck's petition . . .

13. Change "However" at the beginning of a sentence to "But" or "Yet."

- **But** he also stated that one of the factors . . .
- **But** the question for the Fifth Circuit was not whether . . .
- **But** our holding on prejudice makes clear that . . .

14. Change "is unable to" or "lacks the capacity to" to "cannot."

Buck **cannot** obtain relief unless he is entitled to the benefit of this rule . . .

15. Change "in the event [that]" to "if."

- **If** the jury did not impose a death sentence . . .
- [B]oth parties litigated this matter on the assumption that *Martinez* and *Trevino* would apply **if** Buck reopened his case.

16. Change "where" for conditions to "if" or "when."

- We held that **when** a state formally limits the adjudication of claims of ineffective assistance of trial counsel to collateral review . . .
- **When** a defendant's own lawyer puts in the offending evidence . . .

17. Change “similar to” to “like.”

- **Like** Dr. Lawrence, Dr. Quijano thought it significant that . . .
- [H]is case would be treated **like** Saldano’s . . .

18. Change “is required to” to “had to” or “must.”

- Given that the jury **had to** make a finding of future dangerousness before . . .
- To satisfy *Strickland*, a litigant **must** also demonstrate prejudice.

19. Change “upon” to “on.”

- Based **on** these considerations, Dr. Lawrence determined that . . .
- In 2006, a Federal District Court relied **on** that failure . . .

20. Change “demonstrates” to “shows.”

- A defendant who claims to have been denied effective assistance must **show** both that counsel . . .
- [T]he prisoner has failed to **show** that his claim is meritorious.

21. Change “such” to “that.”

Texas confessed error on **that** ground, and this Court vacated the judgment below.

22. Change “subsequently” to “later” or “then.”

- . . . and **then** had confessed error in the other cases . . .
- His case **then** entered a labyrinth of state and federal collateral review . . .
- An officer would **later** testify that Buck was laughing at the scene.

23. Change “in order to” to “to.”

To satisfy *Strickland* . . .

24. Change “pursuant to” to “under.”

- The court noted that **under** *Strickland*, Buck . . .
- **Under** state law, the jury could impose a death sentence only if . . .

25. Change “whether or not” to “whether.”

- [T]he only question is **whether** the applicant has shown that . . .
- In determining **whether** Buck was likely to pose a danger in the future . . .

Of course, you could also have these edits and thousands more made automatically.

Five Ways to Write Like John Roberts The Brief-Writer

www.briefcatch.com/blog/five-ways-to-write-like-john-roberts-the-brief-writer1

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” brief writer to write about the “best” technology for an electric generator, the result in Alaska v. EPA was also the “best” brief that the Justices had ever seen.

So how did Roberts do it? At least 30 techniques distinguish his writing from the norm.

Here are five of the easiest ones to use in your own writing.

1. Let Your Facts “Show, Not Tell.”

The facts in a brief should read like narrative nonfiction, a bit like something you’d read in The Atlantic or perhaps in A River Runs Through It. Watch how Roberts explains the way the Red Dog Mine, the accused polluter, got its name:

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

Now why would Roberts mention an Irish Setter? What does a shotgun-flying dog have to do with the Clean Air Act or administrative law? Is the passage just a flourish of elegant writing that ultimately wastes everyone’s time? **Not at all.** Roberts is litigating a classic federalism fight between the states and the federal government. And who knows how a mine fits into the community better than the local and state officials close to the ground?

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

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

2. Add Speed Through Short and Varied Transitions

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

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

***But** the EPA cannot claim that ADEC’s decision was “unreasoned.”*

***Nor** can the EPA assert that ADEC’s determination in any way results in emissions exceeding national standards or permitted increments.*

***How** to control emissions within those standards . . . was for the State to decide.*

Also vary the logical links you use. Most lawyers stick to eight or so of the tried-and-true —moreover, accordingly, however. A great advocate might use 50 or more "signposts" to help the judge track the brief's internal logic. Roberts uses such varied signals as at bottom, also, under that approach, in short, to this end, because, then, for example, in each case, nowhere, in any event, of course, instead, to begin with, indeed, and thus, just to name a few.

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

*The EPA **thus** regards the state review process as the means by which . . . . [NOT **Therefore**, the EPA]*

*Congress **also** established a preconstruction review and permitting process . . . [NOT **Additionally**, Congress established]*

*The court **then** went on to hold that the EPA had not acted arbitrarily or capriciously . . . . [NOT **Subsequently**, the court went on to hold]*

3. Add Elegance and Clarity Through Parallel Constructions.

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

Sometimes, you can create a streamlined parallel list:

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

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

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

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

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

4. Add Interest Through Short Sentences, Examples, and Figures of Speech.

Variety in your prose is another way to ensure a standout brief. After all, nothing is more tedious than an endless series of medium-long sentences that follow predictable and repetitive patterns.

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

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

The basic division of responsibilities carried through to the PSD program.

The EPA, however, had no authority to do so.

Of course, that is just the point.

So too here.

Second, as in the earlier car analogy, **an example** is often a terrific way to bring an abstract legal point to life. Consider this series of examples. This time, Roberts is claiming that what's "best" for one state (such as Alaska) might not be best for another—another variation on the Ferrari vs. Volkswagen theme:

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

Third, a **well-chosen figure of speech** can be priceless, as long as you're explaining a complex legal point and not taking a potshot at the other side:

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

5. End with a Bang.

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

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

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

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

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:

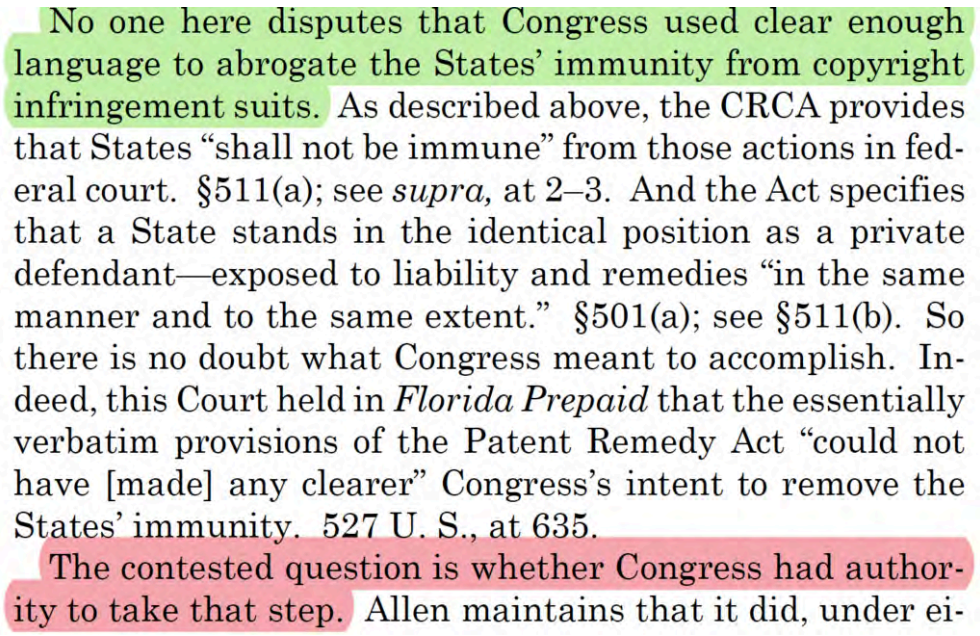
I

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 techniques to try at home.**

1. Sharpen the Flashpoint of the Dispute—Contrast What the Parties Agree on with What They Don't.

One of the best advocacy techniques, which I call "Flashpoint" in *Point Made*, is to juxtapose what a case is about with what it's not about or, as here, what brings the two sides together with what draws them apart:



No one here disputes that Congress used clear enough language to abrogate the States' immunity from copyright infringement suits. As described above, the CRCA provides that States "shall not be immune" from those actions in federal court. §511(a); see *supra*, at 2–3. And the Act specifies that a State stands in the identical position as a private defendant—exposed to liability and remedies "in the same manner and to the same extent." §501(a); see §511(b). So there is no doubt what Congress meant to accomplish. Indeed, this Court held in *Florida Prepaid* that the essentially verbatim provisions of the Patent Remedy Act "could not have [made] any clearer" Congress's intent to remove the States' immunity. 527 U. S., at 635.

The contested question is whether Congress had authority to take that step. Allen maintains that it did, under ei-

2. Favor Tight, Modern Language and Vivid Verbs.

A master of crisp style, Kagan's options always combine the use of vivid verbs (light blue) with punchy, modern language (green).

To decide whether a law passes muster, this Court has framed a type of means-end test. For Congress's action to fall within its Section 5 authority, we have said, "[t]here must be a congruence and proportionality between the injury to be prevented or remedied and the means adopted to that end." *Boerne*, 521 U. S., at 520. On the one hand, courts are to consider the constitutional problem Congress faced—both the nature and the extent of state conduct violating the Fourteenth Amendment. That assessment usually (though not inevitably) focuses on the legislative record, which shows the evidence Congress had before it of a constitutional wrong. See *Florida Prepaid*, 527 U. S., at 646. On the other hand, courts are to examine the scope of the response Congress chose to address that injury. Here, a critical question is how far, and for what reasons, Congress has gone beyond redressing actual constitutional violations. Hard problems often require forceful responses and, as noted above, Section 5 allows Congress to "enact[] reasonably prophylactic legislation" to deter constitutional harm. *Kimel*, 528 U. S., at 88; *Boerne*, 521 U. S., at 536 (Congress's conclusions on that score are "entitled to much deference"); *supra*, at 10. But "[s]trong measures appropriate to address one harm may be an unwarranted response to another, lesser one." *Boerne*, 521 U. S., at 530. Always, what Congress has done must be in keeping with the Fourteenth Amendment rules it has the power to "enforce."

3. Craft Paragraph Openers That Flow from One to the Next, with Each Contributing a Piece of a Larger Puzzle.

In the best legal and judicial writing, paragraph openers are far more than just topic sentences. As you can see below, Kagan's paragraph openers for **Section II.B** meld into a single analytical unit:

- Section 5 of the Fourteenth Amendment, unlike almost all of Article I, can authorize Congress to strip the States of immunity.
- For an abrogation statute to be "appropriate" under Section 5, it must be tailored to "remedy or prevent" conduct infringing the Fourteenth Amendment's substantive prohibitions.
- To decide whether a law passes muster, this Court has framed a type of means-end test.
- All this raises the question: When does the Fourteenth Amendment care about copyright infringement?
- Because the same is true of patent infringement, Florida Prepaid again serves as the critical precedent.

4. End Each Paragraph with a Springboard to the Beginning of the Next.

Also on the structural side: with gurus like Justice Kagan, at the end of each paragraph it's almost as if the writer is staging a conversation with an imaginary reader. She knows she's fleshed out the opening sentence, and now it's time to take the reader by the hand and right into the next paragraph. As here:

Paragraph End: That power, the Court has long held, **may enable Congress to abrogate** the States' immunity and thus subject them to suit in federal court.

> **Next Paragraph Start: For an abrogation statute to be "appropriate"** under Section 5, it must . . .

Paragraph End: That means a congressional abrogation is valid under Section 5 **only if it sufficiently connects** to conduct courts have held Section 1 to proscribe.

> **Next Paragraph Start:** To decide **whether a law passes muster**, this Court has framed a type of means-end test.

Paragraph End: Always, what Congress has done must be in **keeping with the Fourteenth Amendment rules** it has the power to "enforce."

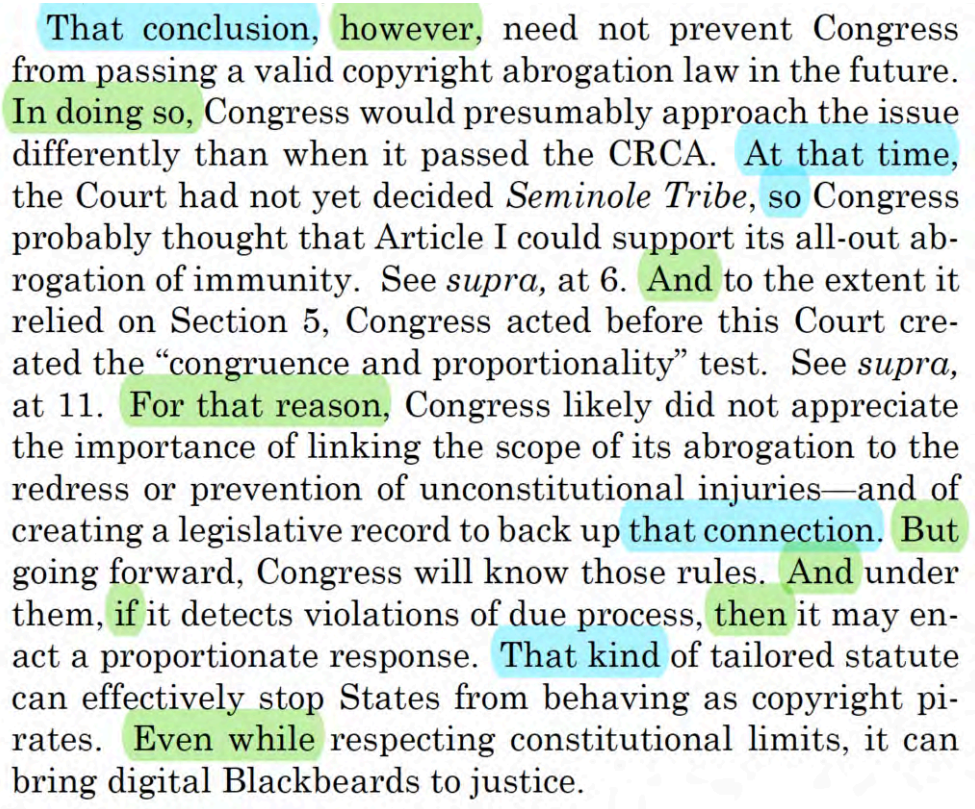
> **Next Paragraph Start:** All this raises the question: When does the **Fourteenth Amendment care** about copyright infringement?

Paragraph End: That means within the broader world of state copyright infringement is **a smaller one where the Due Process Clause** comes into play.

> **Next Paragraph Start:** Because **the same is true** of patent infringement, *Florida Prepaid* again serves as the critical precedent.

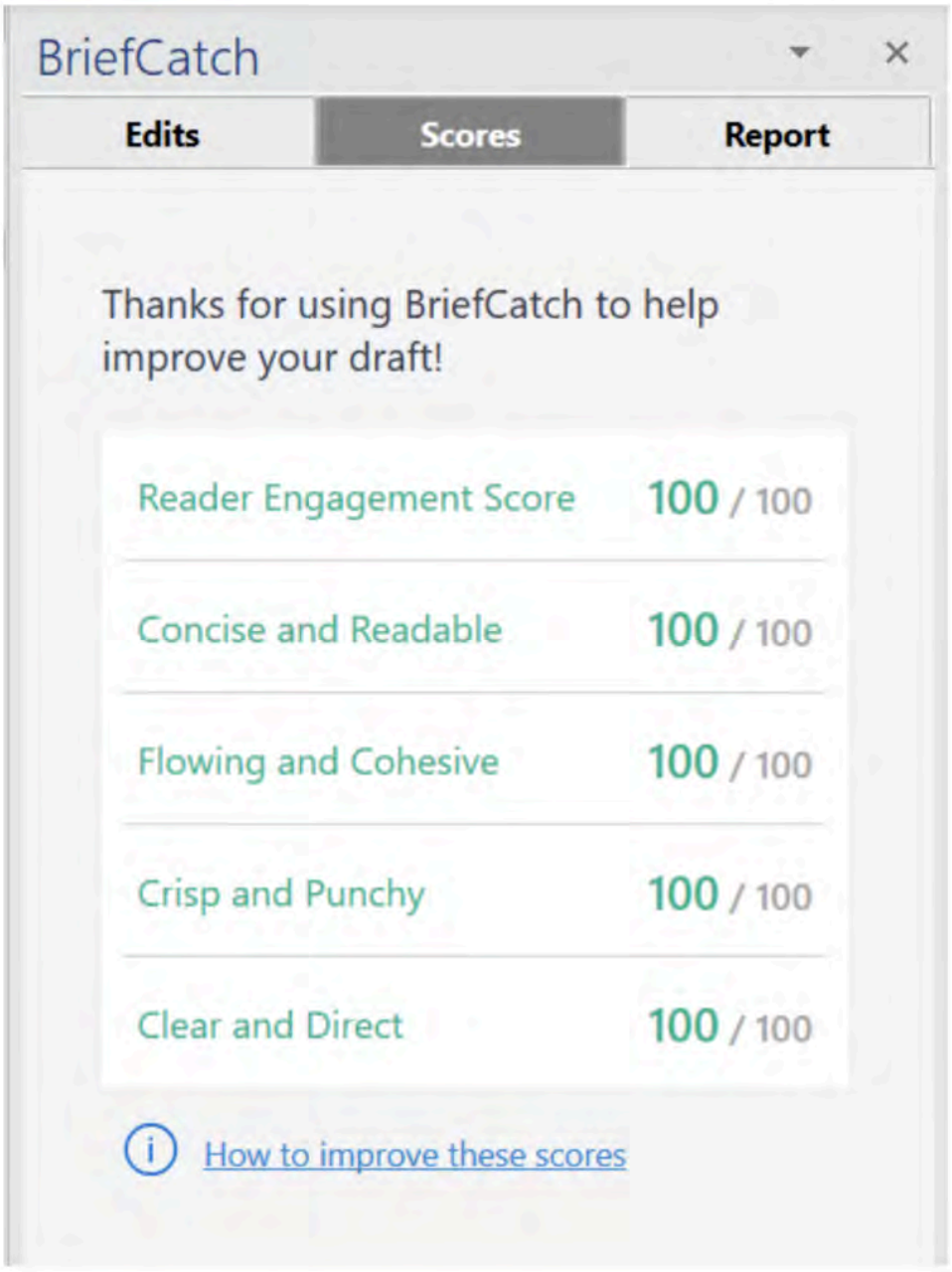
5. Sprinkle your Analytical Paragraphs with Logical Transitions and Logical Links to the Previous Sentence.

Now we have a big-picture contrast, brisk and confident word choice, a forward march of paragraph openers, and bridges between the paragraphs as well. But there's one more ingredient (at least for today): within the paragraphs, an enticing mix of logical connectors (green) and semantic links between the sentences (light blue).



That conclusion, however, need not prevent Congress from passing a valid copyright abrogation law in the future. In doing so, Congress would presumably approach the issue differently than when it passed the CRCA. At that time, the Court had not yet decided *Seminole Tribe*, so Congress probably thought that Article I could support its all-out abrogation of immunity. See *supra,* at 6. And to the extent it relied on Section 5, Congress acted before this Court created the "congruence and proportionality" test. See *supra,* at 11. For that reason, Congress likely did not appreciate the importance of linking the scope of its abrogation to the redress or prevention of unconstitutional injuries—and of creating a legislative record to back up that connection. But going forward, Congress will know those rules. And under them, if it detects violations of due process, then it may enact a proportionate response. That kind of tailored statute can effectively stop States from behaving as copyright pirates. Even while respecting constitutional limits, it can bring digital Blackbeards to justice.

That's a lot for a writer to pull off. Marrying ruthless command over structure, generous logical signposts, and a tight, light style is no mean feat. I was not surprised, in fact, to see that Kagan's opinion won the Royal Flush of BriefCatch Scores:


BriefCatch
Edits
Scores
Report
Thanks for using BriefCatch to help improve your draft!
Reader Engagement Score 100 / 100
Concise and Readable 100 / 100
Flowing and Cohesive 100 / 100
Crisp and Punchy 100 / 100
Clear and Direct 100 / 100
How to improve these scores

Five Ways to Write Like George Conway III

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.” and “B.” and “C.” in just a few paragraphs?

To the rescue: inline subheads. They’re sleek and discreet. And Conway seems to love them.

He gets a two-for-one in his reply brief below. Conway first organizes his analysis through a helpful numbered list (green), and then he returns to each item through a matching inline subhead (light blue). The subheads are stylishly formatted in ***bold italics*** and end with a period or question mark, not a colon.

Plaintiffs have failed to plead particularized facts giving rise to a strong inference of scienter.

Plaintiffs' contention that they have pleaded a strong inference of scienter boils down to three things: *first*, CEO Yosef Shiran's signatures on the 2012 and 2014 Mikroman agreements, *see* Pl. Mem. 18–19; *second*, the so-called "core operations" doctrine, *id.* at 19–20; and, *third*, Shiran's exercise of his stock options, which they say establish "motive and opportunity," *id.* at 21–23. None of these establishes a cogent and compelling inference of fraudulent intent.

The Mikroman supply agreements. Shiran's execution of the 2012 and 2014 Mikroman agreements fails to establish scienter for the same reason that those agreements fail to establish a false or misleading statement: while the agreements establish what *Mikroman* was charging for

* * *

The "core operations" doctrine. As for the so-called "core operations" doctrine, it may not even exist. The seminal "core operations" case, *Cosmas* v. *Hassett*, 886 F.2d 8 (2d Cir. 1989), "was decided prior to the enactment of the PSLRA," and the Second Circuit has "not yet expressly addressed whether, and in what form, the 'core operations' doctrine survives as a viable theory of scienter." *Frederick* v. *Mechel OAO*, 475 F. App'x 353, 356 (2d Cir. 2012).

* * *

"Motive and opportunity." Finally, plaintiffs have failed to satisfy the "motive and opportunity" prong of the scienter analysis, which of course makes their burden "correspondingly greater." *ECA*, 553 F.3d at 199 (citation omitted). Quite understandably, they entirely *punt* on—they fail to address *at all*—the fact that the Shiran stock sales alleged in their complaint were nothing but "[i]ncentive compensation," in the form of exercises of "stock options that became exercisable," and thus cannot "give rise to a 'strong inference' of an intent to deceive." *Acito* v. *IMCERA Grp., Inc.*, 47 F.3d 47, 54 (2d Cir. 2001); *see* Def. Mem. 19–20 (citing additional cases). They have nothing to say on this point because there *is* nothing to say.

2. Lighter Than Air

Organization is key. But is there more to Conway's style than stylish subheads?

Surely. Mr. Conway, like the best writers (legal or otherwise), favors light sentence openers over their longer counterparts, such as "Furthermore" and "Consequently" and "Pursuant to."

The "core operations" doctrine. As for the so-called "core operations" doctrine, it may not even exist. The seminal "core operations" case, *Cosmas* v. *Hassett*, 886 F.2d 8 (2d Cir. 1989), "was decided prior to the enactment of the PSLRA," and the Second Circuit has "not yet expressly addressed whether, and in what form, the 'core operations' doctrine survives as a viable theory of scienter." *Frederick* v. *Mechel OAO*, 475 F. App'x 353, 356 (2d Cir. 2012). And given "the trajectory of 'core operations' law in this and other circuits, … the future of the doctrine may be tenuous. Indeed, the plain language of the PSLRA, which requires facts supporting the scienter inference to be 'state[d] with particularity,' would seem to limit the force of general allegations about core company operations." *In re Wachovia Equity Sec. Litig.*, 753 F. Supp. 2d 326, 353 (S.D.N.Y. 2011) (quoting 15 U.S.C. § 78u–4(b)(1) and surveying conflicting case law). As a result, if the "core operations" doctrine survives the PSLRA at all, it can at most provide only "supplementary but not independently sufficient means to plead scienter." *Id.*[4]

But whatever the theory's status is, it helps plaintiffs not a whit here. For on this much the courts agree: "Proof under this theory is not easy." *Police Ret. Sys. of St. Louis* v. *Intuitive Surgical, Inc.*, 759 F.3d 1051, 1062 (9th Cir. 2014). Even *plaintiffs'* cases say that they must *still* plead—with *particularity*—"'contradictory facts of critical importance … [that] either were apparent, or should have been apparent,'" before those facts "may be properly ascribable to senior officers" under the "core operations" doctrine. *In re JP Morgan Chase Sec. Litig.*, 363 F.

3. Story Time

It's not easy to muster up passion, even manufactured passion, for the scienter standard or the distinction between an investigation and an administrative proceeding. Like all the greats, though, Conway overcomes the challenge by slipping many story-telling techniques past the fortified formality of briefs.

Lively thinking prompts lively transitions. Precise, varied, generous, and vigorous transitions are hallmarks of first-rate analytical writing. Of all the factors that combine into our five BriefCatch scores for legal documents, the quality of transitions has one of the highest correlations with the writer's reputation.

he conveys a sense of time through words, not dates:

> **little more than a month before** the settlementthe SEC settlement that went through **five weeks later**announced the final settlement the **next monthsome four days after** the SEC settlement was announced

***Second*, he has a knack for vivid verbs:**

> both **hinge** on a pairask this Court to **indulge**attempts to **bolster**That **suffices** to defeat**get no traction** from quality**turns on** the difference**regurgitates** a lot of facts**double down** on their claimno facts to **back** that

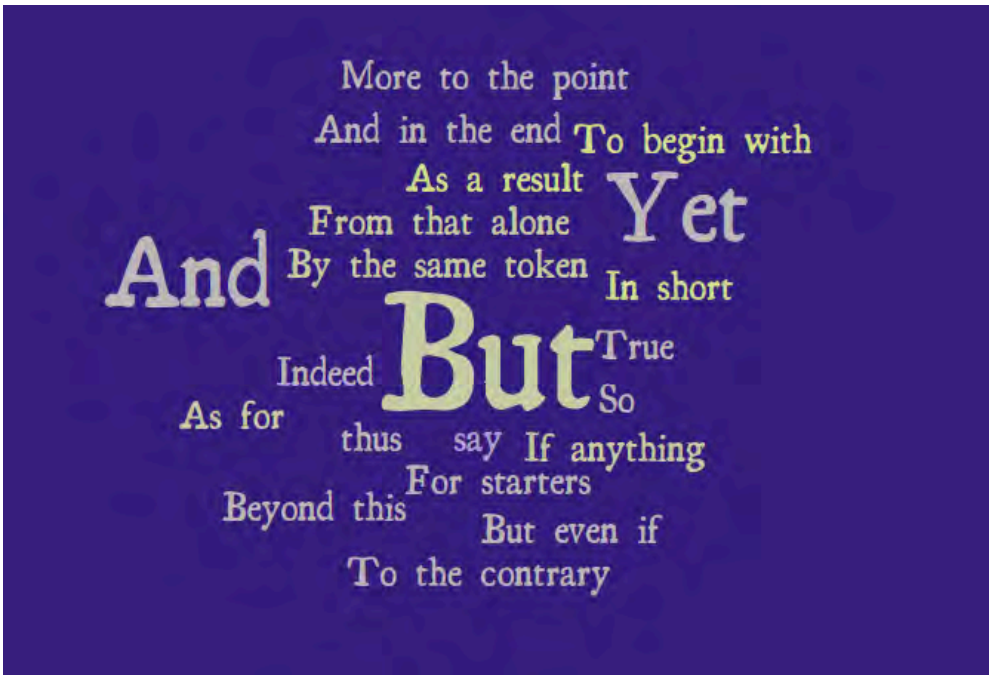
***Third*, he's not afraid to be conversational:**

> that simply does not **cut it**for **a couple of reasons**and this is **the clincher**which **brings up the main pointnot a whit**

***Finally*, he has a feel for the rhythms of speech. Just look at the build-up to the one-word sentence below!**

But on what factual basis do plaintiffs claim that quartz—*a heterogeneous category of rock*—is "a fungible commodity" in the way that, say, soybeans and sweet crude oil are? ***None.***

4. Mind Meld

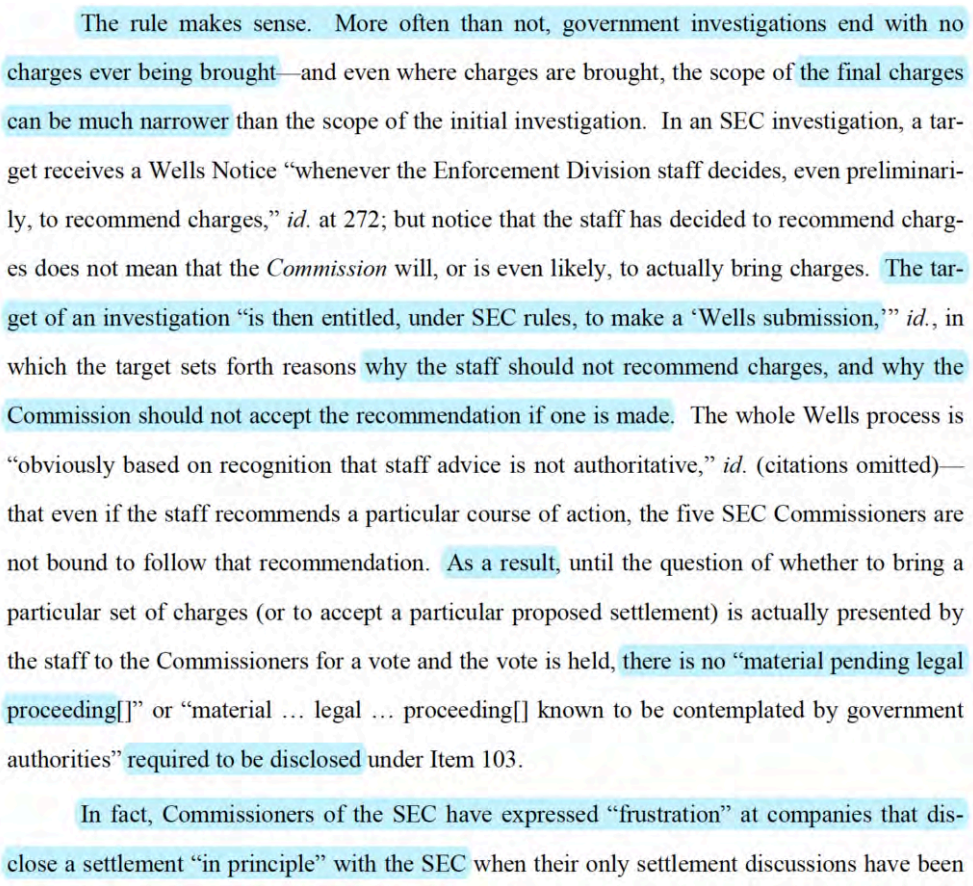


True to form, Conway floods his motions with all sorts of intricate logical moves married to transitional devices that weave the argument threads together.

Above is a transitional cloud I created from Conway's two motions. Inspiring, no? Be sure to exercise moderation even if so: adding one new transitional device a week is plenty.

5. What's Right Is Right

Legal analysis can drag both writer and reader into the weeds. The rituals of analogizing and distinguishing can become ends in themselves. That's why it can be particularly persuasive to take a step back and explain why a rule or doctrine makes sense. Conway does that effectively in the Lionsgate excerpt below. He argues not only that a regulation doesn't require disclosure but that it shouldn't:



The rule makes sense. More often than not, government investigations end with no charges ever being brought—and even where charges are brought, the scope of the final charges can be much narrower than the scope of the initial investigation. In an SEC investigation, a target receives a Wells Notice "whenever the Enforcement Division staff decides, even preliminarily, to recommend charges," *id.* at 272; but notice that the staff has decided to recommend charges does not mean that the *Commission* will, or is even likely, to actually bring charges. The target of an investigation "is then entitled, under SEC rules, to make a 'Wells submission,'" *id.*, in which the target sets forth reasons why the staff should not recommend charges, and why the Commission should not accept the recommendation if one is made. The whole Wells process is "obviously based on recognition that staff advice is not authoritative," *id.* (citations omitted)—that even if the staff recommends a particular course of action, the five SEC Commissioners are not bound to follow that recommendation. As a result, until the question of whether to bring a particular set of charges (or to accept a particular proposed settlement) is actually presented by the staff to the Commissioners for a vote and the vote is held, there is no "material pending legal proceeding[]" or "material … legal … proceeding[] known to be contemplated by government authorities" required to be disclosed under Item 103.

In fact, Commissioners of the SEC have expressed "frustration" at companies that disclose a settlement "in principle" with the SEC when their only settlement discussions have been

For reasons unrelated to his day job, Mr. Conway is likely the world's most glamorous securities litigator, and he might be the world's most controversial one as well. Writing reply briefs isn't glamorous, I admit, but I hope that this much isn't controversial, either: whatever you think of Conway's Twitter missives, he is one heck of a legal writer.

Five Grammar Myths Debunked

www.briefcatch.com/blog/debunk-five-grammar-myths1

For scams and urban legends, check 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."

Merriam-Webster Usage Notes: "If you're going to create a silly-sounding acronym, . . . then go whole-hog and list all of the words that schoolchildren have been told not to put at the beginnings of sentences over the past 200 years. We crafted one for you that helpfully looks like a web address: WWWFLASHYBONNBAN, which stands, obviously, for, **whether, well, why, for, likewise, and, so, however, yet, but, or, nor, now, because, also, nevertheless."**

American Heritage Guide to Contemporary Usage and Style: Starting sentences with conjunctions is "rhetorically effective" (p. 70).

Joseph Williams, *Style*: "Just about any highly regarded writer of nonfictional prose begins sentences with and or but, some more than once a page" (p. 182).

Garner's Modern American Usage: "It is a gross canard that beginning a sentence with but is stylistically slipshod" (p. 121).

Fowler's Modern English Usage, 2nd ed.: "That it is a solecism to begin a sentence with and is a faintly lingering superstition. The OED gives examples ranging from the 10th to 19th c.; the Bible is full of them" (p. 29).

Wilson Follett, Modern American Usage: "A prejudice lingers from a bygone time that sentences should not begin with and. The supposed rule is without foundation in grammar, logic, or art. And can join separate sentences and their meanings just as but can both join sentences and disjoin meanings" (p. 27).

Merriam-Webster's Dictionary of English Usage: "Everybody agrees that it's all right to begin a sentence with and, and nearly everybody admits to having been taught at some past time that the practice was wrong. . . . Few commentators have actually put the prohibition in print; the only one we have found is George Washington Moon (1868)" (p. 93).

Myth Two: You can never split an infinitive.

What it would mean if true: The Star Trek writers should have rewritten this famous sentence: "To boldly go where no man has gone before."

Who says it's a myth:

Chicago Manual of Style, 17th ed.: "It is now widely acknowledged that adverbs sometimes justifiably separate the to from the principal verb" (5.108).

The Guardian: “Maybe 100 years ago, splitting an infinitive meant, ‘I don’t know my grammar rules’, because they were usually avoided by people who did. However, now that most people, including language experts, are relaxed about split infinitives, that changes. Indeed, taking trouble carefully to avoid them means: ‘I’m a bit fussy and old-fashioned.’”

Grammar Girl Quick and Dirty Tips: “The only logical reason to avoid splitting infinitives is that there are still a lot of people who mistakenly think it is wrong. If you write from a position of power, split your infinitives as much as you want. Be guided by the sound and flow of your sentence. On the other hand, if you have to please others or avoid complaints, it’s safer to avoid splitting infinitives. There’s no reason to deliberately split infinitives when you know it’s going to upset people.”

The Elements of Style, 4th ed.: “Some infinitives seem to improve on being split,” as in “I cannot bring myself to really like that fellow” (p. 113).

American Heritage Guide to Contemporary Usage and Style: “[T]he split infinitive is distinguished [by both] its length of use and the greatness of its users . . . noteworthy splitters include . . . Abraham Lincoln, George Eliot, Henry James, and Willa Cather” (p. 441).

Barbara Wallraff, *Word Court:* “Splitting an infinitive is preferable both to jamming an adverb between two verbs . . . and to ‘correcting’ a split in a way that gives an artificial result” (p. 99).

Fowler’s Modern English Usage, 2nd ed.: “We admit that separation of to from its infinitive is not in itself desirable,” but “we will split infinitives sooner than be ambiguous or artificial” (p. 581).

Myth Three: You can’t split a verb phrase.

What it would mean if true: You would have to write “he usually will take an extreme position,” not “he will usually take an extreme position.”

Who says it’s a myth:

Chicago Manual of Style, 17th ed.:“There has never been a rule against placing an adverbial modifier between the auxiliary verb and the principal verb in a verb phrase. In fact, it’s typically preferable to put the adverb there” (5.171).

Garner’s Modern American Usage:“[M]ost authorities squarely say that the best place for the adverb is in the midst of the verb phrase” (p. 23).

Wilson Follett, Modern American Usage: “With a compound verb—that is, one made with an auxiliary and a main verb—the adverb comes between auxiliary and main verb (He will probably telephone before starting)” (p. 18).

Merriam-Webster's Dictionary of English Usage: "This bugaboo, commentators agree, seems to have sprung from fear of the dread split infinitive" (p. 36).

Fowler's Modern English Usage, 2nd ed.: "It is probably a supposed corollary of the accepted split-infinitive prohibition; at any rate, it is entirely unfounded. . . . There is no objection whatever to dividing a compound verb by adverbs" (pp. 464-65).

Myth Four: You can't end a sentence with a preposition.

What it would mean if true: You would have to mimic Winston Churchill, who famously mocked the alleged rule by saying, "This is the type of arrant pedantry up with which I shall not put."

Who says it's a myth:

Chicago Manual of Style, 17th ed.: This rule imposes "an unnecessary and pedantic restriction" (5.180).

Benjamin Dreyer (author, Dreyer's English): "[T]o tie a sentence into a strangling knot to avoid a prepositional conclusion is unhelpful and unnatural, and it's something no good writer should attempt, and no eager reader should have to contend with."

Grammar Girl Quick and Dirty Tips: "I've read long, contorted arguments from noted grammarians about why it's OK to end sentences with prepositions when the preposition isn't extraneous, but the driving point still seems to be, 'Nobody actually talks this way.' Yes, you could say, 'On what did you step?' but not even grammarians think you should. It usually sounds pedantic."

Garner's Modern American Usage: The rule is "spurious" (p. 654).

Patricia O'Connor, Woe is I: "This idea caught on, even though great literature from Chaucer to Shakespeare to Milton is bristling with sentences ending in prepositions" (p. 183).

Fowler's Modern English Usage, 2nd ed.: "It was once a cherished superstition that prepositions must be kept true to their name and placed before the word they govern in spite of the incurable English instinct for putting them late" (p. 473).

Myth Five: You can't start a sentence with because.

What it would mean if true: Emily Dickinson made a mistake when she wrote, "Because I could not stop for Death, He kindly stopped for me."

Who says it's a myth:

Grammar Girl Quick and Dirty Tips: “It’s OK to start a sentence with “because”; you just have to make sure you’re writing complete sentences and not sentence fragments.”

Cambridge Dictionary: “We often put the because-clause at the beginning of a sentence, especially when we want to give extra focus to the reason.”

American Heritage Guide to Contemporary Usage and Style: Starting a sentence with “because” is “perfectly appropriate” (p. 53).

Mark Davidson, *Right, Wrong, and Risky*: Starting a sentence with “because” is “fully accepted” (p. 105).

Joseph Williams, *Style*: “[T]his particular proscription appears in no handbook of usage I know of” (p. 181).

Garner’s Modern American Usage: This “odd myth [that] seems to have resulted from third-grade teachers who were trying to prevent fragments” (p. 92).

Merriam-Webster’s Dictionary of English Usage: “This rule is a myth. Because is frequently used to begin sentences,” often “for greater emphasis” (p. 171).

And now we can go back to debating that moon landing.

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

www.briefcatch.com/blog/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, here are eight of the most common issues below:

1. Misuse of Mid-Sentence 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, read this article 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.**

Note: You need **me** in both cases. In the first example, Jone Doe and myself are objects of the verb ***contact.*** In the second example, the client and myself are the objects of the verb ***led***. Thus, the object pronoun **me** is correct in both.

3. Who vs. whom

Tip: Recast the sentence by inserting **she** or **her**. If **she** works, use ***who***. If it's **her**, use **whom**. So in

> "She is someone **whom** I once thought would go to prison," the **whom** should be ***who***: "I thought **she** would go to prison," not "I thought **her** would go to prison."

4. Tense-Sequence Errors in a Sentence or Provision

Tip: Stick to the present tense when possible. In condition-consequence constructions, use present tense for the condition clause and "will" for the consequence clause:

> **Proper Construction:** If employment **terminates**, all benefits **will** terminate**.**

5. Since vs. Because

Since: Use **since** only for **time:** I haven't heard from her **since Friday.**

Because: Use **because** for **cause and effect**: **Because I haven't** heard from her, **I assume** she will reject the proposal.

6. Fewer vs. Less

Fewer: If you **can count it**, use **fewer**: Our client has **received fewer complaints** than usual.

7. Using 'their' with a Singular Collective Noun Such as a Client, Party, or Law Firm

Tip: In American English, unlike in British English, these words take **it** or **its**, not **their**: “**The Bank** has been known to underreport **its liabilities**.”

8. Errors with Possessive Apostrophes

Tip: Watch for common typos with words like Debtors’, Debtor’s, and Debtors. Also decide how you’re going to make the possessive form of a word ending in –s like *Ross*.

Preliminary Statements and Introductions: Checklists and Models

www.briefcatch.com/blog/preliminary-statements-and-introductions-checklists-and-models

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 the parties? *When and where and how* did the dispute take place? *What* question is the case trying to answer? *Why* should you win? Your answers should both prep the court for what's to come and sound themes that work to your client's advantage.

Eric Holder's motion to dismiss, *In re Chiquita Brands Int'l*

Plaintiffs in this action are **relatives of five American missionaries** who were abducted for ransom and tragically murdered in the mid-1990s by a communist **guerilla group** in **Colombia**, known as the Fuerzas Armadas Revolucionarias de Colombia. **Now, more than a decade later,** they seek to hold Chiquita Brands International, Inc. liable for those deaths under the Antiterrorism Act, and Florida and Nebraska tort law. There is **no allegation, however, that Chiquita was involved** in the kidnapping and murder of the decedents, **that Chiquita intended that** these despicable acts occur, **or that Chiquita even knew** about them until plaintiffs brought this lawsuit.

George Conway III's motion to dismiss, *In re Lions Gate Ent. Corp. Secs.*

At issue in this case is whether Lions Gate Entertainment Corp. was required to disclose an SEC investigation. That investigation resulted in a settlement, announced on March 13, 2014, in which Lions Gate consented to a set of negotiated charges and agreed to pay a civil monetary penalty in an administrative proceeding before the SEC. **The charges did not involve** any assertion of intentional fraud. **They did not involve** any charges against individual officers and directors. **And they did not involve** the company's financials or the health of any line of the company's business, but rather only some unique events that had occurred during a takeover battle **some four years earlier**.

The settlement's only financial impact on the company was the civil penalty, which, at $7.5 million, amounted to less than 0.27 percent of Lions Gate's total assets at the time. The stock **did not even drop** (in fact, it rose) when, on February 6, 2014, **a little more than a month before** the settlement was concluded, Lions Gate had announced that "[g]eneral and administrative expenses increased by $18.7 million," an amount that "included an accrual related to an anticipated settlement of a legal matter that goes back several years"—which **turned out to be** the SEC settlement that went through **five weeks later**.

Beth Wilkinson's motion for summary judgment, *Roanoke River Basin Ass'n v. Duke Energy Progress*

This lawsuit is premised on a disagreement with the considered judgment of the North Carolina Department of Environmental Quality. **That state agency**, acting pursuant to authority delegated by the Environmental Protection Agency, has issued permits approving Duke Energy Progress, LLC's operation of a wastewater treatment system at the Mayo Steam Electric Generating Plant since that site opened. **This system** includes a settling basin that separates coal-ash solids from wastewater and stores those solids. **DEQ knows the basin is unlined** and that, because all earth is permeable, dissolved constituents from the ash can migrate into the surrounding groundwater. **Nonetheless, DEQ has inspected** Mayo dozens of times **and repeatedly reissued** the permit without requiring any change to the basin to make it watertight.

Logical Models

After you've spun the dispute as a narrative, explain what you want the Court to do about it and list three or four reasons it should do so. Make your reasons factual, not circular.

Cristina Arguedas's motion to dismiss the indictment, *United States v. FedEx*

[The] government subverted the grand jury's vital role as a bulwark against improper prosecutions by misleading the jurors about the two most crucial legal concepts in the case.

First, the prosecution misinstructed the grand jury concerning the proof that could satisfy the *mens rea* elements of the offenses under consideration. That instruction was incorrect: neither knowledge nor specific intent . . . .

Second, the prosecution failed to properly inform the grand jury about the line that differentiates culpable from innocent conduct. The law recognizes that carriers . . . .

Neal Katyal's respondent's brief for Minnesota in *Minnesota v. [Derek] Chauvin*

The arguments in the Petition do not change this commonsense conclusion.

First, there is no conflict in the Court of Appeals. In case after case, the Court of Appeals has confirmed that its decisions are precedential from the day they issue. Petitioner's entire theory for review rests on a single line of dictum in a single Court of Appeals decision . . . . **But the opinion below spends** three pages analyzing *Collins* and concludes that . . . .

Second, Petitioner now points to two jurisdictions which have adopted express rules limiting the precedential effect of a pending intermediate appellate decision. **But that just proves** that the Court of Appeals got it right: **Minnesota's rules *lack any* such provision**.

Pragmatic Models

Especially when you represent a not-so-sympathetic party, explain what turns on the outcome if you lose. Such consequences can include suggesting something irrational, upsetting expectations, creating unfounded rules, encouraging undesirable conduct, or discouraging desirable conduct.

Don Verrilli, *FASORP v. Harvard Law Review*

FASORP seeks extraordinary judicial relief that **would transform this Court into an Article III Editor-In-Chief**, with the responsibility to oversee the Law Review's editor- and article-selection decisions.

Mary Jo White, *In re Bank of Am. Corp. Secs., Derivative and ERISA Litig.*

[T]o hold [former Bank of America CEO] Mr. Lewis liable in these circumstances would set a novel and very troubling precedent, **exposing CEOs to liability when they follow the reasonable judgments of their subordinates** who opine and consult with counsel on complicated legal issues instead of imposing their own[] less-informed will.

Contrasting Models

“Every brief,” said former Third Circuit Judge Ruggero Aldisert, should begin by “identifying the flashpoint of controversy” by contrasting two competing views. What’s really driving the dispute?

Ruth Bader Ginsburg’s amicus brief for the ACLU, *Regents of the Univ. of Cal. v. Bakke*

The issue in this case is **not whether the Constitution compels** the University to adopt a special admission program for minorities, **but only whether the Constitution permits** the University to pursue that course.

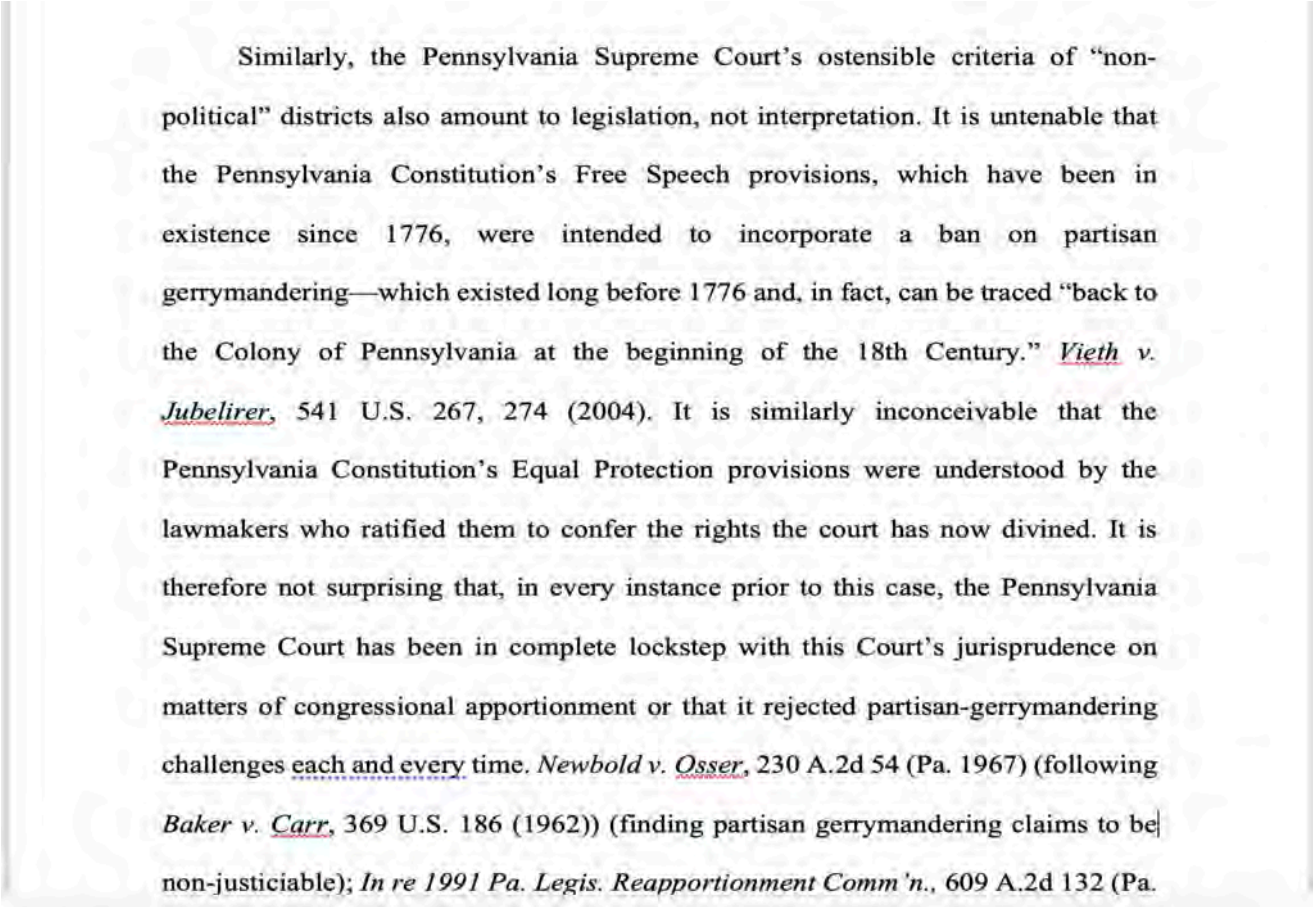
Morgan Chu’s motion for summary judgment, *Univ. of Utah v. Max Planck Gesellschaft*

At root, this is **not a case about inventorship attribution**. **Utah wants money, and lots of it**.

A BigLaw Paragraph Meets BriefCatch: A Case Study

www.briefcatch.com/blog/a-biglaw-paragraph-meets-briefcatch-a-case-study

"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:



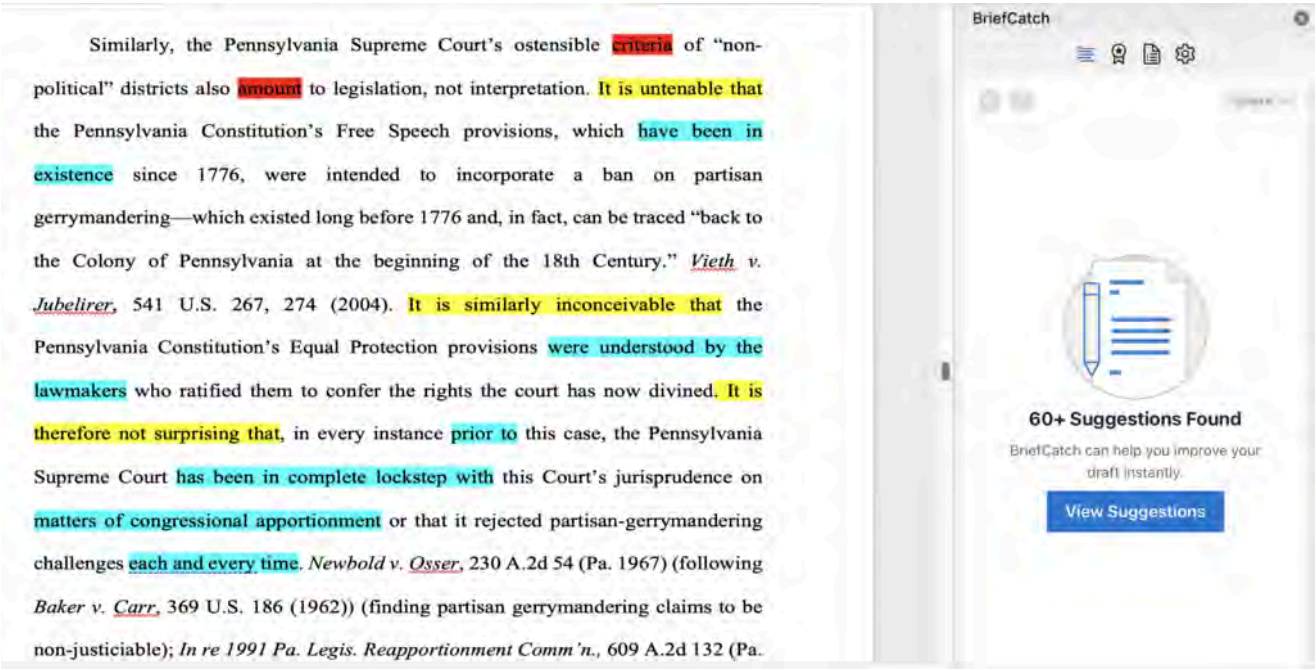
Similarly, the Pennsylvania Supreme Court's ostensible criteria of "non-political" districts also amount to legislation, not interpretation. It is untenable that the Pennsylvania Constitution's Free Speech provisions, which have been in existence since 1776, were intended to incorporate a ban on partisan 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 Supreme Court has been in complete lockstep with this Court's jurisprudence on matters of congressional apportionment or that it rejected partisan-gerrymandering challenges each and every time. *Newbold v. Osser*, 230 A.2d 54 (Pa. 1967) (following *Baker v. Carr*, 369 U.S. 186 (1962)) (finding partisan gerrymandering claims to be non-justiciable); *In re 1991 Pa. Legis. Reapportionment Comm'n.*, 609 A.2d 132 (Pa.

BriefCatch can help you find many issues in just this paragraph alone.

Throat-Clearing and Much More

The first thing to notice is the series of three throat-clearing sentences in a row: "It is untenable that . . . It is inconceivable that . . . It is therefore not surprising that . . ." These are highlighted below in yellow. We should recast the passage around actual subjects so that the reader doesn't have to process a series of shifting dummy-pronoun "it" references. (They are called dummy pronouns because they don't actually refer to anything.)

There are also a few grammatical errors (highlighted in red) and several phrases that can be tightened up to enhance readability or clarity (highlighted in light blue).



Grammatical Errors:

- In the first sentence, there is only one criterion, not several "criteria."
- Also in the first sentence, the verb should be singular: "amounts," not "amount."

Readability and Clarity Edits:

- In the third and fourth lines, "been in existence" is wordy for "existed."
- The second sentence, which runs 50 words, has an unhelpful passive construction (in blue) that obscures the sentence's point. We can also put like parts of the sentence together.
- What does "has been in complete lockstep with" mean?
- We can tighten "matters of congressional appointment" to "congressional-appointment matters."
- "In every instance" and "each and every time" (which is itself a classic wordy phrase) are redundant.

Let's make those changes:

Similarly, the Pennsylvania Supreme Court's ostensible ~~criteria~~ criterion of "non- political" districts also amounts to legislation, not interpretation. ~~It is untenable that t~~The Pennsylvania Constitution's Free Speech provisions, which have ~~been in existence~~existed since 1776, were not 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~~Nor did the lawmakers who ratified the Pennsylvania Constitution's Equal Protection provisions ~~were understood by the lawmakers who ratified them~~intend for them to confer the rights that the court has now divined. That is why until ~~It is therefore not surprising that, in every instance prior to~~ this case, the Pennsylvania Supreme Court has always ~~been in complete lockstep with~~ followed this Court's jurisprudence on ~~matters of~~ congressional- apportionment matters and ~~or that it~~ rejected all partisan-gerrymandering challenges ~~each and every time~~. *Newbold* v. *Osser*, 230 A.2d 54 (Pa. 1967) (following *Baker* v. *Carr*, 369 U.S. 186 (1962)) (finding partisan

And here's a new paragraph just seconds later: shorter, tighter, and, let's hope, clearer:

Similarly, the Pennsylvania Supreme Court's ostensible criterion of "non-political" districts also amounts to legislation, not interpretation. The Pennsylvania Constitution's Free Speech provisions, which have existed since 1776, were not 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). Nor did the lawmakers who ratified the Pennsylvania Constitution's Equal Protection provisions intend for them to confer the rights that the court has now divined. That is why until this case, the Pennsylvania Supreme Court has always followed this Court's jurisprudence on congressional-apportionment matters and rejected all partisan-gerrymandering challenges. *Newbold v. Osser*, 230 A.2d 54 (Pa. 1967) (following *Baker v. Carr*, 369 U.S. 186 (1962)) (finding partisan gerrymandering claims to be non-justiciable); *In re 1991 Pa. Legis. Reapportionment Comm'n.*, 609 A.2d 132 (Pa. 1992) (following *Bandemer*, 478 U.S. at 109) (finding that partisan

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.

One strategy is to embed unfavorable facts in **Although** clauses and then turn the reader's attention elsewhere. In the copyright case of *Aguiar v. Webb*, for example, Larry Lessig had to defend a filmmaker who had used protected footage of the fighter Count Dante in a trailer for his own documentary. Lessig acknowledged the use of the footage but minimized its length, importance, and visibility:

It is not disputed that Defendant Webb used a portion of the Footage in one of the trailers for his biographical documentary about Count Dante. That trailer, as well as a still image of the portion of the trailer containing the Footage, is already before the Court. In the trailer, the Footage runs for approximately **fifteen seconds** as **part of a collage** of images. The

Footage appears **in the background**, with a photograph of Count Dante in the foreground. The Footage is also **obscured** in part by the text of a quotation by Count Dante. *Although perhaps it can be inferred that one of the fighters is Count Dante*, the other fighter is **not mentioned** or identified explicitly or by inference. The faces of both fighters are **washed out** and **barely visible**.

Here, too, in Ted Olson's prevailing brief in *Citizens United v. FEC* he used an **Although** clause to acknowledges that the film “Hillary: The Movie” was distributed during Hillary Clinton’s campaign for president, but he stressed that the film did not “expressly advocate” her defeat:

In mid-2007, Citizens United began production of Hillary: The Movie, a biographical documentary about Senator Hillary Clinton, who was then a candidate to become the Democratic Party’s nominee for President. *Although Senator Clinton’s candidacy was the backdrop for the 90-minute documentary*, **neither the movie’s narrator nor any of the individuals interviewed** during the movie **expressly advocated her election or defeat** as President. The movie instead presents a critical assessment of Senator Clinton’s record as a U.S. Senator and as First Lady in order to educate viewers about her political background.

By showing confidence as you both concede bad facts and reassure wary readers, you will adopt a compelling and convincing voice while stopping your opponent from spinning those facts and beating you to the punch. As the late D.C. Circuit Chief Judge Patricia Wald once put it, “The facts give the fix.” Keep a poker face as you let them do their job!

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

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.

Innocent on Count One: Shorthand Adverbs

The *Journal* article makes much of high-profile cases over adverbs like *knowingly* or *substantially*.

But no language expert has ever suggested that we could avoid such "shorthand" adverbs even if we wanted to. The great linguist Geoffrey Pullum offers the adverb *carefully* as an example: Stripped of the adverb *carefully*, Pullum notes, the sentence "*Defusing a bomb must be done carefully"* would morph into the nonsensical "*Defusing a bomb must be done." Carefully* here, like *reasonably* in a commercial contract or *recklessly* in a criminal statute, is purposely vague: There's no way to define ahead of time exactly what conduct would be "careful" or "reckless" or "reasonable."

(True, you could replace shorthand adverbs like *carefully* with long phrases like *while exercising abundant caution*, but to what end?)

Justice Kennedy makes this very point in the article—though *unknowingly* so. Instead of using adverbs as "a cop-out," Kennedy is quoted as saying, "you just discipline yourself to choose your words more carefully." Oops. Did Kennedy just violate his own anti-adverb rule?

Innocent on Count Two: Frequency Adverbs

Consider another type of adverb-laden sentence:

Courts *rarely* find for plaintiffs in these cases.

I have *always* loved you.

The Agency has *consistently* argued as much.

Thank goodness for adverbs that tell us how often something happens. If you cut adverbs like these from your sentences, you would be lying. And I can't put it more *bluntly* than that.

Guilty on Count Three: Prop-Up Adverbs

So much for the innocents. Now let's venture into Stephen King territory: "guilty" adverbs that are superfluous or that prop up a weak verb.

When writing, we often (note the proper "frequency" adverb), type the first verb that comes to our mind, realize that it's not quite right, and then plop in an adverb to clean up the mess. A better strategy? Take a deep breath and search for a precise, vivid verb.

The *Journal* article *unwittingly* offers up a case in point: "On the Supreme Court, Associate Justice Anthony Kennedy has assiduously sought to banish them from his own prose."

Assiduously sought? Let's do the math: Assiduously + sought = ? How about "Kennedy has **strived**"?

But we shouldn't stop there:

> reluctantly + stated = **conceded**dramatically + increased = **jumped**painstakingly + examined = **scrutinized**assertively + claimed = **insisted**

Guilty on Count Four: Rhetorical Adverbs

Now let's talk about rhetorical adverbs, which come in two flavors:

- "I'm so right": *clearly*, *obviously*, *patently* (these are often known as "intensifier" adverbs)
- "They're so wrong": *blatantly*, *speciously*, *preposterously*

Both sets violate the "Show, Don't Tell" principle. If your point is so clear, then just state it clearly. And if the other side's points are so *blatantly* specious or *preposterously* illogical, then let your words speak for themselves.

Guilty on Count Five: Sentence Adverbs

Also resist what's known as the "sentence adverb." These adverbs hover over the start of sentences, modifying at once everything and nothing.

For attorneys and judges, the four most common culprits are *Specifically*, *Arguably*, *Notably*, and *Tellingly*. (The article's author is a superb writer, but he falls into this trap himself when he introduces a surprising finding with *notably*—a finding that already sounded notable on its own.)

To sum up, just remember the following:

Is the adverb necessary shorthand or a reflection of how often something happens? Then leave it in.

But is the adverb propping up a weak verb, trying to force the reader to see things your way, or lurking for no reason at the start of a sentence? Then take it out.

And I recommend that approach most ***emphatically***.

Client Alert or Client Asleep?

www.briefcatch.com/blog/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

Start by telling your clients what they can or should do now. Only then discuss the case or regulation—and only to highlight the "So what?" factor. Try something like this:

Under a recent Third Circuit ruling, if an employer fires an employee to preserve workplace safety, the employer need not prove that the employee has directly threatened anyone. In that case, for example, the court allowed the Postal Service to fire an employee who was "unfit for duty" simply because he had refused treatment for paranoid schizophrenia. Although this case appears to allow employers to fire an employee for legitimate business needs alone, employers should take the following steps before doing so. . . .

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.
- **Try this:** “The prosecution cannot prove a key element of insider trading**:** the purchase or sale of a security.”

4. *Due to*

A grammatical minefield**,** this phrase is better off put to rest. So don’t write “We were forced to file this motion **due to** your stubborn refusal to respond to our requests.” To make matters worse, this clumsy phrase is often paired with “the fact that,” as in “We were forced to file this motion **due to the fact that** you have stubbornly refused to respond to our requests.”

- **Pavlov’s dog says:** “**because**,” “**from**,” or rephrase
- **Try this:** “We were forced to file this motion **because of** your refusal.”

5. *Specifically*

A bad-habit “sentence adverb” that you should almost always avoid. So don’t write “Seller’s conduct in these negotiations has been reprehensible. **Specifically**, Seller misrepresented . . . .”

- **Pavlov’s dog says:** Enumerate—or just cut to the chase.
- **Try this:** “Seller’s conduct during these negotiations has been reprehensible. **First**, Seller misrepresented . . . .”

Still Saying No!

Just like its sister article Just Say No, this article adds to our list of quick style fixes.

1. After: “The Ford Motor Company (‘Ford’).”

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 relinquishing your right to contest it on appeal."
- **After:** "**Because** you failed to raise the issue at trial, you cannot contest it on appeal."

4. *Hereinafter*

Ban it.

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

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

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

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

5. *However* (*at the beginning of a sentence*)

Most stylists are opposed.

- **Before:** "I have reviewed your letter. **However***,* I disagree with many of your arguments."
- **After:** "I have reviewed your letter. I disagree, **however**, with many of your arguments."

The Attorney Toolkit

By

Ross Guberman

President, Legal Writing Pro

About Ross Guberman

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
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	**2. As a Section 1983 Plaintiff, Jones Need Not Prove Tangible Job Detriment**[1]
Even as to the "sexual harassment" form of gender-based discrimination, "tangible job detriment" is *not* 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).	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.[2] In arguing otherwise, the President confuses a constitutional claim for a statutory one.
In *Bohen v. City of East Chicago*, 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	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

[1] A good heading is self-contained and mixes law and fact; here, the relevant "fact" is the regime under which Jones filed.

[2] The first sentence of each section should focus on the client's specific case rather than wallow in platitudes or abstractions about the law.

Original	Revision
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").	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."[3] *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.").
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-	Because of this distinction,[4] 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.[5] *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

[3] 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.

[4] Try to bridge concepts and ideas from one paragraph to the next by using connecting words or by repeating key concepts: here, "distinguish" . . . "distinction."

[5] Judges are concerned about being reversed. Show explicitly what other courts have done in similar circumstances.

Original	Revision
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.").[6] *Id.* at 359–60 (citations omitted).

[6] 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.

Original	Revision
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,[7] then, the "relevant context"[8] 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.[9]

[7] Favor simple words such as "here" rather than "in the instant case" or "in the present case."

[8] Another bridge: "relevant context."

[9] This paragraph merges the legal standard into the facts of Jones's case.

Original	Revision
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.[10] *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.

[10] 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.

Original	Revision
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.[11]

[11] 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
1.6 Conflicts of Interest. 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	**1.6 Conflicts of Interest**. **1.6.1. Definition**. A conflict of interest is any connection with any outside activities that may adversely affect Company. **1.6.2. Company's right to identify conflicts**. Company reserves the sole right to determine whether a conflict exists. **1.6.3. Employee's duty to avoid conflicts**. Under Employee's fiduciary duties to Company, Employee shall not knowingly engage in a conflict of interest with Company. **1.6.4. Employee's duty to report and remove conflicts**. 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. **1.6.5. Employee's right to remove conflict without reporting conflict to Company**. If Company has suffered no harm, Employee may eliminate the outside interest without reporting the conflict to Company. **1.6.6. Company's right to eliminate conflicts and to invoke remedies**. 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.

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

135 Transition Words and Phrases

To provide another point

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

To conclude

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

To extract the essence

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

To show cause and effect

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

To draw an analogy or comparison

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

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

To draw a contrast

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

To give an example

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

To concede a point or to preempt a counterargument

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

To redirect

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

To emphasize or expand

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

* 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

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

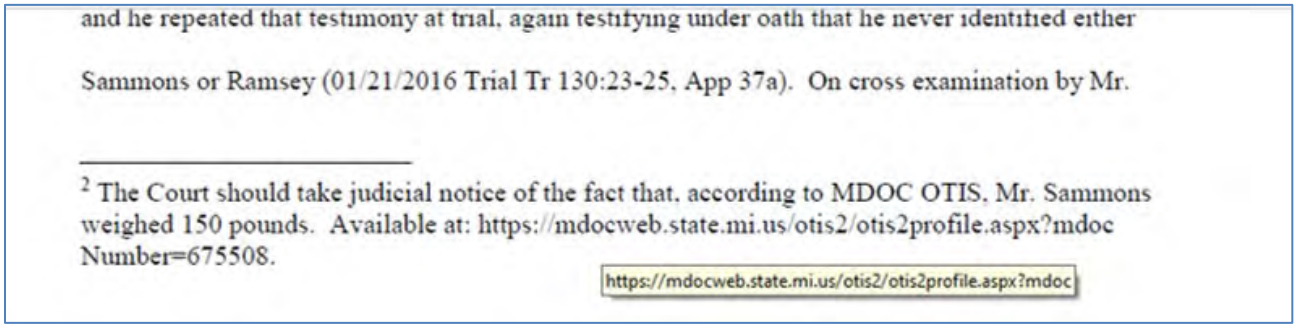
URL shorteners

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

Bit.ly	Rebrand.ly
Bl.ink	TinyURL.com
Perma.cc *	Tiny.cc

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.



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

Judges Speaking Softly
What They Long for When They Read

ROSS GUBERMAN

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

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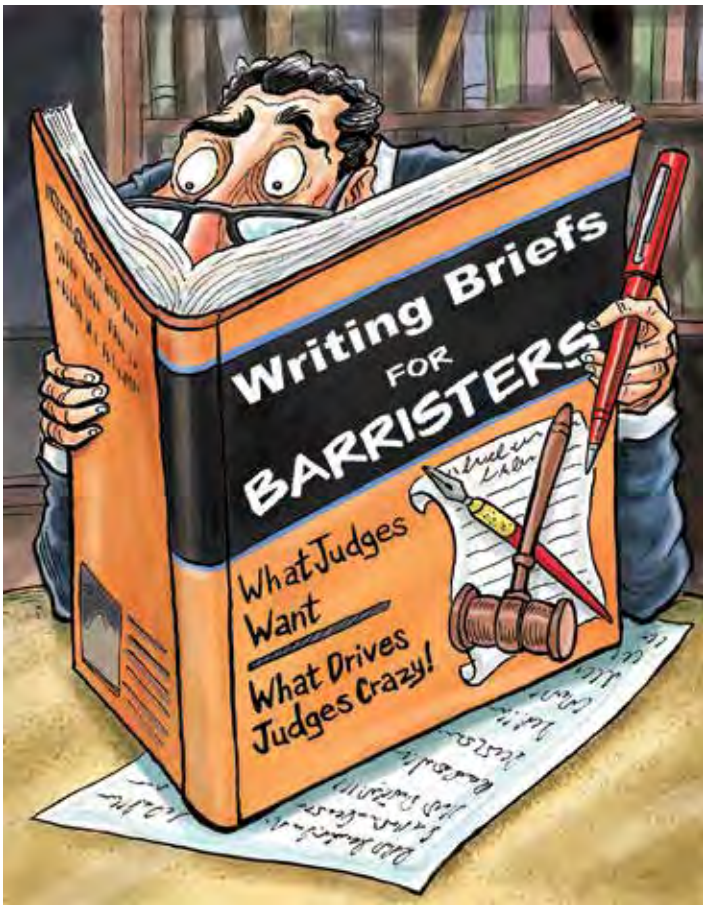

tone is warranted. In fact, lawyers often tell me that they absolutely must point out how disingenuous their opponent is, because otherwise the court won't see it. Solution: Show, don't tell.

- "'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

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- "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."

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

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)

Ross Guberman

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.

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 horribles.

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.

Ross Guberman is the founder of BriefCatch LLC, the president of Legal Writing Pro LLC, and the author of "Point Made: How to Write Like the Nation's Top Advocates" (Oxford University Press, 2014).

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

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

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

[4] 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.

[7] https://www.supremecourt.gov/opinions/21pdf/21-429_8o6a.pdf.

[8] https://www.supremecourt.gov/opinions/21pdf/21-954_7l48.pdf.

[9] https://www.supremecourt.gov/opinions/21pdf/20-1650_3dq3.pdf.

[10] 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

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

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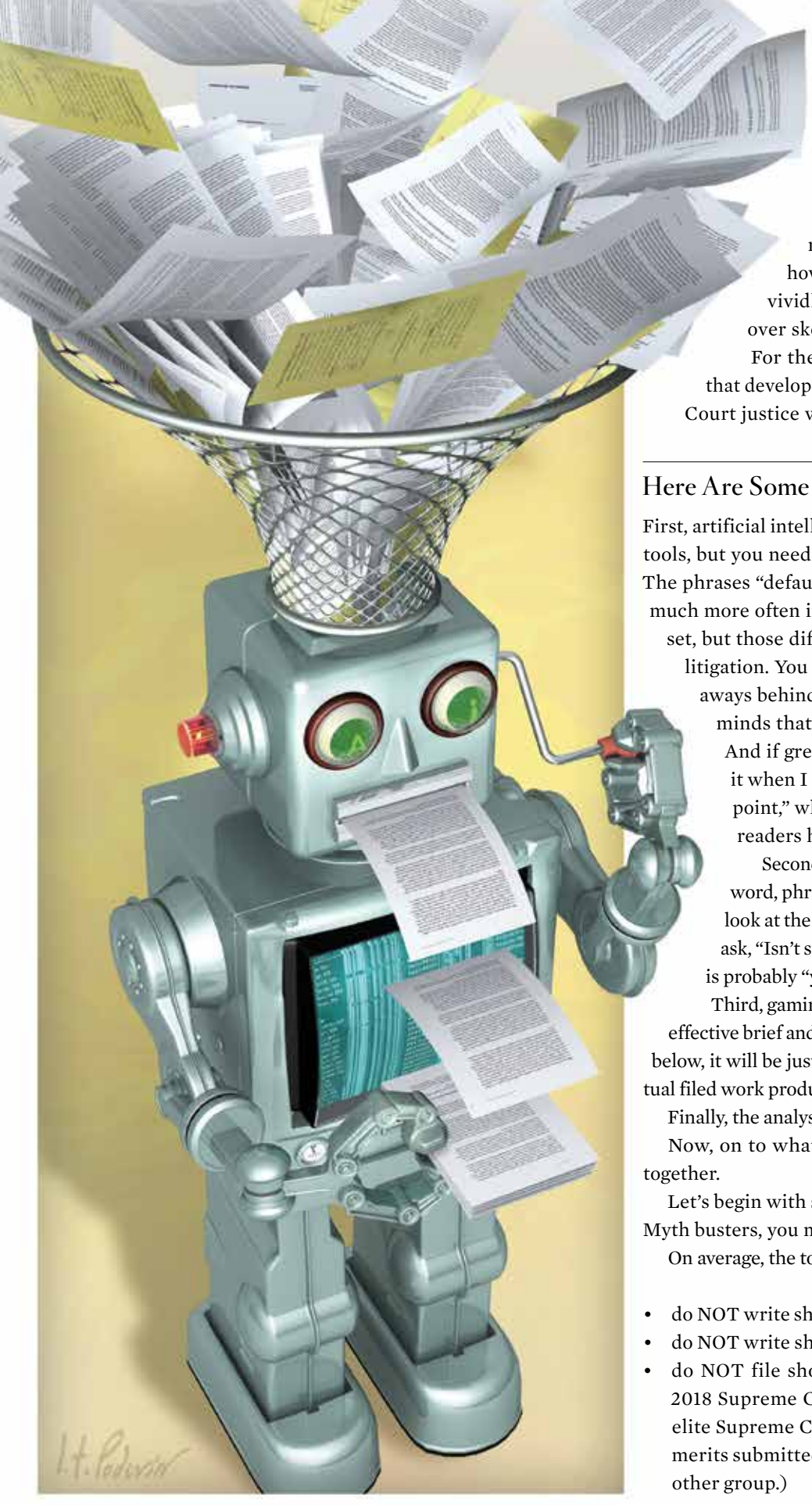

is only a sliver of what dictates outcomes. What's more, lawyers stuck with bad law, bad facts, or both are less likely to win and more likely to feel forced into writing choices that could muddy the pool of losing briefs. Think of how Supreme Court justices often write more vividly in dissents than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

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 "*id.*" Use *See also* 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 overused 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 recite "Concise. Clear. Organized." before you go to bed while your 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. ■

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."


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The Big Picture

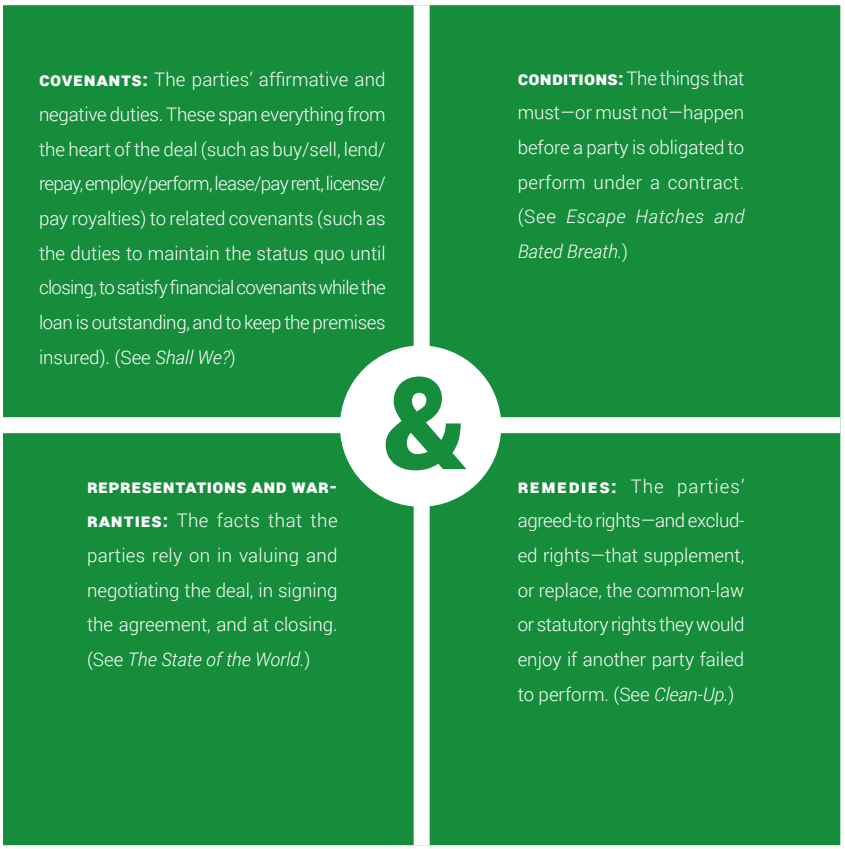
The Heart of the Deal

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.*)

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.

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

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

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)

■ 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.

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…"

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

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?*)

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

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."

● 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.

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.

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.

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.

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.

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

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

▲ 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.[1]

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.

1 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.

- 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.

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

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

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

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.

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.

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

Provide that the reps survive the closing to preserve recourse for an inaccuracy that might not be discovered until after the closing.[2] 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*.)

2 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."[11]

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."

11 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
at the present time	now (or cut)
at the time when	when
attached thereto, hereto	attached
because of the fact that	because
by means of	by
by reason of	because
covenant	shall
covenant and agree	agree, shall
despite the fact that	although, even though
during such time as	while
each and every	each
endeavor	attempt, seek, try
for the purpose of	to, for
for the reason that	because
herein/hereto	(cut)
hereinafter	(cut)
hereinafter defined as	(cut)

BEFORE	AFTER
in an effort to	to
in order to	to
in respect of (UK)	on, for, about
in the event (that)	if
inter alia	among other things
notwithstanding (the fact) that	although, even though
now, therefore	(cut)
prior to	before
pursuant to	under
said, such, same	this, that
subsequent to	after
therein, thereto	(cut)
until such time as	until
whereas	(cut)
with a view toward	to
with respect to	on, for, about
witnesseth	(cut)

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