

WRITING WELL

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I. INTRODUCTION

Why do lawyers write so poorly?

We cannot claim ignorance as an excuse. We all recognize good legal writing. It clarifies, persuades, and lingers in our memory.

We cannot argue that we have insufficient chances to practice. We spend much of every day reading our own writing or other lawyers' writing. When it comes to writing, lawyers differ from doctors, accountants, engineers, and other professionals. They write sparingly, usually as an ancillary to their real work. For many lawyers, writing is our work.

We cannot contend that writing well takes God-given talent. Good writing does not require great intelligence or analytical skills. Instead, it requires common sense, self-discipline, and practice.

So why do lawyers write so poorly?

Perhaps the problem begins in grade school. Teachers reward students' use of new vocabulary words rather than simple words the students already know. Teachers praise long complex sentences that

demonstrate students' familiarity with the parts of speech and sentence diagramming they just covered in class.

Students learn more bad habits in later grades. Teachers set a minimum number of words that students must use in each assignment. This encourages wordiness. I recall frequently stopping during my homework to anxiously count the number of words I had already written, and calculate how many more I had to write. Although word processors now automatically determine these numbers, today's young students face the same incentive to use many words when few would do.

Unfortunately, our writing often deteriorates as we move through law school. Proud parents and arrogant professors constantly tell us that we are better people than those who get up early, work hard, and receive hourly pay. We begin to use uncommon and complex words to set us apart from the general population. The law itself encourages this "special priesthood" concept by arming us with an intimidating vocabulary all our own.

Whatever the reasons, we deserve our reputation for bad writing.

Fortunately, even old lawyers can learn the tricks of good writing. This article gives you some of the tricks. To make it easier, the article

follows the sequence all writers follow: starting with words; then discussing sentences; moving on to paragraphs; concluding with the entire written piece.

Through all of these exercises, the goal remains the same. Your writing should communicate your ideas as concisely, directly, and simply as possible. Be a Hemingway -- not a Faulkner.

To be sure, transactional lawyers and litigators must sometimes use different writing styles. First, transactional lawyers sometimes prepare documents meant to guide peoples' conduct years later. Examples include wills, trusts, and business agreements. Although most transactional lawyers could use more simple language in such documents, they normally could not use the type of conversational style that litigators can use when writing briefs. Second, as explained below, transactional lawyers must sometimes use arcane and awkward phrases, because the phrases carry defined meanings derived from cases, laws or regulations. For both of these reasons, transactional lawyers must sometimes use a more formal style than litigators.

However, transactional lawyers may still use this outline's tips when writing more informal and persuasive documents, such as explanatory letters for clients or position papers for government regulators.

As you use these suggested tricks, your writing will improve. As explained below, you will even be able to measure your progress.

II. WORDS

A. Words to Use

Almost without exception, each word you use in your writing should be simple and familiar.

Although lawyers must occasionally use technical words (such as *res judicata* or *collateral estoppel*), these words should be the exception.

Some of history's great writing has been remarkably simple. Author William Zinsser has analyzed the words President Lincoln used in his famous Second Inaugural Address. Lincoln's speech consisted of only 701 words. Of these 701 words, 505 contained only one syllable. Of the remainder, 122 contained only two syllables. As Lincoln proved, one can communicate great things with simple words.

You should also use familiar words. As you write, you should pretend that you are talking to a neighbor.

Where do you find these simple and familiar words? A thesaurus is the best place to start, and you should have one with you when you write and edit.

B. Words to Avoid

You should avoid at least three kinds of words when you write.

1. Words You Should Never Use

First, you should never use some words. These include:

said

aforementioned

hereinafter

One author labels these words "professional Pig Latin." You would feel like an idiot using these words in everyday conversation, and you therefore should not use them when you write.

Some otherwise appropriate words become taboo when combined into pairs. Their use is the most commonly parodied habit of legal writers.

They include:

null and void

true and correct

free and clear

Using these double words does not add to your writing's content -- almost without exception one or the other word would suffice.

Why do lawyers cling to this habit? Some authors suggest that this peculiar style began after the French-speaking Normans conquered England in 1066. Lawyers used an English word and a French synonym to assure that both the native Englishmen and the Normans would understand their writing.

You have only one excuse for using awful words like these -- their presence in statutes, regulations, or judicial decisions. If a legislator, bureaucrat, or judge has given a defined meaning to certain words, you owe your client the certainty they bring by using them in your writing. You just have to swallow hard and blame some legislator's or judge's third-grade teacher.

2. "Intelligent" Words

Second, you should avoid words that lawyers use to make themselves sound intelligent. Here are some of these words, with a translation into everyday language.

<u>Bad Word</u>	<u>Good Word</u>
subsequent to	after
prior to	before

How do you know whether to use these words? If you would be embarrassed to use the words in normal conversation, do not include them in your writing. Because you would not say "Prior to seeing the movie, let us proceed to dinner," you should never write a sentence with those phrases.

3. "Litter" Words

Third, you should watch for words that are not intrinsically evil, but which add nothing to your writing's substance. Because you are trying to write as simply as possible, you cannot afford to have any useless words.

I call this third category of bad words "litter" words. In some ways, they pose the greatest risk to good writing. They drain the vitality from your writing and make it more confusing, yet are more difficult to spot and eliminate than the bad words discussed above.

How do you identify these "litter" words? Look for small words, such as:

of

in

on

for

to

the

The most dangerous of these "litter" words travel in packs. They form phrases that clog your writing, and make it much more difficult to read.

Try this simple exercise. Hold your writing at arm's length, and squint so you can see the length of your words without actually reading them. If you see long words linked by very short words in a Morse Code-like dot-dash-dot fashion, I guarantee that the writing will be difficult to read. It includes too many phrases containing "litter" words. On the other hand, if most of your words are about the same length and you see only a few very small words, your writing will be easy to read. You have either consciously or fortuitously avoided the common phrases containing "litter" words.

If your writing fails this "squint" exercise, you should strive to eliminate "litter" words and the phrases they form. You can completely erase some of these phrases, such as "it is worth mentioning that" or "because of the fact that." You can shorten other groups of "litter" words to just one or two words. Here are some examples:

<u>Bad Phrase</u>	<u>Good Word</u>
by reason of	because
for the reason that	because
in the event that	if
on the grounds that	because

Try to avoid "litter" words when you write, and remove them when you edit.

C. Specific Rules for Specific Words

Now that you know in general terms what words to use and what words to avoid, you are ready to select particular kinds of words.

1. Verbs

Verbs act as the heart of every sentence. They supply your writing's movement and vitality. If you look carefully, you will see that the difference between good and bad writing often lies in its verbs.

When choosing verbs, follow these four rules:

a. Use Root Verbs, Not Expanded Forms

When we talk in everyday conversation, we use a word like "decide." We say: "Have you decided what movie to see?" But many lawyers expand the verb. Perhaps to sound pretentious, they write: "Have you reached a decision as to which movie to see?"

Like most other lawyer habits, this is a bad one. Try to shorten your verb forms. Using the root verb "decide" rather than the expanded form of "reach a decision" makes your writing clearer, because it reduces the number of words while conveying the identical meaning.

Here are some other examples:

<u>Expanded Form</u>	<u>Root Verb</u>
hold a meeting	meet
impose a requirement	require
make a determination	determine

b. Use Active Verbs, Not Passive Verbs

In the active voice, a subject acts on an object: "John threw the ball." Here, the subject "John" takes some action against the object "ball." The passive voice would be: "The ball was thrown by John."

Here, the subject "ball" is acted upon by the object "John."

Whenever possible, you should use the active instead of the passive voice. Everyone tells you this, but no one tells you why. Here are some possible reasons:

- Most people talk in the active voice. Your writing will sound more familiar and conversational if you use the active voice.
- Using the active voice reduces the number of words you use -- especially the dreaded "litter" words.
- Generally, the actor plays the most important role in your writing. For instance, when discussing a lower court's

proceedings, you normally would write: "The lower court denied Smith's motion."

As with most rules, some exceptions apply. For instance, sometimes you will want to emphasize what normally would be the object. If your litigation focuses on a letter that you sent to an adversary, you might be tempted to write "The letter was received by defendant on June 27." Using the same verb in the active voice would emphasize the wrong thing: "Defendant's office received the letter on June 27."

But don't surrender to the passive too quickly. In some situations, you can simply use another verb -- transforming your sentence back into the active voice without abandoning your emphasis on what normally would be the object. Thus, you might write: "The letter arrived at Smith's office on June 27."

In any event, you should use the passive voice only rarely, and look for alternatives that suit your purpose while maintaining the active voice.

Using the active voice will dramatically improve your writing. Look at these sentences:

Passive

The interrogatory answers were signed by my client on July 9.

It was agreed by the parties that the trial would be postponed.

Active

My client signed the interrogatory answers on July 9.

The parties agreed to postpone the trial.

c. Avoid "Is" Verbs

Good writers avoid "is" verbs whenever possible. "Is" verbs add no movement to your writing. Compare the following sentences:

With "Is" Verb

There were also briefs filed on the laches defense.

The defendant is permitted under Rule 15 to amend his Complaint.

Without "Is" Verb

The parties also briefed the laches defense.

Rule 15 allows Smith to amend his Complaint.

In some cases you cannot avoid using "is" verbs, but keep their use to a minimum.

Remember the following rule: make someone (or something) do something in your sentences. Make courts rule, issues arise, positions include, memoranda address, arguments fail, etc. If someone or something takes action in your sentence, your writing will improve.

d. Use Strong and Vigorous Verbs

While avoiding "is" verbs will instantly improve your writing, you should do more. You should use robust verbs that describe action.

Review the following portion of Professor Edmund S. Morgan's The Birth of the Republic, 1763-1789 (1956). Look at the verbs Morgan uses.

"As Congress spoke in feebler terms, the state governments grew contemptuous of its authority. They violated the Articles of Confederation by ignoring the nation's treaties with foreign countries, by waging war with the Indians, by building navies of their own. They sent men with less vision and less ability to represent them and at times failed to send any, so that Congress could scarcely muster a quorum to do business."

Professor Morgan's verbs give his writing power and movement.

You can improve your writing using the same technique. Listed below are some weak verbs, and possible alternatives.

<u>Weak Verb</u>	<u>Strong Verb</u>
initiate litigation	sue
does not agree with	denies
did not consider	ignored

Using the proper verb also lets you add "spin" to your sentences.

When you try to write persuasively, every sentence should have a "spin."

Compare the very different meanings conveyed by the following three sentences, which describe the same event with different verbs.

The plaintiff read the agreement.

Smith examined the agreement.

Smith glanced at the agreement.

Good writers always look for verbs that provide the desired "spin." For instance, you and your client never "argue." That verb sounds contentious and insincere. Let the other side "argue" -- you and your client "note" or "recognize." Similarly, the other side "admits" or "confesses" -- you and your client "acknowledge." You should pack favorable meaning into every verb you choose.

2. Nouns

When selecting nouns, follow these two rules.

a. Use Names Instead of Descriptions

Try to avoid using the terms "plaintiff" and "defendant." Try even harder to avoid the terms "appellant" and "appellee." After twenty years of writing briefs, I still confuse these two terms. All honest lawyers will agree. Using a party's name makes your writing much easier to follow.

b. Use the Possessive

Whenever possible, use the possessive. This shortens your sentence by reducing "litter" words.

<u>Bad Phrase</u>	<u>Possessive</u>
ruling of the court	court's ruling
brief of appellant	Smith's brief

3. Adjectives and Adverbs

You can use adjectives and adverbs to eliminate "is" verbs and shorten your sentences.

Without Adjective or Adverb

The property that was condemned is just to the west of Hanover Courthouse.

Defendant's arguments are baseless, and this court should not accept them.

With Adjective or Adverb

The condemned land lies just west of Hanover Courthouse.

This court should reject Smith's baseless arguments.

III. SENTENCES

When you arrange your words to form sentences, your goals do not change. Your sentences should be simple, direct, and clear. They should generally have only one thought.

Many lawyers write seemingly endless sentences that confuse their readers. Young lawyers' increasing use of computers has worsened this problem. Young lawyers with whom I work claim that they can more efficiently prepare documents by typing documents themselves at their computers, because they "get it right" from the beginning.

However, lawyers who type their own documents must rely on their own self-discipline to avoid wordiness. Unlike lawyers who dictate, typists cannot rely on two important tools for keeping sentences short: (1) running out of breath; and (2) forgetting what you are saying. Those factors generally save us from run-on sentences when we talk, and their absence during the typing process often results in overly long sentences.

If you have a problem with run-on sentences, try this simple exercise. Never use more than twenty words in any sentence. You will still be able to

communicate your ideas, but will find yourself forced to use simpler and clearer sentences.

Whatever your sentences' length, you should rely on three techniques to improve your writing. Following these rules requires only simple revisions, but will bring immediate results.

A. Do Not Begin Your Sentences With Long Clauses

Deleting long introductory clauses makes your writing much clearer. A long introductory clause usually condemns readers to re-read a sentence, because they will not recognize the clause's significance until they have waded through the entire sentence. Compare the clarity of these sentences.

With Clause

Although fraudulent or malicious intent is not a necessary element of conversion, proof of malice is necessary to recover punitive damages.

In discussing why he waited from the beginning of 1984 until the beginning of 1985 to file his Complaint in this Court, plaintiff does not provide an adequate justification.

Without Clause

Smith must prove malice to recover punitive damages for conversion.

Smith offers no justification for his year-long delay in suing Jones.

B. Give the Punch Line at the Beginning

This second rule relates to the first. Beginning a sentence with a long clause delays the important point until the end. You should avoid this error with every sentence -- even if you do not begin with a long clause.

Do not force the reader to wait until the end of your sentence to hear the punch line. Here are some examples.

Punch Line at the End

The court found the defendant's practice of manufacturing the gun with the new GP2-78 safety instead of the old GP2-80 safety to be reprehensible.

The plaintiff had reviewed the architect's plans and after an exhaustive survey had found them acceptable.

Punch Line at the Beginning

The court condemned Acme's use of the new safety instead of the old safety.

Smith accepted the architect's plans after carefully reviewing them.

Examine the sentences on the left. Those sentences force the readers to suspend in their minds all the information you give them -- until they arrive at the very last word. Only then can the readers make sense of the sentence. As a writer, you should never force your readers to work that hard. Instead, you should make your main point as early as possible in each sentence. Your grateful readers will then know how to digest the rest of the information in the sentence.

C. **Keep the Subject and the Verb Close Together at the Very Beginning of Your Sentences**

This third rule also improves clarity. It provides your reader an immediate clue to the meaning you intend to convey. Look at the following sentences:

Scattered Verb and Subject

Clearly, under New Jersey law, to award punitive damages, a court must find defendant's conduct to be wantonly reckless or malicious.

The cases plaintiff cites in support of her proposition in her brief involved the laws of states other than Virginia.

Subject and Verb Close Together at Beginning of Sentence

New Jersey courts award punitive damages only if defendant acted with wanton recklessness or maliciousness.

Plaintiff relies solely on decisions from other states.

A quick look at Professor Morgan's writing (see above) reveals that he knows how to use this technique.

You can follow these simple procedures by writing as you would talk. When people talk, they normally avoid long introductory clauses, generally

give the punch line first, and usually include the subject and verb at the beginning of each sentence.

In describing a neighborhood incident, you would not say:

"By reason of the confrontation between our dog and the cat that is owned by our neighbor, the cat was chased by our dog and ran up a tree."

You would say: "Cricket chased Pansy up a tree today." Be sure to write the same way.

IV. PARAGRAPHS

When you join your sentences together to form paragraphs, you should follow the same rules as when you were selecting words for your sentences.

Your paragraphs should be simple, direct and clear. They should not be very long. One-sentence paragraphs can be useful for emphasis or transition.

Just as your sentences should have just one thought, so your paragraphs should have just one thought. That thought should appear in your paragraph's first sentence. You should be able to gather 90% of your writing's meaning by reading just the first sentence of each paragraph. Try this exercise with your writing. If it fails, you must work on your initial sentences.

Your paragraphs should begin with sentences like these:

The Fourth Circuit follows a three-part test.

The statute of limitations also bars Smith's claims.

V. ENTIRE WRITTEN PRODUCT

After you have chosen simple and familiar words, and built them into good sentences and short paragraphs, you should look for more ways to make life easier for your readers.

A. "Signal" Words

You can help your readers by using what can be called "signal" words -- which refer to matters you have already discussed, or to matters that you will discuss. Using "signal" words like this can serve a number of functions.

First, "signal" words help guide your readers through your writing. They tie one sentence to the next, and build momentum. Good writing creates a sense of logical inevitability, pushing readers sentence-by-sentence toward an inescapable conclusion. Logic plays some part in this process, but "signal" words can also contribute.

Second, these internal references induce your readers -- if only for a split second -- to review what you have already written, or to anticipate what you will be writing. And each time your readers think of the ideas you are conveying, they are likelier to understand and remember them.

Some "signal" words can be blunt -- such as "see below" or "as explained above." Some "signal" words create a more subtle impact. For instance, words like "this," "that," or "those" provide neutral reminders to readers about what they just read. If you want to reinforce or supplement a point, you might use "signal" words such as "also," "similarly," "moreover," "furthermore," etc.

Your use of "signal" words becomes most important when you are shifting directions or creating contrasts. You owe your reader some warning that you are moving in another direction. The following "signal" words serve this function.

on the other hand

in contrast

unlike

but

As you would expect, using "signal" words in your paragraphs' opening sentences creates the biggest impact.

Look at the second suggested opening sentence in the "Paragraph" section above: "The statute of limitations also bars Smith's claims." This sentence obviously looks forward to a statute of limitations discussion. But

by including the simple word "also," the sentence also looks backward -- at another defense barring Smith's claims. Using a "signal" word in that opening sentence reinforces the points you made in the previous paragraphs.

History's great writers knew this trick. Attachment 1 to this Outline contains Lincoln's Gettysburg Address. Look at the signal words that Lincoln used. They help tie Lincoln's speech together.

Look also at how often Lincoln used the word "we" (ten times), "our" (two times) and "us" (two times). These three words represent an amazing five percent of the entire Gettysburg Address. Although they are not technically "signal words" as I have used the term, they serve the parallel function of binding the speaker to the audience. These tricks helped President Lincoln turn his noble ideas into a timeless masterpiece.

B. Visual Tricks

Even lawyers skilled at preparing attractive annual reports or elaborate trial exhibits seem to forget these talents when they write. As authors, we often ignore the common-sense visual tricks that we find appealing as readers. As you write, keep your "reader" hat on.

First, use headings and subheadings as often as you can. These also help your readers understand what you are writing.

Second, use paragraph breaks. Readers' hearts sink and their attention wanders when they see an unbroken page of writing. Why? A page without paragraph breaks tells the readers that the writer has not taken the time or care to organize the page into digestible chunks. This means that the reader must do this. Successful writers do the work themselves. They never ask their readers to work. There should always be paragraph breaks on every page -- the more, the better.

Third, use bullet points down the page to emphasize, separate, and highlight lists of items. Readers can quickly scan and digest items that each have their own bullet point.

Fourth, use lists within your sentences -- such as (1), (2), (3), or (a), (b), (c). These help the reader follow your writing.

Fifth, use all the punctuation our language provides. Like helpful road signs, punctuation guides your readers through your sentences.

All of these visual tricks make your writing more inviting to the reader, and help convey your writing's substance.

VI. EDITING

As you begin to improve your writing, you will initially find yourself making the same old mistakes. Eventually you will reduce the mistakes, but you will never eliminate them in your first drafts. Instead, you must use the editing process to fine-tune your writing.

As you keep working at it, your first drafts will contain fewer and fewer mistakes. But you will still need to edit.

As you edit, picture someone asking you to defend every word you leave in your writing. If you can eliminate a word without sacrificing substance, cross it out.

As you edit, ask yourself:

- Is there any clearer or more concise way to say this?
- Is there a more active or powerful verb I can use to convey this idea?
- Have I placed my subjects and verbs together at the beginning of my sentences?

VII. FINAL TIPS

For some reason, people seem to communicate better when they talk than when they write. Perhaps this is because people speaking to one another must use fairly short sentences, generally rely on the active rather than the passive voice, usually include subjects and verbs together at the beginnings of their sentences, and provide plenty of "clue" words.

Whatever the reasons, you can prove my theory's accuracy. Ask a colleague to read a page or two of your writing. Then explain to your colleague face-to-face what you wanted to say in your writing. I guarantee that your oral explanation will always be clearer and more succinct than your written explanation.

You should take advantage of this universal human trait.

First, when you write, pretend that you are explaining something to a nonlawyer. Best of all, pretend that you are explaining something to a ten-year-old child. You will instinctively find yourself using all of the tricks this article has discussed.

Second, read your writing out loud when you finish editing. If you have a stable relationship with a significant other, you might want to read

your writing to him or her. In either case, your writing should sound like you are talking to a nonlawyer. If it does, you have earned a place in the small but growing ranks of lawyers who write well.

VIII. MEASURING YOUR PROGRESS

As explained above, computers often sabotage lawyers' writing by allowing (if not encouraging) run-on sentences. In contrast, dictaphones force lawyers to mimic their everyday conversation, which yields good writing.

Ironically, computers can also help our writing by providing objective data. You should employ these new tools to measure your progress as you use the tricks described in this Outline.

The most common word processing software allows you to analyze your writing's "readability," providing such objective indicia as characters per word, words per sentence, sentences per paragraph, and percentage of passive sentences. The software also determines what it calls "Reading Ease" and "Grade Level."

Try this exercise. Run some of your current writing through the software and then try it again after a week or so of using the tricks I suggest. You should see some improvement.

IX. RECOMMENDED READING

For the best short books on effective legal writing, look for:

Wydick, Plain English for Lawyers

Good, Mightier Than the Sword -- Powerful Writing in the Legal Profession

Litigators may also want to use:

Alterman, Plain and Accurate Style in Court Papers

Useful works of general interest include:

Zinsser, On Writing Well

Strunk & White, The Elements of Style

Kilpatrick, The Writer's Art

A recent book provides superb guidance to grammatically challenged writers:

Good, A Grammar Book for You and I...Oops, Me!

Attachment 1The Gettysburg Address*

Gettysburg, Pennsylvania
November 19, 1863

Four score and seven years ago our fathers brought forth on this continent, a new nation, conceived in Liberty, and dedicated to the proposition that all men are created equal.

Now we are engaged in a great civil war, testing whether that nation, or any nation so conceived and so dedicated, can long endure. We are met on a great battle-field of that war. We have come to dedicate a portion of that field, as a final resting place for those who here gave their lives that that nation might live. It is altogether fitting and proper that we should do this.

But, in a larger sense, we can not dedicate -- we can not consecrate -- we can not hallow -- this ground. The brave men, living and dead, who struggled here, have consecrated it, far above our poor power to add or detract. The world will little note, nor long remember what we say here, but it can never forget what they did here. It is for us the living, rather, to be dedicated here to the unfinished work which they who fought here have thus far so nobly advanced. It is rather for us to be here dedicated to the great task remaining before us -- that from these honored dead we take increased devotion to that cause for which they gave the last full measure of devotion -- that we here highly resolve that these dead shall not have died in vain -- that this nation, under God, shall have a new birth of freedom -- and that government of the people, by the people, for the people, shall not perish from the earth.

* Emphasis added.