Concrete Ways to Improve Your Legal Drafting

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September 13, 2013
Attorney Disclaimers

- Strictly my views
- Consult your attorney
- Use at your own risk
What is “legal drafting”?

Sometimes asking the opposite question is more helpful.
Example of **Illegal drafting**
Many lawyers draft poorly

94% of federal and state judges surveyed reported that basic writing problems routinely marred the briefs they read.

Many lawyers draft poorly

This search in Westlaw’s “All Federal & State cases” database...


...retrieved 4,527 cases in June 2013, with the most recent two being 10 days old.
Drafting is important

An American Bar Foundation survey of practicing lawyers concluded: “[o]ral and written communication skills are deemed to be the very most important skills necessary for beginning lawyers.”

Drafting is important

The ABF survey also concluded: “[Law firm] partners expect those skills to be possessed by the associates..., even though they are not much taught in the law schools.”

Why is good legal writing important?

• Writing is at the heart of the legal profession
• "Good writing results from good, disciplined thinking. To work on your writing is to improve your analytical skills."

Why is good legal writing important?

2 reasons to write well

• help you do your job better

• advance your career
What is good legal writing?

“Good writing is simply speech ‘heightened and polished.’”


“Good writing is clear thinking made visible.”

Quotation variously attributed to Ambrose Bierce or Bill Wheeler
What is good legal writing?

• Good writing satisfies the needs and desires of the reading audience

• Good legal writing helps the reader to make important decisions

What are qualities of good legal writing?

Four qualities of good legal writing

• Clear
• Concise
• Engaging
• Elegant

1. Use the 4-step writing process

1. Madman
2. Architect
3. Carpenter
4. Judge

Use the 4-step writing process

1. Madman/brainstormer/researcher

   - Write down *all* ideas
   - Ask others for their ideas
   - Withhold judgment about ideas
Use the 4-step writing process

2. Architect/Organizer/Outliner

Select best ideas

Arrange ideas in patterns

Put most important ideas first
Use the 4-step writing process

3. Carpenter/builder/writer

Put ideas together logically

Ensure each sentence is clear, contributes to the argument, and leads gracefully to the next sentence

Fill in details, but do not edit!
Use the 4-step writing process

4. Judge/editor/quality control inspector

   Edit punctuation, spelling, grammar, and tone

   Ask others to edit
2. Organize your writing

The court granted the defendant’s motion to dismiss for several reasons, including poor organization, stating: “A complaint may be so poorly composed as to be functionally illegible.”

Organize your writing

Organize material to serve the reader's needs

Use introductory paragraph

Use transitional phrases between paragraphs (e.g., “however”)

Organize your writing

Begin each paragraph with a topic sentence

Limit each paragraph to one topic

Summarize message with concluding sentence or paragraph
Organize your writing

Break up lengthy documents by using

• short headings and subheadings
• short, numbered lists
• bullets
• table of contents
Organize your writing

Break up lengthy documents by using

- Cut-ins
- Tables
- Mathematical formulas
- Diagrams
## Three types of headings

<table>
<thead>
<tr>
<th>Type of heading</th>
<th>What it is</th>
<th>How it looks</th>
</tr>
</thead>
<tbody>
<tr>
<td>Question Heading</td>
<td>A heading in the form of a question</td>
<td>Why Do We Use Headings?</td>
</tr>
<tr>
<td>Statement Heading</td>
<td>A heading that uses a noun and a verb</td>
<td>Headings Help Guide a Reader</td>
</tr>
<tr>
<td>Topic Heading</td>
<td>A heading that is a word or short phrase</td>
<td>Headings</td>
</tr>
</tbody>
</table>
Organize your writing

Organize material by using one of these methods:

• Chronology

• Logic (cause and effect)

• Problems/Solutions

• Actor’s actions

• Witnesses’ observations

• Issues
Organize your writing

State general rule first, then exceptions, conditions, and specialized information

Put context first, then details
3. Write the way you talk!

- Write for the average reader
- Use pronouns
- Use present tense if possible
- Use familiar, concrete words
- Use contractions when natural
4. Use transition words

<table>
<thead>
<tr>
<th>Type of transition</th>
<th>Description</th>
<th>Examples</th>
</tr>
</thead>
<tbody>
<tr>
<td>Pointing words</td>
<td>Refer directly to something already mentioned</td>
<td>This, that, these, those, the</td>
</tr>
<tr>
<td>Echo links</td>
<td>Words or phrases echo a previously mentioned idea</td>
<td>“This highly unusual maneuver...”</td>
</tr>
<tr>
<td>Explicit connectives</td>
<td>Words whose chief purpose is to supply transitions</td>
<td>Further, also, therefore</td>
</tr>
</tbody>
</table>
Use transition words

EXPLICIT CONNECTIVES

• **When adding a point**: also, and, in addition, besides…

• **When giving an example**: for instance, for example, for one thing.

• **When restating**: in other words, that is, in short, put differently, again…

• **When introducing a cause**: because, since, when.

• **When introducing a result**: so, as a result, thus, therefore…
Use transition words

EXPLICIT CONNECTIVES

• **When contrasting:** but, however, on the other hand, still, nevertheless…

• **When conceding or qualifying:** granted, of course, to be sure, admittedly…

• **When pressing a point:** in fact, indeed, of course, moreover.

• **When explaining a sentence:** that is, then, earlier, previously…

• **When summing up:** to summarize, to sum up, to conclude, in short…

• **When sequencing ideas:** First,…Second,…Third,…Finally,…
5. Make it shorter!

Lease: “[The tenant shall] when where and so often as occasion requires well and sufficiently ... repair renew rebuild uphold support sustain maintain pave purge scour cleanse glaze empty amend and keep the premises and every part thereof ... and all floors walls columns roofs canopies lifts and escalators ... shafts stairways fences pavements forecourts drains sewers ducts flues conduits wires cables gutters soil and other pipes tanks cisterns pumps and other water and sanitary apparatus thereon with all needful and necessary amendments whatsoever ....”

Make it shorter!

“The tenant must repair the premises”
Make it shorter!

One of Australia’s leading banks uses a standard mortgage has a clause with 763 words; the clause contains 2 commas, 1 semicolon, 3 sets of brackets, but no other punctuation.

A New Zealand bank’s standard guarantee form features an entirely punctuation-less sentence with 1,299 words.

42 U.S.C. § 1396a(a) - Medicare statute has a sentence with 13,854 words.
Make it shorter!

Plaintiff filed 465-page complaint with 54 claims

Defendant filed motion for more definite statement

Presidio Group, LLC v. GMAC Mortgage, LLC et al., Civ. A. No.: 08-05298 RBL, 2008 WL 2595675 at * 1 (W. D. Wash. July 27, 2008)
Make it shorter!

Court ruling

Plaintiff has a great deal to say,
But it seems he skipped Rule 8(a),
His Complaint is too long,
Which renders it wrong,
Please re-write and re-file today.

Presidio Group, LLC v. GMAC Mortgage, LLC et al., Civ. A. No.: 08-05298 RBL, 2008 WL 2595675 at *1 (W. D. Wash. July 27, 2008)
Make it shorter!

The Ninth Circuit has declared:

“In order to give fair consideration to those who call upon us for justice, we must insist that parties not clog the system by presenting us with a slubby mass of words rather than a true brief....Enough is enough.”

N/S Corp. v. Liberty Mut. Ins. Co., 127 F.3d 1145, 1146 (9th Cir. 1997)
Make it shorter!

Short headings

Short paragraphs

Short sentences

Short words

Lincoln's Gettysburg Address required only 275 words, and 196 of them had only one syllable.
6. Eliminate unneeded words

Empty words

Jargon and Buzzwords

Legalese

Wordy idioms

Double negatives
Eliminate unneeded words

Empty words

“There are”
“It is”
“As stated previously,”
“I might add”
“It should be noted that”

Replace "There are kids swimming in the lake" with "Kids swim in the lake."
Eliminate unneeded words

Empty words

“I would like to point out that”
“I would argue that”
“the fact that”
“In fact”
“the course of”
“It has been determined that”
## Eliminate unneeded words

### Jargon and Buzzwords

<table>
<thead>
<tr>
<th>Reconceptualize</th>
<th>Ideation</th>
</tr>
</thead>
<tbody>
<tr>
<td>Demassification</td>
<td>Impactful</td>
</tr>
<tr>
<td>Attitudinally</td>
<td>Value-added</td>
</tr>
<tr>
<td>Incentivize</td>
<td>Paradigm shift</td>
</tr>
<tr>
<td>Leverage</td>
<td>Price point</td>
</tr>
<tr>
<td>Eliminate unneeded words</td>
<td></td>
</tr>
<tr>
<td>--------------------------</td>
<td></td>
</tr>
<tr>
<td><strong>Legalese</strong></td>
<td></td>
</tr>
</tbody>
</table>

- Aforesaid
- Hereinabove
- Heretofore
- Wheresoever
- Undersigned
- Herewith
- Whereat
- Said
- Thereof
- Whereof
Eliminate unneeded words

**Wordy idioms**

<table>
<thead>
<tr>
<th>Don’t say</th>
<th>Say</th>
</tr>
</thead>
<tbody>
<tr>
<td>at this point in time</td>
<td>now</td>
</tr>
<tr>
<td>despite the fact that</td>
<td>although</td>
</tr>
<tr>
<td>for the duration of</td>
<td>during</td>
</tr>
<tr>
<td>in the event that</td>
<td>if</td>
</tr>
<tr>
<td>in accordance with</td>
<td>by, under, per</td>
</tr>
</tbody>
</table>
# Eliminate unneeded words

## Wordy idioms

<table>
<thead>
<tr>
<th>Don’t say</th>
<th>Say</th>
</tr>
</thead>
<tbody>
<tr>
<td>in order that</td>
<td>for, so</td>
</tr>
<tr>
<td>in the amount of</td>
<td>for</td>
</tr>
<tr>
<td>in the near future</td>
<td>shortly, soon</td>
</tr>
<tr>
<td>utilize, utilization</td>
<td>use</td>
</tr>
<tr>
<td>the manner in which</td>
<td>how</td>
</tr>
</tbody>
</table>
## Eliminate unneeded words

### Double negatives

<table>
<thead>
<tr>
<th>Don’t say</th>
<th>Say</th>
</tr>
</thead>
<tbody>
<tr>
<td>no fewer than</td>
<td>at least</td>
</tr>
<tr>
<td>has not yet attained</td>
<td>is under</td>
</tr>
<tr>
<td>is not...unless</td>
<td>is...only if</td>
</tr>
<tr>
<td>not uncommon</td>
<td>common</td>
</tr>
<tr>
<td>not insignificant</td>
<td>significant</td>
</tr>
<tr>
<td>no small part</td>
<td>large part</td>
</tr>
</tbody>
</table>
7. Beware of acronyms

D.C. Circuit dislikes acronyms:

‘We ... remind the parties that our Handbook...states that "parties are strongly urged to limit the use of acronyms" and "should avoid using acronyms that are not widely known."....Here, both parties abandoned any attempt to write in plain English, instead abbreviating every conceivable agency and statute involved, familiar or not, and littering their briefs with references to "SNF," "HLW," "NWF," "NWPA," and "BRC" – shorthand for "spent nuclear fuel," "high-level radioactive waste," the "Nuclear Waste Fund," the "Nuclear Waste Policy Act," and the "Blue Ribbon Commission."

8. Use “punchy” verbs

Reject nominalizations (hidden verbs)

<table>
<thead>
<tr>
<th>Don’t say</th>
<th>Say</th>
</tr>
</thead>
<tbody>
<tr>
<td>give consideration to</td>
<td>consider</td>
</tr>
<tr>
<td>have knowledge of</td>
<td>know</td>
</tr>
<tr>
<td>am in receipt of</td>
<td>received</td>
</tr>
<tr>
<td>submit an application</td>
<td>apply</td>
</tr>
<tr>
<td>catalyze a transformation</td>
<td>transform</td>
</tr>
</tbody>
</table>
Use “punchy” verbs

Reject weak verbs

Don’t say  Say
club has weddings  club hosts weddings
was not truthful  lied
was very angry  was enraged
Use “punchy” verbs

Avoid these weak verbs when possible

Indicates  Appears
Seems    Becomes
Feels    Provides
Gives
9. Use active voice

Avoid “be” verbs

be
been
is
was
art
wert

being
am
are
were
wast
Use active voice

Don’t say

“the deadline was missed”

Say

“X missed the deadline.”
Use active voice

Don’t say

“**It must be done**”

Say

“**You must do it.**”
10. Avoid generic terms

<table>
<thead>
<tr>
<th>Don’t say</th>
<th>Say</th>
</tr>
</thead>
<tbody>
<tr>
<td>The plaintiff</td>
<td>Mark Jones</td>
</tr>
<tr>
<td>The defendant</td>
<td>Sue Perkins</td>
</tr>
<tr>
<td>The day in question</td>
<td>August 30</td>
</tr>
<tr>
<td>The scene of the accident</td>
<td>parking lot</td>
</tr>
<tr>
<td>Her place of employment</td>
<td>Chuys</td>
</tr>
</tbody>
</table>
11. Proofread!


“A person is guilty of reckless driving who fails to stop, when approaching from any direction, any school bus which is stopped...for the purpose of taking on or discharging children....”
Exception: Not in Mississippi

Indictment: “goods, ware, and merchandise unlawfully, feloniously and burglariously did break and enter.”

Defendant appealed conviction, arguing indictment charged goods, not him.
Court: If the “rules of English grammar are a part of the...law of [Mississippi], [the] conviction must surely be reversed, for the indictment ...would receive an ‘F’ from every English teacher in the land.”

“Correct grammar, however desirable, is...unnecessary....the indictment is legally sufficient.”

Henderson v. State, 445 So. 2d 1364, 1365-68 (Miss. 1984)
Proofread!
Proofread!

- Eliminate red and green underlines in Word & Powerpoint
  - Red = spelling mistake
  - Green = grammar mistake
- Print it out
- Review document the next day
- Read it aloud
- Have a colleague review it
Questions?