

An Approach to Legal Style: Twenty Tips for the Legal Writer

Bryan A. Garner

BEING YOURSELF

1. *Develop Your Own Plain Voice.*

You are your style. If you are a novice who has not yet developed a distinctive style, the statement may be unfair, just as it might be to say that your style indicates your morality. In most legal writing, as it happens, the writer's personality rarely surfaces.

That is not to say, however, that you can write without a voice, any more than you can speak without one. Generally, your written voice ought to be subdued in legal prose. Still, you may often enliven your writing to good effect. The old advice for public speaking, "Just be yourself," holds equally true in writing. Try to express yourself honestly, clearly, unpretentiously. Your natural voice will emerge. As Sir Arthur Quiller-Couch argued, "[T]he first and last secret of a good Style consists in thinking with the heart as well as with the head."¹

What the head can do in legal writing is strive for a literate, precise, but relaxed style. Observe the voices of writers you admire, especially the good legal writers. In doing so, you will see new possibilities in your own writing. But beware giving your admiration too freely — without much critical thought — because what you admire in others' writing will affect your own.

What the heart can do in legal writing brings us to the next point.

¹ ON THE ART OF WRITING 291 (1916).

2. *When Appropriate, Invest Your Writing with Some Honest Feeling.*

Law is not just a bunch of dusty old precepts to be applied with humdrum objectivity. It is alive; blood courses through its veins. As often as not, to apply legal rules you must weigh, judge, and argue about human folkways and human foibles. And to do that well, you must have a heart.

Readers would probably be offended if briefs and judicial opinions about child custody, massive worker layoffs, abortion, or the death penalty completely ignored the human agony that these issues involve. For in the end, the law has something to do with justice.

Recognizing this fact is not a license to emote all over the page. But often in legal writing, sincerely expressing some feeling will work to your advantage. The first Justice Harlan showed magnanimity and empathy in his lone dissent in *Plessy v. Ferguson*, the case that gave rise to “separate but equal” facilities for blacks and whites:

[T]he Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights. Every true man has pride of race, and under appropriate circumstances when the rights of others, his equals before the law, are not to be affected, it is his privilege to express such pride and to take such action based upon it as to him seems proper. But I deny that any legislative body or judicial tribunal may have regard to the race of citizens when the civil rights of those citizens are involved.

. . . .

What can more certainly arouse race hate, what more certainly create and perpetuate a feeling of distrust between these races, than state enactments, which, in fact, proceed on the ground that colored citizens are so inferior and degraded that they cannot be allowed to sit in public coaches occupied by white citizens?²

By contrast, Justice Brown's majority opinion in *Plessy* shows what can happen when you write with your head but not your heart:

We consider the underlying fallacy of the plaintiff's argument to consist in the assumption that the enforced separation of the two races stamps the colored race with a badge of inferiority. If this be so, it is not by reason of anything found in the act, but solely because the colored race chooses to put that construction upon it.³

3. *Establish Your Tone and Stick to It.*

In recent years the levels of diction in English have become less distinct than they once were, as reputable writers increasingly call on a wider spectrum of words to express themselves. Today most readers see no incongruity in using a phrase such as *play fast and loose* (though it is a cliché) in the same sentence with *eminent domain*.

Even so, it will not do to use a slang phrase such as *Monday-morning quarterbacking* in an otherwise very formal sentence, because readers sense a confusion of styles:

This sort of Monday morning quarterbacking not only encourages but also compels the agency to conduct all rulemaking proceedings with the full panoply of

² *Plessy v. Ferguson*, 163 U.S. 537, 554-55, 560 (1896).

³ *Id.* at 551.

procedural devices normally associated only with adjudicatory hearings.⁴

Your tone should vary with the topic. When the tone ill suits the subject matter, you leave readers bemused:

One bright sunshiny day in May, 1918, while Katherine Veach was, with others, riding as a guest in an automobile from Louisville in the direction of Shelbyville, Ky., the machine was struck by an interurban electric car of appellee . . . , and all five of the occupants of the automobile killed and the machine completely demolished.⁵

Upon reading the opening phrase, reminiscent of a fairy tale, the reader expects a light touch in what follows. But the judge then subverts the natural expectation. No doubt the judge's ironic purpose was to illustrate how Katherine Veach had set out cheerily with her friends, carefree and jovial, only to meet with a nightmarish end moments later. But tone by itself cannot achieve that effect. The better approach is to say directly what you mean. If your tone is light and cheery ("One bright and sunshiny day . . .") and your subject is somber ("all five were killed"), the reader, taken unawares, may well think you a ghoulish writer.

Having a consistent tone does not mean allowing a pompous formality to petrify your prose. Nor must you eliminate all variety. What you want is a relaxed, comfortable tone. Lord Denning — old Lord Denning, that is — provides a good model:

Old Peter Beswick was a coal merchant in Eccles, Lancashire. He had no business premises. All he had was a lorry, scales, and weights. He used to take the

⁴ Vermont Yankee Nuclear Power Corp. v. Natural Resources Defense Council, Inc., 435 U.S. 519, 547 (1978).

⁵ Veach's Adm'r v. Louisville & Interurban Ry., 228 S.W. 35, 35 (Ky. 1921).

lorry to the yard of the National Coal Board, where he bagged coal and took it round to his customers in the neighbourhood. His nephew, John Joseph Beswick, helped him in the business.

In March 1962, old Peter Beswick and his wife were both over 70. He had had his leg amputated and was not in good health. The nephew was anxious to get hold of the business before the old man died. So they went to a solicitor, Mr. Ashcroft, who drew up an agreement for them. The business was to be transferred to the nephew: old Peter Beswick was to be employed in it as a consultant for the rest of his life at £6.10s a week. After his death the nephew was to pay his widow an annuity of £5 per week, which was to come out of the business⁶

EXPOSITION AND ARGUMENT

4. Assume an Audience of Well-Informed Generalists.

Your readers may have legal training in common, but legal training can diverge greatly from one reader to the next. Unless you know otherwise, assume that your readers are generalists unversed in special technicalities. If you plunge straightway into a complicated issue, you lose readers, however smart they may be. (They may be smart enough to quit on you, if you demand that they spend needless brainwork deducing your path.) Granted, you may be — had better be — an expert on what you are writing about. You are now well familiar, say, with the three criteria for successfully appealing an interlocutory order. Do you therefore begin by analyzing them?

⁶ Beswick v. Beswick [1966] 1 Ch. 538, 549.

No. Remember that your readers have not been with you in your research. Even if they once knew the standards for taking an interlocutory appeal, you must jog the memory. Before launching into the analysis, briefly remind your readers of the fundamentals you intend to elaborate in the pages ahead.

Do not, however, assume an audience of ignoramuses. Readers understandably resent the implication that they know nothing. For example, a recent law review article says,

In 1981, Justice (now Chief Justice) Rehnquist, concurring in *Northern Pipeline*, wrote that

Can we not assume that readers of a law review will know who the current Chief Justice of the United States is? And that they will know approximately when he ascended to that position? Most readers coming upon this reference will conclude that you have addressed someone else, an audience of novices.

5. Take Pains to Be Thorough, Then Distill the Essence.

To judge from judicial opinions of the era, the bane of late 19th-century legal writing was the failure to distinguish what was merely interesting (and often not so interesting) from what was necessary to the conclusion. Though not nearly so widespread today, the bane still flourishes.

Legal readers do not seek diversion; they want reasoning and persuasion. Sometimes details fulfill that goal. For example, in a brief or opinion that attempts to justify imposing a death sentence, we often see graphic descriptions of the murder and what led up to it. The detail may even grow lurid, but the reader is moved to understand just how heinous the crime was. The gore may not be strictly necessary to the case's disposition, but it provides important rhetorical support for the logical argument.

Just as often, though, details serve no rhetorical purpose. We fail to distill when we describe the signing of a contract by stating the number of earlier drafts in the negotiations, the location of the signing, the people present, and the climatic conditions — all this

when the signing is not an issue. A complete history misdirects by requiring the reader to do what the writer should have done: answer the question, “What is really important here?”

Consider this well-known syllogism:

All men are mortal.
Socrates is a man.
Therefore, Socrates is mortal.

We do not need to know that Socrates is bald, or how old Socrates is, or where he lived, or anything else. Legal argumentation should be syllogistic in this way, omitting all that is not directly helpful to reaching the desired result.

6. Sharpen Your Argument by Building a Reason into Your Thesis.

If you state your conclusion in an introductory paragraph, summarize your reasoning as well as your conclusion. Then your readers can follow what you say. When you find yourself using *clearly* or other such words before you have stated your reasoning completely, you have given your conclusion too early, without adequate support.

We are not accustomed to think of judges’ opinions as arguments, but that is precisely what they are. They may be winning arguments (majority opinions) or losing arguments (dissents). Consider how differently these two opening paragraphs, both from judicial opinions, affect you as a reader. The first gives only a conclusion; the second couples a reason with the conclusion:

[T]he petitioner-appellant in this case, Martha’s Vineyard Scuba Headquarters, Inc. (Mavis), took not a particle of comfort when an order was entered in a federal district court awarding title to various artifacts

retrieved from a sunken ship to a rival, Marshallton, Inc. (Marshallton). Mavis appeals. We affirm.⁷

And:

A disappointed faculty member, Harriet Spiegel, sued the trustees of Tufts College in the United States District Court for the District of Massachusetts following rejection of her tenure application. The district court dismissed most — but not all — of her statements of claim without requiring defendants to answer, and thereafter authorized a partial judgment in Tufts' favor Because we conclude that the judgment was prematurely entered, we dismiss the appeal.⁸

The principle of coupling reasons with conclusions applies to more than judicial opinions: Always try to state the most compelling reason for reaching your conclusion when stating what that conclusion is.

7. *Get to the Point.*

“[S]trike the jugular,” wrote Holmes, “and let the rest go.”⁹ The dawdling writer will be a deserted writer. When readers discern no forward movement — are asked to march in place for a while or to amble without direction — they lose all patience. Here, for example, we have a strongly stated question followed by platitudes that fail to advance an argument:

⁷ *Martha's Vineyard Scuba Headquarters, Inc. v. Unidentified, Wrecked & Abandoned Steam Vessel*, 833 F.2d 1059, 1061 (1st Cir. 1987).

⁸ *Spiegel v. Trustees of Tufts College*, 843 F.2d 38, 40-41 (1st Cir. 1988).

⁹ OLIVER WENDELL HOLMES, *SPEECHES* 75, 77 (1934).

How can the organized bar help in addressing the educational problems facing this country? Note that the question is not put as to whether the organized bar should be involved. As lawyers, we are inextricably bound to the rest of society. What happens to us as a nation not only has a profound effect on our clients, it also has a profound effect on the quality of our personal lives and those of our families. Clearly, the welfare of our family members and clients depends on matters beyond the confines of the law. Over and above the practical impact that issues may have on us, we must remember that lawyers are not just members of society; we have been, and remain today, leaders of that society. Just as our renewed emphasis on professionalism reminds us of our duty to look beyond the narrow interests of our clients to the broader interests of the legal system, so too must we make the maximum use of the privileged position we hold for the benefit of society.

The legal profession is in an ideal position to act as both a catalyst and a facilitator of consensus. . . .

On and on it goes. The writer of these paragraphs lost sight of the stated goal. He found several ways to say what ought to have been left unsaid — that lawyers are leaders — but failed to move anywhere. The prose has stagnated.

Omit whatever does not move toward your target. If you have no clear target in mind, you have no business putting pen to paper. (The target, remember, differs from the path, which you may not have charted in every detail.) Consider just how much ground Ronald Dworkin swiftly covers in this paragraph:

The Constitution is the fundamental law of the United States, and judges must enforce the law. On that simple and strong argument John Marshall built the institution of judicial review of legislation, an institution that is at once the pride and the enigma of American jurisprudence. The puzzle lies in this. Everyone agrees that

the Constitution forbids certain forms of legislation to Congress and the state legislatures. But neither Supreme Court justices nor constitutional law experts nor ordinary citizens can agree about just what it does forbid, and the disagreement is most severe when the legislation in question is politically most controversial and divisive. It therefore appears that these justices exercise a veto over the politics of the nation, forbidding the people to reach decisions which they, a tiny number of appointees for life, think wrong. How can this be reconciled with democracy? But what is the alternative, except abdicating the power Marshall declared? That power is now so fixed in our constitutional system that abdication would be more destructive of consensus, more of a defeat for cultivated expectation, than simply going on as before. We seem caught in a dilemma defined by the contradiction between democracy and ancient, fundamental, and uncertain law, each of which is central to our sense of traditions. What is to be done?¹⁰

In some particulars, of course, we are left disappointed: Dworkin uses the *neither . . . nor* construction with three elements, uses *which* for *that*, and twice relies on *this* to refer to a series of sentences. But how quickly he gets to his point, how deftly he propels the argument forward!

¹⁰ RONALD DWORGIN, *The Forum of Principle*, in A MATTER OF PRINCIPLE 33, 33 (1985).

SPEAKING LEGALLY

8. *Avoid Jargon and Beware Terms of Art.*

When you find your writing “encrusted by the barnacles of jargon,”¹¹ do not rejoice at acquiring the briny mementos. Eliminate every trace of them if you can. In legal writing, jargon consists mostly of stilted words and phrases — blemishes, not graces — such as *aforsaid*, *arguendo*, *said (policeman)*, *hereinafter*, *hereunto*, *before-mentioned*, *comes now*, *further affiant sayeth not*, *et ux.*, *instante*, *such (person)*, *wherefore*, *to wit*, *witnesseth*. Most hoary legal phrases have no substantive purpose. They sometimes mar the substance by suggesting precision where in fact an ambiguity lurks. The only reason for using them is to affect a legalistic style — a style better interred than exhumed.

Good legal writing is hardly more than literary English applied to law. If we foster differences, we ought to know the reasons for those differences. We should question even such jargon as *the instant case* and *the case at bar*. Why not *this case*? Most of the circumlocutions, formal words, and archaisms that characterize lawyers’ speech and writing are easily simplified to good effect.

¹¹ *Continental Oil Co. v. Bonanza Corp.*, 677 F.2d 455, 460 (5th Cir. 1982).

Instead of

adequate number of, an
 anterior to
 at the present time
 at the time when
 cause *x* to be done
 contiguous to
 divers
 during such time as
 excessive number of, an
 for the duration of
 for the reason that
 in case
 in order to
 instant
 in the event that
 in the interest of
 is able to
 is entitled to (do)
 it is directed that
 it is the duty of
 notwithstanding the fact that
 on the ground that
 period of time
 previous to
 prior to
 pursuant to
 subsequent to
 sufficient number of, a
 the reason being that
 until such time as

Write

enough
 before
 now
 when
 have *x* done
 next to
 several, various
 during, while
 too many
 during
 because
 if
 to
 this
 if
 for
 can
 may (do)
 shall, must
 shall, must
 although
 because
 period, time
 before
 before
 under, in accordance with
 after
 enough
 because
 until

Lawyers often spoil their prose by choosing phrases in the left-hand column instead of those in the right-hand column. As a cynical wag once quipped, a lawyer would probably have titled Kipling's famous poem "In the Event That."

As to terms of art — terms with a specific legal meaning — these much-vaunted favorites are an endangered species. No longer must a testator use the formula *and the heirs of his body* to create a fee simple. Legal formalism continues its slow death. Most "lawyerly words" are mere legaldegoon, not irreducible terms of art that carry a meaning not otherwise to be precisely conveyed. Though we have hundreds of jargonistic terms, the common terms of art number fewer than fifty. Count them: *plaintiff, defendant, fee simple, mandamus, mens rea, ejusdem generis, in rem*, and the like. Many supposed terms of art are too imprecise to be properly so classed: *Ratio decidendi* and *res judicata* have more than one layer of meaning; so do *common law* and *equity* (many more layers). Because such terms span an array of senses, you should specify the sense in which you use the terms. We err to suppose that they are finely honed terms of art.

Jargon may suit your purpose now and then. You may want to say *gift causa mortis* instead of *gift given by reason of the donor's immediate perception that he or she was dying*. Given the need to express the idea repeatedly, *gift causa mortis* grows on you quickly.

But never assume that traditional legal expressions are legally necessary. As often as not they are scars left by the law's verbal elephantiasis, which only lately has started into remission. Use words and phrases that you know to be both precise and as widely understood as possible. Rarely can you justify the little-known word on grounds that it is a term of art.

9. *Write in English, not in Latin or Norman French.*

Following this injunction has at least three advantages. First, you succeed in communicating. No one benefits from a conclusion stated in this way:

Parens patriae cannot be *ad fundandam jurisdictionem*.
The zoning question is *res inter alios acta*.¹²

Second, you avoid the “marvelous capacity of a Latin phrase to serve as a substitute for reasoning.”¹³ Third, you do not embarrass yourself with a pretentious blunder, as by writing *corpus delecti* in place of the correct phrase, *corpus delicti*: You neither show yourself to be a lack-Latin nor unwittingly entice necrophiliacs.

The English language has fully naturalized dozens of Latin and French words and phrases: *a priori*, *bonus*, *cause célèbre*, *de facto*, *ex cathedra*, *vis-à-vis*, and so on. We have a number residing only in the legal domain: *de minimis*, *ex parte*, *habeas corpus*, *nolo contendere*, *prima facie*, *voir dire*. Several reside comfortably both in legal English and in the broader language: *alibi*, *bona fide*, *quorum*. What all these phrases have in common is that each fills what was perceived to be a gap in the English language.

Many foreignisms found in legal writing do not fill such gaps and have not truly been imported into the English language. Why does anyone write that it would be *contra bonos mores* not to punish fathers who fail to care for their children; that clauses to safeguard a party are included in contracts *ex abundanti cautela*; that an interest in realty begins *in praesenti*, or *in futuro*; that one undertakes to rescue another *sub suo periculo*? These terms convey

¹² *Mississippi Bluff Motel, Inc. v. County of Rock Island*, 420 N.E.2d 748, 751 (Ill. App. Ct. 1981).

¹³ Edmund M. Morgan, *A Suggested Classification of Utterances Admissible as Res Gestae*, 31 YALE L.J. 229, 229 (1922).

no special legal meanings, no delicate nuances apprehended only by lawyers. They are pomposities that have ready English equivalents.

Imported jargon accounts for much of the obscure lawyerly tongue, which excludes all but those initiated into the legal fraternity. Simplify wherever possible:

<i>Instead of</i>	<i>Write</i>
<i>ab initio</i>	from the beginning
<i>arguendo</i>	for the sake (or during the course) of argument
<i>cestui que trust</i>	beneficiary
child <i>en ventre sa mere</i>	fetus
<i>ex contractu</i>	in contract, contractual
<i>ex delicto</i>	in tort
<i>ex hypothesi</i>	by hypothesis, hypothetically
<i>in esse</i>	in being
<i>in foro conscientiae</i>	in the forum of conscience
<i>in haec verba</i>	verbatim, in these words
<i>instanter</i>	instantly
<i>inter alia</i>	among others
<i>ipsissima verba</i>	the very same words
<i>non compos mentis</i>	insane
<i>res nova, res integra</i>	an undecided question, a case of first impression
<i>simpliciter</i>	simply, summarily, taken alone
<i>stricti juris</i>	of the strict right of law
<i>sub silentio</i>	silently, tacitly
<i>sui generis</i>	one of a kind, unique
<i>vel non</i>	or not, or the lack of it

Our genuine dilemmas under this heading are few: whether to write *gift causa mortis* (see Rule 8); whether to use the journalists' phrase *friend of the court* instead of *amicus curiae*; whether to write *doctrine of precedent* instead of *stare decisis*, *on its own motion* instead of *sua sponte*, and so on. Since lay readers have no better idea what a *friend of the court* is than an *amicus curiae* — indeed,

are more likely to believe mistakenly that they understand the English phrase — we hardly advance clarity by adopting the journalists' phrase. In general, though, the best course is to use a native English expression where one is available and to use a foreignism only as a last resort. Rarely, we might say, is a foreignism the *mot juste*.

10. Instead of Using Doublets or Triplets, Use a Single Word.

Among the lawyer's least endearing habits is stringing out near-synonyms. The causes are several. First, the language of the law has its origins in the unhurried prose of centuries past. Second, the strong oral tradition in England led inevitably to a surfeit of words to allow time for the listener to take in the speaker's point. Third, where one of the words might be unfamiliar, the synonym served as a gloss. Finally, lawyers distrusted their ability to find the right word, and therefore used a verbal scattergun instead of a rifle shot. As a result, we still use phrases such as these:

agree and covenant
all and singular
any and all
bind and obligate
cancel, annul, and set aside
cease and determine
do and perform
give, devise, and bequeath
liens and encumbrances
ordain and establish
pay, satisfy, and discharge
possession, custody, and control
premeditation and malice aforethought
remise, release, and forever quitclaim
right, title, and interest
uncontroverted and uncontradicted
vague, nonspecific, and indefinite.

That last string ties up nicely the main objection to these lawyerly word lists: They show no effort to be precise, specific, and definite. In a string such as *cancel, annul, and set aside*, any of the three synonyms would suffice. In others, such as *possession, custody, and control*, one of the words is broad enough (*possession*) to swallow the others in most contexts. Very few such phrases — notably *aid and abet* — are necessary as terms of art. Unless you are certain that each additional word colors the sense in the way you desire — or unless you want a ceremonious tone (*the truth, the whole truth . . .*) — settle on the single most appropriate word.

11. *Understate Rather Than Overstate.*

Writers too often cheapen words by inflating their value. When readers catch on, they intuitively adjust for the overstatement by believing a little less than what the writer has said, if indeed they believe any of it.

Unmindful of how judges are persuaded, advocates all too commonly try to reduce every opposing argument to “an utter fallacy,” “a logical absurdity,” or “an argument completely unsupported in law or in fact.” Lawyers who adopt this approach seem to want every case to be a knockout. They launch roundhouse punches in every argument. Judges quickly weary of refereeing these contests because they know that the world is more complicated than the belligerents would have it. Most cases have some merit on both sides; not every opposing argument can or need be pummeled down to absurdity.

Most issues about which serious argument takes place cannot be reduced to a simple dichotomy of right and wrong. Even in retrospect, after your side has won and the other lost in court, you should not think in these terms, for your client may have had complete vindication merely by a slight preponderance.

Take a measured, responsible approach in arguing against an opponent. Evaluate the other side’s argument by attempting first to understand it. That advice sounds quite elementary, but lawyers frequently argue without really understanding what their oppo-

nents are saying. Before rebutting the opposing arguments, try to state them in a way that would please your opponent. When you can do that, you can begin dismantling those arguments.

Successful written argument, then, does not take the most extreme possible position by grossly overstating the merits of one side and ignoring the merits of the other. Instead, it takes a more thoughtful approach. It refrains from exaggeration, from sweeping assertions that repel (not engage) the reader.

On the mundane level, “three” does not become “several” or “many”; a dog that has bitten a client’s leg does not become a “ferocious beast,” unless such a charged description can be substantiated; and corporate officers in a shareholder’s derivative suit do not become “self-seeking moguls whose sole aim was to perpetuate themselves in office, whatever havoc they wreaked on the corporation.” That is the type of writing that gave rhetoric a bad name.

EXPRESSIVE TACTICS

12. Use Kernel Words, Not Long Derivatives.

All too often, writers use a long noun to convey the same information as a kernel verb or adjective. To illustrate, we might (if we had no sense of style) write *submit an application* instead of *apply*. Similarly:

<i>Poor</i>	<i>Better</i>
exhibit resistance	resist
file a motion	move
make (or take) a decision	decide
make reference to	refer to
offer a rebuttal	rebut
proffer an argument	argue
reach a resolution	resolve
take into consideration	consider

Like kernel verbs, kernel adjectives hit the sense crisply: We should try where possible to write *complete*, not *completeness*; *disinterested*, not *disinterestedness*; *enforceable*, not *enforceability*; *specific*, not *specificity*. The principle makes our sentences leaner.

<i>Instead of</i>	<i>Write</i>
discovery by a person	the person discovered
in our discussion of the employment of additional workers	when we discussed hiring more workers
during the police investigation of the funds diverted by embezzlement	while the police investigated the embezzled funds

More than any other parts of speech, verbs bring prose to life, or life to prose. But only action verbs do this — verbs such as *snatch*, *stop*, *grasp*, *run*, *urge*, *plead*. Many English verbs, most notably forms of *be* (*is*, *are*, *might be*, etc.), are nondescript: They convey little, if any, action.

A *be*-verb followed by an adjective and a preposition often signals a circumlocution. For example, *be determinative of* is verbose for *determine*. Wordiness like this abounds in legal writing:

<i>Instead of</i>	<i>Write</i>
be abusive of	abuse
be benefited by	benefit from
be decisive of	decide
be derived from	derive from
be dispositive of	dispose of
be in attendance	attend
be indicative of	indicate

Many other wordy constructions can be boiled down into the present-tense singular: *is able to (can)*, *is authorized to (may)*, *is binding upon (binds)*, *is empowered to (may)*, *is required to (shall, must)*, *is unable to (cannot or may not)*.

Just as we say 1/4 instead of 12/48 — where there is no reason for working with the larger denominator — so we should reduce our words to the kernel.

13. *Stress Verbs and Nouns, Not Qualifiers.*

Usually, the job of adjectives is to weaken nouns; the job of adverbs is to weaken verbs. Instead of writing,

She was extremely interested in the book.

write this:

She was enthralled by the book.

Find the best single word instead of warming up a tepid one with a qualifier.

Likewise to be watched are qualifiers that douse the flame of the nouns they qualify: *somewhat*, *virtually*, *rather*, *surely*. Even would-be fortifiers such as *clearly*, *quite*, *undoubtedly*, and *undeniably* usually weaken prose instead of strengthening it.

Adjectives placed in high relief sometimes serve us well. See what Clarence Darrow does with *selfish*, *superstitious*, *bigoted*, and *outrageous* here:

He speaks of the people in the United States now as if they owned this country. Why, the first of them came over on the Mayflower. They couldn't stay at home without going to jail for debt. They were selfish, superstitious, and bigoted in the extreme. They came over here to get a chance. The real American was the Indian, and they solved that problem by killing him. The land was occupied, but they took it, and then our

Puritan fathers proceeded to pass the most outrageous laws that any country ever knew anything about.¹⁴

Even so, the verbs and nouns do most of the work here, not the adjectives. If we qualify the passage with more adjectives and adverbs, it collapses into fecklessness:

He speaks of the people of the United States now as if they *virtually* owned the country. Why, *many* of the first of them came over on the Mayflower. They couldn't, *for the most part*, stay at home without going to jail for debt. They were *extremely* selfish, *excessively* superstitious, and *quite* bigoted. They came over here *truly* to get a chance. The real American was the Indian, and they solved that *difficult* problem *more or less* by killing him. The land was *largely* occupied, but they *unashamedly* took it, and then our Puritan fathers proceeded *swiftly* to pass the most outrageous laws that *almost* any country ever knew anything about.

For their force, the two passages can hardly be compared. The second passage we know to be a travesty; but any lawyer can attest to how pervasive such qualifier-laden prose is in court papers, letters, judicial opinions, and law-review articles.

14. *Mind the Cadence of Your Prose.*

Prose writers are seldom as sensitive to rhythm as poets, no doubt because rhythm is less crucial in prose. But it is not unimportant. Rhythm makes the difference between clumsy, monotonous writing and graceful writing that shows logic. Masterly writing suggests inevitability: a sense that each word must follow the one that precedes and that no other placement of sentences and paragraphs would have worked so well.

¹⁴ CLARENCE DARROW, *The Immigration Law*, in VERDICTS OUT OF COURT 134, 137-38 (1963).

Overlook sentence length at your peril. Try to write mostly short sentences, but punctuate these by the occasional long sentence. Dworkin provides a good example:

These are the direct effects of a lawsuit on the parties and their dependents. In Britain and America, among other places, judicial decisions affect a great many other people as well, because the law often becomes what judges say it is. The decisions of the United States Supreme Court, for example, are famously important in this way. That Court has the power to overrule even the most deliberate and popular decisions of other departments of government if it believes they are contrary to the Constitution, and it therefore has the last word on whether and how the states may execute murderers or prohibit abortions or require prayers in the public schools, on whether Congress can draft soldiers to fight a war or force a president to make public the secrets of his office.¹⁵

Apart from length, be sure that not every sentence follows the same structure. Once you have learned to vary sentence structure, your rhythmic repertory broadens.

Strive for the best possible phrasing of your sentences. Just as a flutist must know when to take breaths without interrupting the musical flow, you must consider where the pauses fall, and with what effect. As you read this sentence, imagine how it would sound if read aloud:

The plaintiff having conveyed away by deed, purporting to grant a fee simple interest in the lands, and having had them conveyed back to her, is now seised of a fee simple interest.

¹⁵ RONALD DWORKIN, *LAW'S EMPIRE* 2 (1986).

We may question the wisdom of using a periodic sentence for such a statement. But if we are to stay with that structure, we greatly improve the cadence by repositioning the subject directly before the verb and by making the participial phrase introductory:

Having purported to convey a fee simple interest in the lands, and having had them conveyed back to her, the plaintiff is now seised of a fee simple interest.

Now let us abandon the periodic sentence:

The plaintiff conveyed a fee simple interest in the lands and then had them conveyed back to her. Therefore, she now owns the lands in fee simple.

That is not moving prose, to be sure; but it is simple, clear, and suited to the message.

In the previous example, *purport* did not survive editing because the writer conceded the efficacy of the grant. Legal writers often add such needless words that disrupt cadence. The result is awkward prose that lumbers along. One more example:

The basis for, and the need of, such encouragement is no longer existent.

When we reduce the sentence from 13 to 8 words — partly by recognizing that the word *need* swallows *basis*, as here used — we gain a more natural rhythm:

The need for such encouragement no longer exists.

Or, if the meaning permits, six words:

They no longer need such encouragement.

Paring down sentences in this way — cutting every word that does not directly advance the argument — almost always improves the rhythm. No longer need we read the many unaccented words while searching for a word that can bear emphasis.

15. Use Clichés with Caution.

Clichés are timeworn expressions, those once clever phrases that have been reduced to formula. The best way to handle clichés is not to avoid them altogether, but to use them warily. Usually a cliché (*comparing apples and oranges*) is better than a circumlocution invented merely to displace the cliché (*comparing plums and pomegranates*). What you want to avoid are the prepared wads of verbiage that displace thought.

Good writers use clichés consciously, for a purpose. For example, a clever judge once wrote that the “unwritten law is not worth the paper it isn’t written on.” For a less waggish example, who doubts that Fred Rodell had the mountain-out-of-a-molehill cliché well in hand here?

With law as the only alternative to force as a means of solving the myriad problems of the world, it seems to me that the articulate among the clan of lawyers might, in their writings, be more pointedly aware of those problems, might recognize that the use of law to help toward their solution is the only excuse for the law’s existence, instead of blithely continuing to make mountain after mountain out of tiresome, technical molehills.¹⁶

Contrast the seeming inevitability of Rodell’s phrasing with this oblivious use of a cliché: “[A] recurrent dream of social reformers has been that the law should be (and can be) simplified and purified

¹⁶ Fred Rodell, *Goodbye to Law Reviews — Revisited*, 48 VA. L. REV. 279, 284 (1962).

in such a way that the class of lawyers can be done away with. The dream has never withstood the cold light of waking reality."¹⁷ One reads that last sentence with a sunken feeling.

Before using clichés such as these, make them prove themselves:

add insult to injury	last-ditch effort
all things considered	left up in the air
at first blush	lock, stock, and barrel
commune with nature	none the wiser
considered opinion	no uncertain terms
constrained to hold	no-win situation
deliberate falsehood	one and the same
distinction without a difference	open and shut
fateful day	powers that be
fall on deaf ears	pros and cons
foregone conclusion	pull no punches
frame of reference	pure and simple
garden-variety (case, etc.)	Scylla and Charybdis, between
grievous error	search far and wide
it goes without saying	wheels of justice

Clichés are not forbidden; rather, when you find yourself about to use one, rethink what you want to say. How can you say it best? If you believe it is by consciously using a cliché, then read the sentence and then the paragraph to yourself, listening especially for banal tone. You will find that you use fewer clichés and achieve better results.

16. *Root Out Sexist Language.*

Much can be, and has been, done to minimize sexist language. Legal writers are at the forefront of the movement to eradicate the linguistic unfairness of the English language. Today even some of

¹⁷ GRANT GILMORE, *THE AGES OF AMERICAN LAW* 1 (1977).

the stodgiest scholars show in their writing a sensitivity to the existence of women.

Only a boorish writer today would begin a sentence, "For the lawyer more than for most men . . . ,"¹⁸ or would write: "There is a brand of lawyer for whom law is the making of a livelihood, a competence, a fortune. Law offers means to live, to get ahead. It is so viewed. Such men give their whole selves to it"¹⁹ The second example was written many years ago, but the first appeared in 1980 (right before and after warnings in the same text to avoid sexist language).

Nowadays, legal writers have become so sensitized to the problem that a tacit rule has emerged: In all hypotheticals posed, doctors, judges, professors, and other leading citizens are women; drug addicts and criminals remain men. When, we must wonder, will it be safe to have a better balance?

Not just in hypotheticals has the cause progressed. Many writers use *she* and *her* as generic pronouns. Indeed, at least two law reviews have enshrined this practice as their policy.²⁰ A writer must be sure to get her pronouns right before submitting an article to those journals.

Despite our considerable progress, writers must grapple with particular problems in wording. There are many ways to avoid sex-specific pronoun references that readers increasingly find objectionable. Consider any of these choices, but avoid clumsy artifices that are sure to prove ephemeral, such as *slhe* and *(wo)man*. Some devices may not work in a particular context; we may not

¹⁸ HENRY WEIHOFEN, *LEGAL WRITING STYLE* 1 (2d ed. 1980).

¹⁹ KARL LLEWELLYN, *THE BRAMBLE BUSH* 119 (1930; repr. 1951).

²⁰ They are the *University of Pennsylvania Law Review* and the *New York University Review of Law and Social Change*. A prefatory statement in the latter reads: "In order to further the *Review's* commitment to sex equality, contributors are expected to use feminine pronouns for the third person singular when the pronoun is used generically."

succeed in completely uprooting *he* as a generic pronoun, but we can shrivel its roots by using these methods.

First, cut the pronoun. Instead of,

The judge should try to read trial briefs as they are submitted to *him* by the parties.

write this:

The judge should try to read trial briefs as they are submitted by the parties.

Second, repeat the noun. Instead of,

The judge in whose court the case is first filed has priority in hearing the case. If venue appears to be improper, *he* should grant a motion to transfer venue.

write this:

The judge in whose court the case is first filed has priority in hearing the case. If venue appears to be improper, the judge should grant a motion to transfer venue.

When overused, this method of repeating nouns (*the judge . . . the judge . . . the judge*) gives prose an un-English appearance and tires the reader.

Third, make the antecedent plural. This tactic makes the singular *he* unnecessary. Instead of,

A judge should conscientiously meet his responsibility to avoid even the appearance of impropriety.

write this:

Judges should conscientiously meet their responsibility to avoid even the appearance of impropriety.

Note the slight change in connotation: The responsibility appears to be less an individual than a collective one.

Fourth, use an article instead of a pronoun. For example, instead of,

Every judgment-creditor may use legal means to enforce his judgment.

write this:

Every judgment-creditor may use legal means to enforce a judgment.

Fifth, use *one*. Instead of,

A prevailing plaintiff in this circuit is more likely to be awarded attorneys' fees than he is in that circuit.

write this:

A prevailing plaintiff in this circuit is more likely to be awarded attorneys' fees than one in that circuit.

This method is not calculated to encourage writers to say, "One may begin an appeal from an adverse judgment by filing one's notice of appeal and then timely submitting one's brief." Repeating *one* in that manner seems unnatural to most Americans.

Sixth, use *who*. Instead of,

Law professors assume that if a writer cannot write standard English, *he* cannot be expected to understand and analyze complex legal problems.

write this:

Law professors assume that a writer *who* cannot write standard English cannot be expected to understand and analyze complex legal problems.

Seventh, use the imperative. This method has limited use in legal writing. But teachers and commentators may profitably avoid the needless verbiage here:

The litigator must always take the greatest care when he is choosing a jury.

If your audience consists of litigators, write this:

Take the greatest care in choosing a jury.

Finally, reword the sentence. Instead of,

A trial judge who decides not to recuse himself may continue hearing the case unless an appellate court reverses his decision and orders recusal.

write this:

A trial judge who denies a motion to recuse may continue hearing the case unless an appellate court reverses the decision and orders recusal.

The generic *he* is not our only problem. We also have suffixes that many perceive to be sexist, as in *chairman*, *foreman*, *workman*, *venireman*, *testatrix*, and *executrix*. These difficulties can usually be avoided (preferably not by making *-person* a suffix): *chair*, *presiding juror* instead of *foreman*, *worker*, *veniremember*, and *testator* and *executor* (used for both sexes). We may never be able to dust out the sexism from every corner of the language (*manhole* may persist), but with a little sensitivity and effort we can eliminate most sexist references without becoming manic.

17. Ban Omnibus Words.

Whatever is generic in writing is an enemy to good legal writing. Just as glib generalities weaken the arguments they would support, so omnibus words detract from the message they are to convey. To be avoided on this count are highly abstract words

such as *area*, *aspects*, *case* (when referring to other than a law case), *factor* and *consideration* (in nonlegal senses), *field*, *important*, *kind*, *meaningful*, *parameters*, *phase*, *type*. Expunge these words and you will find your writing more vigorous, concrete, and vivid.

Poor

There are a number of areas in which we might achieve meaningful reform in the field of tort law.

Better

We might advantageously reform tort law in several ways.

18. *Use One Word for One Notion.*

“Besides arabic script, we all learn in school a . . . reluctance to repeat even a single word more than once in a paragraph.”²¹ Thus, a modern textbook on law for artisans says:

Except for this potential problem, the *craftmaker's* estate is taxed only on the *craftworker's* share of the corporation. The estate and the beneficiaries receive the *craftperson's* stock with a fair market value basis . . .²²

Just how many people have died here?

Fowler termed “elegant variation” the ludicrous practice of never using the same word twice in the same sentence. When Fowler named this linguistic vice over half a century ago, *elegant* connoted precious overrefinement. Today, on the whole, the word

²¹ *Burlington Indus., Inc. v. Dayco Corp.*, 849 F.2d 1418, 1421 (Fed. Cir. 1988).

²² LEONARD D. DUBOFF, *THE LAW (IN PLAIN ENGLISH) FOR CRAFTSPEOPLE* 71 (1984) (emphasis added).

has positive connotations. The vice is now more appropriately called *inelegant variation*.

The rule for undue repetition is that you should not repeat a word in the same sentence if it can be felicitously avoided. But this rule is hardly an absolute proscription. The problem is that if you use terms that vary slightly in form, the reader is likely to deduce that you intend the two forms to convey different senses. For example, writers who use *insidious* here and *invidious* there almost certainly intend to distinguish the two; the same conclusion follows from *presumptive* in one paragraph, *presumptuous* in the next. We intuitively understand that similar words with different forms have different meanings.

Thus, you do not write *punitive damages*, *punitory damages*, and *punishment damages* all in the same opinion or brief, lest the reader infer that you intend a distinction. Yet judges have done that, apparently fearful of using the same phrase twice in an opinion, or in a single sentence, as here:

The law with respect to *punitive damages* is that in order to justify the infliction [READ: imposition?] of *punitory damages* [READ: *punitive damages*] for the commission of a tort, the act complained of must have been done wantonly or maliciously.²³

Note how much better the sentence may be rewritten in 14 words instead of 35:

Punitive damages may be imposed only when the tortious conduct was wanton or malicious.

Finally, do not use two or more unrelated phrases to describe a single thing. We confuse readers by writing *leased property* in one paragraph, *demised premises* in the next, and *realty subject to lease* in

²³ Stenson v. Laclede Gas Co., 553 S.W.2d 309, 315 (Mo. Ct. App. 1977) (emphasis added).

the next. To a much greater extent than general style, legal style limits a single meaning to the single phrase.

19. *Ferret Out Ambiguities.*

Jacques Barzun, a leading authority on writing, once worked alongside John Simon when the latter was just beginning his career as a film and theater critic. Simon recalls:

Barzun gave me a number of invaluable pointers about writing, the most astonishing of which was the suggestion that I refrain from using in the same passage the words *regiment* and *calvary*, because, in that context, readers were sure to misread the latter as *cavalry*. This struck me as a bit farfetched at the time; still, I dutifully changed *calvary* to *golgotha*.²⁴

Retrospectively expressing his gratitude, Simon explained the lesson: "That one could use such foresight and courtesy to forestall misreading — to make some hypothetical reader's sailing a little smoother — is something that would never have occurred to me. Now is it something I can never forget."²⁵

Forestall misreading. One common type of misdirection occurs when readers stress a word other than the one the writer intends to emphasize. Take this sentence:

The average law review writer is peculiarly able to say nothing with an air of great importance.²⁶

²⁴ J. SIMON, PARADIGMS LOST: REFLECTIONS ON LITERACY AND ITS DECLINE 55-56 (1980).

²⁵ *Id.* at 58.

²⁶ Rodell, *supra* note 16, at 280.

Is it that the writer cannot say anything with an air of great importance? Or that the writer can say something without substance and make it sound very important? The latter, one realizes upon a moment's reflection. But why make the reader think about which of the two meanings was intended? A comma after *nothing* remedies the ambiguity.

The self-critical writer rules out phrases such as *dormant sodomy laws*,²⁷ *alimentary canal smuggling*,²⁸ and *prophylactics against a wrongful discharge*,²⁹ which evoke images far different from those intended. Once thrown off track by such a phrase, readers are likely to consider the writer oafish.

To avoid these pitfalls, review your writing ungenerously, as a harsh critic might. If you approach your own writing mercilessly, your readers are sure to be merciful. That brings us to the final point.

20. *Revise, Revise, Revise.*

"There is no such thing as good writing," Justice Brandeis once said (borrowing from Flaubert): "There is only good rewriting."³⁰ Justice Brandeis, who often reworked his opinions 15 or 20 times, would have deplored the "dictator's style" of the modern lawyer — the unfortunate result of "writing" orally into dictating machines and neglecting revision.

²⁷ See J. Drew Page, *Cruel and Unusual Punishment and Sodomy Statutes*, 56 U. CHI. L. REV. 367, 390 (1989).

²⁸ *United States v. Montoya de Hernandez*, 473 U.S. 531, 533 (1985).

²⁹ *Findeisen v. North East Indep. School Dist.*, 749 F.2d 234, 238 (5th Cir. 1984).

³⁰ George W. Pierce, *The Legal Profession*, 30 THE TORCH 5, 8 (1957) (quoting an oral remark by Justice Brandeis).

Editing requires different faculties from writing. As an editor, even of your own work, you become a critic, distancing yourself from what has been written (or said into a machine). The two processes — writing and then editing — might be analogized to those of the hypothetical-deductive method: The scientist must call upon creativity in posing a hypothesis, then upon critical analysis to test its truth through experimentation. Both elements are essential.

In revising, the greatest skill is knowing what to reject. Search for every superfluous syllable. If a word or phrase does not add to the sentence, blot it out. Every word, every phrase, every sentence ought to have some definable purpose. If you cannot connect words with thoughts, strike the words and begin again, always keeping your goal in mind.

At the final stage of revision, read your prose aloud for content and for style. You will be surprised how often you spot subtle problems in the reasoning, or deficiencies in the analysis, by reading aloud. By relying on your ear — not just on your mind's ear — for guidance, you will also find more ways to improve your phrasing. If you cannot read a sentence or paragraph aloud and have it make sense to a listener, then the writing is inadequate. Work it over again.

Never leave your proofreading entirely to others, or to a computer. Ask others to read for you, to be sure, and use the computer's spelling program. But always proofread for yourself. Even something as trivial as a typographical error can detract from the message. Perhaps lawyers do not feel justified in billing clients at high hourly rates merely to correct spelling; perhaps some judges consider the task beneath them. But professionalism demands that you take these pains. Finding only misspellings will be the exception — more likely, even in the fifth or sixth read-through, you will find some way to improve the substance. If you find nothing to improve on, you gain the peace of mind that comes from thoroughgoing care. More likely, though, you have not read closely enough.

Writing is an art form. However far we may take the notion of “legal science,” we cannot escape the art of prose, cannot reduce our use of words to a formula. Rules are helpful, because they codify our predecessors’ wisdom. But slavish adherence to the rules is only a little better than complete ignorance of them. Merely obeying rules will never yield literary excellence. That, ultimately, depends on judgment, intelligence, maturity, and learning — each of which we ought to cultivate with all our effort. These qualities enhanced, our ends as legal writers will become more readily attainable.

Even seasoned lawyers do well to recall Felix Frankfurter’s words to 12-year-old M. Paul Claussen, Jr., in 1954: “The best way to prepare for the law is to come to the study of law as a well-read person. Thus alone can one acquire the capacity to use the English language on paper and in speech and with the habits of clear thinking which only a truly liberal education can give.”³¹ Law, like literature, is a way of life. If we know and appreciate law, we understand our society more keenly than before. If we know and appreciate literature, we understand life more keenly than before. Successfully combining the two passions is one of the highest ideals to which a lawyer can aspire.

³¹ Felix Frankfurter, *Advice to a Young Man Interested in Going into Law* (quoted in *THE LANGUAGE OF THE LAW* 357, 357 (Louis Blom-Cooper ed. 1965)).

