

# The Legal-Writing Skills Test

Bryan A. Garner

What follows is a two-part, three-hour exam designed to evaluate the skills of legal writers. The exam tests a variety of abilities that legal employers typically expect of their lawyers: (1) understanding grammar and usage; (2) tightening wordy sentences; (3) eliminating legalese; (4) summarizing judicial holdings; and (5) writing a cogent argument. The questions range from easy to difficult, from fairly obvious to fairly subtle.

Why have such an exam — the LWST (“el-wist”), as I call it? Well, imagine a world in which:

- all law students are expected to take the test — probably after their first year of law school — and to tell prospective employers what their LWST scores are;
- the LWST is administered in much the same way as the SAT, GMAT, or ACT — at designated times and places all over the country simultaneously, in a controlled setting, and with rigorous standards for protecting the integrity of the tests;
- more than 15,000 LWST scores are issued annually;
- state bar associations require a minimum score as part of the bar exam;
- judicial nominees are asked to take the exam to ensure that they can write;
- judges in turn consider the LWST scores of prospective law clerks to ensure that they can write;
- law firms treat candidates’ scores not as the deciding factor, but as one more criterion for gauging the relative ability of candidates from different schools;
- the exam actually widens the field of qualified applicants because it’s used not just for screening out bad writers, but

also for considering good writers whose law-school grades might not truly reflect all their skills.

If the test were to become established in these ways, the methods for teaching legal writing — the degree of seriousness accorded to legal-writing programs in law schools — would have to change considerably. If employers expect their candidates to achieve a certain level on the LWST, then legal-writing programs would have to prepare students for the exam.

Standards would be set by a committee of legal-writing specialists throughout the country. Grading would be as uniform as it can be on such tests — but note that the GMAT and even the SAT are moving toward performance-based writing tests, meaning non-multiple-choice testing.

For now, of course, this is all fanciful. But it could happen, and it probably should happen. I have already administered the exam to two groups — one very small and one rather large — and I am confident that it distinguishes reliably between the superb writer and the merely competent writer, and between the merely competent writer and the inept one. Further, though, the exam shows which skills a writer needs to improve.

Some might be tempted to dismiss the exam when seeing that there are five questions on *that* and *which*. Why the emphasis on relative pronouns? The answer is fivefold. First, although this distinction is often neglected, it is a nicety that careful writers — and professional American editors — still follow. Second, to grasp and apply the distinction is to show a refined analytical bent. Third, the distinction was not invented simply to give writers headaches, but to help them avoid ambiguities; those who observe it bypass those pitfalls. Fourth, hiring committees at law firms usually have more than a couple of members who prize a mastery of this distinction. Fifth — if I may be allowed a purely subjective reason — writers who distinguish between these words, by reserving *which* for nonrestrictive clauses, tend to write more vigorously.

Each part of the exam has an underlying rationale. For now, though, it is probably enough simply to put the exam into circulation.

Meanwhile, think of the implications. Think of what might happen if Yale and Stanford graduates could be assessed head-to-head by the same standard. Think of how law schools could be ranked from 1 to 180 (or so). Think of how the law schools would begin to revamp their writing programs toward the practical. Think of how much money law firms would save by not filling precious summer positions with candidates who can't write. Think of how the profession might improve within a single generation.

What boggles the mind is that it hasn't already been done.



5. Plaintiff's experts have testified that the amount of damages for loss of use are based on the revenues expected under the contract in question.
  
  
  
  
  
  
  
  
  
  
6. If either the debtor or the creditor want an extension of the stay, an application under § 105 should be filed with the bankruptcy court.

### **Punctuation Errors**

Each sentence below contains two errors in punctuation. Assume that citations are correctly supplied. Correct the errors in each sentence.

7. The Court in *Singleton*, held that the use of a sole-negligence-of-owner exclusion, to find the parties' intent is impermissible.
  
  
  
  
  
  
  
  
  
  
8. An ex employee of Higgins Oil Tool Company was summarily dismissed and she filed a lawsuit against the company for not making a "reasonable accommodation."

9. On July 29, 1992 Gifford McDowell of our office traveled to Niagara Falls, New York to attend and participate in the videotaped depositions of Darrin Meredith, Mark Ingstrom, and Paul Encino.
  
  
  
  
  
  
  
  
  
  
10. The program was modified, however, it was not — to any great extent — changed in its basic structure.

### Passive Voice

Each sentence below contains at least one passive-voice construction. Although passive voice isn't always undesirable, these sentences could benefit from a passive-to-active transformation. Circle each passive construction and then rewrite the sentence entirely with active voice.

11. The fee-simple interest could have been conveyed by her to the defendant.
  
  
  
  
  
  
  
  
  
  
12. It is not shown by the plaintiff that the defendant was motivated by a desire to destroy the value of plaintiff's interest in the promissory note, as is alleged in the complaint.

13. Each month, price lists were exchanged between the defendant manufacturers, and it was agreed by them that all sales would be made at list price or above.
  
  
  
  
  
  
  
  
  
  
14. The burden is borne by the plaintiff to plead and to prove the actual amount of profits that would have been received by the plaintiff.
  
  
  
  
  
  
  
  
  
  
15. If the thing that is sought to be subjected to taxation is really an interest in land, then by concession the proposed tax is not permissible.

### Misused Words

Each sentence below contains a single misused word. Circle it and write the correct word nearby.

16. The statute does not supersede, but rather compliments, the city's authority.

17. The statute of limitations did not adversely effect the defendant's right to pursue its cause of action against third parties for contribution.
  
18. The department has concluded in principal that the instrument meets all the statutory requisites.
  
19. The *Mulholland* court's holding inferred that each of these elements is invariably comprised in a valid acceptance.
  
20. The mental anguish resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the incident.

### **Tightening**

Each sentence below is much wordier than it needs to be. A good editor could cut 25% of each one. Rewrite each sentence trying both to preserve the original meaning and to save as many words as you can.

21. Inferentially, the *Champlin* court's decision can be read to stand for the proposition that mere ownership of property in a county does not establish venue where employees operate out of that property on a sporadic basis. [36 words]

22. As pertains to Captain C.K. MacLaine, because of his lack of any tangible assets and previous judgments on his record, Captain MacLaine is not able to satisfy any judgment which may be levied against him. [35 words]
23. Ordinarily, determining which entity is the employer in a given situation is not difficult; however, when an employee of one employer is lent to work for a second employer, the question becomes more difficult to resolve. [36 words]
24. Plaintiff's fellow employees expressed feelings of apprehension with regard to Plaintiff and feared retaliation by him. Their allegations of sexual harassment were made in strict confidence with the understanding that their identities would in no way be revealed to the Plaintiff. [41 words]

25. This case was set for trial on November 4, 1994. At the request of Defendant Bandog, Inc., this case was removed from the November 4, 1994 docket. The Court has scheduled this case for trial on March 30, 1995. Plaintiffs now request that the Court retain this case on the March 30, 1995 docket. [54 words]

### *That and Which*

Each of the following sentences contains a blank in which a relative pronoun — either *which* or *that* — should appear. The correct answer is apparent even without the greater context. Fill in the blanks with either *which* or *that*, and supply any necessary punctuation.

26. Article 12 of the city charter contains provisions \_\_\_\_\_ specify improper acts by city officers and employees.
27. Rule 166b is in direct conflict with § 552 of Title 5 of the United States Code \_\_\_\_\_ is often referred to as the Freedom of Information Act.
28. The vessel's master was unsure of the vessel's plastic-disposal procedures but made statements \_\_\_\_\_ he felt would prevent the Coast Guard from acting.

29. CERCLA's goal of speedy remediation is not advanced when patently inequitable settlements are pursued at a site \_\_\_\_\_ is no longer posing any health threats.
30. The court endorsed the oligopoly economic theory \_\_\_\_\_ assumes a company will, without agreement, seek to maintain its market share at the highest possible price.

### Eliminating Legalese

Rewrite the following passages in plain English.

31. TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, Shrimpcorp, by and through its attorneys of record, Farndash & Farndash, and in continuation of its Answer and for its Motion to Dismiss Plaintiff Elfcorp's cause of action for failure to state a claim upon which relief can be granted pursuant to the provisions of Rule 12(b)(6), states: [etc.].

32. Enclosed please find two (2) copies of the three (3) cases decided subsequent to April 1994.
33. Pursuant to my telephone conversation with Mr. Robert Stanley of your office on today's date, I hereby request a revised legal description and revised survey of the above-referenced property.
34. If you should require any further information or statement of a position in this matter, please be advised that you may contact the undersigned.

35. This letter shall confirm our understanding and agreement that if your loan application on the above-described property is approved, you shall occupy the same as your primary residence within thirty (30) days of the closing date. You are aware that if you shall fail to do so, such failure shall constitute a default under the Note and Security Instrument executed in connection with your loan and upon occurrence of such default, the full and entire amount of the principal and interest payable pursuant to said Note shall become immediately due and payable at the option of the holder thereof.

**Part Two**  
**Essay Section**

36. Write a three-paragraph essay in support of either of the following propositions. Do not repeat the proposition verbatim, but restate it more concretely. Make sure that you have a clear thesis sentence and that you illustrate your argument.
- People cannot be made honest by an act of the legislature.
  - Lawyers should reclaim an ideal expressed by Shakespeare: “Do as adversaries do in law — strive mightily, but eat and drink as friends.” (As part of your essay, you may wish to use this very quotation.)
37. Frame the primary issue addressed by the court in *Nebraska Equal Opportunity Commission v. State Employees Retirement System*, 471 N.W.2d 399 (Neb. 1991). This issue is contained in paragraphs 1-8. Ignore the issues contained in paragraphs 9-15 (although you may wish to scan the entire opinion).  
Phrase your answer as a “deep issue,” in the form of statement-statement-question (or premise-premise-conclusion). End with a question mark. Keep your issue under 100 words — and preferably under 75.  
Remember that you are framing the question that the court actually answered. The opinion is reprinted in the pages that follow.
38. If you were asked to write a dissenting opinion in *Nebraska Equal Opportunity Commission v. State Employees Retirement System*, how would your deep issue read?

NEBRASKA EQUAL OPPORTUNITY  
COMMISSION, Appellant,

v.

STATE EMPLOYEES RETIREMENT  
SYSTEM, Appellee.

No. 89-0140.

Supreme Court of Nebraska.

June 28, 1991.

HASTINGS, C.J., and BOSLAUGH, WHITE, CAPORALE, SHANAHAN,  
GRANT, and FAHRNBRUCH, JJ.

CAPORALE, Justice.

[1] On behalf of Charles Thiessen, the Nebraska Equal Opportunity Commission, the appellant, sued the State Employees Retirement System, the appellee, alleging that certain actions taken by the Retirement System in accordance with the requirements of the State Employees Retirement Act, Neb.Rev.Stat. §§ 84-1301 through 84-1331 (Cum.Supp.1986), violated the Act Prohibiting Unjust Discrimination in Employment Because of Age, Neb.Rev.Stat. §§ 48-1001 through 48-1009 (Reissue 1988), to Thiessen's detriment. Following a bench trial, the district court dismissed the commission's petition. The commission asserts, in summary, that the district court erred in (1) failing to follow the traditional age discrimination analysis and (2) overruling the commission's motion to amend its pleadings after judgment. We affirm.

[2] Thiessen was born November 16, 1924, began working for the State in August 1961, and almost 25 years later, at 61 years of age, voluntarily terminated his employment on June 6, 1986.

[3] Under the statutes then in effect, employees who were members of the Retirement System could choose among three benefit schemes: (1) a monthly annuity based upon the combined contributions made to the retirement fund by both the employee and the State, (2) a lump-sum payment of up to 25 percent of the employee's contributions to the fund and an annuity based upon the combined remaining employee and State contributions, or (3) a lump-sum payment of 100 percent of the employee's contributions, coupled with a forfeiture of the State's contributions. § 84-1319. However, employees below age 55 could, upon terminating their employment, receive a lump-sum payment of 100 percent of

their personal contributions, along with an annuity based upon the State's contributions. § 84-1321. In other words, those employees over the age of 55 who wished to receive a lump-sum payment of their personal contributions to the fund were forced to forfeit any benefit from the State's contributions, while younger employees would receive a lump-sum payment and an annuity.

[4] Thiessen opted to receive the lump-sum payment. Since he was over 55, he forfeited any benefit from the employer's contributions, which amounted to \$12,337.72.

[5] The Legislature has since amended § 84-1319 to give terminating employees the same benefit options regardless of age. See 1987 Neb.Laws, L.B. 60.

[6] The essence of the commission's position in its first summarized assignment of error is that former §§ 84-1319 and 84-1321 violated the age discrimination statutes. The question therefore boils down to whether compliance with one series of state statutes can constitute a violation of another series of statutes of the same state. There are two rules of statutory construction which are applicable to situations where statutes enacted by the same sovereign appear to conflict. The first is the doctrine of repeal by implication, and the second is the principle that statutes of general application yield to those of specific application.

[7] Repeals by implication are not favored, and a construction which, in effect, repeals another statute will not be adopted unless such construction is made necessary by the evident intent of the Legislature. A statute will not be considered repealed by implication unless the repugnancy between the new provision and the former statute is unavoidable. *State v. Fellman*, 236 Neb. 850, 464 N.W.2d 181 (1991); *Sarpy Co. Pub. Emp. Assn. v. County of Sarpy*, 220 Neb. 431, 370 N.W.2d 495 (1985); *City of Grand Island v. County of Hall*, 196 Neb. 282, 242 N.W.2d 858 (1976). The age discrimination statutes were enacted in 1963 and most recently amended in 1983. The forfeiture of employer contributions was mandated by a 1986 amendment to § 84-1319. See 1986 Neb.Laws, L.B. 311. Logic dictates that a prior enactment cannot repeal a subsequent one. Since the forfeiture provision was enacted after the age discrimination statutes, the age discrimination statutes could not have worked a repeal of the benefit statutes.

[8] We have stated that "[w]here general and special provisions of statutes are in conflict, the general law yields to the special, without regard to priority of dates in enacting the same, and a special law will not be repealed by general provisions unless by express words or necessary implication . . ." *Glockel v. State Farm Mut. Auto. Ins. Co.*, 219 Neb. 222, 231, 361 N.W.2d 559, 565 (1985), quoting *Kibbon v. School Dist. of Omaha*, 196 Neb. 293, 242 N.W.2d

discrimination in a variety of employment situations. The statute mandating the asserted discriminatory treatment is narrower and more specific; it is limited to retirement and termination benefits of employees who are part of the Retirement System. Since the general law yields to the specific, the benefit scheme is to be treated as an exception to the general prohibition against age discrimination.

[9] The commission directs our attention to a plethora of federal court decisions which hold that compliance with a state statute is not a defense in an action for age discrimination under the federal age discrimination act, 29 U.S.C. §§ 621 et seq. (1988). The commission suggests that our own age discrimination statutes are based upon the federal act, and, thus, the same rule regarding compliance with a state statute should apply under our act. This argument is without merit. Of course, compliance with a state statute will not defeat an action under a federal act; the supremacy clause of the federal Constitution gives federal enactments precedence over state law. See U.S. Const. art. VI, cl. 2.

[10] In an attempt to overcome this obvious impediment, the commission asserts that the federal cases it cites

did not rely on the supremacy clause. Rather, those courts looked at the reasonableness of reliance on a discriminatory state statute. The courts found that the defendants did not rely on a reasonable factor other than age. In those cases, liability was found even though the defendants had no notice that reliance on a state statute was invalid.

Reply brief for appellant at 10.

[11] However, the fact that some of the cases cited by the commission may not express their reliance on the supremacy clause is immaterial. Such reliance is implicit in the result reached, and the cases are therefore of no help when confronting a conflict between two statutes enacted by the same sovereign.

[12] In its second summarized assignment of error, the commission complains that the district court erred in denying its motion to amend its pleadings after judgment was entered against it.

[13] Neb.Rev.Stat. § 25-852 (Reissue 1989) provides:

The court may, either before or after judgment, in furtherance of justice, and on such terms as may be proper, amend any pleading, process or proceeding . . . by inserting other allegations material to the case, or, when the amendment does not change substantially the claim or defense, by conforming the pleading or proceeding to the facts proved . . . .

This statute is to be liberally construed so as to prevent a failure of justice. *Building Systems, Inc. v. Medical Center, Ltd.*, 213 Neb. 49, 327 N.W.2d 95 (1982). Since the decision to grant or deny an amendment rests in the discretion of the trial court, *West Town Homeowners Assn. v. Schneider*, 215 Neb. 905, 341 N.W.2d 588 (1983), the question becomes whether the district court abused its discretion when it denied the commission's motion.

[14] While it is an abuse of discretion to refuse to permit an amendment proposed at an opportune time in furtherance of justice, *Jacobs v. Goetowski*, 221 Neb. 281, 376 N.W.2d 773 (1985), and *Kleinknecht v. McNulty*, 169 Neb. 470, 100 N.W.2d 77 (1959), we have held that a trial court is not to permit an amendment of a pleading to conform to the proof if the proposed amendment would substantially change the nature of the claim or defense, *Malerbi v. Central Reserve Life*, 225 Neb. 543, 407 N.W.2d 157 (1987).

[15] The commission's motion requests leave to amend its pleadings "so as to state a cause of action based on constitutional claims and under federal law" without specifying the constitutional claims which were to form the basis of its new cause. Even if we assume that the commission is empowered to assert such claims (authority seemingly not conferred by the provisions of § 48-1007, which invests the commission with power to bring suits for violations of the age discrimination statutes), the fact remains that pleading federal law and constitutional questions would substantially change the nature of the cause the commission had litigated. Accordingly, the district court did not abuse its discretion by denying the commission leave to amend its petition.

[16] For the foregoing reasons, the judgment of the district court is affirmed.

AFFIRMED.

## Grading the LWST

For this 38-question exam, there are 142 possible points for the raw score — 70 on the objective part (questions 1–35) and 72 on the essay part (questions 36–38). In the exams that I've administered, the scores have ranged from a high of 127 to a low of 48.

The exam is designed for two 90-minute segments separated by a 15-minute break. In the first part, each objective question is worth two points. A test-taker who gets an answer half right scores one point on that question. In the second part, each essay question is worth 24 points. Although the issue-statements called for in questions 37 and 38 require consistent elements and similarity of approach, question 36 (the three-paragraph essay) is open-ended. It requires several skills: imagination, organization, logic, and the ability to support abstract ideas with concrete examples — all within a tight structure.

The following guidelines show roughly how to assess raw scores:

- 125–142 Outstanding
- 110–124 Very Good
- 95–109 Good
- 80–94 Fair
- 65–79 Poor
- Below 65 Very Poor

# Model Answers for the LWST

## Part One Sentence-Level Editing Section \*

### Fixing Grammatical Errors

Each sentence below contains a single grammatical error. Assume that citations are correctly supplied. Correct the error in each sentence.

1. The Court held that in an action to determine which of the two subscribing employers ~~were~~ <sup>was</sup> liable for workers' compensation due an employee, the borrowed-servant doctrine applies.

2. Appellant contends that the trial court both denied him due process and used an improper ~~criteria~~ <sup>critrion</sup> for determining attorneys' fees.

3. ~~Researching~~ <sup>[demonstrates]</sup> Gerard v. Carey, ~~it became clear~~ <sup>[makes clear]</sup> that the entire-controversy rule would not preclude Johnson's lawsuit. <sup>shows</sup>

4. The court ordered the defendant to pay a \$200 fine and ~~that he~~ <sup>to</sup> ~~must~~ perform 200 hours of community service.

\* Bracketed words suggest alternative edits.

5. Plaintiff's experts have testified that the amount of damages for loss of use ~~are~~ based on the revenues expected under the contract in question.

is

6. If either the debtor or the creditor want an extension of the stay, an application under § 105 should be filed with the bankruptcy court.

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### Punctuation Errors

Each sentence below contains two errors in punctuation. Assume that citations are correctly supplied. Correct the errors in each sentence.

7. The Court in *Singleton* held that the use of a sole-negligence-of-owner exclusion to find the parties' intent is impermissible.

(Not a great sentence, but these are the only punctuation errors.)

8. An ex-employee of Higgins Oil Tool Company was summarily dismissed, and he filed a lawsuit against the company for not making a "reasonable accommodation."

9. On July 29, 1992, Gifford McDowell of our office traveled to Niagara Falls, New York, to attend and participate in the videotaped depositions of Darrin Meredith, Mark Ingstrom, and Paul Encino.

10. The program was modified; however, it was not — to any great extent — changed in its basic structure.

^  
← Semicolon

its

### Passive Voice

Each sentence below contains at least one passive-voice construction. Although passive voice isn't always undesirable, these sentences could benefit from a passive-to-active transformation. Circle each passive construction and then rewrite the sentence entirely with active voice.

11. The fee-simple interest could have been conveyed by her to the defendant.

*She could have conveyed the fee-simple interest to the defendant.*

12. It is not shown by the plaintiff that the defendant was motivated by a desire to destroy the value of plaintiff's interest in the promissory note, as is alleged in the complaint.

*The plaintiff has not shown that the defendant intended to destroy the value of the plaintiff's interest in the promissory note, as the complaint alleges.*

13. Each month, price lists were exchanged between the defendant manufacturers, and it was agreed by them that all sales would be made at list price or above.

*The manufacturers exchanged price lists each month and agreed to make all sales at list price or above.*

14. The burden is borne by the plaintiff to plead and to prove the actual amount of profits that would have been received by the plaintiff.

*The plaintiff bears the burden to plead and prove the actual amount [he] [she] was to receive.*

*use appropriate pronoun, depending on the case.*

15. If the thing that is sought to be subjected to taxation is really an interest in land, then by concession the proposed tax is not permissible.

*Of the thing that the IRS seeks to tax is really an interest in land, ...*

*Of what the taxing authority seeks to tax is really an interest in land, ...*

*Of an interest in land is within the ambit of this tax, ...*

### Misused Words

Each sentence below contains a single misused word. Circle it and write the correct word nearby.

16. The statute does not supersede, but rather compliment, the city's authority.

*complement*

17. The statute of limitations did not adversely <sup>affect</sup> effect the defendant's right to pursue its cause of action against third parties for contribution.
18. The department has concluded in <sup>principle</sup> principal that the instrument meets all the statutory requisites.
19. The *Mulholland* court's holding <sup>implied</sup> inferred that each of these elements is invariably comprised in a valid acceptance.
20. The mental anguish resulted from a direct emotional impact upon the plaintiff from the sensory and contemporaneous observance of the incident.  
 ↗  
 correct!  
 observation

## Tightening

Each sentence below is much wordier than it needs to be. A good editor could cut 25% of each one. Rewrite each sentence trying both to preserve the original meaning and to save as many words as you can.

21. Inferentially, the *Champlin* court's decision can be read to stand for the proposition that mere ownership of property in a county does not establish venue where employees operate out of that property on a sporadic basis. [36 words]

*Champlin* [suggests] [implies] that mere ownership of property in a county does not establish venue if employees work there only sporadically. [20 words]

22. As pertains to Captain C.K. MacLaine, because of his lack of any tangible assets and previous judgments on his record, Captain MacLaine is not able to satisfy any judgment which may be levied against him. [35 words]

*Because Captain MacLaine lacks [any] tangible assets and [has previous judgments against him] [is already a judgment debtor], he is judgment-proof. [17 words]*

23. Ordinarily, determining which entity is the employer in a given situation is not difficult; however, when an employee of one employer is lent to work for a second employer, the question becomes more difficult to resolve. [36 words]

*Determining the employer is usually easy. But when one employer lends an employee to another, the question becomes more difficult. [20 words]*

24. Plaintiff's fellow employees expressed feelings of apprehension with regard to Plaintiff and feared retaliation by him. Their allegations of sexual harassment were made in strict confidence with the understanding that their identities would in no way be revealed to the Plaintiff. [41 words]

*Plaintiff's coworkers feared that he might retaliate. They alleged sexual harassment in the strictest confidence. [15 words]*

25. This case was set for trial on November 4, 1994. At the request of Defendant Bandog, Inc., this case was removed from the November 4, 1994 docket. The Court has scheduled this case for trial on March 30, 1995. Plaintiffs now request that the Court retain this case on the March 30, 1995 docket. [54 words]

*Trial in this case has already been postponed from November 4, 1994 to March 30, 1995 — at Defendant Bandog's request. Plaintiffs now ask the Court to proceed to trial on the latter date.*  
[33 words]

### *That and Which*

Each of the following sentences contains a blank in which a relative pronoun — either *which* or *that* — should appear. The correct answer is apparent even without the greater context. Fill in the blanks with either *which* or *that*, and supply any necessary punctuation.

26. Article 12 of the city charter contains provisions that specify improper acts by city officers and employees.
27. Rule 166b is in direct conflict with § 552 of Title 5 of the United States Code, which is often referred to as the Freedom of Information Act.
28. The vessel's master was unsure of the vessel's plastic-disposal procedures but made statements that he felt would prevent the Coast Guard from acting.

29. CERCLA's goal of speedy remediation is not advanced when patently inequitable settlements are pursued at a site that is no longer posing any health threats.
30. The court endorsed the oligopoly economic theory, <sup>^</sup>which assumes a company will, without agreement, seek to maintain its market share at the highest possible price.

### Eliminating Legalese

Rewrite the following passages in plain English.

#### 31. TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, Defendant, Shrimpcorp, by and through its attorneys of record, Farndash & Farndash, and in continuation of its Answer and for its Motion to Dismiss Plaintiff Elfcorp's cause of action for failure to state a claim upon which relief can be granted pursuant to the provisions of Rule 12(b)(6), states: [etc.].

*Two ways to approach this:*

- ① [Delete altogether and begin with points to be decided.]
- ② On moving to dismiss under Rule 12(b)(6), Shrimpcorp states as follows: [11 words]

32. Enclosed please find two (2) copies of the three (3) cases decided subsequent to April 1994.

*Enclosed are two copies of the three cases decided since April 1994.*  
[12 words]

33. Pursuant to my telephone conversation with Mr. Robert Stanley of your office on today's date, I hereby request a revised legal description and revised survey of the above-referenced property.

*Please send me a revised legal description and a revised survey of the property. Earlier today, Robert Stanley confirmed that you [would do so] [simply needed a written request].* [24 words]

34. If you should require any further information or statement of a position in this matter, please be advised that you may contact the undersigned.

*Please call me if you need further information.* [8 words]

35. This letter shall confirm our understanding and agreement that if your loan application on the above-described property is approved, you shall occupy the same as your primary residence within thirty (30) days of the closing date. You are aware that if you shall fail to do so, such failure shall constitute a default under the Note and Security Instrument executed in connection with your loan and upon occurrence of such default, the full and entire amount of the principal and interest payable pursuant to said Note shall become immediately due and payable at the option of the holder thereof.

*This letter confirms our agreement that if your loan application on this property is approved, you must [live there] [make it your primary residence] within 30 days of the closing date. If you fail to do so, you will be in default under the Note and Security Instrument, and the entire principal and interest payable under the Note will be due upon the holder's demand.*

**Part Two**  
**Essay Section**

36. Write a three-paragraph essay in support of either of the following propositions. Do not repeat the proposition verbatim, but restate it more concretely. Make sure that you have a clear thesis sentence and that you illustrate your argument.
- A. People cannot be made honest by an act of the legislature.
  - B. Lawyers should reclaim an ideal expressed by Shakespeare: “Do as adversaries do in law — strive mightily, but eat and drink as friends.” (As part of your essay, you may wish to use this very quotation.)

**A Possible Answer for Question 36A:**

A law cannot make people honest. When we refer to people’s honesty, we refer to more than their propensity to tell the truth on a certain occasion; we allude to their character, their moral fiber. And the moral realm remains beyond effective legislation.

Admittedly, laws can attempt to guide human behavior. Indeed, most would agree that behavior modification marks one purpose of just laws. For instance, there can be little doubt that perjury laws encourage witnesses to tell the truth when on the stand. Truthful testimony, which displays one facet of honesty, helps make our judicial system work.

But the dishonest witness will circumvent the perjury law’s laudable goal. Even if the law forces the witness to be truthful on a certain occasion, it has not changed that person’s untruthful nature. In fact, liars who are forced by circumstances to tell the truth when they normally would not may learn to be more deceitful in the future. Thus, while a law can attempt to guide our behavior, it cannot change our moral fiber.

### A Possible Answer for Question 36B:

An old saw has it that lawyers beat each other's brains out in court and then go have an amiable lunch together. That's the way it ought to be. But the common practice differs dramatically from that: modern litigators *do* hold grudges. They dislike their opponents. Some even cultivate their dislike for opposing counsel. In some law offices, for example, lawyers in the midst of trial actually cover dart boards with the faces of opposing counsel. So much for their lunch together the next day.

If there's a problem in all this — and surely there is — it is that these lawyers forget to separate professional conflict from personal conflict. Yes, the lawyers are there battling in court against opponents, but it's a civilized battle, a battle by proxy. If lawyers get their personal feelings all mixed up in the fight, there's little reason for the proxy.

That's not to say, of course, that lawyers shouldn't genuinely — if vicariously — feel some of the emotions that their clients feel. Indeed, they probably need to. But as seasoned lawyers frequently say, being uncivil to another lawyer rarely does anything to advance the client's cause. Just the opposite may occur, in fact, if there are opportunities for successful mediation or settlement. In short, there should be a balance between zealous I-feel-your-pain advocacy and a dispassionately mature approach to relations with other lawyers. Without the latter, it may someday become necessary to hire proxies for the proxies — just to keep things civilized — and that way madness lies.

37. Frame the primary issue addressed by the court in *Nebraska Equal Opportunity Commission v. State Employees Retirement System*, 471 N.W.2d 399 (Neb. 1991). This issue is contained in paragraphs 1–8. Ignore the issues contained in paragraphs 9–15 (although you may wish to scan the entire opinion).

Phrase your answer as a “deep issue,” in the form of statement-statement-question (or premise-premise-conclusion). End with a question mark. Keep your issue under 100 words — and preferably under 75.

Remember that you are framing the question that the court actually answered. The opinion is reprinted in the pages that follow.

### A Possible Answer for Question 37

Under principles of statutory construction, when statutes are in conflict, the specific controls over the general. In 1986, the Legislature narrowly tailored the retirement statutes so that a retiree over the age of 55 who decided on a lump-sum payment of benefits would forfeit certain other benefits. The Equal Opportunity Commission now claims that this amendment is impermissible in light of the 1963 age-discrimination statute, which is broadly worded. Which statute controls? [74 words]

38. If you were asked to write a dissenting opinion in *Nebraska Equal Opportunity Commission v. State Employees Retirement System*, how would your deep issue read?

#### Four Possible Answers for Question 38

- #1 Since 1963, the statutory law of this state has prohibited discrimination on the basis of age. In 1986, the Legislature amended the retirement statutes in a way that forced retirees over the age of 55 to forfeit some of their benefits if they chose a lump-sum payment — but allowed those under 55 to make this choice with no such penalty. Did the Legislature intend to override its long-held prohibition of age discrimination? [74 words]
- #2 Relying on a now-repealed 1986 statute, the state required 55-year-old Charles Thiessen to forfeit state retirement contributions to receive a lump-sum payment, but allowed state employees under 55 to receive state contributions and a lump-sum payment. Nebraska’s Equal Opportunity Commission sued the state under the 1963 Age Discrimination Act (NADA) because its only basis for treating Thiessen differently was his age. May the state legislature, by enacting discriminatory legislation, tacitly repeal NADA by implication? [79 words]
- #3 At 61, Charles Thiessen retired as a Nebraska state employee. To obtain 100% of his retirement contributions, the law required him to forfeit all state contributions. But the same law provides that if he had retired before reaching 55, the state contributions would have been paid as an annuity. If the federal courts have uniformly held that compliance with a state statute is not a defense under the Federal Age Discrimination Act — and the Nebraska Age

Discrimination Act is identical — should the federal rule apply? [85 words]

- #4 In 1986, the Legislature amended the retirement statutes so that a retiree over the age of 55 who decided on a lump-sum payment of benefits would forfeit certain other benefits. The Equal Opportunity Commission now claims that this amendment is impermissible in light of the 1963 statute broadly prohibiting age discrimination. The state contends that the general statute must yield to the specific. But because any discriminatory act of the Legislature would necessarily be more specific than the age-discrimination statute, does the specific-over-general canon of construction apply here? [92 words]