

Concrete Ways to Improve Your Legal Drafting

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Attorney Disclaimers



- Strictly my views
- Consult your attorney
- Use at your own risk

What is “legal drafting”?

Sometimes asking the opposite
question helps to answer the
original question.



What was **Illegal drafting?**

Many lawyers draft poorly

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

Susan H. Kosse & David T. ButteRitchie, "How Judges, Practitioners, and Legal Writing Teachers Assess the Writing Skills of New Law Graduates: A Comparative Study," 53 J. Legal Educ. 80, 85-86 (2003).

Many lawyers draft poorly

This search in Westlaw's "All Federal & State cases" database...

"POOR! SLOPP! AWKWAR! BAD! DEFECTIV! CARELES! NEGLIGEN!
SLAPDASH SLIPSHOD SHODD! INEPT! AMATEU! CLUMS!
INELEGAN! DEFICIEN! DREADFU! TERRIBL! AWFUL!
THOUGHTLES! HORRIBL! APPALL! WORSE WORST INADEQUAT!
INFERIO! /5 DRAFT! WRIT! COMPOS! /6 DOCUMENT
INSTRUMENT ORDINANCE LAW CODE LEGISLATION STATUTE
REGULATION PROVISION RULE BYLAW BY-LAW RESOLUTION
CONTRACT AGREEMENT DEED EASEMENT LEASE"

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

Drafting is important

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

Bryant G. Garth & Joanne Martin, "Law Schools and the Construction of Competence," 43 J. Legal Educ. 469, 508-09 (1993).

Drafting is important

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

Bryant G. Garth & Joanne Martin, "Law Schools and the Construction of Competence," 43 J. Legal Educ. 469, 508-09 (1993).

Why is good legal writing important?

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

Bryan A. Garner, "The Mad, Mad World of Legal Writing," Garner on Language and Writing. American Bar Association, 2009

Why is good legal writing important?

2 reasons to write well

- help you do your job better
- advance your career

What is good legal writing?

"Good writing is simply speech
'heightened and polished.'"

Bryan A. Garner, Legal Writing in Plain English: A Text with Exercises 49 (2001)
(quoting Judge Jerome Frank, A Man's Reach: the Philosophy of Judge Jerome
Frank 38 (1977))

"Good writing is clear thinking made
visible."

Quotation variously attributed to Ambrose Bierce or Bill Wheeler

What is good legal writing?

- Good writing satisfies the needs and
desires of the reading audience
- Good legal writing helps the reader
to make important decisions

Mark K. Osbeck, "What is 'Good Legal Writing' and Why Does it Matter?," 4
Drexel L. Rev. 417, 425-26 (2012)

What are qualities of good legal writing?

Four qualities

- Clear
- Concise
- Engaging
- Elegant



Mark K. Osbeck, "What Is 'Good Legal Writing' and Why Does It Matter?," 4 Drexel L. Rev. 417, 422 (2012)

1. Use the 4-step writing process

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



Betty Sue Flowers, "Madman, Architect, Carpenter, Judge: Roles and the Writing Process," 58 Language Arts 834-36 (Oct. 1981)

Use the 4-step writing process

1. Madman/brainstormer/researcher

Write down *all* ideas

Ask others for their ideas

Withhold judgment about ideas

Use the 4-step writing process

2. Architect/Organizer/Outliner

Select best ideas

Arrange ideas in patterns

Put most important ideas first

Use the 4-step writing process

3. Carpenter/builder/writer

Put ideas together logically

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

Fill in details, but do not edit!

Use the 4-step writing process

4. Judge/editor/quality control inspector

Edit punctuation, spelling, grammar, and tone

Ask others to edit

2. Organize your writing

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

Duncan v. AT & T Communications, Inc., 668 F. Supp. 232, 234 (S.D.N.Y. 1987)

Organize your writing

Organize material to serve the reader's needs

Use introductory paragraph

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

Organize your writing

Begin each paragraph with a topic sentence

Limit each paragraph to one topic

Summarize message with concluding sentence or paragraph

Organize your writing

Break up lengthy documents by using

- short headings and subheadings
- short, numbered lists
- bullets
- table of contents

Organize your writing

Break up lengthy documents by using

- Cut-ins
- Tables
- Mathematical formulas
- Diagrams

Organize your writing

Three types of headings

Type of heading	What it is	How it looks
Question Heading	A heading in the form of a question	Why Do We Use Headings?
Statement Heading	A heading that uses a noun and a verb	Headings Help Guide a Reader
Topic Heading	A heading that is a word or short phrase	Headings

Organize your writing

Organize material by using one of these methods:

- Chronology
- Logic (cause and effect)
- Problems/Solutions
- Actor's actions
- Witnesses' observations
- Issues

Organize your writing

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

Put context first, then details

3. Write the way you talk!

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

4. Use transition words

Type of transition	Description	Examples
Pointing words	Refer directly to something already mentioned	This, that, these, those, the
Echo links	Words or phrases echo a previously mentioned idea	"This highly unusual maneuver..."
Explicit connectives	Words whose chief purpose is to supply transitions	Further, also, therefore

Use transition words

EXPLICIT CONNECTIVES

- **When adding a point:** also, and, in addition, besides...
- **When giving an example:** for instance, for example, for one thing.
- **When restating:** in other words, that is, in short, put differently, again...
- **When introducing a cause:** because, since, when.
- **When introducing a result:** so, as a result, thus, therefore...

Use transition words

EXPLICIT CONNECTIVES

- **When contrasting:** but, however, on the other hand, still, nevertheless...
- **When conceding or qualifying:** granted, of course, to be sure, admittedly...
- **When pressing a point:** in fact, indeed, of course, moreover...
- **When explaining a sentence:** that is, then, earlier, previously...
- **When summing up:** to summarize, to sum up, to conclude, in short...
- **When sequencing ideas:** First...Second...Third...Finally...

5. Make it shorter!

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

Ravenseft Properties Ltd. v. Davstone (Holdings) Ltd., 1 All Eng. Rep. 929 (1979).

Make it shorter!

"The tenant must repair the premises"

Make it shorter!

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

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

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

Make it shorter!

Plaintiff filed 465-page complaint with 54 claims

Defendant filed motion for more definite statement

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

Make it shorter!

Court ruling

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

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

Make it shorter!

The Ninth Circuit has declared:

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

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

Make it shorter!


Short headings

Short paragraphs

Short sentences

Short words

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



6. Eliminate unneeded words

Empty words

Jargon and Buzzwords

Legalese

Wordy idioms

Double negatives

Eliminate unneeded words

Empty words

"There are"

"It is"

"As stated previously,"

"I might add"

"It should be noted that"

Replace **"There are kids swimming in the lake"**
with **"Kids swim in the lake."**

Eliminate unneeded words

Empty words

“I would like to point out that”

“I would argue that”

“the fact that”

“In fact”

“the course of”

“It has been determined that”

Eliminate unneeded words

Jargon and Buzzwords

Downsizing

Event horizon

Granular

Benchmarking

Mission-critical

Impactful

Game-changer

Value-added

Sourced

Incentivize

Paradigm shift

Mirandize

Leverage

Price point

Exit strategy

Eliminate unneeded words

Legalese

Aforementioned

Herewith

Arguendo

Hereinabove

To wit

Please be advised

Thereupon

Said

Hereby

Whatsoever

Foregoing

In point of fact

Undersigned

Instantly

Comes now

Eliminate unneeded words

Wordy idioms

Don't say

at this point in time
 despite the fact that
 for the duration of
 in the event that
 in accordance with

Say

now
 although
 during
 if
 by, under, per

Eliminate unneeded words

Wordy idioms

Don't say

in order that
 in the amount of
 in the near future
 utilize, utilization
 the manner in which

Say

for, so
 for
 shortly, soon
 use
 how

Eliminate unneeded words

Double negatives

Don't say

no fewer than
 has not yet attained
 is not...unless
 not uncommon
 not insignificant
 no small part

Say

at least
 is under
 is...only if
 common
 significant
 large part

7. Beware of acronyms

D.C. Circuit dislikes acronyms:

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

Nat'l Ass'n. of Reg. Util. Comm'rs v. U.S. Dep't of Energy, 630 F.3d 819, 820 n.1 (D.C. Cir. 2012)

8. Use "punchy" verbs

Reject nominalizations (hidden verbs)

Don't say

give consideration to

have knowledge of

am in receipt of

submit an application

catalyze a transformation

Say

consider

know

received

apply

transform

Use "punchy" verbs

Reject weak verbs

Don't say

club has weddings

was not truthful

was very angry

Say

club hosts weddings

lied

was enraged

Use "punchy" verbs

Avoid these weak verbs when possible

Indicates	Appears
Seems	Becomes
Feels	Provides
Gives	

9. Use active voice

Avoid "be" verbs

be	being
been	am
is	are
was	were
art	wast
wert	

Use active voice

Don't say

"the deadline **was** missed"

Say

"X missed the deadline."

Use active voice

Don't say

"It must **be** done"

Say

"You must do it."


10. Avoid generic terms

<u>Don't say</u>	<u>Say</u>
The plaintiff	Mark Jones
The defendant	Sue Perkins
The day in question	August 30
The scene of the accident	parking lot
Her place of employment	Chuks

11. Proofread!

Va. Stat. § 46.2-859 (1970-2011)

"A person is guilty of reckless driving who *fails to stop*, when approaching from any direction, *any school bus which is stopped...*for the purpose of taking on or discharging children..."



Proofread!

Exception: Not in Mississippi

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

Defendant appealed conviction, arguing indictment charged goods, not him.

Proofread!

Court: If the "rules of English grammar are a part of the...law of [Mississippi], [the] conviction must surely be reversed, for the indictment ...would receive an 'F' from every English teacher in the land."

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

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

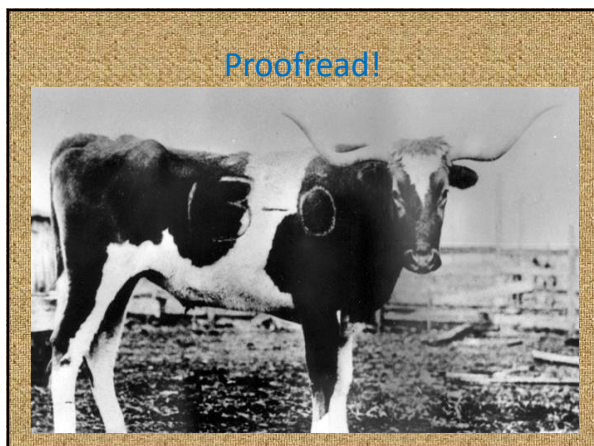
Proofread!





Proofread!

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



Questions?