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THE ART OF LEGAL WRITING

Thomas E. Spahn, Esq. ^{1/}

Most lawyers write poorly. Perhaps it is one of the reasons people dislike us so much. At best, nonlawyers find our writing unfamiliar and snobbish. At worst, our writing must seem like a ritualistic chant that obscures the truth. It is no wonder that some laymen believe we purposely select confusing words and construct unintelligible sentences in order to frustrate justice and preserve our monopoly.

This well-deserved reputation for bad writing is ironic. First, the legal system does not encourage bad writing. In fact, lawyers who write well produce more persuasive briefs, better business arrangements and clearer wills. Lawyers who write clearly and succinctly tend to be more successful than those lawyers who do not. Second, writing well does not require any innate skills or native intelligence. Perhaps knowing what to say requires these attributes, but knowing how to say it does not. Writing well requires only common sense, self-discipline and practice.

I should distinguish between writing style and the basic elements of good writing. The former can be as individual as a fingerprint. It grows from the writer's particular use of words and the cadence of his sentences. Not everyone should use the same writing style even if it were possible. On the other hand, all good legal writers share one common goal. Their writing tries to convey the substance of what they want to say as concisely, directly and simply as possible. Their writing never obscures the substance of their message.

This emphasis on simplicity does not mean that good writing must be dull or colorless. If anything, writing that is direct--that can say something with the fewest number of simple words--is more memorable than complicated writing.

^{1/} Copyright 1989. Thomas E. Spahn is a partner in the Richmond, Virginia office of McGuire, Woods, Battle & Boothe. A version of this article first appeared as "Writing Well" (Part One), Virginia Lawyer (Vol. 37, No. 6, Dec. 1988), and "Writing Well" (Part Two), Virginia Lawyer (Vol. 37, No. 8, Feb. 1989).

Good writing succeeds because people enjoy reading it. They can follow its meaning without effort. The best writing paints a picture in the reader's mind, rewarding him with memorable mental images.

This article will address writing in the way that you undertake it. It will start with words--your writing's building blocks. Then it will discuss sentences, paragraphs and finally the entire written product. Along the way, it suggests simple rules for improving legal writing.

WORDS

General Rules

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

Using simple words will not necessarily render your writing pedestrian. Some of history's great writing has been exceptionally simple. One author has noted that Lincoln's remarkable Second Inaugural Address consisted of only 701 words. Of these, 505 contained only one syllable. Of the remainder, 122 contained only two syllables. The simplest writing often makes the greatest impact upon the reader.

Your words should also be familiar words. You should rarely if ever use a word in writing that you would not use in talking to a nonlawyer.

The exercise of conveying complicated ideas with familiar words will also make you a better lawyer. Perhaps a lawyer's most important skill is the ability to distill complex facts or legal principles into easily understood words. Litigators must make juries understand the facts, and business lawyers must communicate effectively with their clients. You will be practicing this important lawyerly skill when you try to write about complicated matters using familiar words.

Where do you find these simple and familiar words? A thesaurus will help you assure precision without straying into the use of uncommon words. You should always have a thesaurus with you when you write and edit.

An Exception to the General Rules

In some circumstances, lawyers have little choice but to use technical jargon. Some words have been given almost a magical effect by legislatures or courts. For instance, the Uniform Commercial Code contains a number of sections whose consequences depend entirely on the use of certain technical words. The same is true with some language specifically approved by a court as having the desired effect in a contract setting or other circumstance. In these cases, a lawyer dare not simplify or paraphrase this legislative or judicial language, or else he risks forfeiting the predictable result.

Perhaps we should applaud the creation of such talismanic phrases. At least they assure uniformity and predictability. On the other hand, they often force lawyers to burden their drafting--especially of contracts, wills or corporate documents--with peculiar and pretentious words.

Unfortunately, there is little lawyers can do about this problem. Instead, we must assure that the necessary use of these technical words does not poison the rest of our writing.

Words to Avoid

There are four kinds of words you should try to avoid when you write.

First, there are words you should never use. These include:

said;	thereunto;
aforesaid;	wheresoever;
aforementioned;	whatsoever;
hereinafter;	whensoever;
hereinabove;	whosoever;
henceforth;	witnesseth.

You would be embarrassed to include these words in your everyday conversation, and you should feel the same way about your writing. Never use them.

Some legalistic words come in pairs. Their use generates a sing-song effect to writing and is the most parodied aspect of bad legal prose. If you want to sound like the Three Stooges, use pairs of words like these:

null and void
ordered and adjudged

true and correct
free and clear
each and every
force and effect
made and entered into

Why do lawyers use both words? It is not to make writing more accurate. Can anyone describe how the word "null" differs in meaning from the word "void"?

Some authors suggest that use of these pair words began after the Norman Conquest, when lawyers used both an Anglo-Saxon word and its French synonym to assure that their writing was understood. There may have been some excuse for using terms like this in 1067, but there is none today.

Second, you should avoid words that are misused by the general population. These include:

hopefully
finalized
prioritize
other "ize" words

These words seem to generate spontaneously among lawyers and nonlawyers alike. Insurance companies no longer obtain statements from witnesses, they "statementize" the witnesses. Senator Joseph Bidden once accused President Reagan's Star Wars plan of "nuclearizing" the heavens (I am not sure who originally used this term). Using these words will not necessarily brand you as a lawyer, but you should avoid them nevertheless.

Third, some people use certain words to make themselves sound intelligent or well educated. Listed below are some of these words, along with a translation into the familiar.

<u>Bad Word</u>	<u>Good Word</u>
subsequent to	after
prior to	before
cease	stop
desist	stop
donate	give
proceed	go
purchase	buy

For obvious reasons, people use these words only in their written form. You would not tell someone: "Prior to seeing the movie, let us proceed to a restaurant and purchase dinner."

Because you would not use these words in your everyday conversation, you should not use them in your writing.

Fourth, some words are not intrinsically bad, but add nothing to your communication of ideas. And because these words do not add anything, they are more than just a waste. They retract from your writing's clarity.

When writing as simply and directly as possible, you cannot afford to have any useless words. Almost without exception, the fewer words you use, the better your writing.

I call this fourth category of bad words "litter" words. They are good writing's number one enemy. "Litter" words drain the vitality from your writing. They tend to confuse the reader and slow him down. The best writing can be read quickly while still conveying the desired substance. "Litter" words have just the opposite effect.

How do you spot these "litter" words? They are generally small, such as:

of
in
on
for
to
the
that

Some "litter" words travel in packs. They form phrases that clog your writing and make it much more difficult to read and understand. Consider the following phrase: "the fact that." Almost without exception, this is a totally worthless phrase. Even worse is the phrase: "because of the fact that."

Some of these "litter" phrases can be totally eliminated without sacrificing meaning. Consider the phrase: "it is worth mentioning that." If it is important to mention something, just go ahead and mention it.

If the phrases cannot be eliminated, they can usually be shortened. And (as mentioned above) reducing the number of words in your writing is the surest way to improve it. Listed below are some common packs of "litter" words and translations into everyday words.

Bad Phrase

Good Word

by reason of	because
for the reason that	because
in the event that	because
in the event that	if
for the purpose of	for
along the lines of	like
in the nature of	like
on the grounds that	since, because
inasmuch as	because
in order to	to
in favor of	for, to
with a view to	to

You should always be looking for "litter" words. Root them out when you write and when you edit.

WORDS TO USE

Good writing requires more than avoiding certain words. This article will now suggest good words to use.

Verbs

Verbs act as the heart of every sentence. To an amazing degree, the difference between good and bad writing lies in the writer's selection of verbs. Good verbs impart a vitality that makes reading pleasurable and helps paint a picture in the reader's mind.

You should follow three basic rules when selecting verbs.

First, use root verbs rather than their expanded forms. In everyday conversation, we use a perfectly good verb like "decide." We say: "Have you decided where to eat tonight?" But when lawyers write, they translate this simple verb into the expanded form. Judges no longer "decide," they "reach a decision." Selecting the root verb "decide" reduces the number of words you use to convey the identical meaning.

Relying on the root verb rather than the expanded form also makes your writing more active and vibrant. Root verbs more readily paint a picture in the reader's mind. You can picture a judge "deciding," but reading that a judge "reached a decision" conveys two thoughts--reaching and deciding. This

dilutes the strength and image-making potential of your writing. In good writing, groups do not "hold a meeting," they "meet"; courts do not "make a ruling," they "rule"; and agencies do not "impose requirements," they "require."

Second, you should use the verb's active rather than passive voice. In the active voice, a subject acts on the object: "John threw the ball." Here, the subject "John" takes some action against the object "ball." The passive voice would be: "The ball was thrown by John." The subject "ball" is acted upon by the object "John."

Everyone tells you to use the active rather than the passive voice, but no one tells you why. I think there are a number of reasons to use the active voice. People generally talk in the active voice, so using it in your writing will make it more familiar and conversational. Using the active voice also reduces the number of words--especially "litter" words. Changing "the ball was thrown by John" to "John threw the ball" eliminates two short words that tend to clog the sentence.

Finally, using the active voice gives vitality and movement to your writing--because it follows the natural sequence of the reader's thought process. Upon reading "John threw the ball," the reader pictures John and then sees him throwing the ball. On the other hand, upon reading "the ball was thrown by John," the reader first sees a ball, and then learns that something is done to it. Only at the end of the sentence does the reader discover who is taking the action. This is the reverse of the normal mental sequence, and thus reduces clarity.

There are some occasions when you will deliberately choose to use the passive voice. You may want to avoid naming the actor: "the brief was filed late." You may choose the passive voice when the actor's identity is unimportant: "dinner was served." But generally you should strive to use the active rather than the passive voice. When you read good writing, you will almost always note that the reader uses active verbs.

My third rule for verbs is to use strong and vigorous verbs. Good writers avoid "to be" verbs whenever possible. "To be" verbs add no vitality to your sentences. You should use verbs that connote action. Instead of writing that plaintiff "looked at" defendant's documents, write that plaintiff "examined" the documents. Better yet, explain that plaintiff "searched" the documents. You should always use the most powerful and vigorous verbs possible without losing precision.

Review the following portion of The Birth of the Republic, 1763-1789 (1956) by Professor Edmund S. Morgan.

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

Professor Morgan's selection of verbs (which are underlined above) renders his writing vigorous and powerful. There is no reason why legal writing cannot have the same effect.

Nouns

The second most important words used as building blocks are nouns. You should follow two rules when selecting nouns.

First, you should personalize your nouns. Do not use the word "plaintiff" or "defendant" (or especially "appellant" or "appellee"). In nearly every case you should use the parties' names. Using names will make your writing easier to read and thus more likely to create a lasting memory.

Second, you should select strong nouns. Do not write about the plaintiff's position"--write about his "argument." One way to assure more powerful nouns, and also reduce "litter" words, is to rely on the possessive. For some reason, lawyers abhor the possessive. Good writers use the possessive wherever appropriate. Instead of discussing the "ruling of the court," you should cite the "court's ruling." Rather than writing about the "brief of appellant," you should refer to "Smith's brief."

Adjectives and Adverbs

Adjectives and adverbs are the least important of your sentences' building blocks. You should use them only sparingly.

It is far better to include the desired meaning in your verbs and nouns rather than adding another word to your sentence. For instance, do not write about someone living in a "very wealthy style"--strengthen the noun and call it "affluence."

The same rule applies for adverbs. Do not describe someone as "walking aimlessly"--write that he "wandered."

When you must employ adjectives or adverbs, be sure to use negatives when appropriate. This reduces "litter" words, and it makes your writing easier to follow. Instead of characterizing an issue as "not important," label it "unimportant."

SENTENCES

When you arrange your words together to form sentences, your writing's goal should not change. Your sentences should be simple, direct and clear. For this reason, they should generally contain only one thought.

A sentence's beginning is its critical portion. In almost all cases you should try to keep the subject and the verb: (1) very close to one another; and (2) at the sentence's beginning. This simple step makes your sentences much easier to read. It also gives the reader a road map about where you are going with your sentence. For instance, many lawyers would write:

The court, after considering all of the arguments advanced by plaintiff and defendant and rejecting the notions of due process in the amicus brief, ruled

In reading this sentence, the reader must wait until he is well into the sentence before having any clue about what you want to say. Starting the sentence with the simple phrase "the court ruled" would immediately alert the reader to your sentence's main thought. You can assure this clarity by starting most sentences with the subject and verb next to one another. And you should generally avoid long dependent clauses at the beginning of your sentences.

Examine the portion of Professor Morgan's book included above. His sentences begin with a subject immediately followed by the verb. This is one of the reasons Professor Morgan's writing is so clear.

One way to assure clarity is to write like you talk. When talking in normal conversations, people do not begin their sentences with long dependent clauses. If you arrived home late, you would not say:

By reason of the traffic jam on the bridge, I am late.

You would say:

I am late because the traffic was bad.

You should write the same way.

Not all of your sentences should be simple. Unless you vary your sentences' length, you might develop a sing-song effect. However, short sentences--especially very short sentences--often make the greatest impact. For instance, you may wish to follow a long paragraph about a lower court's opinion with the following succinct conclusion: "The appellate court reversed." This sentence will catch your reader's attention like a slap in the face.

You can use some tricks to improve your sentences' clarity. First, use lists within your sentences--such as (1), (2), (3) or (a), (b), (c). These help the reader organize his thoughts and offer a quick road map to guide him through your sentence.

Second, always use the punctuation that is available to you. Lawyers do not use semicolons, colons or dashes often enough. Like helpful road signs, these punctuation marks help give the reader a clue about where you are going.

PARAGRAPHS

When you put your sentences together to form paragraphs, you should have the identical goals as when you are picking words and putting them together to form your sentences. Your paragraphs should be simple, direct and clear. They should not be very long. Even one-sentence paragraphs can help with transitional thoughts or for emphasis.

Just as your sentences should have one thought, your paragraphs should each have one main thought. That thought should normally appear in the paragraph's first sentence. With good writing, reading the first sentence of each paragraph provides you with over 90% of its meaning.

ENTIRE WRITTEN PRODUCT

If you have selected good words and put them in simple sentences and simple paragraphs, your writing will be easy to read. It will give your reader clues of what you are going to say and then reward the reader by internally summarizing what

you have already said. This will give your writing a sense of inevitability.

You should liberally use references back and forth within your writing. Some of these can be blunt--such as "see below" or "as explained above." Sometimes they will be more subtle. For instance, you may wish to start a new paragraph with "collateral estoppel is not the only doctrine that applies"--referring to the immediately preceding paragraph about collateral estoppel. This transition sentence refers to what you have already said and also points to what you are about to say. Other phrases serving the same purpose include: "not only does"; "unlike"; "given the"; "moreover"; "on the other hand."

All of these phrases provide clues to your reader. They make the reader feel that he is following your writing. When you refer to something you have already written, the reader thinks to himself: "I remember that." And if you refer to something you will be writing, the reader will think: "I will be looking for that." In either case, the reader is carefully guided through your argument and rewarded for paying attention.

Part of making your written product easy to read has nothing to do with words--it is visual. Seeing an entire page of print unbroken by paragraph indentations depresses the reader. There should always be paragraph breaks on every page--the more the better. Just looking at a page with paragraph breaks tells the reader that your writing's substance has been broken into bite-size chunks. This will encourage him to forge ahead.

You should always use headings and subheadings. These are not only visually encouraging, they provide a further road map for the reader. You should include lists indented in the middle of the page. You should indent quotations whenever appropriate. All of these visual tricks make your writing more inviting to the reader and are more likely to induce him to read carefully.

EDITING

Once you have finished writing, your job is not over. In some ways, it is just beginning.

Editing is at least as important as the initial writing. When writing the first draft, you should concentrate on substance. As you begin to write better, your first draft will also reflect some good writing. But the editing process

helps you fine-tune your writing. Once you are confident of the substance, you can emphasize style.

As lawyers, we must balance the pressure of time with our desire for quality work. There is a story about someone asking a sculptor: "How long does it take for you to finish a sculpture?" The sculptor reportedly replied: "I don't know, I just keep working until they take it away." You may not want to emulate that sculptor, but you should always be improving your written product for as long as possible.

When editing, keep in mind all the rules discussed in this article. Two goals are especially important.

1. Always try to remove "litter" words.
2. Upgrade your words whenever possible--especially verbs.

As you edit, picture someone asking you to defend every word you leave in your written product. Ask yourself:

1. "Is there any clearer way to say this?"
2. "Is there any more concise way to say this?"
3. "Is there a more active or powerful verb, or a more precise noun, I can use to convey this idea?"

The best editing exercise is to read your writing out loud. The great historian Barbara Tuchman has said, "An essential element for good writing is a good ear. One must listen to the sound of one's own prose." With the best writing, you can hear the author talking to you face-to-face when you read his writing.

As lawyers, we are fortunate that we can draft out loud. Although many experts disagree, I think you can be a better writer when you dictate. Perhaps this is because our society increasingly emphasizes oral rather than written communications. Try this test: ask the author of a written product what he meant to say. You will find that his oral explanation is always clearer and more concise than his writing.

Dictation has the following advantages:

1. You are more likely to use simple and familiar words when you dictate.

2. You cannot dictate long sentences with complex dependent clauses because you would stumble into a sentence and be unable to dictate your way out.
3. You generally will not use the awful words listed earlier in this article because you would feel like a fool saying them out loud.

At first dictation will require more editing. You will use wasted phrases like "it is important to remember that." These generally act as fillers while you are desperately trying to think of what you want to say. You will also use weak words that will need upgrading during the editing process. As a result, your editing process should emphasize upgrading all your words and removing wasted words.

There is one fool-proof method for improving your writing. It is guaranteed to make you a better writer. When you dictate, pretend that you are explaining something to a ten-year-old child. You will find yourself using simple and familiar words, simple sentences and giving plenty of clues.

PLEADINGS

Some lawyers follow all of the good writing rules until they draft pleadings. This is generally because lawyers use forms instead of writing pleadings from scratch. While this saves the lawyer's time and the client's money, mindless use of forms perpetuates bad writing.

Archaic words and phrases survive in pleadings longer than anywhere else. Many pleadings start with the phrase, "Comes now." Does anyone know what that adds to a pleading? Another amusing habit involves the beginnings of new counts. When drafting complaints, most lawyers start a new count with a phrase like this:

Plaintiff re-alleges and re-incorporates herein by reference each and every allegation contained in paragraphs __ through __ of this Complaint as if fully set forth herein.

Let me offer a substitute:

Jones re-alleges paragraphs __ through __.

Many lawyers save their most atrocious writing for the final page of their pleadings--the certificate of service. Our office actually received the following certificate:

The undersigned, being duly sworn, deposes and says that she deposited a copy of the foregoing instrument in the United States mail, proper postage fully prepaid, at _____ on the ___ day of _____, 1986, plainly addressed to the following:

Questions flood the mind while reading this. Did the "undersigned" really swear, depose and "say"? Did she "deposit" the pleading, or "a foregoing instrument"--perhaps a stethoscope? Was she worried that the recipient might think she used the Yugoslavian mail rather than the United States mail? Is it better to have proper postage that is not fully prepaid, or improper postage that is fully prepaid? Would the "undersigned" perjure herself if she addressed her envelope indistinctly or unclearly? Consider the following:

On June 25, 1988, I mailed a copy of this document to _____.

It says the same thing as the longer certificate, but in the style that you use every day. And it meets every legal requirement.

RECOMMENDED READING

If you want to read more about good writing, you should begin with the following books:

Widick, Plain English for Lawyers
Strunk & White, Elements of Style
Zinsser, On Writing Well

If you want to learn how not to write, you should consider two options--depending on how much time you have available. If you have only a short period of time, you should spend it on airplanes. You will hear words like "de-plane" and "smoking material." As one author has suggested, the latter phrase gives the impression that someone's coat is on fire. I most enjoy taxiing to the terminal while the flight attendant invites each passenger to "look for any personal items you brought on Board with you." This announcement apparently is intended to deter travelers from spending hours scouring the plane for personal items they did not bring on board with them.

If you have more time, you should take a job reviewing insurance forms completed by drivers involved in car accidents. This experience would teach you that some writers can mutilate our language without resorting to complex words or sentences. The following are actual statements from such insurance forms:

The guy was all over the road. I had to swerve a number of times before I hit him.

I had been driving for 40 years when I fell asleep at the wheel and had an accident.

The pedestrian had no idea which direction to run, so I ran over him.

The telephone pole was approaching, I was attempting to swerve out of its way, when it struck my front end.

If you want to devote your life to reading bad writing, enlist in the military. In the recent Iran/Contra hearings, General Singlaub referred to Americans as "United Statesians." And instead of saying "now," General Alexander Haig has said, "at this juncture of maturization."

In honor of General Haig, the monthly Armed Forces Journal has created an award for the "Al Haig nonword of the month." One recent winner comes from the Pentagon phone book, which states that "answerizers" (people who answer the telephone) should

volunteer the whereabouts and whenabouts of an absent person.

If the military fights as well as it writes, we may soon be reading articles about writing simple Russian.

CONCLUSION

Apart from authors themselves (whose goal often is not the conveying of ideas as directly as possible), there are two professions in which writing plays a predominant role. The first is the news media. Most of that profession's members write well. You can pick up a newspaper or magazine and catch most of its meaning without much effort. And you can listen to Tom Brokaw while eating spaghetti and not miss much of his content. Ironically, the same cannot be said of the second profession in which writing plays such an important role--our profession. Most lawyers--not to mention laymen--dread the

thought of reading lengthy briefs or agreements. Courts feel obligated to artificially limit the length of our writing to make their life somewhat bearable.

Trying to write well can sometimes degenerate into pedantry. To be sure, we can all do better--this article violates most, if not all of the rules it suggests. But this does not mean that we should not try. Perhaps people will still dislike us, but it will not be because we write poorly.