YOU CONVINCED ME: A LAWYER'S GUIDE TO PERSUASIVE WRITING

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I. Lawyers Are Professional Writers

A. Poverty of performance despite a wealth of instructional resources

A glance at the stacks in Vermont Law School's Cornell Library reveals numerous instructional volumes devoted to legal writing. Considering this wealth of resources, no Vermont lawyer has a valid excuse for not writing well. Still, the writing guides cite numerous examples of bloated, confusing, and deadly dull prose written by lawyers, both callow novices and grizzled veterans.[1] What accounts for this poverty of performance amidst a wealth of instructional guides?

B. Finding the law and getting it down is not good enough.

The best answer I have heard comes from legal-writing guru Bryan A. Garner, who has written that few lawyers "seem to think of their work as being essentially creative. They often think that writing well is simply a matter of finding the law and getting it down."[2] Instead, writes veteran Houston attorney William Pannill, a lawyer "should put the kind of effort into writing a brief that a poet or a novelist puts into his art, for when [a lawyer] write[s] a brief [he or she] is a professional writer."[3] Thus, "finding the law and getting it down" is not good enough, especially in a close case when opposing counsel is as experienced and thorough a legal researcher as you are. That case may well turn on the persuasiveness of your brief, motion, or memorandum, which will depend on the quality of your writing.

C. The importance of persuasive writing

This observation is especially true in appellate practice. Today, more than ever before, cases turn on the persuasiveness of briefs. For the sake of efficiency, state and federal appellate courts now hear fewer (and shorter) oral arguments than in the past. Therefore, your brief may not just be your best means of influencing the outcome of the case; it may be the **only** means

available to you. Even when oral argument is available, many judges read the briefs and make up their minds about who should win before hearing oral arguments. Moreover, in most state and federal appellate courts, oral argument usually lasts no more than a half-hour, so counsel can offer just one or two arguments amidst questions from the bench. Briefs, on the other hand, often arrive at the court a month before oral arguments occur and they are available for reference by judges and clerks for months after the arguments. You take a big risk, then, by submitting a half-baked brief in hopes that the quality of your oral argument will compensate for the limitations of your brief.[4]

You also take a risk in submitting a poorly written motion or memorandum of law to a trial court. Admittedly, the trial setting may give you a greater chance than the appellate setting to compensate for weak writing with strong oral advocacy. But trial judges have less time than appellate judges to reflect on your prose, so persuasive writing is essential in the trial courts, too.

D. Becoming a persuasive writer

Persuasive writing begins with an appreciation for the value of the author's craft. If you are skeptical about the notion that lawyers are professional writers, consider that "every week a small law office publishes (produces for distribution to outside readers) more material than a major book publisher or a national newspaper."[5] Under these circumstances, lawyers should be as concerned about the quality of their writing as novelists and journalists are. Remember, though, that persuasive writing only takes shape after careful study and frequent practice. "What is written without effort," Samuel Johnson admonished, "is in general read without pleasure."[6] Be prepared to spend thirty percent of your brief-writing or memo-writing time on research, forty percent on composing, and thirty percent on editing.[7] These materials will discuss ways to make your legal writing clearer, more elegant, and, most of all, more persuasive.

II. Good Legal Writing is Good Nonfiction Writing.

A. Examples of good and bad legal writing

"Good legal writing," says a classic text on the subject, "does not sound as though it has been written by a lawyer."[8] Below is an example of legal writing that sounds as though it were written by a lawyer who flunked freshman English or should have.

> At 1:00 P.M., while plaintiff was a business invitee and customer, present at that certain real property, a Ralph's Market, located at 1725 Sunset Blvd., Los Angeles, California, and that at said time and place, the defendants, and each of them, carelessly and negligently owned and operated and maintained and controlled the said real property and particularly a shopping cart thereof, and the said cart was at said time and place in a dangerous condition, because there was no "seat flap" in the upper basket and a can fell through, breaking plaintiff's foot and it was unsafe for use by persons, including plaintiff, and directly because of such condition, and the negligently and carelessly maintained condition thereof the plaintiff was caused to and did sustain injuries and was proximately injured thereby as hereinafter set forth.[9]

If the previous example seems too inept to be instructive, consider the following, which mirrors many briefs I have read:

> The gravamen of the cause of action in the instant case is founded in the doctrine of promissory estoppel, a concept which obtains in the law of contract to vindicate justified expectations in situations where there is no formal agreement, but in which there is nevertheless an equitable basis to enforce a promise on which a promisee has relied to his or her detriment.[10]

In contrast, the example below illustrates the clear, concise, and elegant prose of then-Judge Benjamin Cardozo. It comes from his opinion in *Palsgraf v. Long Island Railroad Co.*, 248 N.Y. 339, 162 N.E. 99 (1928).

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap,

> though the train was already moving. The other man, carrying a package, jumped aboard the car, but seemed unsteady as if about to fall. A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she sues.

What distinguishes the fact statement in Cardozo's *Palsgraf* opinion from its counterparts in the anonymous briefs written for the injured supermarket customer and the client in the promissory estoppel case, respectively? Several things come quickly to mind. First, Judge Cardozo used words economically. In line five, above, he wrote, "though the train was already moving," not "despite the fact that the train was already moving." Cardozo would not have written that anybody "owned and operated and maintained and controlled" anything. "Owned and operated" would have sufficed for him. Nor would he have referred to "[t]he gravamen of the cause of action in the instant case" when "the subject of this case" would have worked just fine. Second, Judge Cardozo shunned archaic phrases, whereas the anonymous brief writers are fond of cumbersome phrases, such as "that certain real property," "at said time and place," and "a concept which obtains in the law of contract to vindicate justified expectations in situations in which …."

Third, Judge Cardozo avoided wide gaps between subjects and verbs and between verbs and their objects, making his sentences easily understood. Fourth, his sentences varied in length, but were generally compact, ranging from six words to twenty-seven words. Fifth, he generally used the active voice, writing in line fifteen, for example, "the scales struck the plaintiff," not "the plaintiff was struck by the scales." Finally, and perhaps most obviously, Judge Cardozo

understood the function and the importance of punctuation, which the first anonymous brief writer evidently did not. These principles, and other essentials of good legal writing, are the subjects of the remainder of this section.

B. The essentials of good legal writing

In 1998 the Securities and Exchange Commission (SEC) published a pamphlet, titled *A Plain English Handbook*, authored by William Lutz, a professor of English at Rutgers University. Professor Lutz identified the essentials of good legal writing as follows: "Use the active voice. Keep sentences short. Avoid legal and financial jargon, weak verbs, and superfluous words. Instead of 'capital appreciation,' write 'growth.'[11] Similarly, former Civil Aeronautics Board Chair Alfred E. Kahn told his staff, "Every time you are tempted to use herein, hereinabove, hereinunder, or… therein and its corresponding variants, try here or there or above or below and see if it doesn't make just as much sense."[12] Put another way, you should avoid using any word that the reader is unlikely to understand immediately.[13] Professor Lutz and Mr. Kahn would likely endorse the following suggestions:

1. Avoid surplus words.

a. *Distinguish between working words and glue words*.

Lawyers are prone to use more words than are necessary or advisable to express an idea. We apparently think that additional words will enhance the clarity of our arguments, but, unfortunately, the opposite result often occurs. And we frequently ignore the good advice of Professor Paul Marx, who has observed, "In writing, word choices count for even more than they do in conversation."[14] Therefore, a few tips for avoiding surplus words are in order. One tip, from Professors Wydick and Sloan, is to distinguish between the **working words** in a sentence, which indicate who did what to whom, and the **glue words**, which link the working words

together to form a sentence. Having identified both types of words, make sure that the working words dominate your sentences.

Consider the following sentence, first with surplus words and then without them:

With surplus words: "The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to the issues that were vital."

Without surplus words: "The trial judge's ruling was prejudicial error because it cut off cross-examination on vital issues."[15]

b. *Avoid wordy idioms*.

Another tip for avoiding surplus words is to cull wordy idioms from your writing. Lawyers' favorite wordy idioms, which add words but not meaning to sentences, include "the fact that," "in most cases," "at this point in time," "the question as to whether," and "pursuant to." Instead of writing, "The fact that she had died spawned litigation over her will," write, "Her death spawned litigation over her will." Replace "despite the fact that" with "although" or "even though." In place of "in most cases," substitute "usually," and in place of "at this point in time," write "now." Banish "the question as to whether" from your writing in favor of "the question whether" or "whether." Replace "pursuant to" with "under" or "by."

c. *Don't begin sentences with "It is" or "There are."*

You can also eliminate surplus words by dispensing with "it" or "there" followed by a form of the verb "to be." "It is," "there is" and "there are" are often unnecessary because neither one refers to anything specific. Consider, for example, the following sentence: "There is no case law that specifically addresses the question presented." Shorten the sentence as follows: "No case law specifically addresses the question presented."[16]

But remember that "it" followed by a form of the verb "to be" is proper when "it" refers to something specific. For example, "The summons arrived this morning. It is on your desk."

d. *Reject nominalizations*.

Still another way to eliminate surplus words is to refrain from turning verbs into nouns, thereby creating "nominalizations." Act, don't "take action," assume, don't "make assumptions," decide, don't "make a decision." When editing your work, look for nominalizations, and if you find one, eliminate it by using a base verb instead. Below is an egregious example of a nominalization, issued by a spokeswoman for Hewlett Packard when Carly Fiorina's tenure as CEO ended. A preferable alternative follows the nominalization.

With nominalization: "Carly was brought in to **catalyze a transformation** of HP."

With base verb instead: "We hired Carly to **transform** HP."

This example also illustrates the folly of adding "-ize" to nouns to turn them into verbs. Avoid the temptation to "incentivize" (or" disincentivize") anyone to do anything. Adding –ize to a noun makes it a lackluster verb, as shown by the difference between "catalyze" and "transform."[17] Although some useful words (agonize, burglarize, fantasize, etc.) have resulted, grammarian Patricia O'Conner observes that the trend has gone too far. "Verbs should be lively little devils," she explains, "and just adding -ize to a word doesn't give it life."[18] O'Conner offers two pieces of advice to writers about verbs ending in -ize: don't create any new ones, and don't use any existing ones you don't like.[19]

Similarly, William Zinsser recommends "using good words if they already exist—as they almost always do"—instead of making up new ones by turning vibrant nouns into weak verbs. So please "encourage" your colleagues if you can and "discourage" them if you must, but please don't "incentivize" or "disincentivize" them.[20]

e. *Avoid doublets and triplets*.

Finally, you can get rid of surplus words by avoiding the doublets and triplets that afflict legal language. Examples include "due and payable" and "last will and testament." These phrases are relics of a bygone era when, following the Norman Conquest of England, English courts frequently paired native English words with French words in legal concepts, hoping that the parties and the court would understand at least one of the words. Ancient doublets and triplets serve no purpose in modern American legal parlance.[21] Accordingly, if one word swallows the meaning of other words in the expression (e.g. will), use that word alone. If two words in the expression are synonymous, choose the one that best fits your sentence.

2. Use the active voice.

Judge Cardozo achieved word economy in his *Palsgraf* opinion partly because he wrote primarily in the active voice. For clear, persuasive writing, lawyers should use it except in a few circumstances, which are noted below. The major difference between the active voice and the passive voice is that in the former, the subject of the sentence acts, whereas in the latter, the subject is acted upon. Using the active voice also eliminates the need for a prepositional phrase beginning with "by," which makes the active voice more concise than the passive voice. It is clearer than the passive voice, too, because it specifies who is doing what to whom. See the following examples:

Active voice: Attorney Smith wrote the brief.

Passive voice: The brief was written by Attorney Smith.

Active voice: The trial judge will probably deny your motion.

Passive voice: Your motion will probably be denied by the trial judge.

Active voice: The Board voted to begin a capital campaign immediately.

Passive voice: It was decided that a capital campaign would begin immediately.

Note, however, that some circumstances call for use of the passive voice. The passive voice is appropriate when you don't want to assign blame or when you don't know who acted. In the first example, presumably, you won't want to state directly that your client knocked several of the plaintiff's teeth out. Therefore, you might state instead: "The plaintiff's teeth were knocked out in a bar fight in Burlington, giving rise to this lawsuit."

3. Write short sentences.

Judge Cardozo's fact statement in *Palsgraf* illustrates the wisdom of short sentences. Short sentences are best in legal writing because they foster clarity, thereby facilitating understanding, which is essential to persuasion. "The shorter a sentence is," writes Professor Marx, "the more emphasis its idea will get."[22] Short sentences are also likely to include just one main thought, which aids in comprehension. Vary the lengths of sentences to hold the reader's attention, as Cardozo did in *Palsgraf*, but still *aim for sentences of fewer than twenty-five words*. A short sentence is most effective as the first or last sentence in a paragraph or in mid-paragraph between two longer sentences.[23]

4. Arrange words for easy understanding.

Within sentences, arrange subject, verb, and object in that order and close together. Put conditions and exceptions where they are easiest to understand. If a condition or an exception is longer than the main clause, put it at the end of the sentence. Example: "A lawyer may disclose a client's confidential information if disclosure is necessary to prevent, mitigate, or rectify substantial injury to the financial interests or property of another that is reasonably certain to result or has resulted from the client's commission of a crime or fraud in furtherance of which the client has used the lawyer's services."[24] This sentence is easily understood when the phrase

that follows "if" is placed at the end of the sentence. The writer would sacrifice clarity, however, by placing the condition at the beginning of a sentence starting with "if." Put another way, it is best to *put the "long element" at the end of a sentence*. But when a condition or an exception is short or needs to be at the beginning of the sentence for the sake of clarity, put it at the beginning of the sentence. Example: "Except for U.S. citizens, all persons passing this point must have a valid passport, a baggage clearance certificate, and a yellow entry card."[25]

Word arrangement is especially important in the first paragraph or two of your brief or memorandum and in the first paragraph of each section. In the former, you need to grab the reader's attention; in the latter, you need to hold onto it when introducing new or additional arguments or information. Therefore, concise and compelling "lead" paragraphs are as important to lawyers as they are to journalists. Like sentences, paragraphs should vary in length, but should generally be short. Break up any paragraph that threatens to take up a whole page of text. Aim for two or, better yet, three paragraphs per page.[26]

Good and bad examples of lead paragraphs follow. The first one fails to draw the reader into the case because it ignores the substantive forest for the procedural trees.

> Appellee initially filed a Motion to Strike Appendices to Brief for Appellant on July 22, 1983. Appellant filed a brief in response, which Appellee replied to. Appellant has subsequently filed another brief on this motion, Appellant's Reply to Appellee's Reply to Appellant's Brief in Response to Appellee's Motion to Strike Appendices to Brief for Appellant (Appellant's most recent brief), to which the Appellee herein responds.[27]

The second example, written by Judge Learned Hand, draws readers into the case and introduces them to its human drama without ignoring its procedural history.

> The suit is to enjoin the performance of the picture play, "Letty Lynton," as an infringement of the plaintiffs' copyrighted play, "Dishonored Lady." The

> plaintiffs' title is conceded, so too the validity of the copyright; the only issue is infringement. The defendants say that they did not use the play in any way to produce the picture; the plaintiffs discredit this denial because of the negotiations between the parties for the purchase of rights in the play, and because the similarities between the two are too specific and detailed to have resulted from chance. The judge thought that, so far as the defendants had used the play, they had taken only what the law allowed, that is, those general themes, motives, or ideas in which there could be no copyright. Therefore he dismissed the bill.[28]

An effective topic sentence is a key ingredient of a successful lead paragraph. Still, a topic sentence is necessary, but not sufficient, for a clear, smooth paragraph. Clarity and smoothness are achieved only when each sentence discusses the same subject, or one that is closely related to, the subject of the topic sentence. The first example below illustrates a disjointed paragraph; the second example shows one that is well organized because its sentences stick to the subject addressed by the topic sentence: lawyers. Note that although the subject of the second paragraph is the subject word of each sentence in that paragraph, the author wisely uses the pronoun "they" as a substitute to avoid excessive repetition.

> An accredited law school must graduate lawyers before the bar exam can be taken. The bar will not admit them to practice until they pass the exam. Only then can they hang out a shingle and even then, the finer points of law practice will elude them; it will be many years before they can practice comfortably. That experience is not gained overnight.[29]

> Lawyers must graduate from an accredited law school before they may take the bar examination. They may be admitted to the bar and hang out a shingle only after they pass the exam. Even then, it will be many years before they feel comfortable with the finer points of practicing law. They cannot gain that experience overnight.[30]

One clear, smooth paragraph, though, does not make a successful brief or memorandum. The author must link sentences (and paragraphs) together by means of connective devices that make the narrative flow easily and logically from one part of the document to the next. Bryan Garner offers a list of *explicit connectives*: words and phrases that exist chiefly to facilitate

transitions between sentences and paragraphs. These words and the circumstances to which they apply are listed below:

a. When adding a point: and, also, besides, similarly, nor, likewise, too, moreover, furthermore.

b. When giving an example: for instance, for example, likewise, another.

c. When restating: in other words, that is, this means, in short, put another way, again.

d. When introducing a cause: because, since, when.

e. When introducing a result: so, as a result, thus, therefore, accordingly, then, hence.

f. When contrasting: although, but, instead, yet, however, on the one hand, on the other hand, still, nevertheless, nonetheless, conversely, on the contrary, whereas, while, despite.

g. When conceding or qualifying: granted, of course, to be sure, admittedly, though, even though, although, even if.

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

i. When explaining a sentence: that is, then, earlier, previously, meanwhile, simultaneously, now, until now, no sooner, eventually, finally, in the end; and

j. When summing up: so, thus, consequently, accordingly, therefore.

Explicit connectives are not the only means of linking sentences and paragraphs. Another linking device is what Garner calls the *pointing words*, which include this, that, these, those, and the. For example, after discussing in the previous paragraph several cases explaining the law of negligence in Vermont, you can start the next paragraph using the pointing word "these," by writing: "Taken together, these cases show that…."

A final linking device is what Garner calls *echo links*: words or phrases that partially reiterate a previously mentioned idea. For example, the last sentence in the first paragraph of this document asks why lawyers often write poorly amidst a wealth of instructional materials on legal

writing. The first sentence of the next paragraph connects that paragraph to its predecessor, stating: “The best answer that I have heard comes from legal-writing guru Bryan A. Garner….” Similarly, paragraph two on page one ends by observing that the outcome of a case may well turn on the persuasiveness of your brief, motion, or memorandum, which will depend on the quality of your writing. The following paragraph begins by noting the particular applicability of that observation to appellate practice, thereby connecting the latter paragraph to the former and maintaining the flow of the narrative.

5. Use familiar words.

Along with short sentences, *use familiar words instead of esoteric ones* that will send the reader scrambling for a dictionary. “[T]he needs of the reader,” caution Professors Wydick and Sloan, “must take precedence over the self-gratification of the writer.”[31] Even among familiar words, choose the simple over the pretentious; explain, don’t elucidate, and use, don’t utilize. Simple words can convey powerful thought. Consider the following:

“The criminal is to go free because the constable has blundered.” Benjamin Cardozo, *People v. Defore*, 242 N.Y. 13, 150 N.E. 585 (1926).

“Our Constitution is colorblind and neither knows nor tolerates classes among citizens.” John Marshall Harlan, *Plessy v. Ferguson*, 163 U.S. 537, 16 S. Ct. 1138, 41 L. Ed. 256 (1896).

6. Avoid sexist language grammatically.

Avoid sexist language by using plural nouns and pronouns or by repeating the noun instead of using a pronoun. If you must, use "he or she,” but *never use a plural pronoun to refer to a singular noun*, as in: "Each lawyer should bring their proposed jury instructions to court.” The best arrangement of this sentence would be: “Lawyers should bring their proposed jury instructions to court.” Alternatively, substitute “you” or “we” for the gender-specific pronoun, as

in: “You (we) should bring your (our) jury instructions to court.” Another option is: “One should bring one’s jury instructions to court.” Remember that one always brings “one’s,” not “his or her,” jury instructions to court.

Also remember that “collective nouns” (e.g., court, jury, board, Congress, etc.), which refer to several people working together as a unit, require singular pronouns. For example: “The Supreme Court ended its term on June 30th” or “The jury reached its verdict quickly.”[32] Finally, when an indefinite pronoun (e.g., anybody, everybody, nobody, somebody, etc.) is the subject of a sentence and a personal pronoun refers to the subject in the sentence, modern grammarians approve of using the plural personal pronouns “they,” “their,” or “themselves.” Therefore, despite what you may have learned in elementary school, the sentence that follows is correct. “Anybody would have realized that they left their briefcase in the courtroom.”

Admittedly, indefinite pronouns like “anybody” and “nobody” are used with singular verbs, as in “everybody likes” and “nobody goes.” But indefinite pronouns are not singular in meaning. Indeed, they feel plural because they stand for concepts such as “all people,” “no people,” or “any people.” Therefore, you are correct to write: “Somebody always parks their car in my parking space,” or “If anyone calls, tell them I’ve gone to lunch.”[33]

Similarly modern grammarians approve of the use of “they,” “their,” or “themselves” when referring to a subject that is indefinite and stands for an unknown person or persons. For example, the sentence that follows is correct. “No victim of a crime should blame ‘themselves’ for what happened.”[34] Although the subject (victim) is singular and we use a singular verb with it, (e.g., “The victim says,” “The victim remembers,” etc.), it stands for a group of people—anyone who has been a crime victim—so using a form of “they” is appropriate.[35]

Happily, if you are uncomfortable using "they," "their," or "themselves" when referring to an indefinite singular subject, you can avoid doing so, as I typically do, by making the subject of your sentence unmistakably plural. Then you can match a plural subject with a plural pronoun, as in "Victims of crime should not blame "themselves" for what happened. Making the subject plural will also enable you to avoid awkward alternatives, such as "he or she" and "him or her."[36]

Two cautionary notes are in order before leaving the subject of gender-neutral language. First, if the subject of your sentence is clearly male or female, use the appropriate form of "he" or "she," not "they." Examples: "No victim of fraternity hazing should keep it to himself." "One of the attorneys left her purse at the counsel table."

Second, some dictionaries and writing guides recognize "they" as the pronoun preferred by someone who does not identify as either male or female. An example of this usage might read: "Alex got an A on their torts exam. The professor told them that they scored higher than any other student." Because this usage can be confusing to some readers, try to avoid confusion by noting when the pronouns "they" and "them" refer to only one person.[37]

7. Shun double negatives.

Double negatives are not limited to sentences such as: "You ain't seen nothin' yet," which a lawyer presumably would not write in a formal document. Indeed, double negatives may sound erudite (e.g. "not unlike;" "Isn't that not so?"), but they can be confusing, so you should avoid them in legal writing. The following example from former Secretary of State Alexander Haig illustrates this point.

"This is not an experience I haven't been through before."[38]

8. Use "where" for location only.

Lawyers are fond of writing sentences such as the following: "Where the employee was off on a frolic at the time of the accident, *respondeat superior* does not apply." This is incorrect because "where" should refer to location only. The following sentence uses "where" correctly. "The employer did not know where the employee went on his lunch hour." Typically, you can replace "where" with when or if to express an idea other than location.

9. Reject Clumsy "Lawyerisms."

While you are exorcising stylistic demons, get rid of clumsy "lawyerisms" such as "on point," "on all fours," and "the instant case." Ballerinas are "on point," whereas cases are "in point." If you can visualize a case being "on all fours" or "instant," you have a better imagination than I have. Last, but not least, cite *Marbury v. Madison*, but do not "cite to" *Marbury v. Madison*.

10. Defeat the dangling modifier.

A dangling modifier occurs when the word that it modifies has been left out of the sentence; therefore, the modifier is "dangling" because the noun it is supposed to modify is missing. The best writers make this mistake from time to time. Consider the following example from Emily Bronte's novel *Wuthering Heights*: "On ascending to Isabella's room, my suspicions were confirmed."[39] This sentence causes the reader to wonder if the writer or her suspicions ascended to Isabella's room. Ms. Bronte should have written, "On ascending to Isabella's room, I confirmed my suspicions." Inserting the word "I" clarifies who ascended to Isabella's room.

A second example follows, first with the dangling modifier, then without.

With dangling modifier: "Rushing to finish her brief, Jane's printer broke."

Without dangling modifier: "While Jane was rushing to finish her brief, her printer broke."

To avoid dangling modifiers, ask yourself who or what is doing the action described in the sentence's opening phrase. Then place the answer to that question (e.g. I, Jane, etc.) right after the comma separating the modifier from the main clause of the sentence.[40]

10. Know when to use "that" and when to use "which."

Traditionally, "that" and "which" have not been interchangeable. "That" has long been appropriate in restrictive clauses, e.g., "*Brown v. Board of Education* is the case *that* we discussed in class today." The restrictive clause "that we discussed in class today" is essential to the sentence.

"Which" has been appropriate in nonrestrictive clauses, e.g., "*Brown v. Board of Education, which* we discussed in class today, gave a prominent role to social science evidence." The nonrestrictive clause "which we discussed in class today" adds extra meaning to the sentence but is not essential. It is set off by commas, which should be your hint to use which instead of that. The following hint expresses the traditional rule. Commas, which cut out the fat, go with which, never with that.[41]

At least one recent grammar guide tweaks this rule, though, to say that writers may use either that or which in a restrictive clause, as in: "This is the book that (or which) we discussed in class today."[42] But if you use "which" in a restrictive clause, be careful because your sentence will not always make sense, forcing you to use "that" instead. Example: "Recently we received information which you were interested in our magazine."[43]

11. Know when to use "who" and when to use "whom."

Use "who" when referring to the subject in the sentence. "Who" is a subject because it does something. Use "whom" when referring to the object. "Whom" is an object because something is done to it.[44]

Example 1: "Smith is the candidate who we think will win. ["Who" refers to the subject, Smith, as in "We think he will win"].

Example 2: "Jones is the candidate whom we hope to elect." ["Whom" refers to the object, Jones, as in "We want him to win"].

12. Know when to use "because" and when to use "since."

If, when discussing causation, you use "because," you will always be correct. Example: "Because I now exercise five days a week, I sleep better and have lost weight." And if, when referring to the passage of time, you use "since," you will always be correct. Example: "Since I started exercising regularly six months ago, I have lost twenty-five pounds."

Nevertheless, a modern grammar guide advises that "since" is not restricted to meaning "between now and" or "from the time that." Rather, it can also mean "because" or "for the reason that." But if you use "since" in this way, be careful not to create confusion. Consider: "Since we spoke, I've had second thoughts." In this example, "since" could mean either "because" or "from the time that." To avoid creating such ambiguity, either follow the traditional rule stated above or review your sentence to ensure you are conveying the meaning you intend.[45]

13. Know when to use "although" and when to use "while."

When discussing a relationship (usually a contrast) between two ideas, using "although" is correct. Example: "Although Mary was quiet and unassuming away from work, she was an aggressive advocate for her clients." And you will be correct if, when discussing two events happening simultaneously, you use "while." Example: "While George slept, his wife, Susan, ran three miles, showered, and cooked breakfast."

But nowadays you will also be correct if you use "while" at the start of a sentence or clause to mean "although" or "whereas."[46] Example: "While he is short, he is an excellent basketball player." Be careful, though, when using "while" in this sense because you may confuse the reader. Example: "While he reads the *New York Times*, he watches the news on CNN." In that sentence, "while" could mean either "during the time that" or "although." To avoid this problem, either observe the strict separation between "although" and "while" suggested above or scrutinize your sentence to make sure you are using "while" in the way you intend.

14. Insist on subject/verb agreement.

A subject must agree with its verb in number. That is why you would say that lawyers work hard, not that "lawyers works hard." You know that, of course, but you may not know that subjects plural in form but singular in meaning require a singular verb. To illustrate: "Politics is an avocation for many lawyers." "Economics is a subject that every budding lawyer should study." You may also not know that in "or" and "nor" constructions, the verb must agree with the closest subject. The following sentences illustrate:

"Neither the contracts nor the lease *is* ready to be signed." "Neither the lease nor the contracts *are* ready to be signed."

15. Observe parallelism.

Put ideas of the same rank in the same grammatical form, e.g. "Attorney Thompson spent Thursday *writing* a motion, *meeting* with clients, and *attending* an afternoon seminar." Parallelism is necessary in legal writing to make long, complex sentences understandable. Notice that in the preceding example, parallelism is achieved by matching the endings of the first key word (writing, meeting, attending) in each "coordinated element" of the sentence.

Coordinated elements are parts of a sentence joined by conjunctions, in this case, and.[47] As the first sentence in this paragraph illustrates, a popular and effective form of parallelism is the series of three. It offers a pleasant rhythm when read and, as Professor Marx notes, "three instances makes a point more believable than one or two would."[48]

16. Refer to parties by their names.

A brief or memorandum that refers to parties as "Mr. Smith" or "Ms. Jones" is more readable than one that refers to them by their legal status, that is, as Appellant and Appellee or as Plaintiff and Defendant. But you may use the status terms when discussing a case other than the one in which you are participating.

17. Don't close memoranda or briefs with "for all the foregoing reasons."

The one place where lawyers tend to use too few words instead of too many is the conclusion of a brief or memorandum, which often begins with the hackneyed phrase, "for all the foregoing reasons" or the equally musty "for the reasons cited." These words are so threadbare from overuse that they suggest to the reader you are not about to say anything worth reading carefully. Replace them with a concise recapitulation of the main points of your argument, which will remind the court why you think it should decide in your client's favor. Do this in two or three sentences; then make your request for relief the last sentence of your conclusion rather than the first.

III. Punctuation Aids Persuasion.

A. Punctuation Matters.

Lynne Truss refers to punctuation marks as "the traffic signals of language" because "they tell us to slow down, notice this, take a detour, and stop."[49] Punctuation is especially important in legal writing, where the location of a comma can determine the meaning of a

statutory or constitutional provision. For example, note the difference between the two sentences that follow, depending on the location of a comma. The language is taken from Article 8 § 2 of the Michigan Constitution.

Incorrect: "Neither slavery nor involuntary servitude, unless for the punishment of crime, shall ever be tolerated in this state."

Correct: "Neither slavery, nor involuntary servitude unless for the punishment of crime, shall ever be tolerated in this state."

The first sentence can reasonably be read to mean that the good people of Michigan will tolerate both slavery and imprisonment as punishments for crime. Apparently, this is what the drafters first wrote when revising the Michigan Constitution late in the nineteenth century. Happily, a grammar hawk caught the error and placed the comma after "slavery," thereby changing the punctuation of the sentence to reflect its intended meaning.

So, punctuation matters. A quick survey of punctuation marks and their proper use follows.

B. Commas

Commas are the most frequently used punctuation marks in English; they occur in writing twice as often as all other punctuation marks combined. The role of commas is to tell the reader where to pause.[50] Use them in the following circumstances:

1. *When joining two independent clauses (each of which can stand alone and be a sentence) with a coordinating conjunction (and, but, or, for, nor, yet, and so)*

   Example: "The defendant intentionally entered the government computer system, and he intentionally denied access to authorized users." But when the clauses are short and closely

related, the comma before the coordinating conjunction is unnecessary. Example: "The prosecutor spoke and the jury listened."[51]

2. *After an introductory clause or phrase*

   Example: "Wanting to settle the case quickly, the plaintiff authorized her lawyer to accept any amount over $5,000.00." But if the introductory element is short, omit the comma.

   Example: "At home he wears glasses instead of contact lenses."

3. *To set off parenthetical elements*

Legal citations included in the text of a brief or memorandum are parentheticals, so they should be set off by commas. Example: "In the *DeShaney* case, 489 U.S. 192 (1989), Justice Blackmun dissented along with Justices Brennan and Marshall.

4. *To separate a series of three or more items*

When a sentence includes a series of three or more items joined by one conjunction, put commas after each item except the last. Example: "The defendant was armed with a sawed-off shotgun, a semi-automatic pistol, and a hunting knife when he entered the bank." The second comma is known as the "serial" comma or the "Oxford" comma. Using it will help you avoid writing baffling sentences like the following: "This book is dedicated to my parents, Ayn Rand and God."[52]

5. *To set off transitional words* (conjunctive adverbs)

Always use a comma after transitional words such as therefore, thus, furthermore, moreover, etc. These words are known as conjunctive adverbs. Example: The conclusion, therefore, is that attorney advertising deserves only limited protection under the First Amendment.

6. *To introduce a short quotation*

Use a comma to introduce a short quotation unless the quotation is incorporated into your sentence. Examples: (1) The witness said, "The red car was speeding"; (2) The statute banned smoking "in any public building."

B(1) Commas Misused

Do not use commas in the following ways:

1. *In a comma splice*

Do not use a comma to separate two independent clauses. To grammarians, this is a cardinal sin known as a "comma splice." Example: "The bus didn't come, we had to walk to school." Correct this either by inserting a semicolon in place of the comma or by leaving the comma in place and inserting the conjunction "so" after it. A third option is to use the semicolon, followed by a conjunctive adverb (see B(5), above) and a comma. Example: The bus didn't come; therefore, we had to walk to school."

2. *By placing a comma between two clauses when the second verb has the same subject as the previous verb*. Example: "Counsel for the plaintiff brought proposed jury instructions to court, and submitted them for the judge's consideration." Correct this flaw by removing the comma.

C. Semicolons

The semicolon is a hybrid of a comma and a period. It signals a stronger stop than a comma, but not as strong a stop as a period.[53] Put another way, the semicolon signals that more will be said about what just has been said, whereas the period tells the reader that what follows will be a step forward.[54] Use a semicolon in the following circumstances:

1. *To join two independent clauses without a conjunction*

Example: The defense counsel objected to the question; she said that it called for information protected by the attorney-client privilege.[55]

2. *To set off two independent clauses connected by conjunctive adverbs*.

   Example: "Attorney advertising is a type of commercial speech; therefore (accordingly, consequently), it deserves only limited protection under the First Amendment." Here, the first independent clause makes a general statement, and the second one elaborates. Alternatively, the two independent clauses may depict a clash of opposites. Example: "Democrats seek equality; Republicans favor liberty."

3. *To separate the items in a complex series or in a series that has internal commas*

   e.g. "The prosecutor called the following witnesses: Susan Wu, a psychiatrist; Michael Bradford, a ballistics expert; and George Frye, a police investigator."

D. Colons

Use a colon after an independent clause for the following purposes:

1. *To make a point dramatically*. Example: "John's grades in his first year of law school told him one thing: he must study harder.

2. *To introduce a list*

   See #3 above. When using a colon to introduce a list, be sure that the material before the colon can stand alone as an independent clause. That clause can include "as follows" or "the following," but it need not do so.

   Examples: We must subpoena the following witnesses: Wu, Bradford, and Frye.

   We must subpoena three witnesses: Wu, Bradford, and Frye.

3. *To set up an elaboration or explanation*

   Example: "Attorney Jones's office sustained damage in the tornado: its picture window and a valuable vase were smashed."

4. *To introduce a quotation longer than one sentence*

But use a comma to introduce one-sentence quotations.

(D)(1) Colons Misused

1. Don't put a colon between a verb and the rest of the sentence: e.g., We must subpoena: Wu, Bradford, and Frye. Instead, just write, "We must subpoena Wu, Bradford, and Frye."

2. Don't put a colon between a preposition and its object: e.g., We must serve a subpoena on: Wu, Bradford, and Frye. Here, as in the previous example, the colon is unnecessary. Just write, "We must serve a subpoena on Wu, Bradford, and Frye."

E. Parentheses and Dashes

Like commas, parentheses and dashes set off material that interrupts a sentence. But each device sends a different signal to the reader, so you need to know which one is appropriate in which circumstances. Commas are neutral; they neither emphasize nor play down the textual material that they set off. Parentheses play down the material that they set off. They are used when the material is clearly subordinate, but it deserves mention so as to enhance clarity. Examples: (1) The police found a diamond ring (worth at least $1,000) in the suspect's pants pocket; (2) The levy established in subparagraph 9 does not apply to residential property (property used by a taxpayer as a primary residence).[56]

Dashes emphasize the material that they set off, such as an example, a definition, or a contrast. Use a pair of dashes (em dash) to set off material that interrupts a sentence. Examples: (1) "The magistrate may rule on any procedural motion—including a motion to suppress evidence and a motion to allow or disallow discovery—at any time following the acceptance of a plea"; (2) "We need not reach the constitutional issue—that can await another day and another

set of facts." Use a single dash (en dash) to indicate a range. Example: "The summer semester runs June 1-August 15." When using the en dash, omit words like "from" or "between."

F. Apostrophes

The apostrophe may be the most misused and abused punctuation mark, which is probably why British grammarians have established The Society for the Preservation of the Apostrophe. That name suggests one form of abuse that the apostrophe endures, which is to be omitted where it is needed. Use an apostrophe for the following purposes:

1. *To indicate possession*

Example: "Counsel's argument was cogent and concise." "Attorney Smith's briefcase was missing."

2. *To indicate joint ownership*

If two people own something jointly, indicate that by forming the possessive for the last owner listed. Example: "Late on Friday afternoons, the lawyers adjourned to Bob and Sam's Pub." But to indicate individual ownership, form the possessive for each owner listed. Example: "While at the office, the children played on John's and Jane's computers."

3. *To form the plural of abbreviations, numbers, letters, symbols, and words referred to as words*.

Example: "Revise this contract by replacing all the aforementioned's with this's."

"The witness recalled that the license number included three G's."

"Anne got mostly B's in law school."

"Historically, women have been a higher percentage of the Ph.D.'s than of the J.D.'s or the M.D.'s in the United States."

F(1) Apostrophes Misused

Apostrophes are often misused in contemporary English. The more common misuses include the following:

1. *Excluded from possessive form of noun ending in s*

The possessive form of a noun ending in s is s's. For example, "Michael Dukakis's 1988 presidential campaign started out well but was ultimately unsuccessful." [not Dukakis']

The only times that s' is appropriate are when (1) the plural form of the noun ends in s, as in "the Joneses' house" or "the Indian tribes' removal to Oklahoma in the 1830s" and (2) the noun involved is a classical or biblical name, such as in "Achilles' heel."

2. *In plural forms of years*

The correct form is: "The Impressionists dominated the late 1800s." [not 1800's]

3. *In contractions in formal legal documents*

In a contraction (e.g. don't) an apostrophe stands for an omitted letter, thereby conveying informality. Consequently, contractions (and their accompanying apostrophes) are inappropriate in statutes, court orders, contracts, appellate briefs, and other formal legal documents.

4. *In a possessive pronoun*

Don't use an apostrophe with the possessive form of the pronoun it. You would be correct in writing "the law firm changed its name." Use it's only when you mean "it is."

G. Hyphens

A hyphen is smaller and has a different purpose than a dash. Use a hyphen in the following circumstances:

1. *To join two or more words acting together as a single modifier*

Example: "Joan's pint-sized great-grandmother was the first female attorney in Vermont."

2. *To join a number and a noun together as a single modifier*

   Example: "The twenty-year-old defendant feared being convicted and sent to prison."

3. *With the prefixes ex-, self-, quasi-, and all-*

   Example: "Dan's solo law practice was all-consuming, but he reveled in self-employment and did not miss his ex-partners."

4. *With compound numbers from twenty-one to ninety-nine, even when part of a larger number*

   Example: one hundred thirty-eight

5. *Between all elements of a fraction*

   Examples: "Attorney Jones received a one-third contingent fee." "Mary received a one-twenty-sixth share."

G(1) Hyphens Misused

The following misuses of hyphens are common:

1. *When first term is adverb ending in -ly*

   Example: The correct form is: "The case was poorly argued."

2. *With the prefixes anti, co, de, inter, multi, non, para, pro, re, semi, or super unless the second element is capitalized or the hyphen is needed to avoid confusion* [Write: antitrust, paralegal, codefendant, semicolon, etc.]

3. When the compound modifier includes a foreign phrase, such as "bona fide purchaser" or "per se violation."

H. Quotation Marks

Use quotation marks to set off only the speaker's exact words. Example: "Did you file the motion for summary judgment in the Smith case?" Attorney Baker asked her young associate. For quotations of fifty words or more, indent on both the left and the right and leave internal

quotation marks as they appeared in the original. Surround your quotation with double quotation marks (“) but use single quotation marks (‘) to indicate internal quotations. But don’t place quotation marks at the beginning or end of the passage because the indenting itself shows that the passage is a quotation. Therefore, quotation marks in these locations would be redundant.[57]

Periods and commas go inside quotation marks. Colons and semicolons go outside quotation marks. Question marks go inside if they are part of the quoted material, but outside if they are not. Examples: (1) Attorney Baker asked, “Did I really say that?” (2) Did Attorney Johnson really attribute her client’s suicide to “poor sales projections”?

I. Exclamation Points (Marks)

Lawyers love rules, and the rule here is easy to remember. Generally, don’t use exclamation points in formal legal writing because they tend to be strident instead of persuasive.

J. Brackets

Brackets have two uses. One use is editorial clarification. Lawyers often use brackets for this purpose. The following example illustrates. “The deed stated that ‘[t]he **Grantor** reserves a life estate in all of the property conveyed herein [emphasis added].’” The first set of brackets indicates that you have substituted a lower case “t” for the upper case “T” in the original to integrate the quotation into your sentence. The second set of brackets indicates that you have added the emphasis on the word “Grantor.” Note that *the period sits outside the second set of brackets*.

The second use for brackets is to enclose words that you insert in a quotation to integrate it into one of your sentences. Note the following example. Original quote: “We must never forget it is a *constitution* we are expounding.” Quotation with brackets: Chief Justice John Marshall

famously wrote that "[w]e must never forget it is a *constitution* we are expounding [emphasis in original]."

IV. Edit As Carefully As You Compose.

A. The Importance of Editing

Remember the earlier admonition to devote thirty percent of your time on a legal-writing project to editing. Justice Brandeis lived by it. "There's no such thing as good writing—there's only good editing," he said.[58] This is because different skills are involved in editing than in composing. The goal of composing is to solve an intellectual problem, whereas the goal of editing is to express the writer's preferred resolution as clearly and persuasively as possible. For success in both endeavors, it's wise to "compose early and edit late."[59]

B. Macro-editing vs. Micro-editing

The first part of the editing task is macro-editing, which aims to eliminate unnecessary substantive discussion, such as repetitious paragraphs. During this phase concentrate on paring your presentation of the facts and your argument down to their essential elements. The second part of the editing task is micro-editing, which in turn has two parts. Micro-editing focuses first on removing excess words, long-winded phrases, and obviousness. Then (in your third pass through the document) it concentrates on continuity, making sure that the revised sentences and paragraphs are arranged in a logical order and read smoothly.

C. The Editing Checklist

After completing your macro-editing and micro-editing, glance at your document one last time and *ask yourself the following questions*. If the answer to any one of them is either unclear or "no," then you have some more work to do. The pertinent questions are:

1. Does the opening paragraph (or section) provide a good "road map" to the rest of the document?
2. Does the concluding paragraph (or section) show that the document has reached its intended destination?
3. Does each paragraph make only one major point?
4. Are the paragraphs (and sections) connected by suitable transitions?

When you can answer yes to each of these questions, *show the document to a colleague*, if possible, before copying and filing it. Your colleague may notice substantive or stylistic flaws that you have missed.

IV. Savor The Chance to Create

A. Make It Sing

Legal writing need not be dull. You can make it "sing" by using an interesting figure of speech, such as a metaphor (implicit figurative comparison between two things not literally alike) to make your point. Several of my attempts follow. The first one is from an article about appellate brief writing in the *Vermont Bar Journal*, the second is from a brief in a case involving a dispute between neighbors over a common driveway, and the third is from a book I published in 2003.

1. "After discussing the precedents, **marry** them to the facts of the case, and show how this union naturally, if not inevitably, begets the result that you seek."[60]
2. "Robert Frost wrote that '[g]ood fences make good neighbors.' Judging by this case, the same cannot be said for common driveways."

3. "Almost all the financial, academic, and social problems that plague college sports today existed in 1900. They were the offspring of a fateful marriage between athletic commerce and higher education that was well established by that date."[61]

Whether or not my attempts "sing" to you, when writing a memorandum or a brief, remember the following observation by the late Professor Fred Rodell of Yale Law School.

> "I am the last one to suppose that a piece about the law could be made to read like a juicy sex novel or a detective story, but I cannot see why it has to resemble a cross between a nineteenth century sermon and a treatise on higher mathematics."[62]

And heed what Professors Anne Enquist and Laurel Currie Oates call "the sound, rhythm, and imagery of language."[63] More precisely, build some subtle <u>alliteration</u> (the repetition of consonant sounds) into your writing. The following sentence from a brief supporting a moment-of-silence law illustrates alliteration: "The student may pray but is equally free to meditate or daydream or doze."[64] Alliteration adds rhythm to writing, and rhythm aids comprehension and persuasion."[65]

Vary the lengths of your sentences and the ways in which they begin. Use parallelism (see p. 20) not only to follow grammatical rules, but also to add rhythm and persuasive power to your writing. See how Justice Scalia matches both the structure and the length of the parallel elements in the following sentence: "In the present case, for example, a particular legislator need not have voted for the Act either because he wanted to foster religion or because he wanted to improve education."[66] Similarly, Justice Cardozo used parallelism to great effect in *Hynes v. New York*, when he wrote: "The approximate and relative become the definite and absolute."[67] On the other hand, Justice Brandeis used a metaphor effectively in writing, "Our Government is the potent, the omnipresent teacher."[68]

Whatever technique you use to dress up your writing, remember that elegant language creates "a satisfying sound" and "a memorable image, both of which aid in persuasion."[69] So follow Jim McElhaney's advice and "listen to what you write."[70] Read your work aloud to yourself. Then fix whatever sounds awkward. Write not only to the eye, but also to the ear.

B. Parting Tips

These materials have presented many technical tips for improving your legal writing, but the most important tip to be imparted concerns your attitude toward writing, not your grammar or choice of words. The first step toward improved writing is thinking of yourself as a professional writer. That mindset will spur you to study these materials and to consult the resources cited here. As your writing improves, you will see and, I hope, seize, opportunities to be creative in your legal writing. Your writing will surely improve if you devote some spare time to reading literary classics. The novels of Ernest Hemingway are especially applicable to legal writing because of Hemingway's uncanny ability to say much in a few simple words. So are the novels of Willa Cather, who was a master at painting word pictures in the reader's mind. Then, as you begin to enjoy writing more, honor the importance of editing. If you remember nothing else from these materials, remember to **compose early and edit late**.[71]

Resources

1. Buckley, Marie, *The Lawyer's Essential Guide to Writing: Proven Tools and Techniques* (2011).

2. Enquist, Anne and Oates, Laurel Currie, *Just Writing* (3d ed. 2009).

3. Goldstein, Tom, and Liebermann, Jethro K., *The Lawyer's guide to Writing Well* (3d ed. 2016).

4. Marx, Paul, *The Modern Rules of Style* (2007).

5. O'Conner, Patricia T., *Woe Is I: The Grammerphobe's Guide to Better English in Plain English*, (4th ed. 2019).

6. Rozakis, Laurie. *English Grammar for the Utterly Confused* (2003).

7. Tiersma, Peter M., *Legal Language* (1999).

8. Truss, Lynne. *Eats, Shoots, & Leaves: The Zero Tolerance Approach to Punctuation* (2003).

9. Wydick, Richard C., and Sloan, Amy, *Plain English for Lawyers* (6th ed. 2019). [Includes many practice exercises.]

10. Zinsser, William, *On Writing Well* (2006).

Exercises

I. Style

Using the principles discussed above, rewrite each of the following sentences.

1. The memorandum that was produced by counsel for the defendant went to the heart of the defense asserted, which was the lack of the specific intent to kill the deceased.
2. In point of fact 350 grams of J-12 plastic explosive, seven detonating devices, and one 50-foot roll of insulated copper wire were discovered by the federal security inspectors at the airline gate hidden on the accused's person at the time he was detained and arrested.
3. The fact that the plaintiff was disabled may have had an influence on the jury.
4. For the purpose of controlling how his art collection could be displayed subsequent to his death, the doctor created a very restrictive trust with a view to keeping everything exactly as it was during his lifetime.
5. This provision of the eminent domain law has been repealed. Therefore, it is null and void.
6. I am in opposition to your position on this bill, but if it is my allies' intention to prevent a vote by effecting a filibuster, I will stand in support of your petition to end debate.
7. After 180 days, this Agreement can be terminated by either party.
8. The financial aid application must be completed and submitted to the Financial Aid Office at least 90 days before the start of classes.
9. After staying up until 4 a.m. to finish her paper, class discussion was impossible for Laura to follow because she was sleepy.
10. Being young and uneducated, the attorney argued that his client should have access to educational programs in prison.

11. The prisoner's acclimatization to an institutional environment is one factor that must be taken into account by the Parole Board effectuating his reintegration into society.
12. The felony-murder rule that is the subject of today's class is narrower in scope in Vermont than in Illinois.

II. Punctuation

1. Representatives of all the European states except France declared Napoleon beyond the law, and had to resolve the question of what to do about him.
2. Lutz who sued Reliance Nissan for wrongful termination could not show that the arbitration clause in her employment contract was unconscionable.
3. The witness said "The defendant drove through town at more than 60 miles per hour."
4. Professor DaVinci is so interesting. In class today, the discussion ranged from Pavarotti's opera cape to Joyce Carol Oates new novel to Defendant Smiths fingerprints to Achilles heel and even to Zacharias son, John the Baptist.
5. Tim went to law school in the 1980s. He got mostly As and Bs.
6. The plaintiffs attorney objected to the question, she said that it called for a conclusion on the part of the witness who was not an expert.
7. Counsel for the defendant ski area called the following witnesses Sam Slade an engineer Margaret McCloud an accident reconstruction specialist and Joe Belliveau who was in charge of maintaining the chair lifts.
8. The engineering report by Sandra Ellison Ph.D. concluded that, "the design was structurally sound."
9. We must subpoena: Barnes, Cruz, and Younger.

10. In *NCAA v. Tarkanian* 488 U.S. 179 (1988) the Supreme Court held that the National Collegiate Athletic Association is not a state actor hence it need not guarantee due process to persons accused of breaking its rules.
11. The state's environmental law categorizes any treated wastewater containing less than twenty eight percent solids as sewage sludge.
12. The ideal time to use disinfected sewage sludge is during the May-July growing season.

Suggested Answers

I. Style

1. Defense counsel's memorandum went to the heart of the defense asserted, namely, the lack of a specific intent to kill the deceased.
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7. After 180 days, either party can terminate this Agreement. **Or:** Either party can terminate this Agreement after 180 days.

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11. The prisoner has become institutionalized, which is one factor that the Parole Board must consider as it tries to reintegrate him into society.
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[1] *See, e.g.*, Tom Goldstein and Jethro K. Lieberman, The Lawyer's Guide to Writing Well 13-14, 87-89 (3d ed. 2016).
[2] Bryan A. Garner, The Winning Brief: 100 Tips for Briefing in Trial and Appellate Courts 9 (1999).
[3] William Pannill, *Appeals: The Classic Guide*, Litigation, Winter 1999, at 6-7.
[4] Myron Moskowitz, Winning an Appeal 15 (5th ed., 2016).
[5] Goldstein and Liebermann, *supra* note 1, at 67. The authors reach this conclusion by applying the rule that 400 double-spaced pages equals one 275-page book or one issue of the Wall Street Journal.
[6] Bryan A. Garner, Legal Writing in Plain English: A Text with Exercises 57 (2001).
[7] *Id*. at 51.
[8] Richard C. Wydick and Amy E. Sloan, Plain English for Lawyers 5 (6th ed. 2019).
[9] Goldstein and Liebermann, *supra* note 1, at 13.
[10] Jim McElhaney, *Listen to What You Write,* A.B.A. Journal (January 2011), 20.
[11] Goldstein and Lieberman, *supra* note 1, at 19.
[12] Id. at 121.
[13] McElhaney, *supra* note 10, at 21.
[14] Paul Marx, The Modern Rules of Style 1 (2007).
[15] Wydick and Sloan, *supra* note 8, at 9.
[16] Goldstein and Liebermann, *supra* note 1, at 145, 249.
[17] Patricia T. O'Conner, Woe Is I 72 (4th ed 2019).
[18] Id.
[19] Id.
[20] William Zinsser, *On Writing Well* 45 (2006).
[21] Peter Tiersma, Legal Language 31-32 (1999). The Mayflower Compact of 1620, which established the basic law of the Massachusetts Bay Colony, is replete with doublets and triplets. Note the following language from that document:

> "Do by these presents, solemnly and mutually,
> in the presence of God and one another,
> covenant and combine ourselves together
> into a civil body Politick, for our better
> Ordering and Preservation, and Furtherance
> of the ends aforesaid: And by Virtue
> hereof to enact, constitute, and frame
> such just and equal Laws, Ordinances,
> Acts, Constitutions and Offices, from
> time to time, as shall be thought
> most meet and convenient for the
> general Good of the Colony; unto
> which we promise all due
> Submission and Obedience."

[22] Marx, *supra* note 14, at 5.
[23] *Id.* at 62.
[24] Wydick and Sloan, *supra* note 8, at 43.
[25] Id.
[26] Marie Buckley, The Lawyer's Essential Guide to Writing: Proven Tools and Techniques 16 (2011).
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[29] Id. at 106.
[30] Id.
[31] Wydick and Sloan, *supra* note 8, at 59.
[32] Anne Enquist and Laurel Currie Oates, Just Writing 192-93 (3rd ed. 2009).
[33] O'Conner, *supra* note 17, at 16-17.
[34] Id. at 17.
[35] Id.
[36] Id. at 18.
[37] Id. at 19.

[38] Goldstein and Liebermann, *supra* note 1, at 123.
[39] Id. at 152.
[40] Enquist and Oates, *supra* note 32, at 200.
[41] O'Conner, *supra* note 17, at 4.
[42] Id. at 2-4.
[43] Goldstein and Lieberman, *supra* note 1, at 149.
[44] *Id.* at 7.
[45] O'Conner, *supra* note 17, at 247-48
[46] Id. at 134.
[47] Enquist and Oates, *supra* note 32, at 202-03.
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[50] Laurie Rozakis, English Grammar for the Utterly Confused 150 (2003).
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[54] Marx, *supra* note 14, at 37.
[55] Wydick and Sloan, *supra* note 8, at 90.
[56] Id. at 94-95.
[57] Goldstein and Liebermann, *supra* note 1, at 174.
[58] Id. at 153.
[59] *Id*. at 39.
[60] Brian L. Porto, *The Art of Appellate Brief Writing*, 29 Vermont Bar Journal 30, 34 (2003).
[61] Porto, A New Season: Using Title IX to Reform College Sports 19 (2003).
[62] Fred Rodell, *Goodbye to Law Reviews – Revisited*, 48 Va. L. Rev. 279, 282 (1962).
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[64] *Id.* at 150.
[65] *Id.* at 151.
[66] *Id.* at 156.
[67] *Id.*
[68] *Id.* at 160.
[69] *Id.*
[70] McElhaney, *supra* note 10, at 65.
[71] Goldstein and Liebermann, *supra* note 1, at 41.