Memo to Lawyers: You Don’t Have to Write Like “Lawyers”!
(Or, “A Few Legal-Writing Habits Worth Breaking from Time to Time”)
Today’s Presenter

Rick Horowitz
Wordsmith in Chief,
Prime Prose, LLC
Poll Question 1

• How long have you been practicing law?

  a. 0-5 years
  b. 5-10 years
  c. 10-20 years
  d. More than 20 years
Poll Question 2

- What’s the principal focus of your legal practice?
  a. Litigation
  b. Regulation
  c. Transactional
  d. Other
Is There a Problem?

We lawyers do not write plain English. We use eight words to say what could be said in two. We use arcane phrases to express commonplace ideas. Seeking to be precise, we become redundant. Seeking to be cautious, we become verbose. Our sentences twist on, phrase within clause within clause, glazing the eyes and numbing the minds of our readers. The result is a writing style that has, according to one critic, four outstanding characteristics. It is "(1) wordy, (2) unclear, (3) pompous, and (4) dull". 

Source: Wydick, Plain English for Lawyers
The language of the law must not be foreign to the ears of those who are to obey it.

— Learned Hand —
Situational Writing
Poll Question 3

• What’s the most difficult part of the legal-writing process for you?
  a. Deciding what to include and what to leave out
  b. Organizing my research
  c. Facing the blank screen for that first sentence
  d. Making the argument flow
  e. Finding the right tone
  f. Catching my errors
  g. Other
The Four Big Questions

“What’s in?”

“What’s out?”

“Where do I put it?”

“How do I say it?”
(Or Is It Five?)

“What’s in?”

“What’s out?”

“Where do I put it?”

“How do I say it?”

“How does it come across?”
Which One of These Works?

Version 1

Both the Unruh Act and the Health & Safety Code contain antideficiency provisions. If either of these statutes applies, it will bar the Bank from obtaining a deficiency judgment, regardless of who purchases at the repossession sale. The Unruh Act applies to . . .

Version 2

The Bank will be able to obtain a deficiency judgment against the obligor if the Bank has made a direct loan to the purchaser of the boat or mobile home. However, the Bank will be barred from obtaining a deficiency judgment, regardless of who purchases at the repossession sale, if the Bank has purchased a retail installment contract from a dealer. The relevant antideficiency provisions are contained in the Unruh Act. . . .
Seeing the World Through Your Reader’s Eyes

We can violate our readers’ organizational expectations on the small scale as well as the large—as the three examples below show. This usually happens because we fail to think about the perspective from which a passage should be written.

In the two versions of the passage below, taken from a letter to a client, the first adopts a legal perspective, the second the client’s. The first may be appropriate for a judge, an administrative agency, or, on occasion, another lawyer. The second is usually best for the client itself.

Version 1

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“If you want to sell what John Smith buys, you have to see the world through John Smith’s eyes.”

Folk Wisdom
“Include everything.”

(Actually, don’t.)
The Eternal Puzzle:

How much is enough? How much is too much?
ATFQ
Answer The Freaking Question
“Care for an Argument?”

”Too many advocates treat the process of briefing as if they were a waiter at a cocktail party. They carry around a platter of hors d’oeuvres and ask judges or their readers if they’d like one.”

Source: Stark, Writing to Win: The Legal Writer
“Nothing is less real than realism. Details are confusing. It is only by selection, by elimination, by emphasis that we get at the real meaning of things.”

Georgia O’Keeffe
Situational Selecting

• Who’s receiving your document?
• What do they need to know now?
• How much time do they have?
• How much expertise do they have?
• How familiar with the case are they?
“Start writing immediately.”
“Especially when time is short.”
“And also when time is long.”
(Really?)
Poll Question 4

• What’s your preferred method of preparing to write a legal document?

  a. Outlining
  b. Free writing / “Brain dump”
  c. Mind mapping (Relational)
  d. Other
“Make sure you have the perfect opening sentence before you write anything more.”

(You may never write another word.)
“Once upon a time...”
“Always write the first part first, and the last part last.”

(Unless it works better another way.)
“For maximum impact, organize your facts chronologically.”

(If that’s the best you’ve got. Otherwise...?)
What Goes Where? (Maybe Not What You Think)

After the initial paragraph, lead with your strongest facts; don’t feel compelled to tell your story chronologically. Like judges, almost all litigators relate their facts chronologically, beginning with the event that happened first in a historical sequence and proceeding forward to the present.

This is probably the worst mistake most litigators make in their writing. Modern novels, short stories, and movies rarely begin with what happened first. Instead, they start with an important event that leaves a strong impression. Then the narrative proceeds, with the author filling in the earlier facts as background as the plot moves along.

The only two groups left who tell stories chronologically—at least in American culture—are lawyers and six-year-olds.

Source: Stark, Writing to Win: The Legal Writer
“Let your opponent’s document dictate the sequence and emphasis of your response.”

(Why are you such a wimp?)
“If you understand the flow of your argument, so will they.”

(Have you considered subheads? Summaries? Transition words?)
Before:

3. The CONSULTANT agrees to fully complete the described assignment and furnish same to the DEPARTMENT by _____ calendar days after notification of Approval, it being fully understood and agreed by the parties hereto that if in the event the CONSULTANT shall fail to do so as aforesaid, the DEPARTMENT shall, without the necessity of notice, terminate the services of said CONSULTANT without incurring any liability for payment for services submitted after said due date or shall deduct, as a liquidation of damages, a sum of money equal to one-third of one percent (1/3 of 1%) per calendar day of the total fee if the performance of the entire contract is delayed beyond the due date. Upon written request by the CONSULTANT an extension of time may be granted by the DEPARTMENT in writing, in the event the CONSULTANT has not received from the DEPARTMENT proper information needed to complete the assignment or, in the event other extenuating circumstances occur, the time may be similarly extended. It is further agreed that if a liquidation of damages is imposed pursuant to the aforesaid provisions, any money due and payable to the DEPARTMENT thereby may be retained out of any money earned by the CONSULTANT under the terms of this contract.

After:

5. Due Date for the Work.

The Consultant must complete and deliver the work by _____ calendar days after receiving notice that the Department has approved this contract. The Consultant may ask in writing for more time, and the Department may grant it in writing, if:

(a) the Consultant does not receive from the Department the information needed to complete the work; or

(b) there are other extenuating circumstances.

6. If the Consultant Misses the Due Date.

If the Consultant fails to deliver the work by the due date, the Department may—without having to give notice—choose either one of the following:

(a) terminate the Consultant’s services, and not pay for services that are submitted after the due date; or

(b) claim liquidated damages of 1/3 of 1% of the total contract payment for each calendar day late, and subtract this amount from the total payment.
“Eventually, they’ll figure it out on their own.”

(Unless they don’t.)
FCC Regulations: Two Versions

**Before:**

§ 95.455 Authorized frequencies.
§ 95.457 Policy governing the availability of frequencies.
§ 95.437 Limitations on antenna structures.
§ 95.511 Transmitter service and maintenance.
§ 95.613 Transmitter power.
§ 95.509 External radio frequency power amplifiers prohibited.

**After:**

§ 95.407 On what channels may I operate?
§ 95.408 How high may I put my antenna?
§ 95.409 What equipment may I use at my CB station?
§ 95.410 How much power may I use?
§ 95.411 May I use power amplifiers?

Source: Kimble, *Writing for Dollars, Writing to Please*
“I guess for the public it’s nice…”

CLE Attendee
“The longer the paragraph, the more persuasive the argument.”

(Tell it to the judge!)
Current Rule 14(a)

(a) When Defendant May Bring in Third Party. At any time after commencement of the action a defending party, as a third-party plaintiff, may cause a summons and complaint to be served upon a person not a party to the action who is or may be liable to the third-party plaintiff for all or part of the plaintiff’s claim against the third-party plaintiff. The third-party plaintiff need not obtain leave to make the service if the third-party plaintiff files the third-party complaint not later than 10 days after serving the original answer. Otherwise the third-party plaintiff must obtain leave on motion upon notice to all parties to the action. The person served with the summons and third-party complaint, hereinafter called the third-party defendant, shall make any defenses to the third-party plaintiff’s claim as provided in Rule 12 and any counterclaims against the third-party plaintiff and cross-claims against other third-party defendants as provided in Rule 13. The third-party defendant may assert against the plaintiff any defenses which the third-party plaintiff has to the plaintiff’s claim. The third-party defendant may also assert any claim against the plaintiff arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff. The plaintiff may assert any claim against the third-party defendant arising out of the transaction or occurrence that is the subject matter of the plaintiff’s claim against the third-party plaintiff, and the third-party defendant thereupon shall assert any defenses as provided in Rule 12 and any counterclaims and cross-claims as provided in Rule 13. Any party may move to strike the third-party claim, or for its severance or separate trial. A third-party defendant may proceed under this rule against any person not a party to the action who is or may be liable to the third-party defendant for all or part of the claim made in the action against the third-party defendant. The third-party complaint, if within the admiralty and maritime jurisdiction, may be in rem against a vessel, cargo, or other property subject to admiralty or maritime process in rem, in which case references in this rule to the summons include the warrant of arrest, and references to the third-party plaintiff or defendant include, where appropriate, a person who asserts a right under Supplemental Rule C(4)(b)(i) in the property arrested.
“The more clauses in your sentence, the more information you’re conveying.”

(Are “learning” and “yawning” really synonyms?)
Really?

Any person who, by means of any machine, instrument, or contrivance, or in any manner, intentionally taps, or makes any unauthorized connection, whether physically, electrically, acoustically, inductively, or otherwise, with any telegraph or telephone wire, line, cable, or instrument of any internal telephonic communications systems, or who willfully and without consent of all parties to the communication, or in any unauthorized manner, reads, or attempts to read, or to learn the contents or meaning of any message, report, or communication while the same is in transit or passing over any such wire, line or cable, or is being sent from or received at any place within this state, or who uses, or attempts to use, in any manner, or for any purpose, or to communicate in any way, any information so obtained, or who aids, agrees with, employs, or conspires with any person or persons to unlawfully do, or permit, or cause to be done any of the acts or things mentioned above in this section, is punishable by a fine not exceeding two thousand five hundred dollars ($2,500), or by imprisonment in the county jail not exceeding one year, or by imprisonment in the state prison not exceeding three years, or by both such fine and imprisonment in the county jail or in the state prison. California Penal Code § 631(a)
You Try It: “Working” Words v. “Glue” Words

“A trial by jury was requested by the defendant.” [9 words: 4 working / 5 glue]

[Your fix here...]

“The ruling by the trial judge was prejudicial error for the reason that it cut off cross-examination with respect to issues that were vital.” [24 words: 11 working / 13 glue]

[Your fix here...]

“There are three reasons given in the majority opinion for its rejection of the approach taken by the Supreme Court in its earlier decisions with respect to the Confrontation Clause of the Sixth Amendment.” [34 words: __ working / __ glue]

[Your fix here...]
“Wow them with legal jargon and technical language.”

(Or would you rather be understood?)
“If I don’t use words like ‘herein,’ clients will think it could have been written by an intern, and they won’t want to pay the rates we’re charging them.”

A. Lawyer
“I have never yet met a client who has said, ‘Please write me a letter I don’t understand because then I will think that you are smarter.’”

A. Nother Lawyer
“(W)hen you enter graduate school you enter into a tiny clique, a sub-sub-sub-set of your discipline. Your estimate of the breadth of the knowledge of the people you are writing for gets radically miscalibrated. Highly idiosyncratic ideas are discussed as if they are common knowledge, and you lose the sense of how tiny a club you have joined. And you’re in terror of being judged naive and unprepared, and so you signal in your writing that you’re a member of this esoteric club.”

Steven Pinker
"When a writer does need to use a technical term, then he or she should consider whether to explain or define it, or provide examples. This decision on how much detail to include is probably the toughest call in drafting. It often depends on who the intended readers are and how difficult or unusual the term is. You would not define *indemnify* in a commercial contract between business parties. But you probably should in a consumer contract, such as a car rental."

Source: Kimble, *Writing for Dollars, Writing to Please*
Smythe, Witherspoon & Thistlebottom

jonzé
Park not, lest ye be towed
COMMENCE IMMEDIATE AVOIDANCE OF ALL JARGONIZATION PROCESSES
“Above all, make sure you ‘sound like a lawyer.’”

(They’ll be so impressed!)
“Lawyer, Communicating...”
Instant Survey:

Are you a “So…” or a “Therefore…”?

Are you an “And…” or a “Moreover…”?
“We use contractions – but we’re a non-profit.”

CLE Attendee
It’s not “dumbing down.”

It’s “clearing up.”
“The passive voice should never be used.”

(You have been misled.)
Mistakes were made.
MUST WATCH: Ben Carson is actually pinning all of this on his wife: "I left it with my wife. I said, 'help choose something' ... The next thing that I, quite frankly, heard about it, was that this $31,000 table had been bought."
VW Engineers Wanted O.K. From the Top for Emissions Fraud, Documents Show

... “An internal summary of the meeting, reviewed by The Times, said, ‘The situation regarding technology was acknowledged, and the implementation of the presented measures was confirmed.’”
“When you know your stuff, why bother with proofreading?”

(You’re sure about that?)
Every time you make a typo, the errorists win.
Thanks!

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Next Steps / Q&A

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• Get in touch: Alexandra Stephens, associate director, alumni career programs & engagement, 781-736-3623, astephens@brandeis.edu, alumni.brandeis.edu/careers