

The Rules of the Road

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1. **Use strong verbs.**
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3. **Write as clearly and simply as possible.**
4. **Try not to hedge. If you must hedge, explain why.**
5. **Keep your sentences to twenty-five words or less.**
6. **Try to move subordinate clauses to the beginnings or ends of sentences.**
7. **Write for your readers, not for yourself.**
8. **Use specific imagery, not vague generalities.**
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III. THE TENTH RULE: USE SIMPLE LANGUAGE

I. THE OVERVIEW: THE IMPORTANCE OF BASIC PRINCIPLES

Getting organized is the first step in writing. Yet even lawyers who structure their material well often find that their prose suffers from a common set of problems. Their sentences begin to resemble the Code of Federal Regulations. They keep throwing around phrases such as *res ipsa loquitur*, which few readers can understand and even fewer can relate to.

We all know there are basic principles in learning to write anything well. Authors have devoted entire books to the subject: William Zinsser's *On Writing Well* and Joseph Williams's *Style* are my favorites, and their tracks are all over this chapter. Legal writers should also make Bryan Garner's *A Dictionary of Modern Legal Usage* one of their primary reference books; his work is the source of some of the examples of bad legal writing (which Garner culled from other sources) used throughout this book.

We will spend only a few pages on ten important principles of composition as they apply specifically to *lawyers'* writing. Some you'll recall as you compose your initial draft. Since you are going to want to concentrate on the substance of your message as you write, however, many are probably better applied in the editing process, discussed in the next chapter.

II. YOUR HIGH SCHOOL ENGLISH TEACHER KNEW BEST: EMPLOYING THE FIRST NINE KEY RULES OF LEGAL COMPOSITION

Pedantic as they may appear to be, here are the first nine principles of writing that lawyers need to remember. You may have learned them in high school English class years ago, but reading endless opinions as a lawyer tends to obliterate even the finest classical education. While nine rules may seem like a lot, they have special—and easy—application to legal writing.

1. Use strong verbs.

Try to use active verbs rather than passive verbs. Take the sentence "Jane threw the ball." "Threw" is a verb in the active voice. Contrast that with the sentence "The ball was thrown by Jane." "Was thrown" is in the passive voice. A good writer uses the passive voice around 25 percent of the time. Lawyers, however, tend to use it around 75 percent of the time, with law professors often coming in at close to a 90 percent clip.

One example from a typical legal memo should suffice (citations are omitted):

Restitution on grounds of mistake is most commonly allowed when both parties are mistaken as to some fact material to the transaction. Traditionally, a unilateral mistake is grounds for recovery only if enforcement of the contract would be unconscionable, or if the other party had reason to know of the mistake. . . . All these black-letter rules are founded on the equitable principle of unjust enrichment.

Though much of the legal jargon could be eliminated as well, simply changing the verbs does this:

Courts allow restitution on grounds of mistake only when both parties err as to some fact material to the transaction. A party can recover for a unilateral mistake only in an unconscionable contract, or if the mistake was apparent. . . . The underlying equitable principle of unjust enrichment defines these black-letter rules.

Why are lawyers so wedded to the passive voice? It's often a way of removing the writer from the action, thus appearing to be more official and impartial. Yet the overuse of the passive voice weakens writing for a number of reasons. "All fine prose is based on the verbs carrying the sentence," wrote F. Scott Fitzgerald. If your verbs are weak, so is your prose.

Writers implicitly recognize this weakness, so if they use the passive voice often, they tend to add a number of adjectives and adverbs to compensate. That just makes matters worse, cluttering the page. A writer clinging to the passive also tends to leave out some of the main information in sentences. "This action was filed in the Southern District of New York," writes the litigator, never bothering to tell us who filed it. True, the information may be obvious from what's gone before, but you're still asking readers to put the pieces together. A few similar passive sentences and those readers give up: You're asking them to do too much work. The passive voice "sanitizes and institutionalizes [lawyers'] writing and often anesthetizes the reader," Judge Patricia Wald once complained. "All views are attributable to an unknowable 'it.'"

In legal writing, you should avoid the passive voice in most cases for two additional reasons. First, think about how you give directions. When someone asks how to find a certain landmark, you tell her, "Take I-95. Get off at Exit 28. Go to the third light and make a right. Proceed two miles." Without even thinking about it, you give the directions in the active voice—"take," "get

off," "go," "make," and "proceed." In fact, if you gave the directions in the passive voice (and you never would)—"I-95 should be taken. Exit 28 should be traversed"—no one would find the landmark.

Legal writing is often a form of giving directions. You're telling clients what they should do or telling courts what reasoning you'd like them to apply. As with directions, if you write in the passive voice, your readers can't even begin to figure out what you're saying.

Finally, the language of rhetoric and advertising is quite similar to that of legal writing. In each, the writer is often exhorting readers, attempting to persuade them. Yet speechwriters and writers of ad copy rarely, if ever, use the passive voice. It's "Tastes Great—Less Filling," not "It should be tasted because it is less filling." "Just Do It," commands Nike. If the slogan were "It should just be done!" it's hard to imagine that anyone would buy Nike's products.

This is true of rhetoric as well. "Ask not what your country can do for you, ask what you can do for your country," said President Kennedy in his famous inaugural address, in 1961. I can't even begin to put that sentence in the passive voice. "I have a dream," said Dr. Martin Luther King, Jr., in 1963, in perhaps the most famous American speech of the twentieth century. If King had gone to law school, he might have proclaimed, "A dream has been had by me." It's just not the same.

Obviously, the passive voice has its uses. If you want the reader to focus on the object of an action, the passive voice enables you to encourage this. ("The pedestrian was struck." This works if we don't really care who was driving the car.) And if you're a lawyer representing the "who" who did the "what" to the "whom," the passive voice is your friend. "Smith fired the gun," the prosecutor should write. "The gun was fired," aptly counters the defense attorney, implying that causation is lacking. The problem is that

many of the prosecution or plaintiffs' briefs I read use the passive voice too. By doing so, these lawyers undercut their case.

Politicians speak in the passive voice all the time, in just such a defensive posture. "Mistakes were made," they'll announce, leaving the impression that someone else made them. "[T]he Chinese Embassy was inadvertently damaged," said Bill Clinton after NATO bombed the embassy during the Balkan conflict in 1999. William Schneider, a political analyst for CNN, has called this usage "the past exonerative." John Leo, a columnist for *U.S. News & World Report*, once wrote that the passive voice is "a terrific screen to conceal choices, responsibility, and moral conflicts." If that's your goal—and it rarely should be—by all means use the passive.

Remember two other points as corollaries to this rule. First, try to avoid weak verbs. Verbs like "seems," "suggests," "appears," and "is" do not convey as much action as others. Occasionally we need to use these weaker verbs: "She is a woman" is better than "She equals a woman." Many times, though, lawyers adopt constructions in which the weak verbs can be eliminated. "It was Justice Scalia who said" can be changed to "Justice Scalia said." "He will be a participant" can be revised to "He will participate."

Second, avoid the use of the generic passive. "It is widely known," writes the lawyer, never bothering to tell us *who* widely knows it. Try to identify your subjects for your readers. Otherwise, there's too much room for ambiguity.

2. Eliminate legal jargon.

Lawyers use a lot of odd words and phrases that no one else uses and few understand. Your writing should pass what I call "the McDonald's test." If you were to read the document you're drafting aloud in McDonald's, would people understand what you're saying? If not, your prose is too removed from ordinary language. Pretend that you are writing for a nonlegal audience that will not

understand terms such as "caveat" and "ex parte." If you do, you'll find that your prose is clearer and that you are often using jargon as an excuse for failing to explain yourself. Your style and choice of words should be as conversational and contemporary as possible.

For example, lawyers like to use a lot of ancient verbiage, such as "heretofore," "hereunder," and "said document." That sounds great for those living in London circa 1590, but such prose, even in formal documents, creates a barrier between writer and reader. You would never go up to the counter in McDonald's and say, "Said milkshake—I will quaff it!" So don't write that way either, as one litigator did: "It all fully appears from the affidavit of the publisher thereof heretofore herein filed."

Lawyers also use a lot of Latin. Some of it is a convenient form of shorthand, as in the use of *habeas corpus* or *res judicata*. A lot of it is unnecessary, however. When I see *infra* and *supra*, I still end up turning the wrong way. (With computers, you can find the page and tell the reader exactly where to turn.) Similarly, in McDonald's, you'd never announce, "Assuming, *arguendo*, I don't get the burger but the fish filet." A bilingual debate is going on in this country, but it isn't about Latin and English any longer, a fact a judge on the Illinois Appeals Court must have forgotten when he earned a *Scribes Journal of Legal Writing* "Legaldegook Award" by writing, "*Parens patriae* cannot be *ad fundaban jurisdictionem*. The zoning question is *res inter alios acta*." (See *Mississippi Bluff Hotel v. County of Rock Island*, 420 N.E.2d 748, 751 [Ill. App. Ct. 1981]).

Finally, lawyers use a lot of odd words that they would never think of using in ordinary speech. "In the *instant* case," they write, meaning, one supposes, that if you mix Nestlé's Quik with milk, you get a case. Or they write, "This case is on all fours with another case." (Whenever I see such a phrase, my instinct is to help the case get on its feet.) If you were talking with a friend over cof-

fee, you'd say, "This case is consistent with that case," or "It's a lot like this other case." You should write the same way.

Eliminating jargon is a particular problem for law students and paralegals, who become fascinated with the new words and concepts they are being taught when they enter the profession. Everything these students read, including the work of their professorial role models, encourages them to compose in this pretentious style. Take, for example, this typical passage from an article in the *Harvard Law Review*:

The hermeneutic tradition suggests that historical discontinuities are so substantial that interpretivism must make incoherent claims because it can achieve the necessary determinacy of past intentions only at the cost of an implausible claim about consistency of meaning across time.

I know someone else who is making incoherent claims.

An editor can't even begin to rewrite this sentence so people can understand it. Yet a lot of legal literature—both inside academia and beyond—is composed of texts, opinions, treatises, and articles written in this befuddled prose. Not only does the profession write in this incoherent style, it elevates the style to the pages of its leading law reviews.

3. Write as clearly and simply as possible.

Like all writers, lawyers should convey the maximum amount of information in the fewest number of words. Unfortunately, legal writing tends to be full of clutter, no matter how eminent the writer. I once heard a story about a law graduate who went to clerk for the great Judge Jerome Frank, of the U.S. Court of Appeals for the Second Circuit. On his first day, Judge Frank gave him a fifteen-page opinion to review and edit. The clerk pored

over the draft, anxious to do a good job, and found it extremely wordy and repetitive. After a week, he returned the draft to the judge, the fifteen rambling pages cut to three tight ones.

For a week he heard nothing. Finally Judge Frank stuck his head inside the clerk's office. "I really like the three pages you wrote," he said to the clerk. "Just add them to the beginning of my opinion."

In *On Writing Well*, a wonderful book all writers should read, William Zinsser pointed out:

Consider all the prepositions that are routinely draped onto verbs that don't need any help. Head up. Free up. Face up to. We no longer head committees. We head them up. We don't face problems anymore. We face up to them when we can free up a few minutes. A small detail, you may say—not worth bothering about. It is worth bothering about. The game is won or lost on hundreds of small details.

Coming up with broad categories that encompass these small details isn't easy. Here are six.

a. Eliminate redundancies.

Lawyers tend to be repetitious, presenting the same idea continually in the hope that readers will remember. This constant repetition is one reason that legal prose is as boring as it is.

In sentence construction too, lawyers often add a lot of superfluities. "The accident occurred at 12 noon," writes the young associate. Can it be noon at any other hour? You don't need the "12." "She testified about her past memories," writes the litigator. Last I looked, memories were always about the past. "The armed gunman entered the bank," the prosecutor's brief announces. Someone should tell that prosecutor: All gunmen are armed—it's

part of the job description. Legal writing has hundreds of similar redundancies. Eliminate them.

b. Substitute a word for a phrase.

Whenever lawyers have to use a conjunction or a preposition, they often start sounding like C-3 PO in *Star Wars*, stringing along phrases. In these situations, one short word will almost always suffice. As others, such as the legal scholar Robert Smith, have pointed out, substitute "because" for "due to the fact that"; "can" for "is able to"; "under" for "pursuant to"; "if" for "in the event that"; "after" for "subsequent to"; "before" for "prior to"; "previously" for "at an earlier date"; "about" for "approximately," and "too many" for "an excessive number of."

c. Avoid euphemisms.

Using professional double-speak almost always adds extra words. An Interior Department press release once referred to a nest as an "owl site center." In 1984, the State Department stopped using the word "killing" in its human rights reports, replacing it with "unlawful or arbitrary deprivation of life."

Lawyers and government bureaucrats are not alone in this. As Zinsser has written, airline personnel are notorious for their use of euphemisms. "Please extinguish all smoking materials," they used to announce, leading some in the waiting area to check whether their pants were on fire.

Using this kind of double-speak can also be a form of lying, as George Orwell warned in his famous essay "Politics and the English Language." The statute dealing with suits for nuclear accidents refers to such accidents as "incidents." Politicians may think that calling a tax increase "revenue enhancement" or old people "senior citizens" is a way to appeal to modern sensibilities. The

more you try to cushion the truth with weasel words, though, the harder it is to deal directly with what you're trying to address.

I once heard a story that when an exterminator was sued for spreading a chemical negligently, the term "exterminator" was evidently too direct for the attorney. Instead, the defendant was called a "rodent operative." I doubt the change in language helped one bit.

d. Eliminate unnecessary adjectives and adverbs.

If a writer's verbs are strong, he or she doesn't need as many adjectives and adverbs. So it goes for lawyers, even though they seem wedded to the notion that the more such words they use, the better. Too many adjectives and adverbs weaken writing, albeit for different reasons. "The adjective is the enemy of the noun; the adverb is the enemy of the verb," Judge John Minor Wisdom, a wonderful writer on the U.S. Court of Appeals for the Fifth Circuit, used to warn his clerks.

Take adjectives. The problem with them is that they're often ambiguous. "When the accident happened, it was a *cold* day," writes the typical legal writer. The problem with "cold" is that it means different things to different people: What's cold in Boston isn't what's cold in Palm Springs. If she had written instead, "When the accident happened, it was twenty-three degrees outside," or "Everyone was wearing down coats," you'd know the precise conditions. With adjectives, you don't.

Why are lawyers so fond of adjectives? Probably because legal standards and judges use them so much, talking about the "reasonable person" test in torts or the "substantial evidence" threshold in administrative law. Though it may sound cynical, judges use these terms precisely because they're trying to be vague. A "reasonable person" would do almost anything, which is a way of telling juries

that they have wide latitude to decide these matters. As to that standard in administrative law, how much evidence is substantial? Four documents? Twenty-five? The reviewing courts invoking the standard don't know, and even if they did, they would never tell you. By using an adjective to define "evidence," they keep the standard vague enough so they can employ it as they choose. So if you're trying to be vague, use more adjectives. Usually, however, precision is the goal.

Lawyers should avoid using too many adverbs for a different reason. While adverbs obviously have their place—excuse me: while adverbs have their place—in the hands of lawyers they can become unnecessary tools of exaggeration and hyperbole. "The appellant's argument is totally without foundation," lawyers write, even though "without foundation" is sufficient. A recent brief to the U.S. Court of Appeals for the Seventh Circuit stated, "The Court boldly and enthusiastically stated that the concept of active/passive liability (indemnification) is not applicable to a trust relationship." As in all such matters, one has to question whether the judges were that bold and enthusiastic about this concept.

e. Eliminate many transition words.

In their attempts to be and seem logical, lawyers add words such as "therefore," "thus," and "furthermore" to many sentences. If your writing is logical, you don't need as many transition words. Whenever possible, cut them.

f. Keep things short.

The major complaint I hear from judges, clients, and other lawyers about legal documents is that they're too long. "Many judges look first to see how long a document is before they read the first word," one confided in me. "They made me read twenty-five pages when they could have cut it to six," another com-

plained, in an all-too-typical comment. Elmore Leonard, the mystery writer, once said that he has a rule he applies whenever he writes a novel. "I try to leave out the parts that people skip," he said.

That's a good rule for everyone. Unfortunately, lawyers love to throw in the parts other people skip—often right at the beginning of a document, so the reader can't avoid it. For example, readers come to the second page and have to confront a four-paragraph block quote. The *New York Times* columnist and language cop William Safire characterizes quotes like this as a MEGO—My Eyes Glaze Over. Once readers fall into that stupor, they don't snap out of it easily. Your job as a writer is to grab readers by the lapels and make them read for as long as you can.

Many judges have told me that when they confront documents, the question is not *whether* they'll read them but *how* they'll read them. If a brief or letter hasn't gotten to the main point in a paragraph or two, the mind begins to wander.

Of course, lawyers don't want to leave out information that could aid their cause, and sometimes it's better to err on the side of caution by being overinclusive. If that's the case, at least prioritize your points and put the questionable material toward the back. It's better to make pages 15 through 30 superfluous than to mix the superfluity throughout, because then the reader has to go through all the extraneous information to get to the heart of the matter.

"There is but one art: to omit," the novelist Robert Louis Stevenson once wrote. Though in my view he could have omitted a good deal of the text in *Treasure Island*, his advice was sound.

4. Try not to hedge. If you must hedge, explain why.

Lawyers tend to be paranoid writers, using words such as "seems," "appears," and "maybe" throughout their writing. In a pro-

fession that demands exactitude, such words have their place and are essential. Lawyers, however, overuse them. The more you qualify what you say, the less you say. "Don't be kind of bold," Zinsser once wrote. "Be bold." Or as E. B. White put it, "Be obscure clearly."

Legislative and contractual drafters and judges have good reasons to be paranoid writers. Other lawyers read what these individuals draft with an eye toward getting out of it. The job of construction for these writers is a painstaking process of plugging holes to assure that nothing can be misconstrued.

In other types of legal writing, however, judges, clients, and lawyers read our prose with no such jaundiced eye. While some assertions have to be qualified—in an opinion letter, for example—most don't. "No weasel words," Judge Wisdom cautioned in the primer he gave to clerks.

Still, lawyers hedge almost reflexively. "Apparently, it seems we can win this case," says the memo from the associate. Well, can we prevail or can't we?

If you do have to hedge an assertion, always follow the qualifier with a sentence that explains why. That's because a hedge always introduces an ambiguity that must be clarified. "Apparently, we can win this case," could mean either "I'm not sure we can win this case," or "No one is sure that we can win this case." Is the ambiguity in the mind of the writer or in the general state of affairs? To settle things, you might write, "My doubt is raised by a Connecticut case that went the other way." That follow-up sentence clarifies the uncertainty. Doing this will also compel you to hedge less, since few writers will follow by saying, "My doubt is raised by my terrible insecurity, which causes me to qualify everything!" Forcing yourself to explain your hedges will break the reflexive habit of legal paranoia.

5. Keep your sentences to twenty-five words or less.

The basic rule is this: The more complicated your information is, the shorter your sentences should be. Legal data are frequently complex, so the least you can do for readers is to shorten your sentences and make the information easier to absorb.

Legal writers are famous for their lengthy sentences. None is longer, perhaps, than this one, quoted in the *Wall Street Journal*, from a 1998 stock purchasing offer mailed by Lyondell Acquisition Corp. to holders of Arco Chemical Co.:

The Merger Agreement further provides that, without limiting the generality of the foregoing, from the date thereof until such time as Purchaser's designees shall constitute a majority of the Board of Directors of the Company, except as expressly contemplated or permitted by the Merger Agreement or the Disclosure Letter delivered by the Company to Lyondell and Purchaser concurrently with the execution and delivery of the Merger Agreement, or to the extent that Lyondell shall otherwise consent in writing, the Company will (a) use its commercially reasonable efforts to operate and maintain its business in all material respects only in the usual, regular and ordinary manner consistent with past practice (including undertaking scheduled or necessary "turnarounds" or other maintenance work and including offsite storage, treatment and disposal of chemical substances generated prior to such time as Purchaser's designees shall constitute a majority of the Board of Directors of the Company) and, to the extent consistent with such operation and maintenance, use commercially reasonable efforts to preserve the present business organization of its business intact, keep available the services of, and good relations with, the present employees and preserve present relationships with all persons having business dealings with its business, except in

each case for such matters that, individually and in the aggregate, do not and are not reasonably likely to have a material adverse effect on the Company and its subsidiaries taken as a whole and (b) except to the extent required by clause (a) above, the Company will not, and will not permit any of its subsidiaries to: . . . (iii) amend its Certificate of Incorporation or By-Laws or other comparable organizational documents; . . . (xi) waive any material rights or claims relating to the Company's business; (xii) accelerate vesting or conversion or approve the acceleration or conversion of any shares of restricted stock, except as provided in the Merger Agreement, or grant or approve the grant of any additional shares of restricted stock, phantom stock units, or stock options under any existing plan, except as provided in the Merger Agreement, or modify the term of any performance period or the performance objective to be attained for that performance period under any existing plan; or (xiii) authorize any of, or commit or agree to any of, the foregoing actions.

Even in its abridged form here, the sentence is 376 words long and counting.

No one wants to sound like Joe Friday on *Dragnet* or Edward James Olmos's Castillo on *Miami Vice*, for whom twenty-five words was a season's worth of dialogue. But that kind of brevity isn't going to happen in the legal enterprise. While an occasional long, well-constructed sentence does have its place, shorter is better.

6. Try to move subordinate clauses to the beginnings or ends of sentences.

Take a basic sentence: "Jane filed the complaint." If you were to add a clause to that sentence, you should write, "*Before leaving for the weekend*, Jane filed the complaint," or "Jane filed the complaint *before leaving for the weekend*."

fore leaving for the weekend." What lawyers should not write, but often do, is "Jane, *before leaving for the weekend*, filed the complaint." Or, worse, "Jane filed, *before leaving for the weekend*, the complaint."

The subject, verb, and object present the main information in most sentences. The clause is additional. Putting that clause in the middle makes it harder to read the sentence. So don't do it, unless you have a clause that has to go there because, say, it defines Jane. "Jane, who likes to walk to the courthouse, filed the complaint." In this case, the clause can't go at the end because it won't make sense there.

7. Write for your readers, not for yourself.

We write for others. "Anything that is merely written to please the author is worthless," wrote Blaise Pascal. A story I once heard illustrates this principle. A professor was teaching a photography class and asked her students to bring her their best pictures each week so she could critique them. One student brought in a picture the teacher didn't particularly like. "It's interesting," she began, "but it's taken from such a distance you don't have a focus."

The next week the student returned with the same picture. "I like most of your work," the professor said, "but I saw this picture last week, and on second glance, the color in it isn't very good either."

The following week the student returned with the same picture. "I don't understand this," the professor said. "Every week you keep returning with the same picture, even though it's not very good."

"But you don't understand," the student finally blurted out. "I had to climb a mountain for three days to snap this!"

That's all well and good. But the amount of time you spend on something doesn't translate into whether it's meaningful for your readers to hear about it. That's a mistake lawyers frequently make.

This has two clear ramifications for your writing. First, don't feel the need to introduce yourself in sentences. "I think that this is wrong," writes the lawyer. You usually don't need to say, "I think." Of course you think it—you wrote it. "This is wrong" is enough. Similarly, avoid the temptation to begin sentences with "It is clearly the case that," or "It is interesting to note that," or "My sense is that." It's natural to want to go into a big windup like a baseball pitcher before delivering the message, but it's unnecessary.

A graphic example of what not to do came in a brief filed in the U.S. Court of Appeals for the D.C. Circuit (citations omitted):

When we launched the instant assault upon the indictment we did not do so with the intent of winning the battle but losing the war. From our angle of vision based on two decades of experience on both sides of the appellate sufficiency question, we pursued this appeal fully convinced by the facts and the law.

With all due respect, why inject yourself? Just give us the argument. Your mental processes may be fascinating to you, but they bore a reader, unless your name is James Joyce or Hunter S. Thompson.

Lawyers should also avoid writing in a stream-of-consciousness style, taking the reader on an excursion through their planning. Both judges and lawyers do this all the time, though in the case of judges it's more justified. Take judicial writing: The best way to organize an opinion is to begin with the conclusion and then go on to describe the arguments that support the result. Yet that isn't the way judges write at all. Often they do begin with the conclusion, but they then go on to describe all the losing arguments and how they arrived at their findings, taking the reader on a journey

through the centers of their minds. You want to ask, if these are losing arguments, why do we have to hear about them? Clearly, however, there are jurisprudential reasons—such as assuaging the losers and avoiding appellate reversal—that force many judges to organize opinions in this fashion.

Lawyers often take readers on similar, albeit less justified, intellectual excursions in their letters and memos to clients. "You asked me whether you can be sued for that leak in your back yard," lawyers begin, and then they go on to describe all the research they did in excruciating detail. Yet a recounting of research is of little use to clients, especially up front. It's as if you went to a doctor and told him that you're worried about your cholesterol. "We'll run a blood test," says the doctor. "Come back next week and I'll tell you what you should do about it." You return the following week. "What should I do?" you ask the doctor. "Let me tell you how we did the test," he replies, "thinking like a lawyer" and beginning a ten-minute recitation of lab procedures. You don't care how the test was done at all; you want to know the results and what to do about your cholesterol. The same goes for clients reading your legal recommendations.

Lawyers and law students love to explain their research because they know it's the one skill that really does separate them from the general public. Avoid the temptation.

8. Use specific imagery, not vague generalities.

Because the law is a conceptual discipline, it has a number of big, difficult-to-grasp words. Occasionally, as Joseph Williams of the University of Chicago has written, substituting a word that evokes vivid pictures in the reader's eye can enliven legal writing. You could write, "Law students should spend less time studying and more time having fun." A more memorable sentence, though,

is "Law students should spend less time with Justice Thomas and more time with Tom Hanks." By substituting specific examples for general concepts, the sentence comes alive.

This is what the ad copywriter David Ogilvy did when he was writing a tag line for a celebrated print advertisement for Rolls-Royce. Rather than saying the car was quiet, he wrote, "At sixty miles an hour, the loudest noise in this new Rolls-Royce comes from the electric clock."

Good legal writers use this technique all the time. Justice Oliver Wendell Holmes could have gone into a long dissertation about the value of First Amendment rights and how those occasionally must be compromised if exercising them will cause harm. Instead he wrote, "The most stringent protection of free speech would not protect a man in falsely shouting fire in a theater and causing panic." It's the image that makes the sentence memorable.

The key here is to use the technique sparingly—something judges frequently forget. Justice John Paul Stevens is a wonderful jurist, but he was having a bad day when he wrote in a concurring opinion in *Schad v. Borough of Mt. Ephraim*, 452 U.S. 61 (1981), "And even though the foliage of the First Amendment may cast protective shadows over some forms of nude dancing, its roots were germinated . . ." You also want to use appropriate metaphors. Don't write, as an Ohio lawyer did, "Pour the allegations contained in the Plaintiffs' Complaint through a legal strainer and you would be left with one sole question . . ."

9. Remember that understated prose is the best form of expression.

In a sense, all writing is a one-to-one conversation; readers read alone. You should pretend you're talking to a person across a table in a quiet room. Queen Victoria apparently preferred conversing

with Benjamin Disraeli to conversing with William Gladstone. Gladstone, she said, addressed her as if he were talking to a crowd in a stadium; Disraeli talked to her one-to-one. Too many lawyers sound like Gladstone, lecturing their audiences in a pompous style.

The best briefs are models of simple clarity and restraint, even when the circumstances seem to demand otherwise. In contrast, many litigators—especially, let's face it, many *male* litigators—are graduates of what I call the Bobby Knight–Stone Cold Steve Austin School of Written Advocacy. These writers think that the more they overstate their points, attacking the personality of the other side, adding adverbs, and otherwise engaging in hyperbole, the more effective they are as advocates. Unfortunately, the only conclusion most readers draw from such prose is that these writers are as egomaniacal as they seem. To take but one example (citations omitted):

The Attorney General repeats lamentations echoed earlier and often about the Attorney General's inability to prepare and to litigate the case. The Attorney General calls his asserted inabilities a lack of due process. As a consequence, the Attorney General asks the Department to enter a decision denying the . . . recovery in its entirety and on the merits.

We submit that this apologia for the Attorney General's failure to have proved his case should be rejected. The proposed remedy, *e.g.*, a denial of recovery on the merits without regard to the contents of the record, is so blatantly unlawful, and so blatantly contrary to plain statutory and constitutional requirements, that to hear such an act advocated by the chief law enforcement officer of the Commonwealth is truly grounds for pause.

The tribunal is probably still pausing. In other instances, lawyers ask rhetorical questions. "Can anyone doubt that this is wrong?" writes the attorney, inadvertently implying that if the judge does doubt it, the case is over already. It reminds me of a professor I once had at Yale Law School, who was said to be able to construct a straw-man argument and still manage to lose to the straw man.

Orwell once wrote that "the inflated style is a kind of euphemism. A mass of Latin words falls upon the facts like soft snow, blurring the outlines and covering up all the details. The great enemy of clear language is insincerity." If this condition afflicts your prose, buy a Nautilus machine and work out your aggressions elsewhere. The more you turn up the heat rhetorically, the more you weaken your arguments.

III. THE TENTH RULE: USE SIMPLE LANGUAGE

The nine rules already outlined are important to creating good writing. There is also a tenth rule, which goes beyond them: *Use simple language*. Your choice of words will make or break your composition.

Like the language of most conceptual disciplines, the law is top-heavy with big words. Several years ago, the *Scribes Journal of Legal Writing* quoted this paragraph from a brief:

It would be hebetudinous and obtuse to fail to be cognizant of the adverse consequences of a ruling in this case. However, a decision by a court should not be infected with pusillanimity and timidity. The karma of this case must not be aleatory or adventitious, but a pellucid and transpicuous analysis of the law and facts.

Most attorneys don't write this badly, but all lawyers should strive to use simpler speech. "Clearness is secured by using the words that are current and ordinary," wrote Aristotle. To be sure, a careful writer always strives for precision above all else. That's why legal writers should always keep a dictionary and a thesaurus handy. "You ought never to use an unfamiliar word unless you've had to search for it to express a delicate shade," F. Scott Fitzgerald wrote.

Simple words, many of which came into the English language from Anglo-Saxon, tend to convey meaning more strongly than words that came into the language later from French. Words derived from Latin tend to be conceptual words and are often "lugubriously ambiguous" and sleep-inducing. If your sentences are full of multisyllabic Latin-based words, you're courting trouble.

Look at any memorable line from a speech or an advertisement (forms of rhetoric similar to legal writing) and you'll notice that almost all the words are simple and direct:

Give me liberty or give me death.

I have a dream.

These are the times that try men's souls.

I feel your pain.

Read my lips—no new taxes.

Similarly, when you're skating and fall through the ice, you don't yell, "Assist!" or "Aid!" You call "Help!" There's a lesson in that. "Assist" and "aid" come from French-Latin roots; "help" is derived from Old English.

Most lawyers think there is no way they can discern the origin of most words in the language. Yet we tend to know these things intuitively. Take the famous phrase from Winston Churchill's

speech to the British people in 1940, urging them to fight on against the Nazis. As Robert MacNeil, Robert McCrum, and William Cran point out in their book, *The Story of English*, Churchill, like most effective speakers, relied on words of Old English origin, with one exception. I'll bet you can spot the anomaly:

We shall fight on the beaches; we shall fight on the landing grounds; we shall fight in the fields and in the streets, we shall fight in the hills; we shall never surrender.

The odd word is "surrender," which sounds and looks different from the others. Churchill probably chose it rather than the more consistent "give up" because the French *had* surrendered, and he was trying to draw a subtle distinction for his listeners as to how the British might act differently. The point for our purposes, however, is simply that it's easier to spot words of Norman origin than you might think.

The language of the law tends to be overloaded with French words because in the formative periods of key disciplines such as procedure, criminal law, and property, much of the legal discourse took place in French. Even today, lawyers use so many French-sounding words—"plaintiff," "defendant," "robbery," "burglary," "jury," "indictment"—that they frequently sound like they were born in Paris. A lot of Latin also became embedded in legal language during this period because Latin was the official language of scholarship and academia. Many of these old legal terms of French and Latin origin cannot be replaced, which makes it all the more important that you counteract them by striving for simplicity with the words you can change.

In *Knauff v. Shaughnessy*, 338 U.S. 537 (1949), Justice Robert

Jackson showed how to mix the large words with the smaller ones in one of the more eloquent dissents ever written:

Now this American citizen is told he cannot bring his wife to the United States but he will not be told why. He must abandon his bride to live in his own country or forsake his country to live with his bride.

So he went to court and sought a writ of *habeas corpus*, which we never tire of citing to Europe as the unanswerable evidence that our free country permits no arbitrary official detention. And the government tells the Court that not even a court can find out why the girl is excluded. But it says we must find that Congress authorized this treatment of war brides and, even if we cannot get any reasons for it, we must say it is legal; security requires it.

Security is like liberty in that many are the crimes committed in its name.

A few other historical developments have also contributed to the complexity of legal writing. With the rise of commercial activity and the litigation that arose as a result, the eighteenth and nineteenth centuries were formative periods for legal prose.

During this period, many lawyers and clerks were paid by the word. It was in their interest to make the writing as cluttered as possible. What's more, then, as now, the workers and scribes who assisted lawyers in their drafting often found them arrogant and out of touch. As Charles Dickens captured in *Bleak House*, legal assistants frequently drafted documents with an eye toward satirizing their bosses. Phrases such as "Oyez, oyez, oyez" and "Now comes the plaintiff" might have been delivered with a wink

and a nudge. Finally, these assistants who assisted lawyers were certainly not illiterate, but they weren't highly educated either.

As attorneys continue to perpetuate these styles, they're often imitating the language of semiliterate scribes who were being paid by the word and subtly sending up the law. It's not a role model I would follow.

Besides, the importance of writing in the legal profession is new. For much of our history, lawyers didn't even file briefs in the Supreme Court. Even though there were fewer justices, it was too much trouble to write out all those briefs by hand. What lawyers did instead was to file a short table of cases that made up the basis of the argument and then argue orally in the court, sometimes for hours. (This is still the practice in English courts and throughout Europe.) By modern standards, lawyers did little writing, and what little they did, they dictated to their scriveners.

The rise of the importance of writing in the legal profession came only with improvements in office automation. It's no coincidence that the Federal Rules of Civil Procedure were revised in the late 1930s to encourage more written discovery, because the price of typewriters had dropped precipitously during the deflation of the Depression. It's only in the last generation or two that lawyers have made writing the principal means of their essential communication.

Legal education, however, is always slow to keep up with the real world. Even today, almost all law courses use the case method, studying judicial opinions rather than briefs or other writings by practicing lawyers. A century ago, reading opinions made sense, since little else was written down for law students to read and study. You would think that in the subsequent century, some professors might have come up with the idea that their students could learn more by examining the documents they would

soon have to write—briefs, memos, contracts, and letters—while growing to appreciate the role lawyers have in the decision-making process. No such luck, however.

The oral nature of much early legal discourse also explains a lot of the problems lawyers have with their writing now. Being wordy, using run-on sentences, and asking rhetorical questions are far less egregious faults for speakers than for writers. That, after all, is why they're called *rhetorical* questions. As lawyers have carried these habits of oral communication into writing, however, they've made their writing worse. Reading is very different from listening. Understanding the roots of legal prose can help lawyers learn where their problems lie.

Many lawyers fear that if they adopt the ten rules outlined in this chapter, their prose will become so simple that they won't sound like themselves, or they will look foolish. Yet a complex personal style hides more of an author than it reveals. "Style results more from what a person is than what he knows," wrote E. B. White. As to fears of oversimplification, they seldom prove true for lawyers, who forget that the greatest written prose is seldom complex. Aldous Huxley, who began his literary career as an ad writer, once concluded that

any trace of literariness in an advertisement is fatal to its success. Advertisement writers may not be lyrical, or obscure, or in any way esoteric. They must be universally intelligible. A good advertisement has this in common with drama and oratory, that it must be immediately comprehensible and directly moving.

Just listen to Justice Holmes, as he began his explanation of the common law:

The object of this book is to present a general view of the Common Law. To accomplish this task, other tools are needed besides logic. It is something to show that the consistency of a system requires a particular result, but it is not all. The life of the law has not been logic; it has been experience.

If such a simple, eloquent style worked for him more than a hundred years ago, it will work for you too.