Aspen Coursebook Series

Just Writing

Grammar, Punctuation, and Style for the Legal Writer

Fifth Edition

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Introduction

Writing in the law—people who are new to the field always want to know whether it will be similar to the writing they have done before or totally different. The good news for novice legal writers is that it has more similarities than differences from other kinds of writing. Legal writing relies on organizational patterns and traditional ways of connecting ideas that, for the most part, resemble the organizational patterns and connections of many other kinds of writing. Like most other writing, correct grammar and punctuation are assumed. More important, just as in any other kind of writing, the decisions a legal writer must make always depend on the reader, the purpose of the writing, the author's role in the larger context in which the piece of writing exists, and the conventions for the type of document being written.

The differences from other types of writing are perhaps most obvious in legal writing's conventions. Aside from the dramatic differences in citation format, legal writing differs from many other types of writing because it is more formal. Lawyers tend to avoid first-person pronouns, contractions, abbreviations in text, idiomatic phrases and slang (unless these occur in a quotation), and punctuation marks such as dashes or exclamation points that may suggest informality.

Because of the complexity of much of the material they write about, lawyers adhere to the convention of using explicit organizational references. Roadmaps (e.g., "the person trying to establish title must prove five elements of adverse possession . . .") and signposts ("the first element . . .")

may initially feel obvious and heavy-handed to novice legal writers, but legal readers seem to want, expect, and even demand them. Complexity also prompts legal writers to sum up frequently; closure after each section in the discussion of a legal issue is highly valued. The effect of numerous mini-conclusions, combined with an overall conclusion, is that legal readers often feel led by the hand to the position the writer wants those readers to adopt.

A more subtle challenge for new legal writers is distinguishing which writing virtues are highly prized and which are not. Highest on the list are what one judge[1] has dubbed the ABC's of legal writing: accuracy, brevity, and clarity. Accurate representation of the facts, law, and cases is crucial. Misstatements, even small ones, can have severe consequences, both for clients and for the reputations, credibility, and careers of the lawyers who make them.

Brevity is a legal writing virtue that seems to get the most attention. The public shakes its head about the flood of paper that some lawsuits generate, and many in the profession love to say things such as "briefs should be brief." Virtually all legal readers, particularly judges, rail about verbosity because they quickly realize that wordy writers consume more than their share of time and energy. The brevity bandwagon is an easy one to jump on; it seems that long-winded, rambling writing is a waste of everyone's time.

The issue of brevity in legal writing is more nuanced, however, than it first appears. While it is true that being concise is highly valued, skillful legal writers often use selective repetition to emphasize a point. In advocacy writing, favorable facts get more airtime, while unfavorable facts get the briefest mention possible. A key advocacy notion, having a theory of the case, means that the writer has a theme that must be skillfully repeated and reinforced throughout a persuasive piece of writing. Brevity, then, is an important virtue, but one must know how and *when* to be brief.

Clarity is another legal writing virtue that may seem straightforward but in fact deserves closer examination. At first it may seem that everyone agrees on the importance of clarity in legal writing. From many states' legislation requiring clear, easy-to-understand consumer contracts to former Chief Justice William H. Rehnquist's published statement that "an ability to write clearly has become the most important prerequisite for an American appellate lawyer,"[2] one could easily surmise that clarity is a bedrock principle of good legal writing. In most cases it is. Nevertheless, there are instances when a certain amount of deliberate vagueness is in the client's best interests. This is not to suggest that lawyers should misuse language to hide culpability or deceive readers. Rather, deliberate vagueness can be appropriate when all parties want to retain some flexibility, when crystal clear language would misrepresent a truly fuzzy reality. Intentional vagueness is certainly appropriate in drafting some legislation.

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[1] Chief Judge Emeritus Edward D. Re, the Court of International Trade, in his remarks to the Legal Writing Institute National Conference (1988).

[2] From Webster to Word-Processing: the Ascendance of the Appellate Brief, 1 J. App. Prac. & Process 1, 3 (1999).

Also at the top of the list of legal writing virtues are the paired traits, "well researched" and "well supported." Whether in a brief or a law review article, points are not persuasive to legal readers unless they are supported by statutes, case law, the record, or other recognized authority. Interjecting personal opinion or other editorial asides may be well received or simply tolerated in other types of writing, but in legal writing they are treated as a novice's mistakes.

In contrast, variety in writing, particularly variety in vocabulary, is not the typical virtue in legal writing that it is in many other types of writing. Indeed, when it comes to key terms, using the same term over and over again is expected. The conventional wisdom about this expectation is that using synonyms may create confusion; a different term for the same idea suggests to legal readers that the writer intended a difference in meaning. Such consistency may seem boring at first, but legal readers prefer clarity, even if it is boring, over variety that may be confusing.

Finally, because legal writing occurs in the context of the adversarial legal system, legal writers have to be more careful than most other writers. All of one's readers in the law are not friendly readers who are willing to fill in the blanks or overlook small and not so small errors. Mistakes are chinks in the armor, weak links that an adversary may use to his or her advantage.

The preceding discussion may make legal writing seem like a minefield. It isn't. Rather, it is a specific genre of writing, as distinct as poetry writing or screenwriting or writing repair manuals for automobiles. It has some things in common with all good writing, and it has its own unique features. The trick is to pay attention