

2017 Convention
**Champions
for Justice**

Combined Sections Luncheon
**8 Ways to Make Your Legal Writing
Less Boring**

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8 Ways to Make Your Writing Less Boring



"An artist is not paid for his labor but for his vision."

-James McNeil Whistler



DISCLAIMER

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any loss which may arise from reliance on
information contained in this program.**

Eight Rules for Better Writing

1. Focus on Beginnings
2. Include Only Relevant Facts
3. Omit Surplus Words
4. Use Base Verbs and Active Voice
5. Avoid Nominalizations
6. Choose Familiar, Concrete Words
7. Limit Quotations and Footnotes
8. Write Descriptive Headings



1.



Focus on Beginnings

Readers look for the meaning of your

- Sentences
- Paragraphs
- Briefs

in the beginning of each.

DEFINE the Real Subject of the Brief

- Introduce the real subject early
- Defer (or omit) detailed procedural history
- Give context before factual detail
- Write about people not parties
- Use simple names for motions

Improved Realty Corp. v. Sowers, 195 Va. 317, 318 (1953)

This is a suit for the specific performance of a written contract for the sale of real estate. It was brought by R. L. Sowers, the vendor, herein called Complainant, who thereafter died, and his Executor, the present Appellee, was substituted. It was brought against Improved Realty Corporation, the Appellant, herein called Defendant, which was owned by R. L. Brown and J. A. Schwalm. The Court below heard the evidence *ore tenus* and for reasons stated in a written Opinion held that the Complainant was entitled to specific performance of the contract and granted judgment for the contract price, to be paid on delivery of a proper deed. The Defendant appealed.

Improved Realty Corp. refused to close on a written contract to purchase a lakefront property from the seller, R. W. Sowers, claiming Sowers lacked good title to the lake adjoining the parcel. The trial court held that Sowers' periodic use of the lake since 1927 supplied sufficient title and granted his claim for specific performance. Because we find the evidence of Sowers' continuous possession did not sustain his claim to marketable title in the lake, we reverse and enter final judgment.

Example: The following sentence is typical:

- A. COMES NOW the Plaintiff, Randall Piatt, Administrator of the Estate of Mary Wilson Jones, by and through his attorney of record, and files this Memorandum in Opposition to the Defendant's Motion to Exclude, or in the Alternative, Limit Testimony of Plaintiff's Standard of Care Expert, and states as follows:

This example says almost nothing about the content of the brief and forfeits the best opportunity to begin persuading the reader and give context to the arguments which follow. The following re-write does both:

- B. After reviewing the opinion of a board certified radiologist outlining the errors which led to Mary Jones' death, counsel moved to exclude his testimony. This brief presents three reasons why the court should deny counsel's motion.

Don't Bury the Subject



- Avoid long introductory clauses
- Bring the action up front
- Write short sentences
- For longer sentences use parallel structure and clear punctuation
- Let citations do their job.
- Scrutinize sentences starting with "It" and "There".

Sentence Structure Exercise

1. It is well settled that leave to amend must be liberally granted.

Answer: Leave to amend must be liberally granted.

2. The Supreme Court of Virginia has held that invocation of the right to counsel “must be clear, unambiguous and unequivocal.” Zektaw v. Commonwealth, 278 Va. 127, 136 (2009).

Answer:

A defendant’s request for counsel “must be clear, unambiguous and unequivocal.” Zektaw v. Commonwealth, 278 Va. 127, 136 (2009).

3. There are three opinions which address similar facts.

Answer: Three opinions address similar facts.

2.

Include Only Relevant Facts

- Organize facts by topic
- Omit irrelevant detail
- Avoid what Judge Painter calls “overchronicling”

Just the facts, mam.
Just the facts.





Facts to Omit

- Most dates
- Most procedural history
- Facts related to issues not germane to the relief sought

Organizing Facts



- Facts bearing on conclusions reached in the brief should be included.
- Sort positive, negative and relevant but neutral facts.
- Structure facts by topic in descending order of relevance.
- The most important facts give context.
- Exploit positions of emphasis.

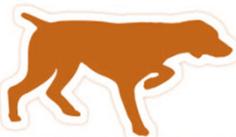
3.

Surplus Words

- Surplus words are those which carry little or no meaning in a sentence. They arise from bad sentence structure. Ridding your writing of surplus words makes it more clear. Clear writing persuades.
- Wydick describes words as “working words” and “glue words”. Working words carry the meaning of a sentence, glue words hold the working words together.
- Avoid compound constructions by careful editing.

Surplus Words Exercise

- Example:
 - 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.
 - 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.
- The trial judge’s ruling was prejudicial error because it cut off cross examination on vital issues.



GET TO THE POINT

Surplus Words Exercise

Underline the working words in the sentence below. Note the proportion of glue words to working words. Then rewrite the sentences, underline the working words, and compare your results with the original sentences.

- A. The argument offered by the defendant to have the expert's deposition reopened is inconsistent with this court's Local Civil Rule 30(h).

Here is the original sentence with the working words underlined:

- B. The argument offered by the defendant to have the expert's deposition reopened is inconsistent with this court's Local Civil Rule 30(h).

Caution: The distinction between working words and glue words is rough-hewn, and reasonable people can disagree about particular words in a sentence. Therefore, do not be puzzled if your answers differ in places from those suggested here.

Surplus Words Exercise

The original sentence could be revised to read:

- C. The defendant's argument to reopen the expert's deposition ignores Local Civil Rule 30(h).

With the working words underlined, the revised sentence looks like this:

- D. The defendant's argument to reopen the expert's deposition ignores Local Civil Rule 30(h).

Compound Constructions

Compound constructions often lead to surplus words. Compound constructions are cumbersome, multi-word ways of saying simple things.

- “For the reason that” instead of “to”
- “In connection with” instead of “about”
- “In the event that” instead of “if”

blah
blah blah



Compound Construction Exercise

Use one or two words to replace the compound constructions in these sentences.

1. Because of the fact that discovery was misdirected, it could be argued that Food Lion’s response is not late.

Answer:

Because discovery was misdirected, Food Lion’s response is not late.

Compound Construction Exercise

2. The jurors should be sequestered by the court during the course of trial until such time as their service is concluded..

Answer:

The court should sequester the jury until the trial is over.

3. It should be noted that Miranda does not apply in a case in which the Defendant was never placed in custody.

Answer:

Miranda does not apply to a non-custodial encounter.

Use Verbs and Nouns to Describe Action

Strong verbs and nouns should carry the meaning of your sentence without relying on adjectives and adverbs.

From Wydick:

Weak

The witness intentionally testified untruthfully about the cargo.

The agents maliciously took advantage of people with little money and limited intelligence.

Strong

The witness lied about the cargo.

The agents preyed on the poor and the ignorant.

4 Use Base Verbs and Active Voice

Readers look for actors, action and objects in each sentence. If any are missing, ambiguity, confusion, and boredom reign. Write sentences that focus on the action, by using active voice verbs, avoiding nominalizations and arranging your sentences with strong subject verb combinations.



Active Voice Verbs

- Active voice verbs help keep the focus on the actor, eliminate ambiguous references and minimize surplus words.
 - Lauren played Mozart on the piano.
 - Mozart was played on the piano by Lauren.
 - Mozart was played on the piano.
- Note how the passive construction in the second sentence uses more words.
- The third sentence omits the actor altogether, creating ambiguity.





Don't Overdo It

Passive voice, while problematic, is sometimes useful:

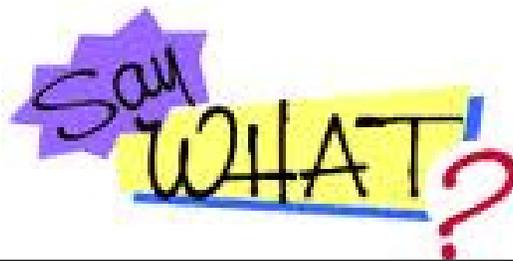
- When you want to disguise, or do not know the actor.
- When the thing being done is important and the actor doing it is irrelevant.
- When a sense of detached abstraction is appropriate

5. Avoid Nominalizations

- A nominalization is a verb that has been turned into a noun. Many nominalizations end in –ion, –ment, –ency, or –ance.
 - Examples:
 - Object Make an objection
 - Decide Come to a decision
 - Move File a motion
- Nominalizations generate surplus words, because they have to be paired with supporting verbs, articles and sometimes prepositions.

6. Use Familiar Concrete Words

- Avoid using legalese and archaic language
- Use strong nouns and verbs
- Use concrete rather than abstract words
- Prefer simple and familiar to complicated and unfamiliar



Instead of:

ascertain
subsequently
utilize
elucidate
procure
additionally
aforementioned
cognizant
substantiate

Choose:

find out
later or after
use
explain
get
also

aware
prove

Professor Eugene Volokh of UCLA prepared a long list of "common clunkers and their simpler, more readable replacements."
See <http://www2.law.ucla.edu/volokh/legalese.htm>.

Abstract and Concrete Words

Purely abstract words reference things we know intellectually. Words like: factor, basis, standard, and impact. Concrete words reference things we know through our senses. Choose concrete words with a common reference.

Abstract

conveyance
indicated
affiliate



Concrete

truck
said
accountant

7.

Limit Quotations and Footnotes

- Quotations should be short and relevant.
- Avoid block quotes – they are rarely read.
- Use quotes when the exact language is important
 - Record documents
 - Statutory language
- Paraphrase or modify cited authority to fit your sentence structure.
- Footnotes should be reserved for tangential matters or observations about the record that are helpful but not central to the opinion.



Footnote¹

¹ Footnote: "(say 'footnoht) noun
1. a note or comment at the foot of a page, referring to a specific part of the text on the page.
2. an added comment, of less importance than the main text.—verb (t) (footnoted, footnoting)
3. to add footnotes to (a text)."

8. Write Descriptive Headings

- Headings and subheadings guide the reader through complicated argument.
- Exploit greater visibility by writing descriptive headings.
- Consider table of contents for a brief greater than 20 pages.

Exercises

Rewrite these sentences, omitting surplus words, nominalizations, and using the active voice unless you can articulate a good reason for using the passive voice. Supply any missing information that you need.

1. Program participants are required to make a number of certifications that express compliance with statutory and regulatory standards.

Answer:

Program participants must certify they comply with statutory and regulatory standards.

2. It could be argued that the testimony offered by Dr. Weatherford was unduly influenced by the graphic video.

Answer:

Dr. Weatherford's testimony was unduly influenced by the graphic video.

OR

The graphic video unduly influenced Dr. Weatherford's testimony.

3. The destruction and/or loss of emails evident from an examination of Plaintiff's computer hard drive provides ample justification for the adverse inference requested.

Answer:

Because Jones destroyed or failed to preserve emails the court should impose an adverse inference.

OR

Jones' destruction or failure to preserve emails warrants an adverse inference.

Resources

- Judicial Writing Manual, Federal Judicial Center (1991)
- Richard Wydick, Plain English for Lawyers, (5th ed., Carolina Academic Press (2005))
- Mark P. Painter, Legal Writing 201, 30 Suggestions to Improve Readability.
- Richard Lauchman, Plain Language Handbook, available at [http\\www.plainlanguage.gov](http://www.plainlanguage.gov).
- Mary Beth Beazley, A Practical Guide to Appellate Advocacy, (2d ed. Aspen 2006).

EIGHT WAYS TO IMPROVE LEGAL WRITING

**DOUGLAS E. MILLER
UNITED STATES MAGISTRATE JUDGE**

Most lawyers already write well. Law School rewards good writing and by the time we're admitted we know how to write clearly and persuasively. But with the time pressures of practice many lawyers don't take the time to apply skills we learned. This checklist provides a short reminder of small changes that will consistently make your writing better.

1. FOCUS ON BEGINNINGS

Readers look for the meaning of your sentences, paragraphs and briefs in the beginning of each. Don't waste these positions of emphasis with unnecessary procedural detail. Instead, define the real subject of your writing early. In a brief defer, or omit entirely, detailed procedural history. In describing facts, give context before factual detail and write about people, not parties. Use simple names for motions, and avoid reciting the opposing party's lengthy descriptions.

Example: The following sentence is typical:

COMES NOW the Plaintiff, Randall Piatt, Administrator of the Estate of Mary Wilson Jones, by and through his attorney of record, and files this Memorandum in Opposition to the Defendant's Motion to Exclude, or in the Alternative, Limit Testimony of Plaintiff's Standard of Care Expert, and states as follows:

This example says almost nothing about the content of the brief and forfeits the best opportunity to begin persuading the reader and give context to the arguments which follow. The following re-write does both:

After reviewing the opinion of a board certified radiologist outlining the errors which led to Mary Jones' death, counsel moved to exclude his testimony. This brief presents three reasons why the court should deny counsel's motion.

The same focus on beginnings should also guide paragraph and sentence structure. Write topic sentences that preview or summarize the discussion. Avoid clunky transition. Write short sentences and avoid long introductory clauses. For longer sentences use parallel structure and clear punctuation. Let legal citations do their job by avoiding repetitive references to a deciding court. Scrutinize any sentence starting with "It" or "There," both

suggest weak sentence structure with a “false subject”¹ disguising the real actor and clouding meaning.

2. INCLUDE ONLY RELEVANT FACTS

Most lawyers know facts win cases, but many don’t spend sufficient time organizing the facts to present their case persuasively. Instead of applying a default outline that begins with the earliest facts and proceeds to the most recent, organize facts by topic. And avoid what Judge Mark Painter calls over chronicling.² Describe facts in descending order of relevance. Your most important facts give context, and should appear first exploiting the positions of emphasis. Include all of the facts bearing on the conclusions reached in your brief, but omit irrelevant detail, including most dates and procedural history unless they are relevant to issues the court must decide. Also omit other facts not germane to the relief requested. Resist the temptation to include sympathetic or egregious facts unrelated to the issues presented by the motion.

3. OMIT SURPLUS WORDS

Surplus words are those which carry little or no meaning in a sentence and unnecessarily complicate your writing. They arise from bad sentence structure and ridding your writing of surplus words makes it more clear. Clear writing persuades.

Wydick’s Plain English for Lawyers³, describes the two kinds of words necessary to each sentence as “working words” and “glue words.” The working words carry the meaning of the sentence and the glue words hold the working words together to satisfy grammatical rules. Reducing the proportion of glue words to working words improves sentence structure. Consider the following example from Wydick’s work:

- A. The argument offered by the defendant to have the expert’s deposition reopened is inconsistent with this court’s Local Civil Rule 30(h).

Here is the same sentence with the working words underlined:

- B. The argument offered by the defendant to have the expert’s deposition reopened is inconsistent with this court’s Local Civil Rule 30(h).

By re-writing the sentence to avoid compound constructions, focus on the action, and use base verbs in the active voice. The new sentence reads:

¹ Richard Lauchman, Plain Language at 82. Mr. Lauchman’s handbook, which is available free for download at www.plainlanguage.gov discusses the importance of strong sentence subjects, and aptly describes false subjects, as “grammatical ghosts.”

² Mark P. Painter, Legal Writing 201, 30 Suggestions to Improve Readability

³ Richard C. Wydick, Plain English for Lawyers, (5th ed., Carolina Academic Press (2005)). Professor Wydick’s work has been continuously in print since it was first published in 1979.

- C. The defendant's argument to reopen the expert's deposition ignores Local Civil Rule 30(h).

Underlining the working words in the new sentence highlights the improvement:

- D. The defendant's argument to reopen the expert's deposition ignores Local Civil Rule 30(h).

4. USE BASE VERBS IN THE ACTIVE VOICE

Readers look for actors and action in every sentence. In elementary school English, we learned to call these the subject and the verb. But while every sentence has a subject, the subject does not always describe an actor. And while every sentence describes action, the action is not always described by the verb. Active voice verbs keep the focus on the actor, eliminate ambiguous references, and minimize surplus words. Write sentences that focus on the actor and the action by using base verbs in the active voice, and arranging your sentences with strong subject verb combinations.

Consider this example:

- Lauren played Mozart on the piano.
- Mozart was played on the piano by Lauren.
- Mozart was played on the piano.

All three sentences are grammatically correct. They all convey the same information. But, note how the passive construction in the second sentence uses more words and the third sentence removes the actor altogether creating ambiguity. More importantly, the first sentence keeps the focus on Lauren, the actor in the sentence, and on what she is doing – playing Mozart.

Strong verbs and nouns should carry the meaning of your sentence without relying on adjectives and adverbs. From Wydick:

WEAK

The witness intentionally testified untruthfully about the cargo.

The agents maliciously took advantage of people with little money and limited intelligence.

STRONG

The witness lied about the cargo.

The agents preyed on the poor and the ignorant.

5. AVOID NOMINALIZATIONS

A nominalization is a verb that has been turned into a noun. They are usually easy to spot by their common suffixes – ion, – ment, – ency, or – ance. Nominalizations generate surplus words because they have to be paired with supporting verbs, articles and sometimes prepositions. They also diminish the clarity and persuasive force of your writing by weakening the verbs where readers look for meaning. Some examples:

- | | |
|----------|--------------------|
| • object | make an objection |
| • decide | come to a decision |
| • move | file a motion |
| • assess | make an assessment |

Each of these pairs describes the same action, but the base verb does it in one word. And the single word describes the action. The nominalization adds words and relies on a weaker verb to describe the action.

6. USE FAMILIAR CONCRETE WORDS

Most lawyers already know to avoid legalese and archaic language. Briefs rarely use terms like “ex-delicto” or “in haec verba” anymore. Yet from ordinary English we still manage to select the most complicated and unfamiliar term to express the simplest concepts. Instead, prefer the simple and familiar. Consider the following examples⁴:

INSTEAD OF:

ascertain
subsequently
utilize
terminate
procure
additionally
aforementioned
cognizant
substantiate

CHOOSE:

find out
later or after
use
end
get
also

aware
prove

Prefer concrete words to abstractions. Abstract words are inherently vague. They reference things we know intellectually, where concrete words reference things we know primarily through our senses. Whenever possible, choose concrete words with a common, well-understood reference.

⁴ The examples are excerpted from Professor Eugene Volokh’s regularly updated list of “common clunkers and their simpler, more reasonable replacements.” See <http://www2.law.ucla.edu/volokh/legalese.htm>

INSTEAD OF
ABSTRACT



CHOOSE
CONCRETE

conveyance
indicated
affiliate

vehicle
stated
employee

truck
said
accountant

7. **Limit Quotations and Footnotes**

Any quotations should be short, relevant, and necessary. Use them only when the exact language you are quoting is important. Examples include:

- Documents important to the record, such as contracts, deeds, or wills
- Statutory language where statutory interpretation is one function of the brief.

Instead of long quotes, paraphrase or modify the cited authority to fit your sentence structure. Footnotes should always be reserved for tangential matters or observations of the record that are helpful but not central to the argument.

8. **Use Descriptive Headings and Subheadings**

Legal writing is complicated. Even if you write crisp, well-organized sentences and paragraphs, your thirty-page brief will still be dense and difficult. Make it simpler by using descriptive headings and subheadings as an index and summary of your argument. But as with other positions of emphasis, don't use their attention-getting font for a simple placeholder. Instead, summarize the point you will make below in a short sentence or phrase. A brief of eight pages or more will almost always benefit from headings and subheadings. In a brief longer than 20 pages consider a table of contents.

9. **Bonus Rule: Don't Always Follow the Rules.**

Each of these rules will help you write clearly and persuasively, but none are universal. Sometimes you want to begin a sentence with a long introductory clause to minimize adverse facts. Sometimes a passive voice verb will keep the focus of your sentence on the action described because that is more important to your brief. Sometimes a lengthy quote is the only way to convey the relevance of important precedent. Writing well does not mean always following rules. But not following them should be a conscious choice.

RESOURCES

- Judicial Writing Manual, Federal Judicial Center (1991)
- Richard Wydick, Plain English for Lawyers, (5th ed., Carolina Academic Press (2005))
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