

Writing Smaller

By Hon. Mark P. Painter

In law school, I don't remember any professor telling us to "write like a lawyer." Maybe "think like a lawyer," but not write like one: take all strong verbs out of your sentences; make every sentence at least 200 words, with as many clauses as possible; have your paragraphs go on from page to page; use words and phrases such as *pursuant to*, *ubereas*, *beretofore*, *prior to*, and *provided that*. And of course use two, and perhaps three or four, words when one would do: *rest*, *residue*, and *remainder*; *free and clear*; *null and void*.

None of these lawyerisms are necessary, and all are distracting and confusing—not only to the public, but also to judges and lawyers.

The problem is that we read cases by old dead judges who were not good writers when they were alive. Certainly, there were good judicial writers—Holmes, Cardozo, Jackson—but they did not write on every issue to be covered in a casebook. So the casebook editor had to pick dull cases. And even after editing, they were still badly written.

So we read stilted, backward, and downright clumsy language that had been passed down for generations—and internalized it. When we got out of law school, we thought

that's how judges and lawyers write, so I should write that way too. Thus, the tradition of bad legal writing continued.

Too Long Words

We tend to use a longer, more formal word, when a shorter one would do better: *subsequent* rather than *after*, *pursuant to* rather than *under*, *provided* rather than *if*.

Here, *there*, or *where* do not take any extra letters. *Hereinafter*, *therein*, *whereas*, *wherein*, and the like should be banned.

And we use phrases when one word would do: *in possession of* for *possess*; *adequate number of* for *enough*; *make an examination of* for *examine*. Always question these phrases: *in order to* is almost always just *to*, and *by means of* is *by*.

Too Many Words

It's not just long words—we use way too many words.

Has anyone ever come to your office seeking a *will* and *testament*? Are they two things? And did they then say, "I would like to give the *rest* of my estate to my spouse, the *residue* to my daughter, and the *remainder* to my son"? Would that be possible? Of course not—they are the same thing, so why do we use three words?

The same goes for *null and void*, *goods and chattels*, *free and clear*. These were couplets in Norman French and Old English.

The explanation of why we started doing this is too long for this article, but you can read a shorthand version in *Kohlbrand v Ranieri*, 823 NE2d 76. It has something to do with the Norman Conquest—we have been doing this foolishness since shortly after 1066. It's time to stop. The *rest* of the estate is enough, as is *clear* title. If anyone tells you these words have different meanings, they are just wrong. (There are a few that are not couplets but separate issues: *joint and several*, for instance. They are the exception and are easy to spot.)

Redundancies

Many times we just write redundancies: *a distance of five miles = five miles* (five miles *is* a distance); *a period of a week = a week* (a week *is* a period).

Only write *during the month of May* if you have a poetic license and insert *merry, merry* before month.

Nominalizations

Do not write *filed a motion* unless the filing itself has some significance. *Filed a motion* conjures up in readers' minds someone

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walking up to the clerk's counter and having a pile of papers stamped. Write *moved*. *Smith moved for summary judgment*.

Nominalization is taking a perfectly good verb, such as *examine*, and turning it into a noun, *examination*. Then you need a verb, which is always a weak one, in this case *make*. *Make an examination of* is four words, three of them useless.

These are some common nominalizations. See how many word you can save by turning them back into verbs. And you gain clarity.

performed a search on	searched
provide responses	respond
offered testimony	testified
provide assistance	help
place a limitation upon	limit
make an examination of	examine
provide protection to	protect
reach a resolution	resolve
reveal the identity of	identify
makes mention of	mentions
make allegations	allege
was in conformity with	conformed
entered a contract to	contracted, agreed
filed a counterclaim	counterclaimed
filed a motion	moved
filed an application	applied
is in violation of	violates
made application	applied
made provision	provided

The preposition *of* is sometimes a marker for nominalizations. Always question any *ofs* in your writing—they may mark not only nominalizations, but also false possessives.

Write *Ohio Supreme Court*, not *Supreme Court of Ohio*. There is nothing wrong with the possessive. Write *the court's docket*, not the *docket of the court*. Recently I read *upon motion of Harmon*. Why not *on Harmon's motion*? Somewhere, someone told lawyers not to use possessives, maybe because *docket of the court* sounds more formal. Or maybe we got confused by someone banning contractions from legal writing (another error) and the possessive apostrophe got unjustly maligned. Whatever the error's genesis, the *of* construction is clutter. And much harder to read.

Examples of *And* and *But*

Holmes:

Courts proceed step by step. And we now have to consider whether the cautious statement in the former case marked the limit of the law . . .

But to many people the superfluous is necessary, and it seems to me that Government does not go beyond its sphere in attempting to make life livable for them.

Jackson:

But we think the previous cases indicate clearly that respondents are within the Act.

Pound:

Hence it is an unjustifiable interference with a natural right. And this is exactly what the court said in an actual case.

Shakespeare:

But I am very sorry, good Horatio
That to Laertes I forgot myself;
For, by the image of my cause, I see
The portraiture of his: I'll court his favours.
But, sure, the bravery of his grief did put me
Into a towering passion.

Tom Wolfe:

He had grown up associating religion with the self-delusion and aimlessness of adults. But now he thought about the soul, his soul. Or he tried to. But it was only a word!

William Faulkner:

But it was not for him, not yet. The humility was there; he had learned that. And he could learn patience.

Isaac Asimov:

But it would be silly to wear clothes in the rain. You didn't wear clothes in the shower. If it rained, you would take off your clothes. That would be the only thing that made sense.

But of Course Start Sentences with *And* and *But*

And do not be afraid to start sentences with *and* or *but*. This signifies good writing. The reason your grammar-school teacher told you not to start a sentence with *and* was because you wrote, *I have a mother. And a father. And a dog*. The last two weren't sentences.

Use *but* rather than *however* to start a sentence, and see how much better it reads.

Almost any example of good writing pulled at random will contain numerous examples. *The Wall Street Journal* and *The New York Times* are well-written—look at the front page of either and circle the number of sentences beginning with *and* or *but*.

Pick up any work by a good writer, and you will find countless examples. ■

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