Free at Last from Obscurity: Achieving Clarity

By Hon. Gerald Lebovits

Oscar Wilde was kidding when he wrote, "'[R]emain, as I do, incomprehensible: to be great is to be misunderstood.'"[1] President and later Chief Justice Taft got it right, though in the negative: "'Don't write so that you can be understood; write so that you can't be misunderstood.'"[2] The hallmark of good legal writing is that an intelligent layperson will understand it on the first read. Some writers use complicated language, intentionally or not, to mask their lack of understanding of the subject. Others write turgidly because they want to impress, because they believe that people are supposed to write that way, or because they don't know better. They err. As Webster stated in 1849, "'The power of a clear statement is the great power at the bar.'"[3]

In short, above all else, the legal writer must be understood. This article offers some suggestions for achieving that goal.

1. Write only if you have something to say. Simplify your writing by omitting unnecessary law, facts, and procedure. Cut clutter, redundancies, and extraneous words, thoughts, and points.
2. Put essential things first in sections and paragraphs.
3. Assume that your reader knows little or nothing about your case.
4. Give the rule first; then give the exception in a separate sentence. Explain any exception you give. Don't simply write that exceptions exist. If you don't want to devote space to explaining exceptions, state your rules so precisely that they admit no exceptions.
5. Introduce before you explain. Novices often discuss something before they lay a foundation for it. The reader won't understand if you discuss the terms of a contract before you establish that the parties have a contract.
6. Dovetail (a type of segue) to connect one sentence or paragraph to the next. Move from old to new, from short to long, and from simple to complex.
7. State the point before you give the details, raise the issue before you answer it, and answer before you justify.
8. Stress issues, not legal authority. Novices devote one paragraph after another to cases. Good writers organize by issues, not caselaw. Authority should be used to support conclusions within issues, not as an end in itself. Thus, cite authority as a separate sentence (or in a footnote), after the stated proposition, to de-emphasize authority and to emphasize issues.
9. Familiarize the reader with the person or entity before you discuss what that person or entity did or didn't do. Give the full names of people and entities the first time you mention them. Use a shorthand version thereafter. Similarly, familiarize the reader with the concept before you discuss it, familiarize the reader with the case before you draw an analogy or distinguish it, and define technical terms as you use them.
10. Keep related matters together. Then say it once, all in one place.
11. Begin with an effective introduction, or road map, that summarizes your case and the legal principles. Use small-scale transitions—concepts and words—to link sentences, paragraphs, and sections. Use topic sentences to bridge between paragraphs.
12. Minimize acronyms.
13. Avoid, as if your writing depended on it (and often it does), intrusive phrases or clauses—like the two in this sentence.
14. Untangle complex conditionals and negative statements by writing in the affirmative. A sign next to the judges' elevator bank at the Criminal Courts Building in Manhattan reads: "NOTICE: USE OF THIS ELEVATOR IS RESTRICTED TO JUDGES ONLY." The sign means that anyone but a judge may use the judges' elevator; no restrictions have been placed on anyone else.
15. Make comparisons complete and logical.
16. State whose position is being asserted. "Plaintiff moves for summary judgment because the facts are not in dispute" *becomes*: "Plaintiff moves for summary judgment because, *he argues*, the facts are not in dispute."
17. Shun overspecificity, which prevents the reader from distinguishing between the important, the less important, and the unimportant. Overspecificity also bores the reader.
18. Write directly, not indirectly. Whatever the merits of indirect speech among thoughtful, attentive people, legal writers must prefer directness and clarity to

---

"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by Joseph Kimble for the Plain English Subcommittee of the Publications and Website Advisory Committee. To contribute an article, contact Prof. Kimble at Western Michigan University Cooley Law School, P.O. Box 13038, Lansing, MI 48901, or at kimblej@cooley.edu. For an index of past columns, visit http://www.michbar.org/generalinfo/plainenglish/.

politesse. Readers should debate as little as possible the meaning of a judicial opinion or a statute. Example: "Defendant is entitled to a fair trial" *becomes*: "The People must turn over all exculpatory material by 3:00 p.m. today."

19. Use headings and subheadings to break up the text of an argument that exceeds a few pages. Divide sections by procedure or issue or both. Make your headings descriptive. Prefer boldface. Do not use all capitals, initial capitals, or underlining. *One caveat*: Headings and subheadings should relate to the text and not be invented to amuse. In *Young v Lynaugh*,[4] the court opined that "the state has played procedural football" in a case in which the defendant sought to set aside his guilty plea. On that premise, the court's headings included "The Players and the Background," "Jurisdiction on the § 2254(a) Playing Field," "Illegal Motion," and "The Final Score." And in *City of Marshall v Bryant Air Conditioning Co*,[5] the court created a reason to compose musical headings like John Sebastian's *Summer in the City*, the Beatles' *We Can Work It Out*, and Burt Bacharach's *Promises, Promises*. But devices like these can come across as too clever or self-satisfied, and even as disrespectful.

20. Use concrete nouns to be clear, concise, and subtle. Avoid abstract nouns unless, as a persuasive-writing device, you wish to de-emphasize a point. Abstract nouns convey intangibles: ideas and concepts (*justice*, *transportation*, *contact*). Concrete nouns describe tangibles (*automobile*, not *transportation*; *wrote a letter*, not *contacted*). The more concrete the writing, the better (*souped-up 1966 Corvette*, not *automobile*). Phrases should also be concrete: "After the accident, plaintiffs sought justice" *becomes*: "Johnny Smith's parents sued Jones after Jones's souped-up 1966 Corvette struck five-year-old Johnny, who was riding his tricycle on a sidewalk in Central Park."

21. Take the plain-English movement seriously. Why write *a means of egress* and then define the phrase as *a way to get out* when you can write *a way to get out* or *exit*? Note the power of earthiness, without foreign or polysyllabic words, from Justice Marshall: "A sign that says 'men only' looks very different on a bathroom door than a courthouse door."[6] For the power of plain English in opinion-writing, read anything by Judge Richard Posner of the Seventh Circuit and Judge Alex Kozinski of the Ninth Circuit. Compare their work with this impenetrable, pathological legaldegook from an appellate court: "Parens patriae cannot be ad fundandam jurisdictionem. The zoning question is res inter alios acta."[7]

22. Punctuate for clarity. Periods, commas, colons, semicolons, and hyphens have many uses. They divide text for readability and provide elegance and variety. They also promote clarity.

    Hyphens: *Ten inch thick briefs* becomes, depending on what you mean, *Ten-inch-thick briefs* or *Ten inch-thick briefs*. Consider the song about "purple people eaters." Without the hyphen between *purple* and *people*, the song is about purple creatures that eat people. With the hyphen between *purple* and *people*, the song is about creatures that eat purple people.

    Commas: Judge: "I want to see Ms. X and her client and I will be in court all morning." Without a comma between *Ms. X* and *and* or between *client* and *and*, the reader does not know whether the judge wants to see Ms. X and her client or whether the client and the judge will be in court all morning.

    Serial commas: "The court clerk must file the stipulation, the court papers and the decision and order" *becomes*: "The court clerk must file the stipulation, the court papers, and the decision and order."

Good legal writing is clear, simple writing. Judge Albert M. Rosenblatt noted one result from a lack of clarity: "[W]hen a dispute breaks out and the contract is susceptible of two interpretations, it will be construed against the author's side. This is an apt legal punishment designed to fit the crime of Writing with Lack of Clarity in the First Degree."[8] ■

Gerald Lebovits is a New York State Supreme Court justice in Manhattan and an adjunct professor at Columbia, Fordham, and New York University law schools.

ENDNOTES

1. Quoted in Belt, *Concerned Readers v. Judicial Opinion Writers*, 23 U Mich J L Reform 463, 463 (1990).
2. Quoted in Steinberg, *Be a Better Lawyer by Being a Better Writer*, NY L J (October 13, 2000), p 1.
3. Quoted in *Quote It! Memorable Legal Quotations* (New York: William S. Hein & Co, 1987), p 18.
4. *Young v Lynaugh*, 821 F2d 1133, 1134 (CA 5, 1987).
5. *City of Marshall v Bryant Air Conditioning Co*, 650 F2d 724 (CA 5, 1981).
6. *City of Cleburne v Cleburne Living Ctr*, 473 US 432, 468–469; 105 S Ct 3249; 87 L Ed 2d 313 (1985).
7. *Miss Bluff Motel, Inc v Co of Rock Island*, 96 Ill App 3d 31, 34; 420 NE2d 748 (1981).
8. Rosenblatt, *Lawyers as Wordsmiths*, 69 NY St B J 12 (November 1997).

The Contest Returns!

Oh, happy day. We haven't had a contest in a while, so let's try one. I'll send a copy of *Writing for Dollars, Writing to Please: The Case for Plain Language in Business, Government, and Law* to the first two people who send me an A revision of the sentence below. Notice the blast of unnecessary prepositional phrases—the worst small-scale fault in legal writing.

> Evidence of a conviction is not admissible if a period of more than ten years has elapsed since the date of the conviction or of the release of the witness for the confinement imposed for that conviction.

Send an e-mail to kimblej@cooley.edu. Put "Contest" in the subject line. The deadline is May 25. I have to be the sole judge of the winners.

—JK