Best Practices for Writing

Contracts, Briefs, and Even Emails

By Dan Sharkey

The world is a hellish place and bad writing is destroying the quality of our suffering.
—Tom Waits[1]

Whether it's motions, contracts, or emails, all of us lawyers write. Most of us write every day, and some of us write virtually all day every day. I've spent most of my 23-year career as a litigator, first criminal and then civil, and now spend about half of my time writing and revising commercial contracts.

The one constant throughout: bad writing. Dull and turgid is one thing; I can muck through that with waders. But ambiguous and murky is another thing entirely: what were the parties to this contract trying to agree on? Bad writing begets uncertainty, which begets disagreement, which begets litigation. And in litigation, bad brief writing often begets bad results. With those thoughts in mind, I offer a list of best practices for legal writing.

You shan't use *shall*

1. Think big first: What is your client trying to accomplish? What are you trying to say? Ask lawyers those two questions and you'll be surprised at how often they don't know the answer. Thomas Mann said, "A writer is someone for whom writing is more difficult than it is for other people." It takes discipline and mental energy to turn off your screen and think.
2. Start with the issue, not the facts. How can readers know what to look for in the facts until they know what the issue is?
3. Underlining: don't, ever. Bryan Garner and the late United States Supreme Court Justice Antonin Scalia call underlining "visually repulsive."[2] Limit bold to headings. Emphasize with *italics*, which should be used sparingly.
4. Never use ALL CAPS. Readers feel like you're yelling at them. (One narrow exception: the need for a conspicuous disclaimer of warranty. I'm not convinced it's necessary in a commercial context, but in a consumer agreement, fine—you get a pass.) And if you like to title your motions and contracts in bold, all caps, and underlined text, then I give up—you're beyond help.
5. Avoid *shall*. It's usually mandatory, but it's often permissive and nearly always confusing. Use *will*, *must*, or *may*.[3]
6. In contracts, write only once, at the beginning, that the parties *agree*, and don't repeat it. The parties agree on everything in the contract—one *agree* is enough.
7. Omit the recital of consideration. I have challenged many lawyers to find a case anywhere, ever, in which a court found that the recital of consideration saved the formation (and hence enforceability) of a contract. Until someone sends me that case, I will continue to consider it surplusage.
8. In either a contract or a brief, after you introduce your client, Schmedlap, LLC, refer to it as Schmedlap. Don't write "Schmedlap, LLC (for all purposes hereinafter 'Schmedlap')." There's only one Schmedlap—we're not confused. Or lost. Yet.
9. Read Jeff Ammon's "Drafting Airtight Documents."[4] My personal favorite is his reduction of a prolix 58-word jury trial waiver to six words: "The parties waive a jury trial."
10. Reduce—or better, eliminate—exhibits, addenda, attachments, schedules, and the like. When you have a long spreadsheet, fine; an exhibit is cleaner, but when you have only a few lines of text or you list a handful of customers—or worse, one territory—put them right in the agreement or the brief. Don't make readers track down different pieces of paper or flip through so many pages. A related tip: go to the bathroom *before*

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you ask a commercial litigator if he's ever had a case in which contract exhibits were lost, changed, disagreed upon later, or never written in the first place.

More numbers, fewer words

11. When you must have an exhibit, tab it—whether it's a contract or brief, it will help your reader keep track of the exhibit in the considerable shuffle.
12. Commas are your friends. They allow the reader to inhale, exhale, and generally breathe. Ahhhh.[5] And always—*always*—use the Oxford comma. The alternative could be costly.[6]
13. Legalese: banish it. *Hereof*, *thereof*, *in witness whereof*, *heretofore*—the list goes on and gets even worse.[7] I challenge you to find a contractual provision or brief in which those words can't be eliminated without affecting the substance. So why keep using them? And while you're at it, keep going: use *before* in place of *prior to*, *under* in place of *pursuant to*—write it like you'd say it.[8]
14. Never write *in the present case*, *in the case at bar*, *in the instant case*, etc. Do you think the judge thinks you're writing about another case? *Here* works fine.
15. Don't begin with: "CONTRACT—This CONTRACT ('Contract') by and between ABC, LLC ('ABC') and XYX, Inc. ('XYZ')…." Try "Contract—ABC and XYZ agree."
16. No need to say that the parties can agree to modify the agreement later. They can, whether you include that or not.[9]
17. Use integration and merger clauses carefully. If you don't want to supersede everything that has happened since Genesis, ensure that whatever you need in the agreement is expressly incorporated.[10]
18. If you want to preclude a fraud claim, consider using a no-reliance clause in addition to a merger clause.[11]
19. Use numbers, not words: "$327,915.27," not "three-hundred twenty-seven thousand, nine hundred and fifteen dollars and twenty-seven cents." And not both.[12]
20. Read the "Plain Language" column in the *Michigan Bar Journal*. Plain language advocates like Professors Joseph Kimble and Mark Cooney are a wealth of knowledge and regularly provide great examples.

Yes to roadmaps, no to name-calling

21. Give your reader "roadmaps"—separate topics, arguments, with headings in bold. In a brief, what relief are you requesting? In an agreement, what is its purpose? Take a stab at the beginning; after you write the brief or contract, you will often be able to refine your roadmaps.
22. With font, bigger is better. Don't use 6- or 8-point type. Most federal courts now require 14-point type, and state courts require 12. It's hard enough to convince a judge to enforce the provision buried in Section 37(d)(1)(iv) on page 23. This is not gymnastics, and you will not be judged on difficulty. Don't use a font so miniscule it's illegible.
23. No name-calling in briefs: ad hominem attacks, even when justified by your worst enemy, ring hollow. Omit *absurd*, *disingenuous*, *bizarre*, *ludicrous*, *self-serving*, and the like. Drop the labels and show the court why it would fit. I must confess to the occasional *blithely*, *illogical*, or *incongruous*, but in the words of Judge Pat E. Morgenstern-Clarrent, don't allow your brief to "stray from the persuasive into the vituperative."[13]
24. Shorter is better. Even the simplest motion for summary disposition ("Defendant conceded at deposition that it failed to pay for the parts that Plaintiff supplied") is visually intimidating if you attach a 37-page contract with 14 exhibits. The old expression, "there must be an issue of fact in there somewhere" omits from the rule "genuine" and "material," but it became a cliché for a reason.
25. Simplicity is hard work: "Brevity is not only the soul of wit, but the soul of making oneself agreeable and of getting on with people, and, indeed of everything that makes life worth living. So precious a thing, however, cannot be got without more expense and trouble than most of us have the moral wealth to lay out."[14]
26. Be a *which* hunter: *that* is usually correct.
27. Hyphenate the phrasal adjective: *third-party plaintiff*, etc.[15]
28. Omit adverbial intensifiers: *clearly*, *obviously*, *certainly*, and definitely *very*. (See what I did there?) And using *literally* figuratively is a cardinal sin: your reader is justified in stopping reading right there.
29. Once you define a party or term in a contract or a brief, be consistent. I have seen both contracts and briefs refer to the same party by many different names: Defendant; ABC, Inc.; Petitioner; Appellant; ABC; etc. Who's who? I'm lost. Give each party or term one name and stick to it. And if you never mention something again, don't define it; that's confusing.

Superstitions and signature blocks

30. Manage your drafts and versions. The most infamous example is the poor lawyer who mistakenly had two versions of a nuptial agreement executed, one saying that the husband would keep the Los Angeles Dodgers, the other saying the wife would.[16]
31. Except for those still tapping away on a typewriter, the long-running debate is over: it's one space after the period ending a sentence, not two.[17]
32. Latin phrases don't replace logic.[18] Use them sparingly.
33. Possessives are good: *defendant's president* is better than *president of the defendant*. Write like you talk.
34. There are reams of mythical "rules" that are really superstitions, but here are two: don't end a sentence with a preposition[19] and don't begin a sentence with a conjunction.[20]

35. Signature blocks in contracts should have five lines: signature, printed name, title, company, and date signed, which need not be its effective date. Transactional lawyers, please don't make us commercial litigators wonder later who signed the contract and when.
36. Above the signature blocks, you can use *IN WITNESS WHEREOF, KNOW ALL MEN BY THESE PRESENTS, THAT THE UNDERSIGNED, HAVING BEEN DULY AUTHORIZED, HEREBY DO AGREE AND ARE FOREVER BOUND* or you can use *Agreed*. Your call.
37. In emails, don't use vague or casual subject lines, e.g., "Hey" or "Thoughts." Describe the client, matter, and subject or issue, e.g., "Smith Automotive re Jones Plastics—proposed revisions to limitation of liability." If it's urgent, include what you need and when, e.g. "need draft response to motion by Thursday, February 13." And if you attach something to your email, explain what it is and why you're attaching it.
38. Typography matters. Read Matthew Butterick's *Typography for Lawyers*.[21] Your documents will be cleaner and easier to read. You will never use Courier, you will agree that Arial is "fatal to your credibility," and you'll even start to question whether it's time to stop using the venerable Times New Roman. And you'll stop underlining.
39. Read Bryan Garner's *The Winning Brief*.[22] You don't need to dive in deep: its inside cover has 50 tips on its two pages. Actually, read anything you can get your hands on by Garner.
40. Declutter. Boil down.
41. Think you're finished? You're not. Get a second set of eyes on it. (My thanks to my partner Jason Killips, who was mine on this.) They will see what you missed.
42. Sign. File. Relax.

There is no substitute for the hard work that it takes to write well. As Justice Antonin Scalia observed, good legal writing takes "time and sweat."[23] By following these best practices, you'll whittle down hulking blobs of contracts and briefs into succinct gems. Judges, law clerks, opposing counsel, and most importantly, your clients will thank you for it. ■

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ENDNOTES

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3. Busk, *Using* Shall *or* Will *to Create Obligations in Your Business Contract*, 94 Mich B J 50 (October 2017) (noting that hundreds of cases have arisen from ambiguity regarding "shall") <https://www.michbar.org/file/barjournal/article/documents/pdf4article3230.pdf>.
4. Ammon, *Drafting Airtight Documents*, Top Tips in Ten Minutes (ICLE).
5. Samuelson, *Farewell, Comma, He Said*, Washington Post (July 18, 2007) <http://www.washingtonpost.com/wp-dyn/content/article/2007/07/17/AR2007071701489.html>.
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7. *Van Tol, Magennis & Lang, Inc v Woodward*, unpublished per curiam opinion of the Court of Appeals, issued October 4, 2012 (Docket No. 30513), p 3 (castigating "heretofore" as "a quaint bit of legalese").
8. For a handy-dandy use-this-instead-of-that chart you can print for reference (I have mine on the wall above my desk), see Busk, *Why I Made Plain-Language Changes to Your Contract*, 94 Mich B J 38, 39 (February 2015) <https://www.michbar.org/file/barjournal/article/documents/pdf4article2562.pdf>.
9. *Quality Prod & Concepts Co v Nagel Precision, Inc*, 469 Mich 362, 372; 666 NW2d 251 (2003) ("[C]ontracts with written modification or anti-waiver clauses can be modified or waived notwithstanding their restrictive amendment clauses.").
10. *UAW-GM Human Resource Ctr v KSL Recreation Corp*, 228 Mich App 486, 504; 579 NW2d 411 (1998) ("[T]he merger clause made it unreasonable . . . to rely on any representations not included in the letter of agreement.").
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18. "The marvelous capacity of a Latin phrase to serve as a substitute for reasoning, and the confusion of thought inevitably accompanying the use of inaccurate terminology, are nowhere better illustrated than in decisions dealing with the admission of evidence as 'res gestae.'" *Rice v Jackson*, 1 Mich App 105, 110 (1965).
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20. Cooney (writing as Clark J. Mooney), *To Mrs. Finkelbean: The Truth About Conjunctions as Sentence-Starters*, 89 Mich B J 60 (August 2010) <https://www.michbar.org/file/barjournal/article/documents/pdf4article1715.pdf>. See, e.g., The Declaration of Independence (1776) ("But when a long train of abuses . . . ." and "And for the support of this Declaration . . . .").
21. Butterick, *Typography for Lawyers: Essential Tools for Polished & Persuasive Documents* (Thomson Reuters, 2d ed 2018).
22. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (Oxford Univ Press, 3d ed 2014).
23. Scalia, *Scalia Speaks: Reflections on Law, Faith, and Life Well Lived* (Crown Forum, 2017), p 58.