When Your Boss Wants It the Old Way

By Wayne Schies

fter participating in my seminar called “Improving Your Motions,” one participant sent me this note:

Professor,

Why are so many attorneys wedded to the old ways of writing motions? How can I make them (supervising attorneys, for example) not insist on using COMES NOW and “this is its motion”?

This article is an expanded version of my response to that participant. I think lawyers use the old-fashioned styles for four reasons.

1. They think judges want it that way. I teach a summer course at the University of Texas Law School called Writing For Litigation. As I lectured recently on how to write a motion, I said that lawyers should use plain language and contemporary formatting, and should abandon archaic styles and phrases. A student asked me: “But so many lawyers still use the old fashioned way of introducing a motion, they must think judges prefer that. Do they?”

No. As part of a 1987 survey of judges (and lawyers) in Michigan, readers were asked to mark their preferences between these two sentences:

1. Now comes the above-named John Smith, plaintiff herein, by and through Darrow & Holmes, his attorneys of record, and shows unto this honorable Court as follows.

2. For his complaint, plaintiff says.

Michigan judges preferred version 2 by 84 percent to 16 percent.1 When the same survey was sent to Florida judges, 88 percent preferred the simpler version.2 Judges in Louisiana and Texas have also replied to the same survey; again, about 75 percent preferred the simpler version in court documents.3

2. Inertia. It’s easier to drag out the old form, copy it, and file it. It’s harder to justify the cost or the time to reformat the old forms into contemporary style and revise them into plain language. Most lawyers are working against a deadline on every document. Most lawyers are busy with a heavy workload. And too many think that if it was good enough before, it’s good enough this time.

3. Fear. No lawyer wants to be the one who “updated” the standard form and fouled it up. Why risk having the document rejected by a judge or criticized by opposing counsel? Or worse yet, why risk having the document fail in its legal function because you changed it? Especially for a young lawyer who is just learning about litigation, it just feels too risky, both for legal practice and for job security, to start changing the old forms the boss has been using.

4. Misguided sense of professionalism. Far too many lawyers believe that an overfonna! tone, archaic usage, and traditional formatting are hallmarks of a professional. That is no longer true, if it ever was. In fact, the trend is the opposite. The more formal, legalistic, and archaic the document, the more likely the audience is to perceive the writer as inexperienced, ignorant, or provincial.4

**Plain Language** is a regular feature of the Michigan Bar Journal, edited by Joseph Kimble for the State Bar’s Plain English Committee. The assistant editor is George Hathaway, chair of the committee. The committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to contribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For information about the Plain English Committee, see our website—www.michbar.org/committees/penglish/pencom.html.

Sadly, there are still many lawyers who use archaisms, unnecessary jargon, and stodgy formats because they believe it will impress—or perhaps intimidate—clients.

So what can you do if you work for someone who insists on doing things the old way? I’ll offer three suggestions and then give an example.

First, don’t take a stand at the expense of your job or your relationship with your boss. The ideas of the plain-language movement and the modern trends in legal writing are designed to make your writing clearer, easier to read, and precise. Those are important goals for legal writing. Though as a legal-writing teacher it pains me to say this, they are not important enough to risk your job over. And I don’t think they are important enough to antagonize the person you work for. That relationship is more important than document format or word choice. As I often tell my students: “You should write it the way I’m telling you, unless your boss wants it another way.”

Second, when you have control over the documents, write them the way you want to. Sometimes you are able to handle a case or matter on your own. When I practiced law in a large law firm’s bankruptcy department, I was usually at the mercy of the attorneys I worked for. The documents we filed—even if written by me—looked the way my boss wanted them to look and used his language. But one time I was given a small bankruptcy case and told to handle it on my own. I tried new formats for the pleadings, new language for the introductions, and a more relaxed tone in the text. (By the way, nothing imploded.) I used that case to experiment with newer, plainer legal writing. So when you’re in charge, write it the way you want; you’ll learn, and you won’t risk offending your boss.
Third, take a stand occasionally. If your relationship with your boss is a good one, then you’ll sometimes be able to persuade her that your way—the contemporary way—is better. But don’t take a stand without back-up. Be sure that recognized experts on legal writing support your point of view. And be sure your boss knows that. For example, you can rely on Bryan Garner’s Dictionary of Modern Legal Usage.5 If you’re in litigation practice, check out the entries on Archaisms, Brief Writing, Document Design, Formal Words, and Plain Language. That dictionary is a solid support for anyone who wants to abandon the old ways.

You can also visit my website: http://legalwriting.net. I offer plain-language guidelines, model documents in contemporary formats, legal-writing tips, and suggestions for other sources. Also, through the site you can reach me, and I’ll provide support for you.

A Practical Example

To make my point about having back-up when you want to make changes, let’s look at the first part of a typical motion filed in a Texas court. Sample 1 is a real motion, filed by a real lawyer, in a real court in 2000. I have fictionalized the parties.

Now review this rewritten version in Sample 2:

Here is a practical and common-sense reason for every change. But sometimes that is not enough. So I have included a reference to the authority that supports the change.

1. Change the use of ALL-CAPS to boldface type.

   

2. Drop the formal phrases in the and in and for in the court designation.

   • The phrase in and for is a redundancy. Thomas Haggard, Legal Drafting in a Nutshell 162 (West 1996).
   
   • Both phrases are baggage that add no meaning to the document; both may be omitted. See Alterman, Plain and Accurate Style in Court Papers 21–22.

3. Drop to the honorable judge of said court.

   • A jargon phrase that is not necessary. See Bryan A. Garner, The Winning Brief 147 (Oxford U. Press 1999) (showing the phrase in a poorly written example and providing a better revision); LeClercq, Guide to Legal Writing Style 61, 127 (showing the phrase in a poorly written example and providing a better revision).

4. Drop comes now.


5. Eliminate the phrase pursuant to.

   • This phrase is not only objectionable because it can be ambiguous, but it is overused by lawyers and sounds stuffy.
Garner, A Dictionary of Modern Legal Usage 361, 721.
• If you must cite the rule, use under.

6. Avoid unnecessarily defining the names of the parties (“parties”).
• Your document will usually be stronger if you refer to the parties by names instead of by procedural designations. Garner, The Winning Brief 150.
• There is no chance for confusion about who the plaintiff and defendant are because that has been clarified in the caption. Do not capitalize them on the mistaken notion that you are referring to a particular plaintiff and a particular defendant. See Alterman, Plain and Accurate Style in Court Papers 15–16.

7. Change moves this court to grant to moves for.
• And drop unnecessary words generally. This revision is based on a widely recommended idea— one of George Orwell’s Six Rules For Writing: “If it is possible to cut the word out, always cut it out.” George Orwell, “Politics and the English Language,” in Shooting an Elephant and Other Essays (Harcourt Brace Jovanovich 1950); see also Alterman, Plain and Accurate Style in Court Papers 77–78 (moves to dismiss is adequate); Richard C. Wydick, Plain English for Lawyers 9–17 (4th ed., Carolina Academic Press 1998) (“omit surplus words’’); Steven D. Stark, Writing to Win 30–31 (Doubleday 1999) (“keep things short”).
• See also Terri LeClercq, Expert Legal Writing 124–125 (U. of Texas Press 1995) (providing an example of a wordy opener to a motion and a shorter, clearer revision).

8. Drop in the above-referenced matter.
• Is the judge really going to think that you are moving for summary judgment in a different case? No. Simplify the phrase to above or name the court again. Alterman, Plain and Accurate Style in Court Papers 77; Garner, The Elements of Legal Style 100.
• If the phrase is a symptom of “overparticularization,” then omit it altogether. Garner, A Dictionary of Modern Legal Usage 9, 631.

9. Set up the first paragraph to state the reason for the motion.
• Don’t just state the formalities of the party names and procedural details. Make it a goal to let the judge know what you want within 90 seconds of picking up your motion. Beginning with a long procedural paragraph will not succeed. Garner, The Winning Brief 48–49; Alterman, Plain and Accurate Style in Court Papers 77.

A Practical Admonition
It is probably not cost effective to go through and update all the motions in your files in this way, all at once. But each time you write a new motion, think about and apply these ideas. Soon all your motions will be converted to a plain, contemporary style.


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FOOTNOTES
4. Joseph Kimble, Writing for Dollars, Writing to Please, 6 Scribes J. Legal Writing 1, 19–31 (1996–1997) (summarizing a number of studies showing that plain language is clearer and more effective than traditional style).