When Your Boss Wants It the Old Way

By Wayne Schiess

After 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 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 re-format 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 overformal 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]

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.

"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/pengcom.html.

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 I have listed the changes I made. There 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.
   - Legal-writing experts agree that the use of ALL-CAPS hampers readability and is hard on the eyes. Bryan A. Garner, *A Dictionary of Modern Legal Usage* 130 (2d ed., Oxford U. Press 1995); Irwin Alterman, *Plain and Accurate Style in Court Papers* 17–18 (ALI-ABA 1987); Joseph Kimble, *A Modest Wish List for Legal Writing*, 79 Mich. B.J. 1574, 1574 (2000).
   - Legal-writing expert Terri LeClercq recommends using boldface to draw attention to important information. See Terri LeClercq, *Guide to Legal Writing Style* 103 (2d ed., Aspen L. & Bus. 2000).

Sample 1

CAUSE NO. 99-555-555F

REMY GONZALEZ	§	IN THE 555TH JUDICIAL
Plaintiff	§	DISTRICT
	§	
	§	
v.	§	
	§	IN AND FOR
CHRIS SMITH AND READY-	§	
FOODS, INC.,	§	
D/B/A ARBY'S	§	
Defendants	§	NORTH COUNTY, TEXAS

DEFENDANTS' MOTION FOR SUMMARY JUDGMENT
& BRIEF IN SUPPORT THEREOF

TO THE HONORABLE JUDGE OF SAID COURT:

COMES NOW, CHRIS SMITH AND READY-FOODS, INC., D/B/A ARBY'S, collectively ("Defendants"), pursuant to Rule 166a, and move this Court to grant summary judgment against all claims of Remy Gonzalez ("Plaintiff"), in the above-referenced matter.

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Sample 2

Cause No. 99-555-555F

Remy Gonzalez, Plaintiff	|	555th Judicial District
v.	|	North County, Texas
Chris Smith and Ready-Foods, Inc.,	|	
d/b/a Arby's, Defendants	|	

Defendants' Motion for Summary Judgment

Defendants Chris Smith and Ready-Foods move for summary judgment on all Plaintiff Remy Gonzalez's claims on the ground that…

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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.*
   - Experts recommend eliminating this jargon phrase. Bryan A. Garner, *The Elements of Legal Style* 182–183 (Oxford U. Press 1991); see also Garner, *A Dictionary of Modern Legal Usage* 173–174; Alterman, *Plain and Accurate Style in Court Papers* 37–38; LeClercq, *Guide to Legal Writing Style* 61, 127.
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 Tex. 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.
   - Or use a bold synopsis. Wayne Schiess, *The Bold Synopsis: A Way to Improve Your Motions* 63 Tex. B.J. 1030 (Dec. 2000).

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.

Reprinted from the February 2001 *Texas Bar Journal.* ♦

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FOOTNOTES

1. Steve Harrington and Joseph Kimble, *Survey: Plain English Wins Every Which Way*, 66 Mich. B.J. 1024, 1026 (1987).
2. Barbara Child, *Language Preferences of Judges and Lawyers: A Florida Survey*, 64 Fla. B.J. 32, 34 (Feb. 1990).
3. Joseph Kimble and Joseph A. Prokop, Jr., *Strike Three for Legalese*, 69 Mich. B.J. 418, 420 (1990); Kevin Dubose, *The Court Has Ruled*, The Second Draft (Legal Writing Institute), Oct. 1991, at 8, 8.
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).
5. Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed., Oxford U. Press 1995).