

# A Modest Wish List for Legal Writing

By Joseph Kimble

The items on my wish list are not the most important things in life or the most important aspects of writing. They are some little ways to improve and to modernize legal writing.

I'm not going to provide authority for each of these points and subpoints. There is little dispute about them among experts on usage and style. If you'd like to see some authority, check the references at the end of this article. I especially recommend the books by Bryan Garner—the Prosser of legal writing. It would be good to have all his books, but the one you must have is *A Dictionary of Modern Legal Usage*. No lawyer should be without it—or argue legal style without consulting it.

Please note that the grammar program or spelling checker on your computer will turn up few, if any, of the items on my list. Technology can help to diagnose a limited number of stylistic flaws, but no amount of technology can create a good writer or a good piece of writing.

My wish list does have one premise: I'm assuming that you're more interested in being clear and readable than in sounding lawyerish.

"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](http://www.michbar.org/committees/penglish/pengcom.html)

## 1. Pay attention to how the page looks.

In the last 15 or 20 years, document designers have developed a set of guidelines for creating text that's both inviting and readable:

- Avoid all-capital letters. THEIR UNIFORM SIZE MAKES THEM NOTORIOUSLY HARD TO READ. Small letters have tops and tails that give them distinctive shapes.

- Avoid underlining. It's a hangover from the days of typewriters. To add emphasis, use italics or boldface.

- For text (as opposed to headings), prefer a serif typeface like Times New Roman or Garamond. Serifs are the little strokes (lines or curves) at the top and bottom of a letter.

This is serif type (Garamond).

This is sans-serif type (Univers).

Above all, avoid Courier.

- Use at least 12-point type, and never less than 10-point.

- Use left headings, not centered headings. Put them in boldface. Do not underline them. If you have subheadings, use a smaller-sized boldface.

- Use a ragged right margin.

- Use lists and bullets. If the items have no rank order, prefer bullets.

- In lists and bullets, use hanging indents. That is, do not bring a second line back any farther than the first word in the first line. (Possible exception: when you have narrow columns like those in the *Bar Journal*.)

## 2. Use sensible paragraphing and numbering.

When drafting rules, contracts, instructions, and the like, writers often create the long, dense paragraphs that drive readers

crazy. Break these monsters down. Garner says that paragraphs—numbered parts or subparts—should average no more than 150 words.

The solution, of course, is to turn a long section into shorter sections or to create subsections. Occasionally, you may need a third level of breakdown—sub-subsections—but rarely more than that.

In numbering, avoid roman numerals and romanettes (like *iii*). They are too much like a foreign language.

You can distinguish different levels by using larger boldface for sections, smaller boldface for subsections, and italicized boldface for sub-subsections when needed. So a section (from a regulation requiring safety barriers around swimming pools) might look like this:

### 4. Requirements for Safety Barriers

#### (A) Height

(1) *Public Pools*

...

(2) *Private Pools*

...

#### (B) Location

With a modified decimal system, the same section would look like this:

### 4. Requirements for Safety Barriers

#### 4.1 Height

(A) *Public Pools*

...

(B) *Private Pools*

...

#### 4.2 Location

One advantage of the decimal system is that it simplifies the numbering. In the first example above, suppose you want to include a numbered list in 4(A)(1). You would probably have to list the items as (a), (b), and (c) to avoid repeating the parenthesized numbers. But with the decimal system, you can use (1), (2), (3).

Note that dividing a document into sections and subsections is different from creating a list within a sentence. But in both

cases, you want to avoid extremes—either not enough levels of breakdown, or too many. Again, in dividing most documents, I would have no more than three levels (section, subsection, sub-subsection). In lists, I would have no more than two levels of breakdown. Federal statutes are gross offenders on both counts.

### 3. Let go of common superstitions.

All the experts scoff at the following “rules.” They have no foundation in English grammar or style. Although some high-school teachers may still be under their spell, these supposed rules are just a bunch of old bogies.

- Never end a sentence with a preposition. (Some writers are so spooked that they contort the *middle* of sentences: “To protect against the dangers about which he knew, the landlord fixed the loose railing.”)

- Never split an infinitive. (If rhythm or clarity calls for a split, then split.)

- Never split a verb phrase. (In fact, adverbs usually follow an auxiliary verb: *will greatly increase*. With two auxiliary verbs, put the adverb after the first auxiliary unless the adverb and verb suggest an adjective and noun that could stand together: *will have greatly increased*. Here, *greatly increased* suggests “great increase.”)

- Never begin a sentence with *and*, *but*, or *so*. (Listen to how you talk. *But* is far more common and more deft than *however* to show contrast at the beginning of a sentence. And when you start a sentence with one of these conjunctions, don’t follow it with a comma; in that regard, they are different from *in addition*, *however*, and *therefore*.)

- Never use contractions. (Maybe not in a brief, but why not in a letter or a law journal?)

- Never use *I* or *me*. (Use them unself-consciously. Avoid the genteel *myself* when you mean *I* or *me*.)

- Never refer to the reader as *you*. (On the contrary, *you* is invaluable for making public documents clear. It puts the reader directly into the picture.)

### 4. Avoid creating initialisms.

They may be trendy, but they are not clever or clear. They may save space, but they do not speed communication. They have become a menace to prose.

If you create an initialism or acronym—say, “Committee on Plain English

(COPE)”—in one place and use it four paragraphs later, the reader will probably have forgotten what it stands for and have to look back. You can almost always find another shorthand, like *the committee*. For the “Elliott-Larsen Civil Rights Act,” use *the act* or *the Elliott-Larsen Act* or *the Civil-Rights Act* (not *ELCRA*). For “Thomas M. Cooley Law School,” use *Thomas Cooley* or *Cooley* or *the school* (not *TMCLS*).

If an initialism has already entered the common vocabulary (*UAW*, *FBI*, *ADA*), fine; use it. But we should not be feverishly creating new ones at every opportunity. And we should certainly not have several different ones operating at once. Give words a chance.

By the way, nothing could be sillier than creating an initialism in one place and never using it again.

### 5. Shun the slash.

Apart from fractions and Web sites, the slash has almost no good uses. *And/or* is classic legalese. *S/he* is distracting, unpronounceable, and unnecessary; you can write in a gender-neutral style without resorting to typographical tricks. Instead of *alumni/ae*, how about *graduates*? Finally, constructions such as *landlord/tenant law* should be hyphenated as *landlord-tenant law*. Likewise, *student-faculty ratio*, *bench-bar conference*, *attorney-client relations*.

### 6. Embrace the dash.

You can go for pages and pages in legal writing and never see a dash, probably because of the notion that dashes are somehow too informal for such a lofty enterprise. That’s another bogey, and one that handicaps writers. Dashes are excellent for highlighting an inserted phrase—what Garner calls an interruptive phrase—within a sentence. They provide even more emphasis at the end of a sentence—when you want a kicker. Of course, like any other technique, they can be overdone.

### 7. Hyphenate phrasal adjectives.

On the first page of a recent issue of my school’s newspaper, writers used the following phrases, all of which should have had hyphens but didn’t:

- *new-class members* (do you see the difference between that and *new class members*?)



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Hyphens prevent reader miscues, even for half a second. Michigan bar... and grill? No. Michigan bar-examination... performance.

Do not use a hyphen, though, when one of three exceptions applies:

(1) the phrasal adjective contains an adverb that ends in *ly* followed by a past participle (*highly regarded authority*);

(2) the phrase follows the noun it modifies (*her paper was well written*); or

(3) the phrase consists of a proper noun (*several New York cases*).

Because this point is such a hard sell, I offer some authority. The first quote is from Wilson Follett's *Modern American Usage* (1966 ed.); the second, from Garner's *The Winning Brief*.

*The first and by far the greatest help to reading is the compulsory hyphenating that makes a single adjective out of two words before a noun: eighteenth-century painting/fleet-footed Achilles/tumbled-down shack/Morse-code noises/single-stick expert. Nothing gives away the incompetent amateur more quickly than the typescript that neglects this mark of punctuation....*

*Invariably, lawyers are skeptical of this point, as if it were something newfangled or alien. But professional editors learn this lesson early and learn it well: you need to hyphenate your phrasal adjectives. . . . Yet in working on briefs, I've had to contend with colleagues who wanted everything to be an exception. They have wanted to write the no waiver of royalty clause, and write it repeatedly. Meanwhile, others have wanted to refer to the law of the case doctrine. Unhyphenated, these phrases cause a slow style, full of double takes. And we lawyers ought to be doing better.*

## 8. Avoid the quirks of newspaper style.

For the most part, newspaper style is clear and crisp. On a few points, though, it runs counter to the strong weight of authority and should be ignored. Not all newspapers exhibit these quirks, but most of them do.

First, newspapers don't use the serial comma. Most would write *Muddy Waters, Buddy Guy and Elmore James*. Put a comma after *Buddy Guy* to avoid possible ambiguity: *Muddy Waters, Buddy Guy, and Elmore*

*James and the Broomdusters*. Use the serial comma every time, without wondering whether you need it to avoid ambiguity.

Second, for singular nouns that end in *s*, newspapers form the possessive by adding an apostrophe, instead of *'s*: *Thomas' jump shot*. Make it *Thomas's jump shot*. After all, how do you pronounce it? Likewise, make it *a witness's testimony*, *Douglas's opinions*, *Congress's intent*.

Third, newspapers are fanatical about dropping the word *that* after verbs. More often than not, you need the conjunctive *that* after a verb to provide a joint in the sentence and prevent a possible miscue. But on the pages of most newspapers, you regularly find sentences made worse by the omission of *that*. Here is a sampling from one day's *Lansing State Journal*:

- "The court ruled liability can exist only when school officials know about and are deliberately indifferent to sexual harassment."

- "The court's four dissenters warned the ruling sets a dangerous precedent."

- "Schauer admits concealed weapons isn't one of his favorite topics."

- "State Board of Education President Dorothy Beardmore agreed too many changes are being thrown at schools."

A few verbs—*say, feel, think, hope*—will tolerate the omission of *that*, but most will not.

Fourth, newspapers overdo sentence fragments and one-sentence paragraphs. Both are especially beloved by sportswriters, perhaps on the theory that the gold medal goes to the breeziest style.

## 9. With numbers, avoid the quirks of legal style.

First, do not double up on words and numbers. Consider the following: "The redemption period shall be six (6) months from the date of sale unless the property is abandoned, in which case the redemption period shall be thirty (30) days from the date of sale." What, pray tell, is the point of the doubling? Is there any real chance of typographical error? Let's do it once and get it right. Otherwise, you produce monstrosities like this: "The amount claimed to be due on the mortgage is the sum of five hundred fifty eight thousand two hundred ten and 23/100 dollars (\$558,210.23)."

Second, generally use numerals for numbers above ten. In other words, forget *The Bluebook* on this one and join the rest of

the world. Of course, there are special rules for money, measurements, fractions, and some others. *The Gregg Reference Manual* covers all the variations.

Third, do not show cents with round dollar figures. Write *a nonrefundable fee of \$20* (not \$20.00).

## 10. Prefer English plurals.

Over time, most foreign words become familiar enough that they lose their sense of foreignness and can take English plurals. We can argue over individual words, but given a fairly equal choice between alternatives, we should generally prefer English. Write *appendixes, formulas, forums, indexes, memorandums, millenniums, referendums, syllabuses, symposiums*.

On the other hand, some foreign plurals have not become anglicized: *analyses, bases, criteria, hypotheses, phenomena* (except for persons), *theses*. When in doubt, consult a good guide to current usage.

## 11. Give *shall* the boot; use *must* for required actions.

Nobody uses *shall* in ordinary speech. Nobody says, "You shall finish the project in a week." So unless lawyers can make a case for *shall*, it should be relegated to the heap—along with *aforsaid, to wit*, and all the rest.

Lawyers may argue that they use *shall* consistently to impose a duty and that *shall* has a settled meaning in law. Not true and not true.

Lawyers regularly misuse *shall* to mean something other than "has a duty to":



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for *Clarity* (the international plain-language organization). He has written many articles on legal writing. He was recently appointed the drafting consultant to the Standing Committee on Rules of Practice and Procedure of the Judicial Conference of the United States.

• “There shall be no right of appeal.” (Change *shall be* to *is*. You are not imposing a duty; you are declaring a legal fact or policy.)

• “Days’ shall be defined as calendar days, unless otherwise specified.” (Change *shall be defined as* to *means*. Same reason as in the first example.)

• “No professor or employee shall individually resolve or attempt to resolve a suspected violation.” (Change *shall* to *may*. You are not negating a duty; you are negating permission.)

• “Appropriate sanctions shall include any one or more of the following . . . .” (Omit *shall*. Better yet, identify the agent. If you are imposing a duty, make it *The hearing panel must impose one or more of the following sanctions*. If you are granting permission, make it *The hearing panel may impose one or more of the following sanctions*.)

*Shall* has become so corrupted by misuse that it has no firm meaning. It can mean “must,” “should,” “will,” “may,” or “is.” No wonder, then, that *Words and Phrases*

takes 93 pages to summarize the more than 1,200 cases interpreting *shall*.

Since *must* is less legalistic and less corrupted, it’s a better choice for required actions, and the change has already started to take place. The new Federal Rules of Appellate Procedure, for instance, use *must*, not *shall*. So do the proposed new Federal Rules of Criminal Procedure.

## 12. Banish *prior to*.

*Prior to* takes the booby prize for the most common inflated phrase in legal and official writing. Why would anyone prefer it to *before*? Try to think of a single literary title or line that uses *prior to*. *Two Years Prior to the Mast*? “’Twas the night prior to Christmas”? “And miles to go prior to my sleeping”?

By itself, *prior to* may seem insignificant. But it often leads to clumsy, indirect constructions:

• “This will be the last recorded message you hear prior to your call being answered.” (Make it *before we answer your call*.)

• “Prior to the argument by the attorneys on the objection, the court excused the jury.” (Make it *Before the attorneys argued the objection . . .*.)

More important, a fondness for *prior to* may indicate a fondness for jargon—and a blind resistance to using plain words. That resistance, that cast of mind, is in large part responsible for the state of legal writing. ■

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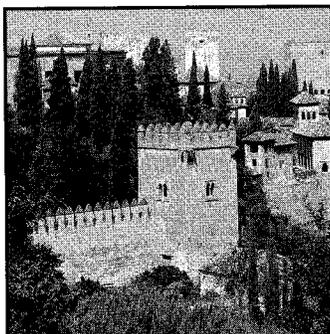
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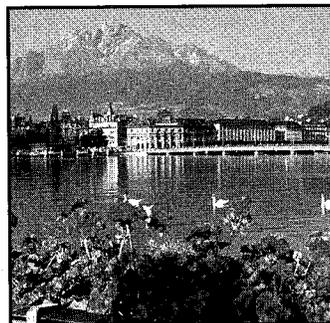
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