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Legal writing: A contract between the reader and writer

By Andrew J. Guilford
U.S. District Court, Central District of California



During my 35 years as a lawyer and judge, the information and instruction I've received from informative articles in the California Bar Journal have been a blessing. Perhaps the biggest blessing has come from occasional instruction on effective legal writing. The rules promoting clarity and conciseness have not changed over the years, but unfortunately, neither has the consistent core of ineffective writers ignoring those rules. So, standing on the shoulders of previous prophets, I repeat here the gospel of good legal writing from my perspective after 35 years of writing and reading too many unfocused words.

But before reciting the rules, I pause to note that people may write differently because they read and process information differently, and their writing reflects how they read and process. Thus, there may be a personal bias in what follows. Still, the key rules here are found in most other pieces on good writing, and these rules promote clarity for most people.

Writing rules and contracts

To begin, it's helpful for a piece of legal writing to have a common theme — a general tapestry with each thread woven into the whole. A theme helps focus thoughts on the important forest, rather than the distracting trees, and as it shortens writings, it saves trees from the paper mills. The theme of this article is that the author of a legal writing has a contract with the reader. If the reader commits to giving the legal writer time to read the piece, the writer commits to value that time by using it wisely and presenting thoughts that flow clearly and concisely. Though I've not seen this theme presented before, on this theme can hang all the writing laws from previous prophets of righteous legal writing.

The core of this contract between the writer and reader is that the reader should never have to reread a passage to understand it properly. A writing requiring rereads wastes the reader's time, and the longer the passage needing to be reread, the greater the waste. I hope this article doesn't breach my end of the bargain with you.

Games for good writing

A good way to achieve concise cogency is to think of your reader as an unsophisticated person sitting at the breakfast table trying to understand your writing. True, many issues in our complex technical world can't be easily explained to all. But this is still a helpful game.

Even better, as you imagine this unsophisticated person sitting at the breakfast table trying to understand your writing, imagine further that you're talking to this person. Don't use words that you would not use in regular conversations. Writing with a conversational tone increases accessibility. Winston Churchill, a Nobel Laureate for his writing and one of the greatest oral and written communicators in the English language, said, "Let us not shrink from using short expressive phrases, even if it is conversational."

Further, since contractions are part of conversational communications, consider using them to make your writing more accessible. True, you must always consider the risk of offending the erudite, but you must remember that many great legal thinkers and writers like Chief Judge Alex Kozinski use plain English and contractions.

Writing for all the various sorts and conditions of folks makes not only better writers, but also better trial lawyers, since people usually talk

like they write, and juries appreciate straightforward language. It also generally improves the image of lawyers, who are often attacked for being stuffy, pretentious and pompous.

Another helpful game is to imagine that, as part of the writer-reader contract, the reader gets to charge the writer for each word read. I've played a related helpful game with colleagues toiling with me on legal writing: if a word can be removed without changing the effectiveness of the writing, the writer pays the reader a dollar. A few rounds of this game sensitize the writer to unnecessary words. I've even played the game with opposing counsel, and we once achieved an effective written exchange with no words at all. We both knew he was late in sending money owed, so I sent him a demand letter that simply said: "?". My quick letter got a quick response, and I received a check with his letter that simply said: "\$". Wordless written communication is rare, but even one or two word sentences can be winners.

Less is more

Short size matters

Since the writer-reader contract requires valuing the reader's time, it's best honored with overall brevity, short sentences, short paragraphs and short, simple words.

Brevity is the soul of wit. And since here "wit" means intelligence, brevity is also the soul of good expository writing. Every word that doesn't help your cause hurts your cause. If you include facts such as dates in your writing, your reader should properly conclude that those facts are necessary for your point. Don't include nonessential dates.

Why short sentences? When a reader comes to the period ending a sentence in the linear technical exposition that is legal writing, something special happens. For a fraction of a second, the reader pauses to confirm that the previous thought is understood and then moves on to the next thought. If any thought is not understood, the sentence must be reread and the writer-reader contract is breached. Short sentences help that process, and when rereading is necessary, short sentences are a blessing. Complex convoluted sentences are more challenging in confirming understanding, making rereads more likely and obviously more time-consuming. And by the way, replacing periods with semicolons can cause problems. They lengthen sentences and leave the reader wondering where to pause for reflection. They are "ugly, ugly as a tick on a dog's belly," according to Postmodernist American writer Donald Barthelme.

As with sentences, a paragraph's end tells the reader to pause briefly to confirm that the previous thought collection is understood. The shorter the paragraph, the more easily this is done, and obviously the more quickly the paragraph can be reread if necessary.

Simple things

Short, simple words commonly understood also honor the writer-reader contract. English often presents a choice between two words with similar meanings, with one a powerful four-letter Anglo-Saxon word and the other a longer, more erudite, less powerful word. Shorter words with fewer syllables bring conciseness and cogency. As Churchill, that peerless practitioner of clear communication, succinctly said, "Short words are best . . ."

Many accomplished legal writers, like Justice William Rylaarsdam, keep a list of improper long words or phrases and the shorter synonymous words or phrases that should always be substituted. There are many such lists that can easily be found with a Google search that includes the word "legalese," and these lists all include the usual suspects. Get such a list and follow it. For starters, use "before," not "prior to," and when it matches your meaning, use "talk," not "communicate," use "said" not "indicate," and use "car," not "vehicle."

Turning to another specific, though it might be the peculiar operations of my mind, "notwithstanding" always seems to me to suggest the opposite of what was intended. Try "despite."

Short words also increase clarity because often the longer, more erudite word has multiple meanings. Too often, lawyers say "the judge indicated that the plaintiff would win" when the judge actually provided the welcome certainty of saying the plaintiff would win. Using "indicate" here to mean "said" leaves the reader wondering if perhaps the judge merely hinted at a plaintiff victory, like maybe with a telling wink.

Further, the more erudite word sometimes has two conflicting meanings. Consider the possible meanings in "the judge sanctioned my conduct" or "the borrower secured the loan" or "the corporation fabricated an effective plug for the leak." It's better to use the simple verbs "punished" and "got" and "made" respectively if that's what happened. Folks taking the oath for admission to the Federal Bar understandably giggle when they say, "I will demean myself as an attorney . . ." Better to use "conduct." Conflicting meanings may be helpful when writing fiction that is purposefully ambiguous, but they're horrible in linear expository legal writing (and in oaths).

So erudite words can be confusing, and often breach the writer-reader contract. And by the way, if you're thinking the word "erudite" is probably sinfully erudite itself, good for you. Consider using "intellectual," "scholarly" or "highbrow" — or maybe "stuffy," "pretentious" or "pompous." William F. Buckley Jr. often tried to impress with his erudition. But perhaps he should have cared enough about his ideas to focus instead on effective communication. That would have honored his contracts with his readers and more effectively delivered his message. Sending a reader to a dictionary breaches the contract.

A related provision of the writer-reader contract is that archaic words and legalistic phrases should be avoided. Take the typical pleading —

please. Too often, complaints begin, "Comes now the plaintiff . . ." This archaic legalistic phrase is perhaps inserted to indicate an erudite writer but instead reveals a writer bound to dusty forms. Drop it. And at the end of a pleading like a complaint, consider going where few pleaders have ever gone before: Replace "wherefore" with "therefore." Writers of the world should unite and untie themselves from archaic, legalistic forms.

Likewise, Latin and other foreign phrases and forms usually are merely "Greek" to many readers. In the 21st Century, why do we continue to use Roman numerals in our headings? When in 21st Century America, do not do as the Romans did — MMCD years ago. A modern reader is likely to find the decimal system for outlying headings friendlier than Roman numerals, and "2.3.1.4" in a heading gives far more organizational information deep into a topic than "iv" or "d." (But the decimal format starts to lose its attractiveness — and writings start to lose cogency — at the fourth level of an outline.)

Finally, be careful about using acronyms. They can be helpful in shortening a writing and acronyms of some organizations are always proper. For well-known institutions like UCLA, do not bother with periods after the letters. But the excessive use of acronyms can cause confusion with too many obscure letters floating around to leave readers feeling that they're eating an alphabet soup with a fork.

Moving along with transitions, and other style points

Transitions

So, brevity, short sentences, short paragraphs, and short simple words honor the writer-reader contract. So far so good. But what about organizing the words and thoughts? Transitional phrases, perhaps like the previous sentences, help the flow and make rereads less likely. Presiding Justice David Sills is very effective in using conversational transitional phrases creatively. Consider these: "That much is clear," "To sum up," "Let's stop here for a second," and "So now to section 286." Oh, and one last thing, the folksy, conversational transitional phrase at the beginning of this sentence appears in a great book co-authored by grammar guru Bryan Garner and the somewhat formal Justice Antonin Scalia. Antonin Scalia and Bryan Garner, Making Your Case, The Art of Persuading Judges 74 (Thomson/West 2008).

Active voice

Moving to other style pointers, compliance with the writer-reader contract almost always requires using the active voice, not the passive voice. The active voice requires fewer words that usually deliver more information with more punch. "Wills stole a base" is better than "A base was stolen by Wills" or "A base was stolen." The passive voice, however, may be needed sometimes, such as to shift emphasis or conceal the actor. Thus, some might prefer "The series was lost" rather than "James lost the series."

Prepositions

As just shown, the passive voice often involves an extra preposition as in "by Wills." Excessive prepositions clearly breach the writer-reader contract. Too often prepositions simply fill up space without providing information or moving things along. Yes, sentences sometimes need prepositions as "glue" words, but too many of them bury the "working" words. When I read or hear too many prepositions, I sometimes get the image of the communicators talking with cotton in their mouths. Their thoughts seem impeded and muffled. Far from punchy, their message is pudgy. They're violating their contract with me.

The worst example of excessive prepositions, found too often in legal writing, is the three-word phrase, beginning and ending with prepositions, that a single word can almost always effectively replace. "Concerning prepositions" is far better than "With respect to prepositions." And, like other bad style, this phrase produces confusion and might communicate that the writer actually is showing "respect" for prepositions.

Footnotes

Since a writer has a contract with the reader to set up a simple flow from sentence to sentence, paragraph to paragraph, and thought to thought, a footnote almost always breaches that contract by destroying the flow. Perhaps it's considered scholarly thanks to volumes of excessively footnoted law reviews, but it still breaches the contract for clear communication. The reader must stop, remember where the flow of information is at the footnoted text, drop down, consider the flow of information in the footnote, and then adjust back to the flow of information in the main text. It's far better to work the footnote information into the flow of the text. And if it doesn't fit into the flow of the text, it probably should be cut.

I once heard Judge Robert Weil tell lawyers that reading a footnote is like coming downstairs on your honeymoon to answer the door. The use of footnotes has been fought by notable writers like Justice Arthur Goldberg, Justice Stephen Breyer and Judge Richard Posner. Judge Abner Mikva has said that if humans were designed to read footnotes, our eyes would be placed vertically on our faces, not horizontally. Know that judges are not blind to the tactic of squeezing excessive words under a page limitation by using single-spacing and smaller type in footnotes. Footnotes are particularly frustrating in some modern digital formatting where there is no page bottom, like the digital formatting for some case reports. (There may be exceptions allowing footnotes, such as for necessary — but distracting — citations, or necessary information the writer wishes to de-emphasize. But perhaps the solution there is a parenthetical rather than a footnote.)

And, but, etc.

Which raises the issue of “but.” Countless schoolmarm may start spinning in their graves. But a sentence can start with “but.” It’s not only proper, but usually preferable. Noted writing expert William Zinser says this on using “but”: “There’s no stronger word at the start. It announces total contrast with what has gone before, and the reader is thereby primed for the change.” William Zinser, *On Writing Well* 73 (7th ed., HarperCollins 2006). “But” is usually better than “however.” As Garner wrote, “However — three syllables followed by a comma — is a ponderous way of introducing a contrast, and it leads to unemphatic sentences.” Bryan Garner, *Garner’s Modern American Usage* 414 (2d ed. Oxford Univ. Press 2003). In short, as Arizona attorney David Abney said, “Starting sentences with a snappy but shortens sentences, clarifies differences, draws attention, and adds punch.” And starting a sentence with “and” is a snappy, emphatic way to shorten and accelerate sentences, add pizzazz and highlight similarities.

Other schoolmarm rules need not be followed on those rare occasions where the rule impedes the effective flow of thoughts. Thus it’s okay to sometimes split an infinitive or dangle a preposition. On the rule against dangling prepositions, Churchill satirically summed up the point by saying, “That is the type of arrant pedantry up with which I shall not put.”

Hyphens

What about hyphens? Churchill said hyphens were “a blemish, to be avoided wherever possible,” and since this great communicator avoided hyphenating words, we should too, unless confusion results. So to avoid confusion, don’t drop the hyphen and write “high school student” if it incorrectly implies a school student on drugs. Instead, use “high-school student.” But there is never any confusion in using “email” rather than “e-mail.”

Whither creativity

By now, the reader may be thinking that concise writing with short words, sentences and paragraphs may be just too plain dull. Right brains may be screaming that the English language is rich, and our writing should be intelligently embellished by such richness. But intelligence can be demonstrated without disturbing the flow of thoughts. And actually, in expository writing intelligence is best demonstrated by the easy flow of thoughts.

Still, if done well, effectiveness can be increased with right brain devices like metaphors, similes, understatement, humor, beat, meter, rhythm, rhyme, quotations and allusions from literature and other writings, alliteration, antithesis, analogy, anaphora and anastrophe. Maybe even, when you come to the pun fork in the road, you should take it — or maybe not. And all of these devices must be used carefully so as never to impede the flow of thoughts.

Likewise, though short sentences are best, varying sentence length increases effectiveness, as long as clarity and conciseness are never sacrificed. And remember that Ernest Hemingway’s short sentences are not boring.

Sexist language

Oh, and one last point to end this style section. Sexist language can hurt both feelings and the flow of thoughts and it can cause other harm. Seek gender neutrality, which usually is achieved by structuring sentences to use plural pronouns like “they,” rather than singular pronouns like “he.” Thus, rather than “A lawyer should simplify his briefs” try “Lawyers should simplify their briefs.”

Judicial opinions

Finally, this contract between the writer and reader applies to judges who write opinions. Fair is fair, and clarity is clarity. True, there are differences between a brief and a legal opinion. Briefs call for advocacy while judicial opinions may make the common law. Judges properly want to preserve the dignity of the courts and some perhaps want to display their erudition. But pomposity is never good and clear communication is always key, particularly when it becomes part of the common law.

Clear and simple judicial opinions can help solve the problem often noted of obtuse jury instructions. Since jury instructions are regularly taken from judicial opinions, clear and simple judicial opinions produce understandable jury instructions.

A judge must always consider the audience for the legal opinion. The audience includes those immediately affected by the opinion, like the unsophisticated relative of the criminal defendant being sent to prison, the victims of that defendant and the working class shareholders of a corporation whose stock drops due to the opinion. It also includes citizens and others who read the opinion as part of our common law or jurors who hear jury instructions based on that law. This makes the contract between the judge writing opinions and those reading them even more important. Indeed, the goal of providing access to justice should include providing access to understanding the meaning of judicial opinions.

Where to, End?

And so dear reader, if you have given me your time to read this far I owe you my appreciation and, with nothing further to write worthy of your time, our contract requires me to STOP.

Andrew J. Guilford can be reached at [AG Chambers@cacd.uscourts.gov](mailto:AG_Chambers@cacd.uscourts.gov)