Trans-Litigation Techniques
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Creative *and* Ethical Legal Writing
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Preface

Lawyers write, so to speak. Contrary to conventional wisdom, lawyers are not mouthpieces. Most of what we do results in a writing of one sort or another. Most oral presentations follow notes, outlines, or scripts. All of what we do is done best when our writing passes literary muster.

Genrè divides the literary world by poetry, prose, fiction and other arbitrary classifications. C*reative nonfiction* is the latest genre in American literary circles. It has yet to crack the legal world because lawyers write, for the most part, non-creative, nonfiction. In crafting our peculiar brand of nonfiction we disdain creativity. Notwithstanding the lawyer's inherent suspicion of new things, the creative non-fiction genre is expansive enough to include the second oldest profession.

Non-lawyer writers who are drawn to creative non-fiction see the larger world of experience as a source of inspiration. Lawyer writers either don't see it at all or focus too intently on mere remedies and defenses. This short paper is an effort to redesign that focus.

Creative non-fiction is the fusion of factual prose with *literary* prose. The very act of separating trade fiction from literary fiction may be elitist to some and opportunistic to others. Nevertheless, it is a clear line between being merely informational and visibly compelling. Said differently, it is the line between force-fed and savored.

Infusing non-fiction with stylistic devices, rhetorical flourishes and lyric phrasing is hardly intuitive. Like all art, it demands time, patience and practice. Unlike fiction, this newest genre demands undeviating fidelity to accuracy. Unlike fiction, the writing of a lawyer is time-bound, restricted by non-literary rules and usually addressed to a narrow audience. That does not mean it has to be long, boring, wordy or obtuse.

Lawyers are the ultimate advocates. Only a small part of our writing is intended to be informational. Our greater duty lies in advocating our client's positions. The advocacy of a lawyer is almost always presented to audiences that are closed to the client. Why then do we settle for advocacy that is unstructured, formless, and not stylistic (at least when viewed from a literary perspective)?

The best professional advocates have always inspired by their art as much as their knowledge. Clarence Darrow, John Bennett Williams and Joe Jamail have taught us that fact-based situations can be compellingly advocated by distinctive, artistic, even lofty, language and composition. All of them are known for their oral advocacy and all of them wrote out what they argued long before they rose up in the well of the court and wowed juries, judges and the press.

There are limitations inherent in creative non-fiction for lawyers. Unlike fiction writers who only have to worry about privacy torts, defamation, prior restraint, infliction of emotional distress and unkind critics, lawyers are restricted by rules of ethics and rules of procedure. The "ethical notes" which follow are not intended to be a comprehensive treatment of the ethics of writing. They are the most obvious restrictions and the ones most likely to turn your local bar association into your strongest literary critic.

Prefatory Ethical Notes

Ethical Note on Duration of Lawyer Client Relationship

[Comment to ER 1.16] Doubt about whether a client-lawyer relationship still exists should be clarified by the lawyer, preferably in writing, so that the client will not mistakenly suppose the lawyer is looking after the client's affairs when the lawyer has ceased to do so. For example, if a lawyer has handled a judicial or administrative proceeding that produced a result adverse to the client but has not been specifically instructed concerning pursuit of an appeal, the lawyer should advise the client of the possibility of appeal before relinquishing responsibility for the matter.

Ethical Note on Bar Admission and Discipline:

ER 8.1. An applicant for admission to the bar, or a lawyer in connection with a bar admission application or in connection with a disciplinary matter, shall not: (a) knowingly make a false statement of material fact; or (b) fail to disclose a fact necessary to correct a misapprehension known by the person to have arisen in the matter, or knowingly fail to respond to a lawful demand for information from an admissions or disciplinary authority, except that this rule does not require disclosure of information otherwise protected by Rule 1.6.

PART ONE: ORGANIZATIONAL STRUCTURE

Legal documents are structured in accordance with procedural rules, culture, and tradition. At first blush, it would appear that there is little room for "structural creativity". However, like the law itself, legal writing is an art form, a genre unto itself.

Legal documents should never be an outpouring of one's emotions, like love letters or sonnets built on fourteen-line frames of five-foot lines. Legal documents are reasoned intellectual declarations structured by type—pleadings, opinions, decisions, demands and requests. Nevertheless, they should comply with elementary principles of composition.

Paragraphs

Paragraphing is the basic design element in legal writing. It is easily recognizable, convenient and procedurally acceptable. However, the underlying strength of organizing by paragraphs is often ignored by lawyers.

A *single idea* is the best litmus test of whether to start or stop a paragraph. This aids the reader and guides the writer. Like all litmus tests, this one is overused. The exceptions to the *single idea* test in legal writing include: (a) Single ideas are not single sentences; (b) Transitional sentences are not single ideas; (c) Dialogue rules which dictate a single paragraph for a single word ("No" is one example) do not apply, and; (d) Legal paragraphing calls for a good eye as well as a logical mind.

The biggest mistake legal writers make in paragraphing is *length.* The enormous block of print that dominates briefs, motions, and pleadings is formidable to judges, clients, and opposing counsel. Consequently, overly long blocks of print are either ignored, like a bad novel, or merely scanned, by the dutiful client or judge.

The Dreaded Passive Voice

Verbs come in two types, active and passive. When active, the subject of the sentence does something. When passive, something is being done to the subject of the sentence. Strunk and White detest the passive verb. Stephen King abhors it. Lawyers wallow in it.

Why is that? Why do lawyers, who otherwise take pride in their prose, write passively? Because it is safe, that's why. There is no troublesome action to clarify. Those who read the appellate opinion, settlement demand, motion for summary judgment or securities opinion have only to close their eyes and "think of the law". At least, that was Justice Frankfurter's view of the matter.

Safety in passivity is not the only reason. One layer down from that protective coating is the need to be accepted. Sounding authoritative fills the need. A passive voice somehow lends authority to our work. For some, it even seems to lend a certain majesty.

Your deposition will be held at 9:00 p.m. on Friday, October 25, 2002.	You will be deposed next Friday, the 25th at nine in the morning.

Where the blonde, brash woman reached for the bridle on the red-headed stranger's horse which resulted in the killing of the woman by the red-headed stranger, the law will presume innocence based on the law relating to the protection of one's property upon the grounds and for the reason that,	You can't hang a man for killing a woman who's trying to steal his horse.
The plaintiff, having met his burden of proof, will be granted judgment, subject to compliance with the terms and conditions of Rule 56(e) and subject to the timeliness requirements set out in the Court's pervious order.	Judgment for Plaintiff.

The timid judge writes passively because he does not wish to give offense and hopes that the fact he ruled against the defendant will be overlooked in the passivity of the language. A simple "judgment for plaintiff", has fewer word and is more direct and a bit harsh. What will they think at the judicial convention?

Passive tense might be acceptable. Sometimes. However, it's contagious. While safe, it's weak. While lending authority, it's circuitous. It can add clarity at the expense of irking readers and gagging English teachers.

Passive voice is often used to express complex thoughts. At least we excuse it on that ground. Try breaking up a complex thought into two simple ones. The reader relaxes and the writer simplifies. Active, right?

Lawyers were invented to get people out of trouble. Why do we trouble our clients with passive verbs? Active voices, like verbs, are direct and vigorous.

Coming upon a man floundering in a swamp, the lawyer would likely define the duty of all passers by in terms of the common law rule of the necessity of a proper draining of the swamp and then apply that elementary principle to the duties of the Good Samaritan to seek and hopefully fetch a length of rope for the singular purpose of	Throw him a rope.
Judge McFate will always be remembered by me.	I will remember Judge Yale McFate
There were a large number of bodies lying beside the road within a few minutes of the first collision."	Dead bodies covered the ground.

The active voice forces good writing and better legal results. It brings life to tame sentences and lame pleadings. Active voice also demands attention. Stronger active sentences are shorter. Brevity is a by-product of vigor. The active form of the last three examples contains 70% fewer words.

Positive Language

Be definite. Don't hesitate. Commit yourself. Be positive.

He is often late to court.	He's late again
She never saw the value of learning the rules of procedure.	She thinks procedural rules are useless.
This kindly woman could surely not have ever espoused to commit such a heinous crime as has been described here which understandably raises the specter that someone else, perhaps looking like her,	Lizze Borden was framed.

Use "not" to deny something rather than to evade it.

Miranda v Arizona is rather weak in spots. The Court does not portray the petitioner as deserving and what he did does not remain long in memory as an important litigant in Fifth Amendment cases.	Miranda was an admitted serial rapist who is famous for how he confessed, not for what he did.
John Philip Walker Lindh, perhaps not realizing his perilous situation, did not deny his love of jihad and never disavowed his affection for Osama bin Laden but he did not do so in the negative context of the conspiracy statute endorsed by Congress, not recently, but rather during the time, two centuries past, when	He really needed a lawyer.
Ask not what your country can do for you; ask what you can for your country.	It's the economy, stupid.

All three examples show the weakness inherent in the word *not.* Readers are intuitively dissatisfied with being told only what is *not;* jurors, clients, judges and even opposing counsel respond better when told what *is*. Even negatives can be expressed in positive form: Dishonest is more positive than not honest. Untrustworthy is shorter than "did not act trustworthy" and "forgot" is clearer than "did not remember".

Concrete Language

Specific language will trump general verbiage. Definite is not vague. There is nothing concrete about abstraction.

A period of neglect set in.	He forgot every day for a week.
She showed her satisfaction as she moved steadily ahead toward her promotion.	She smiled all the way to the executive floor.
Upon approaching the apparent decline, while sitting some twelve feet from the window which was directly behind the drivers head, the passenger exited the safety of the rapidly advancing X-chassis vehicle just before the front wheels lost their traction upon firm roadway and	He jumped out of the truck just before it went over the cliff.

The best way to arouse the attention of one's audience is by being specific, definite, and concrete. Imagine the opening statement in the trial of an ocean liner that never arrived in port. Think about whether tentative language works as well as "cause and effect".

This the time for us to make our opening statements. Think of it as a jigsaw puzzle where the pieces come to you over the course of a month or so and it is hard to see the picture until the end. Now I am going to try to help you see the picture by describing the pieces and tell you that, . . ."	The unsinkable Titanic sunk and 1200 drowned.
There are times in the lives of some unfortunate women that cause them to take what some might think of as rash, perhaps even drastic, actions for the singular purpose of avoiding unpleasant, perhaps even harmful, events to oneself and that is why in this particular case, my client,	He beat her so she shot him.

Useless Language

Chefs never use hamburger helper. Cooks do. Lawyers who use needless words in their briefs, opinions, or letters are, like cooks, never really appreciated.

Good legal writing is always vigorous. Its vigor comes from conciseness. A good sentence contains no unnecessary words, paragraphs no unnecessary sentences, and briefs no unnecessary pages. Procedural rules allow, but do not require, a certain number of pages. Just as a good painting has no unnecessary lines, a good brief has no needless words. This does not mean short sentences, only that every word tells.

The question before the court as to whether	Whether
In a careless and neglectful manner	Carelessly
Plaintiff prays for summary judgment on the grounds and for the reason that there are no materially disputed issues of facts and because plaintiff is entitled to judgment as a matter of law under Rule 56 of the Arizona Rules of Civil Procedure	Plaintiff is entitled to summary judgment because

Tense

Most legal writing is a summary of something. Complaints are a summary of the essential facts, the applicable law and the remedy sought. Motions summarize the factual basis for interim rulings. Appellate briefs summarize hundreds of pages of trial transcript. Opinions letters summarize the legal principles extant in any given factual situation.

Conversely, poems, stories novels, and essays are often "stand alone" documents that make no attempt to summarize anything. Poems, stories, novels, and essays might be structured in past, present, or future tense.

Summaries should use the *present* tense. Shifting from one tense to another might add interest or mystery to a novel. Shifting tense only gives the appearance of uncertainty and irresolution to a summary. Of course, it is often necessary, even when using the present tense, to use passive verbs to indicate past activity.

Legal writers, when summarizing, often commit the sin of overworking such expressions as "the plaintiff said" or the "defendant asserts" or "the judge has ruled". There is a simple cure. Indicate clearly at the outset that what follows is summary, and then waste no words in repeating the notification.

In providing medical services to the plaintiff in this case, the defendant physician fell below the standard of care in several respects.	Dr. Jones fell below the standard of care because,

In the first place, Dr. Jones failed to conduct a complete and thorough physical examination.	He did not examine her,
As a cardiologist, he should have listened to the plaintiff's heart and he should have made sure that he had a complete accurate medical from the plaintiff.	did not listen to her heart
Dr. Jones also failed to perform a critical test by not giving the plaintiff an EKG in his office on the first day he saw him.	Take a medical history or perform an EKG.

Ethical Notes on "Organizational Structure"

Ethical Note on Fees

FEES: ER 1.5 (b)When the lawyer has not regularly represented the client, the basis or rate of the fee shall be communicated to the client, preferably in writing, before or within a reasonable time after commencing the representation (c) A contingent fee agreement shall be in writing and shall state the method by which the fee is to be determined, including the percentage or percentages that shall accrue to the lawyer in the event of settlement, trial or appeal, litigation and other expenses to be deducted from the recovery, and whether such expenses are to be deducted before or after the contingent fee is calculated. Upon conclusion of a contingent fee matter, the lawyer shall provide the client with a written statement stating the outcome of the matter and, if there is a recovery, showing the remittance to the client and the method of its determination

Ethical Note on Conflicts of Interest

CONFLICTS OF INTEREST: ER 1.8 (a) A lawyer shall not enter into a business transaction with a client or knowingly acquire an ownership, possessory, security or other pecuniary interest adverse to a client unless:(1) the transaction and terms on which the lawyer acquires the interest are fair and reasonable to the client and are fully disclosed and transmitted in writing to the client in a manner which can be reasonably understood by the client (2) the client is given a reasonable opportunity to seek the advice of independent counsel in the transaction; and (3) the client consents in writing thereto.. . (d) Prior to the conclusion of representation of a client, a lawyer shall not make or negotiate an agreement giving the lawyer literary or media rights to a portrayal or account based in substantial part on information relating to the representation

PART TWO: FORM

The "form" of legal writing, unlike fiction, is more or less dictated by the *point of view*. Legal writing is reportage, not confessional. It is interior monologue, not stream of conscientiousness. It may be overtly monologue, oratory or journal but never diary. Most importantly, legal writing implies a defined relationship between the writer and the reader. That relationship automatically implies a specific form for the telling of the pleading, brief, decision, or letter.

Form, as the defining characteristic of point of view, is critical to legal writing because it indicates the degree of self-consciousness the lawyer conveys. That alone, dictates a variety of other artistic choices. Lawyers must write in different forms to a different constitutiency, depending on the intimacy of the relationship.

Point of View

Point of view must be carefully considered and carefully varied depending on the writer's audience. The ethical duty to keep a client reasonably informed usually dictates a first person point of view in letters. The duty of candor in court, subject to the limitation of the attorney-client privilege, often dictates an authorial, omniscient perspective. The adversarial posture of litigation sometimes dictates a second person approach to communications with opposing counsel.

Clarity is essential, irrespective of which form is selected, or required. The fiction rule of identifying "who is speaking" applies as well to legal writing. Opening sentences in any legal document that are tentative and perplexing disguise perspective. Making sure that your reader knows exactly whom you are and why you are writing should never be tentative. Making sure that your reader knows you know whom she is should never be perplexing.

I know you can see the need for careful and cautious planning of an estate this large and subject to the ravenous appetite of the estate tax collector.	How much do you want your kids to get?
Ladies and Gentlemen of the jury, my client has no where to turn but to you because her employer's rigid rules of engagement are construed in such a way	They have their rules. She has you.
Does the tree love the axe?	The tree does not love the axe.

Colloquialisms, Exclamations and Cheap Shots

More is expected from lawyers. That is not an incomplete sentence. One could say that ours is a learned profession but one that puts on airs. Colloquialisms have a place in witness examination, factual recitation and, occasionally, responses to insults. However, like insults they suffer from a lack of creativity.

Inappropriate colloquial language is an invitation to the reader to join you in a select society of those who know better but from whom little is expected. Exclamations are the work of amateurs and cheap shots are just that.

My opponent's junkyard dog tactics are ridiculous to the max!!	Perhaps she does not recall the facts.
His imbecilic rants will not sway the court anymore than they swayed our thoughtful and courageous jury.	We urge the court to review the evidence that the jury so carefully considered.
He lied through his teeth and nobody cares.	The truth always wins.

Word Choice

Diction is far more for a lawyer than correctness or accurate meaning. For writers, bad English is embarrassing but for lawyers it can result in harm to the client. Poor word choice is easily overlooked in novels or news articles. The wrong word in a brief can cause the reader to put it down, along with the verdict of the lower court.

The English language is not rigid. Usage is suggested in guidelines, urged in workshops, redlined, blue penciled and tut-tutted. However, legal writing can be rigid, absolutely required, rejected, and costly to edit.

At its softest, diction is persuasive or boring, binding or loose, gut wrenching or curious and, far too often, head shaking. Incidentally, up and down head shaking can be a good thing. It is that side-to-side shake you want to keep your reader from doing.

Aforesaid	Mentioned earlier
The incident of September 11	The terror on September 11
Allude	Refer
He says	He claims
I consider her to be honest	I know she is honest
Etc.	And other things
I would like to object	I object
I feel the court was wrong	The court erred
I feel	I believe

She felt like	She
The Court said	The Court held
The Court held	The Court said
If it pleases the Court	May it please the Court
The loan was pre-approved	The loan was approved
Would	Should
I will	I shall
So good. So interesting. So accurate. So historic.	Good. Interesting. Accurate. Historic.

Ethical Notes on "Form"

Ethical Note Regarding Falsity

FALSITY: ER 4.1 (a) In the course of representing a client a lawyer shall not knowingly make a false statement of material fact or law to a third person;

Ethical Note Regarding Disclosure

DISCLOSURE: ER 4.1 (b) In the course of representing a client a lawyer shall not knowingly: fail to disclose a material fact to a third person when disclosure is necessary to avoid assisting a criminal or fraudulent act by a client, unless disclosure is prohibited by Rule 1.6.

Ethical Note Regarding Information

INFORMATION: ER 1.4 (a) A lawyer shall keep a client reasonably informed about the status of a matter and promptly comply with reasonable requests for information.

Ethical Note Regarding Explanations

EXPLANATION: ER 1.4 (b) A lawyer shall explain a matter to the extent reasonably necessary to permit the client to make informed decisions regarding the representation

Ethical Note Regarding Confidentiality

CONFIDENTIALITY: ER 1.6 (a) A lawyer shall not reveal information relating to representation of a client unless the client consents after consultation, except for disclosures that are impliedly authorized in order to carry out the representation, and except as stated in paragraphs (b),(c) and (d) or ER 3.3(A)(2)

Ethical Note Regarding Advice

ADVICE: ER 2.1 In representing a client, a lawyer shall exercise independent professional judgment and render candid advice. In rendering advice, a lawyer may refer not only to law but to other considerations such as moral, economic, social and political factors that may be relevant to the client's situation.

Ethical Note Regarding Use of Information

USE OF INFORMATION: ER 1.8(b) A lawyer shall not use information relating to representation of a client to the disadvantage of the client unless the client consents after consultation, except as permitted or required by Rule 1.6 or Rule 3.3.

Ethical Note Regarding Candor in Court

CANDOR IN COURT: ER 3.3 (a) A lawyer shall not knowingly:
(1) make a false statement of material fact or law to a tribunal;
(2) fail to disclose a material fact to a tribunal when disclosure is necessary to avoid assisting a criminal or fraudulent act by the client;
(3) fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel; or
(4) Offer evidence that the lawyer knows to be false. If a lawyer has offered material evidence and comes to know of its falsity, the lawyer shall take reasonable remedial measures.
(b) The duties stated in paragraph (a) continue to the conclusion of the proceeding, and apply even if compliance requires disclosure of information otherwise protected by Rule 1.6.
(c) A lawyer may refuse to offer evidence that the lawyer reasonably believes is false.
(d) In an ex parte proceeding, a lawyer shall inform the tribunal of all material facts known to the lawyer which will enable the tribunal to make an informed decision, whether or not the facts are adverse

ARCP 26.1 Each party shall disclose in WRITING to every other party—factual basis of claim or defense—legal theories—witnesses—persons with knowledge—experts—statements—evidence—documents—AND UNDER OATH.

PART THREE: STYLE

Organizational structure, voice, form, and diction are matters of correct or acceptable English. Style is as broad as it is subtle. In legal writing, it is best thought of in terms of distinguished and distinguishing. When a certain combination of words rise to persuasion, when they jar the reader, when they penetrate, they are distinguished. The distinguishing lawyer who writes with style is distinguished. Of course, he or she might still be mired in a second-rate practice but the writing is not to blame.

As art, legal writing, does not lend itself to a satisfactory style. There can be no infallible guide to "creative" legal writing. Nevertheless, like every other facet of law practice, one improves with experience. Not caring about what you write insures blandness and letting others write for you digs the rut deeper.

Mystery

Lawyers are natural skeptics. We might like mystery but we see little of it in our own written work or in the cases we read. That is largely because so few of us produce creative legal writings. Nevertheless, creative legal writing always has a mysterious quality to it. Style is elusive and never forgettable. The proof is in the statement. Thomas Paine is famous for a much-quoted sentence that has endured for well over two hundred years. A lawyer skeptical of the mystery of style might edit Paine in any one of the following ways.

"These are the times that try men's souls."	Times like these try men's souls.
"These are the times that try men's souls."	How trying it is to live in these times!
"These are the times that try men's souls."	These are trying times for men's souls.
"These are the times that try men's souls."	Soulwise, these are trying times.
"These are the times that try men's souls."	[I give up]

Why do these eight, short, easy words forming a simple declarative sentence rise up and jar the soggy brain? Why can every educated American complete the following sentence, "Ask not what your Country can do . . ." Why do all we know that, "You have the right to remain silent" is bad news and will be immediately followed by three additional warnings? In each case, the answer is the elusive, indefinable, and mysterious. Because it has style, that's why.

Worry not that you don't get it, worry that your writing doesn't have it. Style is not the garnish of writing, it's the main course. While style cannot be instilled in a bland lawyer, it can be honed in a creative legal writer.

You have the right to remain silent. You have the right to an attorney. Anything	The Miranda Warnings.

you say can and will be used against you. If you cannot afford an attorney one will be appointed for you.	
Your honor, it may not need saying but my client, being the worlds largest company, is concerned that the small child suing it may, solely on the grounds that she is an orphan, have somehow avoided the clear burden of proving her case by clear and convincing evidence and therefore might be unduly prejudiced given the unfortunate reality of her paralysis and	Hard cases make bad law.
The state has the burden of proving beyond any reasonable doubt that the death of the victim in this case was proximately caused by the frail and admittedly confused thinking of my client which is, as the court knows, a function of his age.	All they proved is that he was old

Write From Above

Drafting pleadings, letters or opinions ought to be a contemplative, calm, somewhat detached and serious exercise. Claiming, asking, informing, replying is best done when you are not in a hurry, not mad, not down, and not for show. Write important legal documents for the purpose of drawing your reader's attention to the substance of the writing rather than your mood.

Strunk and White taught that achieving style is best begun by "affecting none". The search for style is a doomed one. Accordingly, write from above not within the document.

The goal is to find style in the strength of the writing. Immersion and proficiency in the use of language, word choice, and voice will break the barriers that separate legal minds into good, better and best.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceable to assemble, and to petition the Government for a	Bills of rights give assurance to the individual of the preservation of his liberty. They do not define the liberty they promise. [Benjamin Cardozo]

redress of grievances. [First Amendment, 1791]	
The existence of a right to counsel of any sort did not exist in medieval England; it was not until the 15th Century that counsel was allowed to argue points of law and not until 1836 that counsel was allowed in felony cases. [Miranda v Arizona]	We deal here with growing law, and look to where we are going by where we have been. [John P. Frank, Petitioner's Counsel in Miranda v Arizona]
As the court knows from the record of the previous twenty-two judges and special masters who have ruled on the complex issues involved in the water rights dispute involving the Gila River as the case has gone through several discovery and adjudicatory phases during the twenty-seven since the filing of the original petition and has since that time, been the subject of more than sixty separate adjudications, modifications and reversals notwithstanding which we are hopeful that today we can	This is the last hair in the tail of procrastination.

Do Not Force It

Legal writing is often forced by court or agency rules and limited by both ethics and good manners. Creative legal writing can only be stylistic if it is natural and filled with words and phrases that come headily to the mind of the writer.

Live by the rules but write creatively is hardly a legal maxim. It is, however, apt here. You are not stuck with the language you grew up with or the force-fed jargon you ingested in law school. Imitation is the life-blood of good writing and legal writing is no exception. Read the better legal writers and take pains to admire what works.

This court will surely not dismiss the indictment upon the technical ground that there was no warrant for the search or the word of the defendant that he was beaten for three days before he confessed or that the gun was a police special registered in the name of the arresting officer and un-holstered by him on the videotape so recklessly taken by that nosey neighbor across the street.	I was with you Mr. Romley until I heard your argument.
My opponent is ready to get up here and offer you a rebuttal of my case but I am	I give up. Now I realize what Mark Twain meant when he said: "The more

confident you will not listen to him because he will have nothing new to say. I, on the other hand have made the case plain by using the thirty six diagrams stacked there on the table which are so simple that everyone here and perhaps the jury will understand them.	you explain it, the more I don't understand it."

Avoid Adverbs and Adjectives

The master of trade fiction, Stephen King, reminds novelists that adverbs are not their friends. Lawyers, on the other hand, routinely read cases by famous jurists who apparently believe that adverbs and adjectives are suitable alternatives for nouns and verbs.

Choosing strong nouns makes the selection of a modifying adjective unnecessary. Writing moving, active verbs can soften the dilemma of picking a weak adverb (not to mention avoiding the insidious split infinitive).

That said, adverbs and adjectives are still indispensable elements of legal writing. They can advocate not merely inform and can sprinkle excitement over a dry legal subject. The art and the style comes from sparing use and remembering the importance of presentation.

She is paralyzed.	She is permanently paralyzed.
The complicating factor in this case can be said to be the ambiguity of the seller's intent in defining a small widget in a way that sounded larger than is commonly thought.	The contract is simple. Little means small. This widget weighs over five tons.
The accident . . .	The bone-crushing crash . . .
The witness said, . . .	The only witness cried out, . . .
He was a man who said . . .	He was a little man who babbled . . .
Thin	Razor thin
Disadvantaged citizen	Destitute soul

Draft, Then Write.

James Joyce, when asked to name a few other great writers, said, "There are no great writers, there are only great rewriters". The lawyer who can produce what she is

after on the first try ought to abandon the law. There is more fun and a great deal more money in dominating the New York Times Best Seller List.

Cut, copy and paste commands are on the top of every computer toolbar for good reason. The best legal writers are surgeons, not internists. The only danger in rewriting is overwriting. Rich, overblown prose gags. Overstating your case begs rejection. A single, isolated overstatement subjects the entire document to doubt. Overstating, like its oral cousin, exaggeration, diminishes the whole.

The newspaper mantra of "if it bleeds, it leads" has a counterpart in bad legal writing. "If it screams it dies" makes all readers uneasy and unenthusiastic about the writer and, by extension, the pleading, opinion, or letter that was not so carefully rewritten.

The law leaves discretion to the judge.	The best law leaves the least discretion to the judge.
Judge Joseph Howe once had a friendly lawyer appear in his chambers to inform him that the Arizona Supreme Court had just affirmed his ruling in a controversial case.	Judge Howe, upon being told of the affirmance by his only friend, said, "I still think I was right."
How can the prosecutor seriously contend that my client is guilty of conspiring to commit fraud when the only evidence in the case is the documents that he drafted but never signed and which were never actually given to any of the investors? [Mara Siegel]	There is no such crime as a crime of thought; there are only crimes of action. [Clarence Darrow]

Clarity is Overrated

Clarity is a much sought after quality in diamonds, fine wines and good writing. It is essential to communication and therefore a virtue. Notwithstanding its beckoning call, it is not the prize. Clarity can obscure style.

Creative legal writing intends to persuade, maybe even beguile the reader. Filling out the subpoena form demands clarity but the settlement letter or the reply to the motion for summary judgment might, every so often, benefit from a little obscurity. Using obscurity as a stylistic and artistic choice demands high skill. If selected for a particular document, the creative legal writer should *be obscure clearly*.

Opinion letters in the municipal bond field and disclosure statements in civil litigation tell by not telling. Summary judgment motions avoid factual disputes and appellate briefs either point out or ignore fundamental error, depending on which side one is on.

While clarity may not win a prize, muddiness will guarantee last place. While there is a certain ludicrous aspect of obscure writing, it has a place in style. Just make sure that you follow the IRS rule, avoid, but do not evade.

My client's four prior misdemeanors are remote in time and different than his present crime.	Bill Martin's petty crimes, committed decades ago, pale in comparison to his good deeds of today.
Let me be crystal clear about the plaintiff's motivation in filing this injunctive relief case against the 501(c)(3) entity before the court.	Judge, the man wants to shut down Sister Teresa.
The allegation that he makes regarding the motivation he had for engaging in what he belatedly claims was a mere mistake but not the active choice to commit an act that might be construed as lacking conformance with equitable standards subsequent to the time that	No man should take advantage of his own wrong.

The Special Vocabulary of the Law

Every profession has its vocabulary but only the law is thought of as an "eeze". One does not hear of militaryeeze or teachereeze or even governmenteeze but they undisputedly have their unique vocabularies. Accordingly, legal writers must take care to identify the reader's familiarity with our jargon before processing the words.

Even where the code will be easily recognizable, care must be taken to avoid insider language that could be misinterpreted when the document is captured by the enemy or the press.

Fracturing grammar and crossbreeding parts of speech may be advertising jargon but are utterly unacceptable in legal documents. For the most part, legal documents must have a long shelf life whereas ads are discarded faster than used, Styrofoam cups. Legal documents are contextual and therefore reflect a particular situation rather than being situational.

Geeks download, broadband, boot up and mirror their drives with little thought or care whether the analogue world gets it. Lawyers subpoena, arraign, and sequester while logging time, thumbing files, and crossing witnesses. The difference is that lawyers must think about and take care to be inclusive, expansive, and attentive to the citizens and entities that we serve. While subpoenaing, arraigning, sequestering, and logging, we must avoid saying so, in writing, where the jargon would cause us embarrassment and harm to the client.

Municipal regulation can be considered by some as policy choices involving substantive process rights whereas others view the regulatory power in contrast to the public safety obligation of incorporated entities.	A nuisance may be merely the right thing in the wrong place, like a pig in a parlor instead of the barnyard.
A literal reading of this employment agreement will reveal the intent of the employer to have Ms. Siegel work the usual nine days each week and still attend the company picnic which is mandated consistently with the social nature of working where one lives.	There is no surer way to misread a contract than to read it literally.
Lawyers in Tennessee know that when you have the facts on your side, you argue the facts and when you have the law on your side, you argue the law and when you have neither, you holler. [Albert Gore, Jr. 1982]	He never admitted anything. But if he did admit something, he was pressured into it. And even if he did it, I NEVER KNEW IT. I NEVER DID. I NEVER DID.

Ethical Notes on "Style"

Ethical Note on Trial Publicity

TRIAL PUBLICITY: ER 3.6 (a) A lawyer who is participating or has participated in the investigation or litigation of a matter shall not make an extrajudicial statement that a reasonable person would expect to be disseminated by means of public communication if the lawyer knows or reasonably should know that it will have a substantial likelihood of materially prejudicing an adjudicative proceeding in the matter

Ethical Note on Prosecutors

PROSECUTORS: ER 3.8 The prosecutor in a criminal case shall:

(b) make reasonable efforts to assure that the accused has been advised of the right to, and the procedure for obtaining, counsel and has been given reasonable opportunity to obtain counsel;

(c) not seek to obtain from an unrepresented accused a waiver of important pretrial rights, such as the right to a preliminary hearing;

(d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the offense, and, in connection with sentencing, disclose to the defense and to the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal;

Ethical Note on Administrative Hearings

LEGISLATIVE AND ADMINISTRATIVE HEARING: ER 3.9 A lawyer representing a client before a legislative or administrative tribunal in a non-adjudicative proceeding shall disclose that the appearance is in a representative capacity and shall conform to the provisions of Rules 3.3(a) through (c), 3.4(a) through (c), and 3.5.

Ethical Note on Communicating with Represented Persons

SPEAKING WITH REPRESENTED PERSONS: ER 4.2 In representing a client, a lawyer shall not communicate about the subject of the representation with a person the lawyer knows to be represented by another lawyer in the matter, unless the lawyer has the consent of the other lawyer or is authorized by law to do so.

Ethical Note on Dealing with Un-Represented Persons

DEALING WITH UN-REPRESENTED PERSONS: ER 4.3 In dealing on behalf of a client with a person who is not represented by counsel, a lawyer shall not state or imply that the lawyer is disinterested. When the lawyer knows or reasonably should know that the unrepresented person misunderstands the lawyer's role in the matter, the lawyer shall make reasonable efforts to correct the misunderstanding.

Ethical Note on Marketing

MARKETING: ER 7.1 A lawyer shall not make a false or misleading communication about the lawyer or the lawyer's services. A communication is false or misleading if [[SEE LONG LIST UNDER ARSC 42—ER7.1]]

Ethical Note on Solicitation

SOLICITATION: ER 7.3 (a) A lawyer may not solicit professional employment from a prospective client with whom the lawyer has no family or prior professional relationship in person or by telephone, when a motive for the lawyer's doing so is the lawyer's pecuniary gain. [[SEE LONG LIST UNDER ARSC 42 ER 7.3 REGARDING ADVERTISING MATERIAL]]

Ethical Note on Fields of Practice

FIELDS OF PRACTICE: ER 7.4 A lawyer may communicate the fact that the lawyer does or does not practice in particular fields of law. A lawyer shall not state or imply that the lawyer has been recognized or certified as a specialist in a particular field of law except as follows

Ethical Note on Firm Names.

FIRM NAMES: ER 7.5 (a) A lawyer shall not use a firm name, letterhead or other professional designation that violates Rule 7.1. A trade name may NOT be used by a lawyer in private practice. . (d) Lawyers may state or imply that they practice in a partnership or other organization only when that is the fact.

Conclusion

Sir Thomas More was both cleric and lawyer. He was not, however, a creative writer. He famously and passively said,

> All laws are promulgated for this end: that every man know his duty; and therefore the plainest and most obvious sense of the words which must be put on them. *Utopia,* 1516

Writers know that a word must be a friend. Only friends can be understood, even when they are obscure. Lawyers seek detachment and independence but sometimes miss meaning. Like the client who asks if we believe his story and we respond with information. Belief is a state of mind best expressed with emotion and passion.

Just as most wars have been fought over religion, most disputes arise from words. Justice Brandeis said, "In the case at bar, also, the logic of words should yield to the logic of realities." Di Santo v Pennsylvania, 273 U.S. 34 (1927). It seems to me that we should be religious about our speech and speak realistically. That is, we should write and speak *creatively* and truthfully.

Concluding Ethical Notes

Ethical Note On Lawyers & Judges

LAWYERS AND JUDGES: ER 8.2 (a) A lawyer shall not make a statement that the lawyer knows to be false or with reckless disregard as to its truth or falsity concerning the qualifications or integrity of a judge, adjudicatory officer or public legal officer, or of a candidate for election or appointment to judicial or legal office.

Ethical Note On Reporting Misconduct

REPORTING MISCONDUCT: ER 8.3 (a) A lawyer having knowledge that another lawyer has committed a violation of the Rules of Professional Conduct that raises a substantial question as to that lawyer's honesty, trustworthiness or fitness as a lawyer in other respects, shall inform the appropriate professional authority except as otherwise provided in these rules or by law (c) This Rule does not require disclosure of information otherwise protected by Rule 1.6 or information gained by a lawyer while serving as a member of an approved lawyers assistance program to the extent that such information would be confidential if it were communicated subject to the attorney-client privilege and confidentiality has not been otherwise waived

Ethical Note on Misconduct

MISCONDUCT: ER 8.4 It is professional misconduct for a lawyer to (a) violate or attempt to violate the Rules of Professional Conduct, knowingly assist or induce another to do so, or do so through the acts of another; (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation; (e)state or imply an ability to influence improperly a government agency or official;

Gary L. Stuart
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