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Creative Writing For Lawyers

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Contents

Creative Nonfiction Technique

"The Thought Hath Good Lips and the Quill a Good Tongue."[1]

Lawyers write, so to speak. Most of what we do results in a writing of one sort or another. In addition to legal correctness, our writing should also pass literary muster. We write for a variety of purposes—to inform, explain, and advocate, often in the same document. Like our superiors (appellate court judges), we look for a bright line between what is informational and what is inspirational. And like lemmings, we lean toward information and avoid obvious attempts at inspiration. Were we to write more like novelists, we would savor nuance, avoid gratuitous repetition, and look for ways to make our work as inspiring as it is informative.

Stripped of the law's dust covers, what we do every day is tell stories (usually our client's stories). Sometimes we advocate our client's position within, or because of, the story. It is not enough to know the law and to learn the facts. We must see beyond the law and the facts to discover their underlying meaning. Only then can we dramatize that meaning in an interesting, evocative, and informative way. Our greatest duty lies in advocating our client's position. While we advocate to closed audiences, that does mean we settle for advocacy that is unstructured, formless, and not stylistic (at least when viewed from a literary perspective).

Unlike fiction writers who only have to worry about privacy torts, defamation, prior restraint, and unkind critics, lawyers are restricted by rules of ethics and procedure. While those rules do not contain a comprehensive treatment of the ethics of writing. Nevertheless, there are ethical considerations in constructing legal documents. Ignoring those considerations could turn your local bar association into your strongest literary critic.

Creative nonfiction is the latest genre form of writing. Lawyers write, for the most part, bland nonfiction. In creating our peculiar brand of nonfiction, we consciously reject literary flourish as a taint on the purity of legal rhetoric. That is misplaced pride because America's newest literary genre is expansive enough to include the second oldest profession. Non-legal writers drawn to creative nonfiction see the larger world of experience as a source of inspiration. Traditional legal writers either do not see it at all, or focus too intently on mere remedies and defenses. This seminar is an effort to expand the focus by freeing lawyers from the straightjacket of traditional legal writing.

[1] W. Gurney Burnham, *Putman's Complete Book of Quotations, Proverbs and Household Words,* 1927

Creative nonfiction is the fusion of factual prose with *literary* prose. The very act of separating trade fiction from literary fiction is elitist to some and opportunistic to others. Nevertheless, it separates writing that is merely informational to something that is visibly compelling. Said differently, it is the line between force-fed and savored. Infusing creative non-fiction with stylistic devices, rhetorical flourishes, and lyric phrasing is not intuitive. Like all art, it demands time, patience, and practice. Unlike novels, creative non-fiction 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 write to advocate a position, not merely to explain it. Only a small part of our writing is informational. Our greater duty lies in advocating our client's positions. We advocate in ways and to audiences that are unavailable to clients. Why then, should we settle for advocacy that is unstructured, formless, and not stylistic? Because of "how" we write, we are marginally acceptable in judge's chambers, and good literary agents will decline to represent most of us.

America's best professional advocates, sometimes called trial lawyers, have always inspired clients, judges and opposing counsel by their art as much as by their knowledge. Clarence Darrow, John Bennett Williams, and Joe Jamal used distinctive, artistic, and even lofty, language. Oral advocates to the bone, they nonetheless wrote their arguments long before they rose up in the well of the court to wow juries, judges, and the press.

"Eloquence May Set Fire to Reason."[2]

Novelists have a lot to teach lawyers about writing. Emotional vibrancy hallmarks the best fiction. The best legal writing settles for cogency, clarity, and comprehensiveness. Our goal in this seminar is to add the compelling qualities of fiction to legal writing without sacrificing truth. Procedural rules, culture, and tradition work hand in hand to define the structure of legal documents. 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. Nonetheless, they should reflect the human affects of legal controversy. Legal documents are reasoned intellectual inquiries structured by type—pleadings, opinions, decisions, demands and requests. Nevertheless, they should follow elementary principles of composition.

[2] Oliver Wendell Holmes, Gillow v. New York, 268 U.S. 652, 673 (1925).

"Every Why Hath a Wherefore."[3]

Brevity, simplicity, and cohesion are the Blackletter law of clear, effective legal writing. All of us will have acquired basic legal writing skills in our first year mandatory legal writing course. This workshop will expand those skills by focusing on the artistic style that differentiates *creative* nonfiction from *other* nonfiction.

Any lawyer can construct short, simple documents that inform the reader. Some lawyers are prone to longer, more complex, and occasionally obscure writing. For lawyers who want to persuade as well as inform, *creative* nonfiction technique is the answer. Any lawyer who is serious about writing and wants to inform, persuade, and occasionally inspire readers has to master the writer's craft. Lawyers who become masters of *creative* nonfiction will inspire clients, astound opponents, and impress judges.

Lawyers generally fail to take advantage of the most powerful opportunity they have to persuade and inspire—in the letters we write to our clients, opponents, judges, and one another. For the most part, we write lousy letters. Think about the letters you see in novels. They contain greater possibilities of murder than any poison. They inspire by touching that emotion in all of us that makes us want to turn the page. Good letters are never put down, never ignored, and always remembered. The novelist knows that you only write to a person when you are in the same place as your recipient. When a letter is a continuation of presence it is right, but when it confirms your absence, it is intolerable.

Paragraphs

Paragraphing is the basic design element in legal writing. It is easily recognizable, convenient and procedurally acceptable. However, lawyers too often ignore the underlying strength of organizing by paragraphs. A *single idea* is the best litmus test of whether to start, or stop a paragraph. This aids the reader and guides the writer. Of course, 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.

[3] Shakespeare, *The Comedy of Errors,* II, 2, 1592-1593.

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.

Passive Voice

The point about passive voice is that the subject of the clause does not perform the action of the verb. Instead, you back into the sentence. The unfailing test for passive voice is this: you must have a be-verb plus a past participle (usually a verb ending in a –ed). Passive constructions are easy to spot if you simply identify the be-verbs followed by past participles. Sometimes, however, the be-verbs do not appear; they are implied in the context of the sentence.

There are three separate problems with passive voice in legal documents. First, passive voice always adds a couple of unnecessary words. Second, it fails to say squarely "who did what." Third, the passive subverts the normal word order, thus making it harder to process the information. Sometimes, passive voice is justified, as when the actor is unimportant or unknown. Passive voice is acceptable when the punch needs to be at the end of the sentence. Passive voice is preferable when the focus of the sentence is on the thing being acted upon. And, it is just fine when the sentence actually sounds better by using passive voice. Strunk and White suggest that it be avoided. 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 appellate opinions, settlement demands, motions for summary judgment, or securities opinions, most of which are routinely written in passive voice, have only to close their eyes and "think of the law" (to paraphrase Justice Frankfurter).

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

The timid lawyer writes, "your deposition will be held at 9:00 p.m. on Friday, October 25, 2002" because she has learned that saying it that way makes clients believe that she knows her stuff. She could have said, "you will be deposed next Friday, the 25th at nine in the morning." That is a bit too direct, don't you think?

The timid judge writes, "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" because he does not wish to give offense. He hopes that the fact that he ruled against the

defendant will be overlooked in the passivity of the language. He could have ruled, "Judgment for Plaintiff." But that takes fewer words, is directly stated, and somewhat harsh. Whatever will they think at the judicial convention?

Passive tense is occasionally acceptable. Even so, it is always contagious. While safe, it is weak. While lending authority, it is circuitous. It can add clarity at the expense of irking readers and gagging English teachers. Passive voice can express complex thoughts. We often excuse its use 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 by Deus (or was it Zeus) to get people out of trouble. Why do we trouble our clients with passive verbs? The passive legal voice might say, "Judge Craig Blakey will always be remembered by me." Making it a bit more active by omitting "by me" merely makes the sentence indefinite. It also begs the question of whether some undisclosed person, or the world at large, will always remember Judge Blakey. An active voice is more direct and vigorous, "I will always remember Judge Craig Blakey."

The active voice forces good writing and better legal results. It brings life to tame sentences and lame pleadings. Passive: "There were a large number of bodies lying beside the road within a few minutes of the first collision." Active: "Dead bodies covered the ground." Active voice also demands attention. Passive: "The reason he left his employment was that his health became impaired." Active: "Poor health made him quit."

Stronger active sentences are shorter. Brevity is a by-product of vigor. The active form of the last three examples contains 70% fewer words. Are they clearer because they are shorter? You betcha.

Positive Language

Be definite. Do not hesitate. Commit yourself. "He was often late to court," is negative. "He's late again" is positive. "She never saw the value of learning the rules of procedure" is weaker than "She thought procedural rules were useless."

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." Alternatively, "Miranda was an admitted serial rapist who is famous for *how* he confessed, not for *what* he did."

All three examples show the weakness inherent in the word *not.* Readers are intuitively dissatisfied when told only what something is *not;* jurors, clients, judges, and even opposing counsel respond better when told what

something *is*. Express negatives 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 should always trump general verbiage. Definite phrasing is never vague. There is nothing concrete about abstraction. A general writer might say, "A period of neglect set in." A specific editor might rewrite, "He forgot every day for a week." Which is better, "She showed her satisfaction as she moved steadily up the corporate hierarchy?" or, "She smiled all the way to the executive suite."

The best way to arouse the attention of one's audience is by being specific, definite, and concrete. Just imagine the pretrial statement in a case for damages arising out of an ocean liner lost at sea.

Traditional Legal Writing	Creative Legal Writing
"This case arises out of the circumstances that surrounded the collision and damage to an ocean liner in the North Atlantic in 1912. It is a complex case, and one that will take several weeks to present, because dozens of witnesses will be called, and hundreds of exhibits will be offered. The Court will be the ultimate judge of which witnesses are probative and which exhibits are admitted. Until the case-in-chief is complete, it may be hard to see the enormity of what happened. But, with the court's indulgence, we will try to paint a visual evidentiary picture by summarizing the evidence, and outlining the legal theories which underlie the case."	"The unsinkable Titanic sunk and 1200 drowned."

Useless Language

Chefs never use hamburger helper. Cooks do. Lawyers who use needless words in their briefs, opinions, or letters are, like cooks, appreciated, but never venerated. Good legal writing is always vigorous. Its vigor comes from

conciseness. Unnecessary words only add length to sentences. Long paragraphs usually include unnecessary sentences. A good brief is brief. 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 . . .
There is no doubt but that . . .	Doubtless,
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 because . . .	Plaintiff is entitled to summary judgment because . . .

Tense and Summarizing

Tense is a timeframe of reference. English has three basic timeframes: present, past and future. Tenses (plural) show the time of a verb's action and classify each tense as simple, perfect, or progressive. Use the simple present tense for actions occurring now, or habitually. Use simple past tense for actions completed at a specific time in the past. Perfect and progressive tenses are beyond the scope of this paper (not to mention this writer).

Lawyers should leave verb tense alone. Our readers can "hear" when the verb tense is wrong. Some fiction writers fret about consistency in verb tense. Lawyers tend to ignore shifts in verb tense, and often move from one to another in the same sentence. Fortunately, our readers, unlike fiction readers, ain't all that particular.

Tense is important for lawyers, primarily because of *what* we write. 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, and legal predicates for interim rulings. Appellate briefs summarize hundreds of pages of trial transcript. Opinions letters summarize the legal principles extant in every factual situation.

Conversely, poems, stories novels, and essays are often "stand alone" documents. They do not attempt to summarize anything. Poems, stories, novels, are written in past, present, or future tense. Summaries are *present* tense documents. 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.

Traditional Legal Writing	Creative Legal Writing
In providing medical services to the plaintiff in this case, the defendant physician, Dr. Jones, fell below the standard of care in several respects.	Dr. Jones fell below the standard of care because, . . .
Dr. Jones failed to conduct a complete physical examination on his patient, the plaintiff in this action.	He did not conduct a complete physical examination,
As a cardiologist, Dr. Jones should have listened to the plaintiff's heart.	did not listen to the patient's heart,
Dr. Jones also failed to take a complete medical history from the plaintiff.	or take a complete medical history, and
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.	Never gave his patient an EKG.

Form

The author's point of view dictates the "form" of legal writing. Legal writing is reportage, not confessional. It is interior monologue, rather than stream of consciousness. 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 demands a specific form for the telling the client's story in a 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 different audiences, depending on the intimacy of the relationship.

Point of View

Point of view varies greatly 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 usually calls for a third person approach to communications with opposing counsel.

Clarity is essential, whether in 1POV or 3POV. The fiction rule of identifying "who is speaking" applies equally well to legal writing. Opening sentences in any legal document that are tentative and perplexing disguise perspective. Making sure your reader knows exactly who you are, and why you are writing, should never be tentative. Ensuring that your reader knows you know who she is should never be perplexing. For example, if you represent the wife in a domestic relations case and she thinks you are really writing to her husband, you are in big trouble.

Colloquialisms, Exclamations and Cheap Shots

Expect more from lawyers. Most of us are not colloquial, rarely exclaim, and try to avoid cheap shots (at least from the other side). We do put on airs. Colloquialisms have a place in witness examination, factual recitation and, occasionally, responses to insults. However, like insults, our responses often 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 genuine harm to the client. Just as American English separates us from British English, the special language of the law separates lawyers from laymen. Who says "confected" to a pleading, or "confront" to an issue? Do you "imply" terms into a contract, while preferring "conclusional" over "conclusory." 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. That's why we have Garner's "*Modern Legal Usage*," alongside Blacks "*Legal Dictionary*." And it is why lawyers who obsess on writing have both Roget's "*Thesaurus of English Words and Phrases*" and Burton's "*Legal Thesaurus*" on their back credenzas. Every lawyer learns at some point why law terms are omitted from standard unabridged dictionaries. Try looking up enjoinable, litigational, pretextural, quashal, or veniremember, in your *Funk and Wagnall's*. Language carries meaning and arouses spirit only when it is comprehensible. Excess words misdirect. Ambitious words confuse. Errors in diction destroy confidence. What lawyer can afford misdirection, confusion, or lack of confidence in a client? It happens when words are carelessly chosen, not edited out, or simply misused.

At its softest, diction is persuasive or boring, binding or loose, gut wrenching or curious and, far too often, head shaking. Up and down headshaking can be a good thing. It is "side-to-side" headshaking that you want to avoid.

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 [persons][cases]
I would like to object	I object
I feel the court was wrong	The court erred
I feel . . .	I believe . . .

She felt like . . .	She . . .
Irregardless	Regardless
Between you and I	Between you and me
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.

Style

Organizational structure, voice, form, and diction are matters of correct or at least acceptable English. Style is as broad as it is subtle. In legal writing, style equates to distinguished and distinguishing. When certain combinations of words rise to persuasion, when they jar the reader, when they penetrate, they are distinguished. The distinguishing lawyer who writes with style is always in demand, and usually well paid.

As art, legal writing, does not lend itself to a satisfactory style. There is 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

Legal documents need not be mysterious but should not *spoil* the reader's acceptance by beginning at the end or by failing to support the conclusion before announcing it. For example, when responding to a settlement offer,

begin with an explanation of the weakness of the offer, rather than a denial of it. It will garner some respect from the party making the offer, while at the same time forcing him to read your analysis of its weakness. If you begin by denying the offer that might be as far as the other side gets before crumpling it into a little paper ball and aiming for the waste basket in the corner of his little room. The ruling of the judge might be more available when his own intellectual reasoning is addressed at the outset, rather than beginning by suggesting his lack of understanding of precedent.

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 writing. 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.

Thomas Paine	**Thomas Paine's Editor**
"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; it has style.

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.

Write From Above

Drafting pleadings, letters, or opinions ought to be contemplative, calm, somewhat detached, and a serious exercise. Claiming, asking, informing, or replying is never well done when you are in a hurry, mad, or down. 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 said "achieving style is best begun by affecting none." The search for style is a doomed one. But if you write from above, and not from within, the document, your odds improve. The writer's voice has to carry the document, not the other way around. Unless you are recreating an experience and showing your reader the scene, issue, remedy, or consequence, you are just reciting facts or law. It's how you state the facts, and how you interpret the law that makes the difference. 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 documents into good, better, and best.

Do Not Force It

Legal writing is inhibited, as it should be, by court rules. It is appropriately limited by ethics and good manners. Creative legal writing can only be stylistic if it is natural and filled with words and phrases that come easily 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 swallowed 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.

Avoid Adverbs

The master of trade fiction, Stephen King, reminds novelists that adverbs are not their friends. The master of legal writing, Bryan Garner, says this "nonsense apparently derives from a phobia of anything resembling a split infinitive." Lawyers are betwixt and between. We 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 naggingly mention avoiding the insidiously split infinitive).

Even so, 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. Art and style comes from using the right words. Sometimes it means adding a word or two, or making fewer words do more work.

Traditional Legal Writing	Creative Legal Writing
She is paralyzed.	She is permanently paralyzed.
You will remember the contract because . . .	The contract is memorable.
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. You would have more fun, and a great deal more money, by routinely making the *New York Times* bestseller 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.

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 actually 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. 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 (not to be confused with the NBA rule—no harm, no foul).

Traditional Legal Writing	Creative Legal Writing
My client's four prior misdemeanors are remote in time and not really the same thing that he is doing now.	Harry Beans' 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 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, teachereeze, or even governmenteeze, but each calling has its own unique vocabularies. Accordingly, legal writers must take care to identify the reader's familiarity with our jargon before processing our words. Even where the code will be easily recognizable, take care to avoid insider language that could be misinterpreted when the document is captured by the enemy, or the press (which often qualifies in both categories).

Fracturing grammar and crossbreeding parts of speech may be advertising jargon but are client busters in our world. 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 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.

What We Say	**What We Should Say**
At the end of the direct, opposing counsel might . . .	When I finish my questions of you, her lawyer might . . .
In our 26.1 disclosure, we proffered some evidence to the effect that, . . .	We disclosed in court the facts . . .
Hearsay cannot be admitted unless accepted by court ruling and . . .	What someone says to someone else before the trial starts can't be used in court unless the judge decides based on . . .
Ab initio, the Court will determine the justicability of the cause, . . .	First, the judge will decide whether our case is . . .

What's Past—What's Ahead

The practice of law presents a broad, almost limitless opportunity for writers of creative nonfiction. Before the 1800's, traditional law firms would never have allowed young lawyers to write "creatively." Newbie lawyers would never have believed their writing would be increasingly creative. The mere use of the word "creative" implied that lawyers might make up the facts, create the law out of whole cloth, or at best, write subjectively about the law, instead of objectively, as they had been taught in law school. As society became more litigious, and as legislatures clamored for more statutory control, and less "common" law, lawyers began to sense that they would have to write

more creatively—interesting and dramatically, that is—to compete with the many forces undermining the rule of law in America.

Today, many (but not all) judges, and many (but still too few) law firms have accepted the fact that the law will survive creativity. And, if it is to survive "document preparers," "independent" paralegals with portfolios, and national advertisers who don't practice law but are born marketers, we need to upgrade our writing skills.

"A lawyer who has not studied economics and sociology is very apt to become a public enemy."[4]

Lawyers who do not read are doomed to failure as writers. While he was not speaking *about* lawyers (since he rarely spoke *to* them), *Oscar Wilde* famously said, "It is what you read when you don't have to that determines what you will be when you can't help it." Mr. Wilde recognized the beast, as well as the genius in lawyers when he said, "Lawyers always argue and they always win; the bastards."

The Beginning

Lewis Carroll knew something of beginnings. He famously said, "Begin at the beginning." Lawyers cannot take that too literally. Do not start a letter or a motion with the "Big Bang Theory" because it is the currently accepted explanation of the beginning of the universe. Lawyers, being more modest than physicists, must be careful to avoid beginnings that sound like endings.

Subject Matter

[4] Louis D. Brandies, 1856-1935, Samuel J. Konefsky, *The Legacy of Holmes and Brandies, (1956).*

Lawyers are lucky in many respects. Choosing the subject matter of a legal document is one such example. There is never a shortage of subjects. Our world presents itself in terms of conflict, crisis, and resolution. The need to address and resolve those conflicts with clients, opponents, and judges inevitably follows the jangle of the alarm clock and precedes pouring the orange juice.

The first challenge in legal writing is not facing the blank page. Lawyers must stare down the pile of legal material and knead it into pliable and acceptable biscuits. The biggest danger to *creative* legal writing lies in rearranging the pile only to later find that it remains "just as it was." The creative part is to identify, at the beginning, what is interesting, unique, or original in the pile.

Begin with what happened but shape that experience just as you shape the sentences that explain, rather than merely describe the experience. Aristotle said that a "probable impossibility" made a better start than an "improbable possibility." Perhaps he meant that a skillful legal writer could sell glass mountains to juries and hedonic contracts to eager investors. Nevertheless, Aristotle was philosophizing, not creating a legal document. The moral of his message reminds us that a *creative* legal writer is more compelling than a lawyer whose knowledge of grammar is the limit of his writing skills.

Verbal Sensitivity

John Gardner speaks of "verbal sensitivity" in fictional beginnings. It applies equally well to legal documents. More importantly, it should define where we begin a legal document. Good grades in law school often predict how well a lawyer organizes material, sifts through it, and uses the law to advance the client's case. Good grades in English can be predictive of verbal sensitivity.

English has to do with relative competence, sensitivity, and sophistication. Law has to do with relevance, focus, and precedent. Combining English skills and legal knowledge often produces a good beginning in any legal document. It is not true that good lawyers have a keen feeling for the rhythm of the law, or for the connotations, and diction of legal words. Lawyers, like beginning writers, are prone to clunky sentences, feeble metaphors, and often-foolish word choices. They are not as harmful when buried in the middle of the legal document. However, when highlighted at the beginning of the document they invariably result in scanning, rather than reading. Decision makers, that is, clients, judges, buyers, and sellers rarely decide based on what they scan. They make decisions because the text is compelling and the arguments are persuasive.

Brilliance

While there are exceptions, good beginnings in legal documents are not dependent on legal or linguistic brilliance. Language, particularly at the beginning of any legal document ought not to be showy or grossly. Legal documents must be solid, documented, and progressive. As Lewis Carroll said, begin at the beginning. It is usually the first floor, not the penthouse.

Vividness

Fiction writers learn the importance of recreating the vivid and continuous dream of the writer in the story. Novelists aspire to capture language so that the reader, whenever he feels like it, may open the book and dream that dream again. Whether the dream is *vivid* depends on the novelist's language signals, i.e., the words, rhythms, metaphors, and transitions in the work. If they work, the dream is vivid.

Lawyers can accomplish much of the same feeling even though the work is read only once and even then only by a few readers. Novelists write for a largely unknown audience whereas lawyers write *to* someone well known. Therein lays a clue as to how to make the beginning of the work *vivid.* What is vivid to the young, unsophisticated client is often fresh, rapid phrasing that is not premised on historical analysis. What is vivid to an experienced judge might be a more intellectual and deeply reasoned presentation. What is vivid to an eager buyer is the promise, or at least the hint of future profit. The young client might bore easily; the experienced judge might disdain fresh, edgy phrasing. Excessive caution puts off eager investor, which of course, might be the goal of a securities offering, right? Vivid phrasing, like obscenity, lies in who is looking and who is reading.

Profluence

Novelists and nonfiction book-length writers must find some means of satisfying the typical reader's requirement for any piece of writing that exceeds a dozen pages. They must find a way to be profluent. Profluence is the sense that things are moving, getting somewhere, flowing forward. Lawyers often have an inherent advantage in this regard; we write really short stories that we call letters, motions and briefs. However, we squander the advantage if we belabor the point, dribble when we ought to shoot, and meander rather than grab the attention of the client,

judge, or opponent. To make it even more egregious, we belabor, dribble, and meander at the *beginning* of our documents.

Fiction readers are usually voluntary subjects. They can always find something else to read. On the other hand, clients, judges, and opponents are often compelled subjects. They cannot just put the book down on the coffee table and pick up the remote control.

Argument and Story

In fiction, two things keep readers reading: (1) argument, and (2) story. If the novelist's argument just keeps saying the same thing, never progressing from the ground to the air, the reader loses interest. If the novelist's story lacks suspense or conflict, the reader loses interest and eventually puts down the book.

In legal writing, three things keep the reader reading: (1) the compulsion derived from the relationship, (2) convincing argument, and (3) truth. We risk that relationship when our writing does not rise to the level of a compelling argument or when it reeks of implausibility.

Theme

A good story is about something—characters who cause something to happen and who react to what has happened. A better story is one that has a theme—an underlying idea or question. Good novels grow from the seeds planted by the characters and the nurturing that comes from resolving the underlying ideas or questions.

Fiction writers plant first, then sprinkle with the water of diction and finally trim and clip off dead or weak phrasing. Think of planting as outlining, watering as phrasing, and trimming as revising, or rewriting.

Outlines

Legal writers have another advantage. Our characters either caused something to happen, or reacted badly to it. If they did not cause it, or react to it, then they would not need us. Accordingly, the outline form is often the best

way to begin legal documents. Lawyers often dislike the outline approach to legal writing. We are too often lazy and almost always impatient. An effective outline takes time; sometimes the time is not billable. However, without an outline, even if it is only a mental one, the legal writing lacks substance and detail. The document makes quantum jumps and begins by *spoiling* the punch line of the letter, pleading or brief.

Jumps and Spoils

We have all seen letters to clients that jumped to advice about the settlement offer before explaining the tentative, moving target in the settlement negotiations. Judges often read motions where the inadmissibility of the evidence precedes a clear explanation of the foundation for offering the evidence. Opponents learn we are indignant before they understand the layering of the facts that make us so. Mysteries are mysterious because clues preclude the immediate solving of the mystery. They work because the reader becomes party to the process of finding out who done it. Overly clear clues or premature announcements spoil it for the reader, and the judge, or client.

The Quiet Mouse in the Corner of the Judge's Chambers

Arguably, the most valuable thing a young lawyer could do is sit in a corner of a judge's office, and watch the sifting and sorting that typically goes on, as the judge reads pleadings filed by three different lawyers in one case. All three want a different result in the case. The judge might pick the first one up, look at its title, read the opening paragraph, flip through to the end, and frown. Then picking up the second pleading, she might study its title, work through the first two pages, and then flip through to the end, without a telltale look on her face.

The illuminating view would come from watching the judge move from boredom to interest as she spread out the third pleading on the desk, made margin notes, nodded appreciatively on occasion, and sighed when putting the document down. If the judge beams and nods her head up and down, you will know which lawyer is about to win the motion. The point of this small virtual invasion of judicial chambers lies in noting exactly what was different in the three scenarios. It was the **beginning**.

In the first scenario, the judge only read the first paragraph, flipped through the remaining pages, and frowned. But in the second scenario, the judge read two pages before boredom set in, and little else happened. In the third scenario, the judge read the entire document. The ignoble treatment of the first two pleadings might have been

avoided if the lawyer really understood the importance of the *beginning* of any pleading. That is where we lose clients, judges and opponents—right there at the beginning. The beginning may not be more valuable than the end of the document, but when poorly done, the ending is irrelevant because it is never read.

The Middle

Lewis Carroll also knew something about the middle. His character, the Mad Hatter, gave good directions, "Start at the beginning and then go to the middle." When the King asked Wellington how he managed to beat Napoleon, he said simply, "Well, I'll tell you. Bonaparte's plans were made in wire, mine were made in string." Wire brings to mind strength, tightness, and inflexibility. Strings, on the other hand, make one think of loose attachments, soft connectedness, and suppleness.

If the middle of a legal document is not connected from beginning to end, if it is not the route from the beginning to the end, then it is not middle. You might as well start at the beginning and then end, abruptly. The question is not whether you actually need a middle. The question is *how* the middle is constructed—with wire or string.

How Long is the Middle?

Short, single-issue documents might well be *wired* from front to back because the middle is more or less a transition. Mid-length documents deserve a studied, fibrous movement from start to finish. Long, multiple-issue documents should be strung tightly or loosely depending on the reader.

A letter to a client in response to a procedural issue might work best if the wire between the question presented and the answer given is the recitation of a rule, or the explanation of a custom, or habit of practice.

A court pleading seeking relief on multiple grounds will be best structured with a clear, detailed explanation of the rationale for each ground, and the precedents applicable to each. On the other hand, a brief or dispositive pleading must usually be supported by strings of analysis, fibers of reasoning, and subtle persuasion. Hard, inflexible connections preclude thoughtful analysis.

Recency and Primacy

Trial lawyers are specifically trained to recognize the value and power in what is said first and what comes last. Primacy, when viewed from a psychological perspective, usually results in early decisions. Jurors and judges often accept what they hear first to the detriment of the second speaker or writer. Recency, for nearly opposite reasons, is often more persuasive to judges and juries.

Of course, recency is not particularly advantageous where there is little time in between what is said first and what is said last. Likewise, if a fair quantity of other information is conveyed between the first and last statements, recency often wins out. These concepts make the middle of anything that is mid-to-book-length, important.

Odds and Ends In The Middle

It is in the middle that one usually finds the odds and ends of a position, argument, or demand. Calling something odd or even does not make it superfluous, or miscellaneous. The reason that it seems odd is because it does not fit in the beginning and seems weak at the end. There are many reasons why legal documents are often dominated by odds and ends in the middle. Courts encourage “alternative” pleadings; clients like multiple-choice answers, opponents look for diplomatic ways to achieve a mutually satisfactory resolution. Thus, the odds and ends of a legal document are often nearly as important as the beginning, or the end.

Novelists and journalists are usually masters at description. Lawyers often struggle with it. That is, in part, because novelists engage all of the senses in describing, or setting scenes. Journalists earn their daily bread by description to the exclusion of conclusions or even historical reference. Lawyers often describe things by using dull shades and boring passages because ‘describing’ is not nearly as exciting as ‘arguing’ the subject of the document.

Imagine if you will, a lawyer arriving at the scene of a horrific boating accident 50 yards off shore, in one of the SRP lakes north of Phoenix. That lawyer would do well to make immediate notes about the color of the sand, the clarity of the water, the movement of the waves, the sound of the birds, the taste of the air, the number of people about, and so on, and so on. Those things are all part of describing that same scene in a later letter, pleading, or brief. They will be invaluable in shaping the middle of the document.

Creativity in the Middle

Lawyers rarely work in isolation. We talk to colleagues, associates, assistants, lunch partners, and casual acquaintances. Every day, every hour, hour after hour, we tell these people about our cases, our theories, our positions, and our conflicts. We thread events, opposing views and irrelevant notions together and then carefully pick them apart. We string them back together, or braid them tightly in order to make sense of them. Writing the middle of a legal document is like that. It's a multi-colored tapestry giving depth, color, and sense to grab-'em beginnings, and goal-line endings.

The Middle Point of View

The difference between the creatively written middle of a legal document and the more common mishmash of information and legal citations in the middle, comes from writing *from inside someone else's head.* The key to this kind of creativity is visualization. Method actors do it almost intuitively. Lawyers are sometimes too invested in their own personalities to see the middle of the document from someone else's perspective.

That is not to say the middle should be written with a different voice. By seeing the middle from another perspective, you are more likely to be independent and objective. Those who are perceived as independent are usually thought of as being more credible that the "mouthpiece" persona some lawyers evoke. To create is to being into being, to cause to exist, to produce where nothing was before. The old adage that "the pen is mightier than the sword" is a tired aphorism. It nevertheless brings value to any discussion about the middle of a legal document. Communicating clearly and effectively can be more powerful than hiring the biggest law firm. Creating a compelling middle in a legal document can move the reader from beginning to end without losing interest. Whether in writing or banking, interest lost is rarely regained.

The Ending

Just as the beginning proceeds to the middle and then ends, it seems fitting to bring back the Mad Hatter who said, “Begin at the beginning, go to the middle and then stop at the end.” Ending is sometimes, but not always, conclusory. Sometimes it is demanding, and on other occasions, confessional. It can be a plea or an admission, final or tentative, aspiring or despondent. Therein lays the dilemma many lawyers never engage. If it were only an ‘end’, a simple period would do nicely.

Play it Again, Sam

Unlike beginnings or middles, endings cannot be inventive. Endings are corrective, critical, and mostly a matter of getting the document to be the best that it can be. Every great writing teacher knows that anyone can write; what they really teach is how to rewrite. Every great lawyer knows that the best ending to a legal document is the revised and corrected ending.

Janet Burroway teaches fiction writers to “worry it and walk away.” Like a good lawyer, she banishes the critic in the drafting process. Revision, on the other hand, is possible only by welcoming the critic. Rewriting the ending in a legal document is a matter of letting your lawyerlike misgivings surface. Is your ending awkward, flat, or flowery? Tighten, sharpen, and subdue.

Endings cannot be a thought that just popped up, an idea that came out of the blue or something that just dawned on you. A good ending is the story of the story you just wrote. In a legal document, it might be the truthful expression of what you want. You should have said why you want it at the beginning and explained its justification in the middle. End with what you want. When you have worried it enough, walk away.

Shakespeare's Ending

Shakespeare said, "let the end try the man." Lawyers, never the favorite of Shakespeare, often try to prove him right by arguing "to the bitter end." The bitter end is the last extremity of hostility or affliction. It is an unyieldingly end if it ends bitterly. The first artistic choice in how to end any legal document is simple; do it nicely.

To conclude is to become silent, which seems to confine one's thoughts. To conclude an argument is to have the last word but to conclude from the evidence is to infer. If the evidence is inconclusive, it has a certain identifiable smell to it. It is conjecture. If the conclusion does not flow from the evidence, we label it a *non sequitur.* When the case concludes, and the judge bangs the gavel, the client cashes the check, and the opponent closes his file, the argument is over. That means that the end of an argument is a very poor end. It's only the end of the argument. That is exactly where your conclusion starts. Those words, at least when used in the context of a legal document are not synonymous. Finish your argument. Then conclude.

Defining the Elusive

A good definition of the ending to a legal document is hard to come by. That is because it is variable and so often characterized by what does *not* work. Bitter endings do not work, unsupported arguments do not work, and unfounded conclusions are, *a fortiori,* unacceptable. Endings that are cogent, irrefutable, and telling work.

Do not worry; most endings bear a common feel. They *feel* like the end. When that feeling is shared, it brings satisfaction to the writer, relief to the reader and finality to all.

The "For" and the "To" of Legal Writing

Lawyers write primarily <u>for</u> information and <u>to</u> compulsory audiences. We write to people that actually want our explanations. We do not write for entertainment, intellectual thrill, or emotional satisfaction. Like reporters and journalists, lawyers generally write in beige tones. Most of us can be fairly lumped into the great morass of lawyers who write with an "institutional" voice. Legal writing, in particular, seems bent on the avoidance of creativity, art, or anything vaguely approaching literature. This is partly because of the fundamental requirement of truth in legal

writing. There is also an ages old cultural bias that favors a style of writing handed down from the gods of our profession—i.e., appellate judges. This seminar is not an MFA in creative legal writing. There will be no effort to do justice to the big three of legal writing (POV, Angle of Approach, and Voice). All I hope to accomplish in these few pages is to whet your appetite.

Angle of Approach, Point of View, and Voice

You can significantly improve your legal writing by first deciding which angle of approach to take. Letters to clients, motions to trial judges, appellate briefs, and argument notes all demand different approaches. The first decision, and the most critical of my three large subjects, is whether to present the material objectively or subjectively.

The Objective Approach

In deciding whether to approach objectively or subjectively, look first to the facts. You can approach some facts subjectively; others demand an objective presentation. An objective "voice" is an impersonal one. When approaching the subject objectively (and therefore impersonally), essential facts are relevant but factual descriptions are irrelevant. The lawyer's personal feelings and opinions are not included. When we write with an objective piece, we should not make ourselves the focus of the narrative, or insert personal reactions or attitudes.

The Subjective Approach

Writing subjectively determines the level of emotion used in the narrative. Vivid descriptions are included. A subjective "voice" is always a personal one. The lawyer's opinions are central to the personal, subjective voice. Much of what drives the subjective narrative is personal attitude of the lawyer.

Consistency of Approach

Consistency is the key to selecting either an objective or subjective approach. If the lawyer switches back and forth between an impersonal and a personal voice, the reader will become confused. It is bad enough to confuse your client, but confusing a judge, is far more than just bad form. We can use a personal, subjective voice even when writing to judges, if our writing makes it clear that we are consistent within the document and the entire tone of the piece is subjective and personal.

Points of View

Lawyers take stands, express views, and opine on almost everything. The vantage point of the lawyer, that is where he or she stands, often affects the view taken—or given. Because we write for others more often than we write for ourselves, the point of view adopted directly impacts those we are writing for.

First-Person Point of View

The easiest way to select a point of view is to ask a very old question. The answer will give you the first clue to whether you ought to be writing in First or Third Person. Whose case is this? If it is the lawyer's case to make, and if the lawyer is the best person to make it, then the first person perspective is often the most telling perspective. What is the relationship between the lawyer and the purpose of the particular writing? Is the lawyer the main character in the writing? If so, then the lawyer can tell the story from his own, that is, a first-person point of view.

A common problem with first-person narrative in legal writings comes about when the lawyer "takes over," and shuts out the client's message by substituting his own. That, in turn, causes the client to lose her place in the narrative. We must always take heed to make sure that our clients are not lost in the narrative.

Third-Person Point of View

The selection of 1POV versus 3POV within the context of a legal writing centers on "distance." Do you want close-up, intimate, immediate, involved writing in the legal document? If so, use first-person point of view. Alternatively, do you want to stand back, present an overview, deal with more issues, offer more remedies, or legal theories, or seek a change in settled law? Third-person point of view does this much better.

Background or Foreground

A lawyer's strategic choice of where she needs to be in a particular suit or transaction often determines whether to move to stage front, or maintain a background position. When the focus should be on the lawyer, move to the front. Cross-examination is a good example. When the focus should be on the client or the witness, the lawyer should remain invisible. Direct examination is the best example of the importance of staying the background and letting the client, or the witness tell the story.

3POV has less immediacy than 1POV does; it is always an impersonal voice. The lawyer stands above it all, which places limits on how much he is "allowed" to observe as a non-participant in the action of the case.

In fiction, the omniscient narrator may enter all of the character's minds. In creative non-fiction, however, the writer has less latitude, less omniscience. Because truth is inherently limiting, lawyers are limited to those facts that are known, and not subject to dispute. That does not mean that lawyers cannot write omnisciently. We do that when we speak for multiple interests. But for the most part, we represent only one client at a time and we have less latitude than does the judge in the case. Judges are always omniscient, if not omnipotent.

Voice

Voice, like obscenity, is very hard to define. It is "human" and very different from thoughts, ideas, or opinions. Millions of readers abandon books, short stories, poems, lyrics, arguments and political discourse because they cannot "hear" the sound of a human voice in what they are reading. If the human voice in a piece cannot be heard in the first few pages then almost every reader quits "reading." In the case of compelled readers who are

damned to read what we write whether they want to or not (i.e., judges and clients), they go through the motions of reading (sometimes called scanning) but if the lawyer's *voice* is silent, then much is lost.

There are two distinct groups of legal writers. The first rarely write in the "personal" voice and believe that lawyers should subordinate themselves and only tell their client's stories in the words of the client. As writers, they tend to portray reality just as it is and do not interpret it for the reader.

The second group of legal writers insert themselves into what they write. This group, *albeit* quite small, believe legal writing is and can be an art form that advances the cause of the client. This group makes it clear that facts, law, and remedies are being filtered and perhaps distorted by their own intelligence. This latter group writes in a language that approaches literature.

The first group believes that legal writing should be transparent, not calling attention to itself by its fanciness or its beauty. The second group understands that legal writing can call attention to itself. Lawyers who insert themselves into the writing know that the reader may be compelled to it partly for the information conveyed, and partly for the intellectual joy, hearing it filtered through a respected intelligence.

Notwithstanding the difference in approach between these two groups, they share many qualities. While the smaller group advocates the presence of the lawyer's voice whereas the larger, and more traditional group, believe that "voice" has no place in the narrative, both avow an interest in "good" writing. Both groups write with the voice of a human being, not an institutional "non-voice." Both strive for clarity, cogency, and comprehension. However, when you read a pleading or a letter written by a lawyer that is vivid, that lives, and that has a human sound to it, then you are reading creative nonfiction by lawyers.

In the final analysis, voice is the writer's unique style. Lawyers have been using the voice of judges for too long. Selecting the right voice for any particular document will always be an artistic choice. My very subjective, highly opinionated, and easily debated list of the three core subjects (Angle of Approach, POV, and Voice follows. Use it at your own risk.

Letters to Clients

Writing Wrecks

A horse "wreck" is a how cowboys describe the failure of horse and rider to communicate well enough with one another to keep the former from dumping the latter on the ground. As awkward as that sentence is, it is a useful metaphor for how often skilled, but uncreative lawyers, write to clients and get fired for it. Writing "wrecks" happen because of three rookie-writer mistakes: letters that dwell on condescension, impatience, or irritation. This is the triple threat of client discharge.

Write Between the Lines

Even when client letters are clear and cogent, the complex lawyer-client relationship creates an environment where the lawyer sends, and the client receives *messages between the lines*. At its core, that relationship depends on goodwill and trust. Letters that seem to lack goodwill on the part of the lawyer create distrust in the client. It is not in the diction or even the logic; it is in the tone and taint of the letter. Tone is that apparent feeling of the lawyer toward his material, and even toward his client. It may be intimate, distant, casual, affectionate, disapproving, skeptical, or pessimistic; the possibilities are endless. Taint is a distant cousin of Tone. It's harder to see on the page but the reader smells it; it is unpleasant, spoiled, infectious, almost but not quite corrupt. The amazing thing about tone and taint is that they hide on the page. Sometimes, oblivious lawyers cannot see or smell tone and taint. But there are there. That is why you have to write letters to clients "between the lines," where the tone can be uplifting, and the taint undetectable.

Priorities, formatting, idiosyncratic reading, mood, atmosphere is often confused with tone. A lawyer's tone is one of the main elements that create distance between lawyer and client. Clients pick up tone like sour notes in a junior high school band. Sympathy and empathy sound different from facts and law. While it is an oversimplification, many clients want to hear how you feel about their cases, not the facts or law that applies to their case. Tone is the elusive sound that rings sweet or shrill. Information and advice are on the lines of all good letters; tone and taint are in between the lines. Writing to a client is a relationship builder. Writing to someone else need not be. Writing a motion might intentionally be a relationship breaker. Writing a brief should always be formal, professional, and distanced. That is not the case with client letters.

Write for Yourself and Your Client

When lawyers write to clients, it is critical to maintain a *dual* focus. Conversely, motions, or opinions are written with a *single* focus. The dual focus in letters comes from the harsh reality that the message in the letter can be clouded by how the client views the lawyer. It is not sufficient that letters correctly state the law; they must also communicate the lawyer's knowledge of how much the client already knows about the legal subject, and how resistant the client might be to the available legal remedies. Context is everything. Said differently, letters to clients convey what the lawyer knows about the law, as well as the lawyer's "attitude" about the case. If you focus only on the legal information in the letter and not simultaneously on how that information will be received by the client, then your letter has at best, a 50-50 chance of doing what you want it to do.

Write in High Gear

It is axiomatic that every client thinks every letter from "the lawyer" is important. But that sense of importance can be dulled if the lawyer is insensitive to the fear, insecurity, and instability with which most letters from lawyers are anticipated and read. You will write differently if you see yourself sitting at their kitchen tables when they read your letters. What do they do when they read your first two sentences? Do they grimace, grit their teeth, smile, lean back in their chairs, or reach for their coffee cups? Just exactly what attitude do they see in your letters? And does your attitude vary from one letter to the next. Do they see your confidence all the time, even when breaking bad news about the case? Do they see you change your sense of the case over time? They should. Cases change and letters to clients are barometers of change. They see things in your letters that you do not intend. So, always write in high gear. Low gear letters trudge through the case, bog down in rough weather, and seem too heavy on most days. High gear letters travel well, seem clear-headed, and move the relationship, and the case, along with respectable speed.

Half Lawyer—Half Writer

Lawyering is only half the job. Writing is the other half. This half consists of human emotion, human reaction, and the hell of suing, or getting sued. If you mix in criminal indictments, divorce, death, bankruptcy, wipeout, insanity,

and a few other garden variety legal catchphrases, then you get close to what the client sees in your letters (whether or not you mention any of this). Only by writing in high gear, that is writing from your heart as well as your thesaurus, can you communicate the way your client's needs to see you.

Write To Bond with the Client

A lawyer-client relationship is not a mere contract; it is a fiduciary relationship based on loyalty. Granted, its one-way loyalty, but that is the way it should be. We are loyal and clients are clients. But the strength of that relationship comes from the sinew of the words we use. When that communication takes the form of a letter, it is almost always read in private, and held in anxious (if not trembling), hands. If the letter comes at a difficult time in the case, or when the client is particularly vulnerable, then its contents are either fearful, or comforting. Sometimes, it is not what is said but rather how it is said that makes the letter fearful or comforting.

Don't Just Mail In Your Letters

Whether its sports, business, or teaching, sometimes we just "mail in" the effort, contract, or lecture. We do not always play our "A" game, offer the best deal, or inspire our students. Letters to clients should always be the high point of their day. Accordingly, writing the letter must be carefully planned. It does not have to take all day, or even a whole hour. It can be spontaneous only if it is "genuinely" spontaneous; that takes real work.

Writing a letter to a client as though it were merely a letter to a court clerk, or a software vendor, is just as bad. You have to "be there" to write to a client. You have to write to "him" just as though "he" were sitting there in front of you, wringing his hands, waiting for you to get to the point. The huge difference is that, through the magic of good writing, you can be far more precise, vastly more sincere, ten times more accurate, and with luck, believable. That comes with time, editing, and structure; a little personality will not hurt.

Make It Real

Some lawyers use "form" letters to clients without realizing how impersonal they are and how negative clients react. One of the most pivotal elements of any letter to a client is that it *must* be "personable." Personable and

appealing is even better. A letter can be quite personable and nevertheless unappealing. You can personalize the letter by drawing on the personal relationship with your client, but make it unappealing by bureaucratic tones. At the risk of sounding un-lawyerlike, an appealing letter should be enticing, not just pleasing. It should be engaging not merely *ad hominem.* Nor can it be *ad populum* (as in appealing to sentiment).

Stick to the Client Like Glue

An unappealing tone creates an invisible but palpable distance between lawyer and client. "Close" letters are excellent devices to establish trust. Poorly written letters create distance between clients. Actions speak louder than words but words erode in ways that are more insidious. Bad letters are like termites; they eat away at the foundation underlying the lawyer-client relationship. To be appealing, client letters must use active and friendly verbs. They must attach to the client's brain stem and follow him around by sticking to his memory. To do that, they must be written in a memorable style, with fulfilling facts, and easily digestible law.

The First Base of Client Letters

Baseball games are always lost if none of the hitters make it to first base. When writing to clients, remember that first base is tone; clarity sits out there on second base (which is, as all lawyers know, a very lonely place to be). To make the turn and round third base, you need precision. Lawyers strike out when they write letters that are "clearly" unappealing and "precisely" impersonal. The tone of a letter is as complex as the client herself, as dense as constitutional law, and as elusive as the reasonable man standard in tort law. Tone is how your letters sound. Your client may hear flats rather than sharps unless you "know" how you sound to your client. To complicate matters, letters to *new* clients must usually be written in a different tone than letters to *old* clients. Letters to clients at the end of their rope must sound different from letters to clients facing the threat of a distant misdemeanor.

Clarity, and her sister, Precision, are the hallmarks of good legal writing. Letters to clients must also be hallmarks and follow the rule of *stare decisis.* But that is not nearly enough. Selecting the right tone, the right sound, and the right mood for a letter to a client is not a novice task. Johann Strauss wrote hundreds of waltzes, most of which are very unlikely to be heard in this century. But the tone of every composition he wrote was as strong as it was distinctive. Like the letter written by a great lawyer to a needy client, all of Strauss's waltzes were soothing. He

constantly rearranged his notes on the page until something good materialized. And so it should be with every letter you write to a client. Write your letters until they sound right to you and until you think they will sound good to your client. You do not have to write a masterpiece every time. But it better sound good, or the client might turn you off.

Writing Ethically

The notion that client letters have a dual focus comes back into play when considering the "ethics" of client communication. For lawyers, ethics is a way of life, and a life-long commitment to a profession founded on client loyalty. But writing "ethically" to a client assumes that the lawyer actually knows the client's ethical standards as well she knows her own. What you say to an unethical client must take low moral standards into consideration.

In giving legal advice, we must always ponder the "who" question. Who are we advising—priest or penitent—hooker or john—top-down lady—or bottom dwelling misfit? Is your client the kind of person who would fudge a resume, or inform a waitress if she left something off the check? And if the client is unprincipled, what is his breaking point? While not strictly an ethical evaluation, you must also consider the client's motives within the context of the representation itself. Most difficult legal cases involve clients whose motives were originally pure (protection of family, business assets, reputation, or job). But as the case moves forward, and clients become more engaged in the legal process, they sometimes find themselves facing ethical dilemmas (stealing so they can protect, lying to preserve reputation, hiding evidence to prove they are just, and so on).

Under our ethical rules, a lawyer cannot advise a client to take illegal measures, even in defense of a criminal case. Under the rules of good writing, a lawyer should never advise a client to act rudely, discourteously, or in bad faith. And the tone of the letter, its global context, and its diction must convey consistent ethical messages.

What Does A Client Letter Look Like?

Formatting a letter is easy; easy to do, and easy to neglect. It is easy to say that a letter is not a memo (and therefore does not look like a memo). It is not a brief (which looks formidable). It is not a motion (which is almost never "in" motion) and usually has to be pushed out onto the track. It is not a contract, and therefore lacks the jazz of a whereas, and the thrill of an appendix, with an index. It is not any of the other things that might be referenced in the

letter, or paper-clipped to it (like a memo, motion, brief, or contract). It is, by design, personable, appealing, and in "letter-form."

Never Write To Them

By definition, letters communicate both intellectual reasoning and emotional feelings. Letters sent to corporations are nonetheless read by individuals. Accordingly, the reader's response will be the dominant factor in assessing the success of client letters. The first consideration is often an assessment of how much information that particular individual client is willing to accept from the writer. Secondly, you need to be efficient. So, notwithstanding the need for a personal and friendly tone, letters to clients must communicate tone briefly and elaborate legal content.

Write with Cement Not Ink

Wording, content, and organization will define the parameters of every client letter. They will cement or erode the relationship between lawyer and client. Sentences that explain the "why" behind requests, and the "consequences" that result from inaction, are classic examples of good letter technique. Ideally, all client letters should make a client feel good, protected, and assured. That is true even if the subject of the letter is a downturn in the case. Even bad news needs good writing. Giving bad news requires a balance between clarity and tact. Letters about bad news ought to be allowed to settle over night. Write them in the glare of the afternoon sun, and leave them to settle over night; the next morning's redraft almost always results in a more seasoned draft. Letters that contain stinging words (like dismissed with prejudice rather than dismissed subject to appeal) make bad news worse. And letters that pile on bad news so as to get it out of the way in one letter ignore the client's needs at a particularly bad time.

Get To It

Clients, who do not time to read letters from their lawyers, must be accommodated by writing short letters. Short letters are much harder to write than long letters because they must convey more with less. There is a link

between efficiency and speed. The fact that the client is time-challenged does not mean that you write fast, little, letters. When something is written quickly, and efficiently, we call it expeditious. But when it is written quickly and with little care, it is said to be perfunctory. *Justice Felix Frankfurter* said it best when he said,

> In any event, mere speed is not a test of justice. Deliberate speed is. Deliberate speed takes time. But it is time well spent.[5]

Whether your clients live in New York minutes, or in Leisure World, write to them apace, and nimbly.

Know Thy Client

The client's personality will influence the way he or she receives your letter. If you have an impatient client, use crisp diction, and avoid flowery affect. For anxious clients, write softly, and authoritatively. For judgmental clients, use balanced and centrist themes. If your client is an intellectual peer, use specific words that will ring an intellectually honest tone, and sound peer-to-peer.

This one pre-requisite, knowing your client, is itself testament as to why lead lawyers should not routinely delegate (or actually relegate) client letters to junior lawyers. Client letters written by junior lawyers who do not know the client often sound like answers to the wrong question, or advice to plaintiffs when the client is actually the defendant. Clients always need and have a right to a "lead" lawyer. Lead lawyers should always act that way. Write the letter yourself and assign the motion to set the case for trial to whoever is second chair at trial.

Write Like a Lawyer, Not Like a Doctor

America's two leading professions have much in common. They take in a lot of misery, help a lot of people, see the best and worst of human behavior, and make a decent living for their efforts. But they demand very different writing skills. Doctors write only when forced to; lawyers write because they have to. Doctors write in bursts of code, mostly to other doctors, and rarely write anything to patients. Lawyers write long elucidatory letters, mostly to clients, and rarely limit important communications to the vagaries of oral conversation.

[5] First Iowa Coop v. Power Comm'n., 328 U.S. 152, 188 (1946)

Why do lawyers and doctors communicate so differently? Why do doctors hate letters, while lawyers love them? Why is medicine a science and law an art? The answers are always reduced to writing because the questions are important. And that explains why we write and why doctor's don't. The sole reason doctors exist is to *treat* the patient. We exist solely to *represent* the client. It is common to treat illness with little explanation about the why's and how's of either the disease, or its cure. It is uncommon to represent people without careful, detailed, written explanations of the issues, the process, and most importantly, the outcome.

This difference between doctors and lawyers also helps explain why letters to clients are so different from other legal documents. Letters are the only link between the lawyer and the client that makes them feel secure, confident, and hopeful about the outcome. They rely on what we say to them in letters, but give only passing reference to what we say about them in pleadings. They open our letters immediately, but stack the large brown pleading envelopes in little piles to await their attention at some later date. They react to our letters with enthusiasm or dismay but rarely understand the nuance in our motions and briefs.

All of this also brings to the surface why I've spent so much space in this paper. Letters are central to what we do. We should therefore do it as creatively as we possibly can.

Editing, Revising & Rewriting

Content Editing & Framing The Deep Issue

Editing legal documents to correct framing errors is critical to the ultimate look and readability of the document. Do it during the content editing phase. It will not work while you are drafting because at that point there is nothing to frame and no content to edit. Content editing is a careful, paragraph-by-paragraph, search for Deep Issues and Surface Issues. Deep Issues are concrete: they sum up a case. Surface Issues are abstract: they require the reader to know everything about the case before they can comprehend it. They are only visible when the first draft is finished.

125 Words, All On The First Page, That Can Be Read in 90 Seconds

Important legal documents must convey three things: the question, the answer, and the reasons for the answer. Conveying the question, its answer, and the reasons for the answer must be in the reader's head within ninety seconds of picking up the document. In order to accomplish that, the Deep Issue must be framed entirely on the first page of the document. This allows the reader to get it in ninety seconds. Ideally, it should be no more than 125 words. Why one page, why only 125 words, and why only 90 seconds to read? Because the writer is trying to convey three important things—the better the writing, the more clearly and quickly those three things are delivered.

This paradigm blends five elements into something simple enough, even for a non-lawyer, to read and understand. Here are the essential elements:

1. Separate sentences.
2. No more than 125 words.
3. Enough detail to convey a sense of story.
4. Written on page one of the document.
5. Ends with a question mark.

It works because it is tighter, more cogent, and because it puts context before details. If you have clearly in mind you're posing, the writing will be clearer. There is a paradigm for this discovery process. Start with a factually specific issue, and then capture the essence of the solution.

Short statements of "the" Deep Issue often lead a reader elsewhere to learn the precise issue in the case. Longer statements of a Deep Issue ask the reader to do considerably less work. This is another example of the difference between deep issues and surface issues. The surface issues say nothing about what the court is really going to do. The deep issue explains precisely what that something is. Another way of understanding the difference between a surface issue and a deep issue is the surface issue does not disclose the decisional premise; the deep issue makes it explicit.

The goal in issue framing is make sure the reader can identify the deep issue within ninety seconds. The more abstract the issue is, the more superficial it must be. This means the reader must learn much more to comprehend it. The more tangible the issue is, the deeper it is. Deep Issues must be brief, in order to be clear. If you cannot frame a deep issue in one-hundred and twenty-five words, or less, it will not be brief, or clear. Deep Issues control the outcome. The outcome of a case always rests on how the court approaches the deep issue in every case.

Why frame the deep issue? Why not just phrase it in a single sentence like law professors do? Why not just phrase the issue by starting with the word "Whether" as judges do? Why not phrase the issue simplistically [skip the details] like senior partners do? Issue framing leads to tighter, more cogent writing by putting the context before the details. Moreover, it tests the embedded ideas for soundness. To do this, you need a sharply focused paradigm. First, frame the issue so that if your framing is accepted, the case comes out your way. Second, capture the issue by your framing. Third, cement the issue so that the judge cannot forget it.

Editing for Clarity—Bryan Garner's Rules

Editing for clarity usually means using fewer words to express an idea. Fewer words always enhance speed, impact, and clarity. Fewer words mean omitting needless words. Easily said, right? Bryan Garner[6] teaches the five best ways to clarify by omitting needless words.

Uncover Buried Verbs

Buried verbs are not really verbs at all. They are nouns created by a verb—the verb is simply buried in the noun. Buried verbs usually end in suffixes: -tion, -sion, -ment, -ence, -ance, -ity. Find them and gut as many as you can.

Minimize Prepositional Phrases

In legal documents, the worst offender is the preposition "of." It may seem innocuous. But in anything other than small doses, it always results in flabby writing. Reducing the word "of" by fifty percent in any legal document will greatly improve briskness and readability.

Eliminate Redundancies

[6] Bryan Garner is the *quintessential* legal writing teacher. Many of the ideas in this short paper belong to him. His classic work, "Legal Writing In Plain English" is a masterwork and ought to be on the desk of every lawyer. Univ. of Chicago Press, 2001

More often than not, redundancies in legal documents are the result of carelessness (weak editing). But it sometimes occurs because lawyers are paranoid about a paucity of words. We often say, "Give, devise, and bequeath the rest, residue, and remainder." The better style and less cumbersome way is to choose the best single word and let it stand on its own two syllables.

Purge Inflated Lawyerisms

Lawyerisms happen. They usually happen because the writer desperately wants to "sound" like a lawyer. The test for lawyerisms is easy. If you would not use it in ordinary conversation with a friend, then it is a lawyerism. Contrary to conventional wisdom, judges do not want lawyers to use legalisms. Good Judges think lawyers who use legalisms are pretentious and not very smart, because they cover their communication failures with big words.

Editing for Continuity & Clean Story Lines

Motions, briefs, contracts, and memos must have a clean story line. Clean means the document must have a smooth flow of ideas, sentence after sentence and paragraph after paragraph. Legal documents are discourse involving complex ideas. The order has to be logical but not necessarily chronological. The process is complicated because it involves myriad decisions about how best to present the information. Each decision rests on still another decision. If the nature of the material can be chronologically presented, that structure will tell the reader where it "begins, has middle, and ends." Each part of the brief, memo, or contract should "lead" to the next part. That way, the reader stays with you and the writing becomes memorable.

Good Headings

Lawyers are usually expert in grammar, the field of law they plow, and everything about a particular case. But they must still invent a rational sequence for the ideas in the brief, contract, letter, or memo. Most lawyers are amateur in this regard. Continuity dies when strangled by tangential points, or buried under mountains of unimportant facts. The more complex the project, the simpler, and more overt its structure should be. The best way to accomplish this is to make sure the structure is transparent. The best way to make it transparent is with clear headings.

Explicit Links

Sometimes chronological order simply will not work. If so, link the individual sentences in the paragraphs explicitly. There are many ways to do this, but these four always work: (1) Link sentences with pronouns. This instantly shows the reader that you are still discussing the same person or thing and saves the monotonous repetition of those same nouns. (2) Link sentences with demonstrative adjectives—this, that, these, and point them to something just mentioned. This also works well in linking one paragraph to the next. (3) Use echo links. Repeat, or echo, a word or phrase in the preceding sentence. Don't overdo it. It cannot be mindless repetition. (4) Use explicit connectives to transition from one sentence or paragraph to another. They can clarify the relationship between two sentences. Connectives can be thought of as "signposts." They tell your reader where you are going, and remind where you've been.

Bridges

Strive for a paragraph that is explicitly connected to the one immediately preceding it. The first sentence of the paragraph is often thought of as a "topic" sentence. But in legal documents, the first sentence is better thought of as a "bridge" sentence. The chief function of a bridge sentence is to transport the reader down into the next paragraph. Its secondary function is to announce the new focus of the argument contained in that particular paragraph.

Editing Quotations

Legal documents are laden with quotations because our world is based on precedent. Lawyers too often draw attention to cases, or statutes, before discussing them. The result is that we ask our readers to plow through a quotation or citation aimlessly before we tell them why we quoted or cited the material in the first place. Here is what not to do in quoting or citing case law. Avoid trite introductory phrases that weigh down so many legal documents. Banish the following: the court observed; the court held; as stated by the court; Rule 26.1 states: the Miranda court stated; according to Roe v. Wade.

Instead, use a lead-in phrase that describes what the quotation or citation does for you. This will yield four good things. The quotation will more likely be read, not just skipped. Once the reader confirms that the quotation or citation does for you what you say it does, your credibility is enhanced. Third, because you had to assert exactly why you quoted it, the quotation will become shorter and more pointed. Lastly, even if the reader skips the quotation, your train of thought is still discernible.

Once you lead into the quotation, follow up by leading the reader back into your reasoning. That happens when you resume your text by showing how the quotation relates to the rest of your analysis. Trim down bloated quotations. This increases the odds of actually having it read. Take care to note any changes you have made. Signal changes by including square brackets and ellipsis points.

Remember that quotations are only supporting matter. You have to take ownership of them by integrating them into the writing itself. This often provides the balance and sense of independence that legal documents need.

Rewriting versus Editing

Content editing, as outlined above, needs two more steps before you can call any legal document a finished product. Finished documents need two helpings of rewriting and one serving of dessert—copy editing. Rewriting involves moving the lawyer's energy from the creative forces in drafting to the critical forces needed for polished work. Massaging the words, tending to all of the typos, grammar glitches, awkward phrasing, disconnects, poor formatting, passive voice, and buried verbs is the front end of the job. Rewriting is about moving and deleting entire blocks of well-written text, and substituting whatever is needed to make the whole thing effective communication.

Time and Distance

The best way to make the shift from creative drafting to critical rewriting is to stop. Stop the process. Let the document sit quietly for a while before rewriting. Allowing important legal documents to sit gives the lawyer some perspective on how you express your ideas and what insight you provide. Does the whole document work, that is, does it do its job? Time and distance serve a constant need most lawyers have. We are too impressed, once our fingers finish tapping on the keys, with our brilliance and the compelling nature of our arguments. Rewriting is a narrow focus, in the light of a new day, that renders a more concise, finely organized, solid piece of work.

Cut and Stitch

At this late stage, take another careful look at the organization of the document. The content editing phase might have altered the organization in ways that are not visible until the document mellows. The structural organization may need revision so that it logically leads the reader from introduction to conclusion by building on successive points. This is also the time to fill gaps in comprehensiveness. It is quite common for lawyers to find, at this stage, that the reader cannot see where the factual and legal arguments are headed. The rewriting goal is to make sure that all components of the document are included and logically placed.

Will Rodgers said, "The minute you read something and you can't understand it, you can be sure it was written by a lawyer."[7] The critical rewriting stage is how we avoid the humor of Will Rodgers and the even harsher penalty imposed by a disappointed client.

Death and Turgidity

The wonder of a good rewrite is a real and understandable goal. Sometimes a client who is dead on the page will come to life through the addition of a few sentences, or significant details. Sometimes a turgid paragraph can become sharp with a few judicious cuts. Sometimes dropping page one and putting page seven where page three used to be can provide the strong bones of an otherwise limp argument. And sometimes, often, perhaps always, the difference between an ordinary legal writing and case-winning creative legal writing is in the struggle at the rewriting stage.

"The Heaviest Thing That Is, Is One *et cetera*."[8]

Creative writing requires discipline. All lawyers are self-starters but that is not enough for this seminar. Lawyers who aspire to *creative* writing must stop before they are finished. Then, you must "engage the beast." The writer's beast is "rewriting." We rewrite legal documents to cut the inevitable lawyer-like chatter so beloved by judges, and senior partners.

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7 Quoted in Robert B. Smith, *The Literate Lawyer* at page 18 (2nd Ed. 1991)

8 John Florio, *First Fruites,* 1578.

Seven Questions to Ask Before You Sign the Damn Thing

Legal documents, unlike other important documents, often require a signature before submission to the court, client, opposing counsel, or senior partner. The act of signing a pleading filed in court is a certification that the lawyer has *read* the document, is *satisfied* that it is well grounded in fact, warranted by existing law, and *is not* interposed for any *improper* purpose. Those are the "legal" requirements. The "creative writing" requirements can be answered by asking the following questions:

1. Is my case clear? What is the pattern of change in the case? If the pattern is clear, the document will include all of the crucial moments of discovery and decision.
2. Is there unnecessary summary? Another way of saying this is does it cover too much ground. Does it make the case in the fewest possible scenes? Summary and unnecessary detail dissipate energy and lead lawyers to "tell" rather than "show."
3. Is it profluent? Will the judge turn from one page to another until the last page? Or will she read some, skip some, and wing it? The answer is yes if the language is fresh and the narrative alive.
4. Is this argument original? Or is this the usual, familiar, given, tired old story of red car hitting blue car causing damage to the aforesaid?
5. Is the presentation muddled, ambiguous, and sloppy?
6. Is it too long? Lawyers, even the best ones, write too long. We are so anxious to explain every nuance, cover every possible remedy, and cite every applicable case, that we forget the necessity of stringent selection. The best legal writings are sharp, economical, vivid, and telling. More than necessary is too much.
7. Is it too general? Look for vague, fuzzy, superficial arguments. or facts. Be suspicious of yourself anytime you see nouns like *someone* and *everything,* adjectives like *huge* and *worthy.* Write about a particular thing, a particular size, and an exact degree.

Memoranda Writing

Do not write a "Memorandum," write a "Synopsis"

When used by lawyers, a "memorandum," is a either an informal office communication, or a short written statement of the terms of an agreement, contract, etc. In its abbreviated state, a memo is a note to remind someone to do something. Whether long or short, significant or routine, memoranda often calls for more than "just a memo." It calls for a *synopsis*.

Synopsis writing relates the essence of the case in a logical, chronological manner that hits the high points of people, remedy, case acquisition, risk, and resolution. It is not an outline, which *tells* the reader something in a dry, detached manner. A synopsis is a narrative that *shows* the case's origins, likely progress, and the inherent worthiness of the case to the client, firm, and the rule of law in America. If a Lincoln is an upgraded Chevy, then a synopsis is upstream memo.

An outline is never compelling, but often informative. If a big case synopsis (formerly known as a memo) is merely informative, it will fail at every level. While the synopsis should be objective, nonetheless it ought to be persuasive. It must be written persuasively. It must state its own case by formatting, structure, voice, and tone, as well as stating the case for the putative client. A memo should be interesting (not often, but it happens). If the big case synopsis is merely interesting, then its acceptance depends on chance. That is no way to present a big case.

Dreams or Swords

"Do not give it to a lawyer's clerk to write, for they use a legal hand that Satan himself will not understand." Miguel de Cervantes, 1605, *The Adventures of Don Quixote.* The office memorandum, ("memo") is the most frequently used document in the practice of law. Mostly done by clerks and associates, they provide information, evaluation, and criticism about the law that controls a particular issue. When done well, they identify all issues involved in the assignment and analyze all the arguments each party can plausibly make. Sadly, they are usually only objective. But persuasiveness is often there, just out of sight. If the analysis is to be convincing, it must not merely be thorough, it ought to make the best case for the client.

All memos are either dreams or swords. Summon up one or the other by using language that inspires or threatens. The best way to do this is to develop a theme around which the entire memo revolves. The theme of a memo is the main idea, or concept with which the work is concerned. Theme may be a general principle, a moral

point, an ethical point, or a logical or an aesthetic conflict resolution. When partners speak of the point of a case, or a memo, they are referring to the theme of the work.

In thematic comparison, a persuasive writer, in making an argument, should frame her theme to support the argument. The best memos force the reader (usually a partner) to compare the legal value at issue in the case to a larger remedy or resolution having the same legal value or theme. For example, if the memo's subject is the evaluation of a case where a vocational school denied admittance to the client's child, the theme might be "invisibility." The writer will take care to frame the issue in terms that depict a troubled and neglected young boy denied admittance on bureaucratic grounds. It will define the law's purpose and pose the court as intervener between an individual struggling to be recognized as human, and the vast bureaucracy that tends to dehumanize him. The law, and its servant, the court system, refuse to see the boy, as though he was invisible. It sees only his surroundings and him only as a figment of legislative imagination. Bureaucracy and red tape has a way of feeding on it by trapping the invisible before he is placed on an assembly line, only to be dropped off into the unacceptable basket at the end of the treadmill in the admissions office. This is not the actual language of the synopsis; it only the articulation the theme. Once you've got the theme, the diction will flow like fresh air through an open window.

Ethos, Logos and Pathos in Memo Writing

Persuasive discourse depends as much on the advocate's character and credibility **(ethos)** as it does on the logic of the argument **(logos)** or the emotional content of the case **(pathos)**. The memo writer must persuade by establishing credibility in the eyes of the partner. A law clerk or associate who lacks credibility in the eyes of a decision maker will have little chance of persuading any reader, irrespective of how logical or emphatic she may be. This means that internal memos should be, at least in part, about the writer as well as the case.

Of the three elements, which is the most important? I would argue that ethos is more important to persuasive legal writing than either logical argument, or appeals to emotion. Logic and passion depend in large part on perceptions of the author's credibility. If the appeal for the case lies in its emotional whammy, the writer's credibility will likely determine the outcome. That is because a highly emotional argument, if made by someone with little credibility, is always seen with a degree of skepticism. Conversely, when a credible clerk or associate makes an emotional argument, it is often received as it as was intended; a supplement to the arguments based on reason and logic.

The Focus Eye

Where are you going with your memo? Writing memos is like steering a ship: writing without an internal compass inevitability leads to circular argument. Every lawyer has begun a memo only to end up saying something entirely different from she set out to say. Listen to your internal compass. It will keep you safe from rocky language, icebergs, illogical sightings, dark holes in the text, and anchorless endings. Once at sea, or in the middle of a draft, look at it with a merciless eye, an eye that ignores the elegance of the language, and the brilliance of the argument. This eye—the lawyers focused eye—must focus on the document's tack, speed, and destination. Is it working or not? If so, lay on the steam, if not, abandon ship.

Monet once said that he wished he had been born blind and later gained sight. That way he would be able to look at the world freed of the knowledge of what the objects were so that he could more fully appreciate their color. Memo writers need not go to such lengths, but Monet had a point—look at your work with an innocent eye—as well as a focused eye. Is an aquarium a reverse submarine? Is a claim for wrongful termination a reverse hiring? What if your knees bent the other way, what would an executive chair at the head of the long table in the boardroom look like? What if the arresting officer gave the Miranda warnings while eating a donut, would that make them sound insignificant, and beside the point?

Experienced lawyers know that focus, particularly in office memoranda, enriches broadly and narrows tightly. An associate with a creative writer's touch might be able to open with a particularly broad theme and then drill down to one or two core facts, and return to the big picture three pages later, coming full circle in the most subtle way imaginable. Done well, this focused eye approach, will have a seamless transition, without telegraphing. It will catch the partner by surprise and make her say, "Oh. That's right, the memo opened with this—damn clever writing; this is a case we want and an associate we should keep."

The larger point of focused eye writing is that good memos are not accidents, or shipwrecks. Whatever you try to achieve at the beginning should be resolved at the end, staying focused along the way. You can tell an unfocused memo when the facts, legal points, and recommendations do not stay on track. They are introduced but never resolved. Worse yet they are sometimes resolved but never introduced. Unfocused memos lack continuity, contain rabbit trails, had have an overall rambling feel. The partner knows an unfocused memo when he reads it because he ends up feeling the associate only tangentially got to her point. That is not good for the putative client, or the associate's career path. Someone might be looking for a new compass soon.

E-Mail

Email Is Hard To Do

Email is easily the hardest written medium of all. It is unlike all other written communications, because it is toneless, breathless, and designed to invoke the law of unintended consequences. It is vastly oversimplified, and therefore inherently dangerous. Letters give clues to the reader that help divine meaning, just as embossed envelopes hints as to what's inside. Text messaging gets close to real-time exchange, and takes place between people who have an affinity toward one another, or at least a relationship. However, email can as unrevealing as it is toneless because there is no default sound. You cannot hear the sender's voice, or verify misapplied intentions.

Consider a simple inquiry—"Will you bring the exhibits to the meeting?" If stated that simply in a one-line email, it raises many questions, most of which will be erroneously answered. A recipient who is already insecure about the exhibits could take it as a warning, or as a rebuke for forgetting them once before, or as an insult—*of course, I will, don't I always!* The sender's motives might be pure—*I just wanted to know if she was going to bring the damn exhibits*—or slightly harsh—*I shouldn't have to ask this*—or totalitarian—*she never gets anything right.* Many lawyers like email because simplicity is its principal virtue. In fact, email is simplistic, not simple. Big difference.

In this small example, the solution is better writing. Rewrite that simplistic request—make it three sentences instead of one—and go from simplistic to simple. "As you know, I will attend the meeting after my court session and won't have time to go by the office to get the exhibits. Would you mind bringing them? It would be a big help to me." The rewrite contains thirty extra words, but clarifies, as it simplifies, and avoids the law of unintended consequences.

Email is Inevitably Too Fast

Most busy lawyers send and receive scores of email messages every day. And they do this all day, every day. But they typically put more effort into a dozen letters than they do in a hundred emails. Why is that? Even

relaxed lawyers cannot anticipate the moods, circumstances, or pressures created on both sides of the exchange. Part of the speed problem is the underlying assumption that email is just a "message." Too many do not think of email in the larger sense—as an electronic form of written communication. Thinking of it as just a "message," gives rise to the same risks that come from treating email simplistically. Email's inherent speed heightens the risks at both ends of the email chain.

We expect snail mail to take a day or more to arrive. We assume the reader of that kind of mail to take some time to reply. However, we feel email's breathless flash power in our fingertips, and we know that with the click of a mouse button, our email is going to whish up into the Internet cloud, and rain on somebody's parade, whether they like or not. Its speed is an exercise of instant gratification unlike faxes, telegrams, or even the telephone. Words in letters somehow mellow over the time it takes for them to go from outbox to post box, and from truck to airplane, and finally into a postal cart in someone's office. Words in emails are as impactful when we hit SEND as they were when we key stroked them, just seconds ago. That incredible sense of instant communication is energizing, almost addictive, and too often irresistible. Whatever we need, want, hope for, insist on, or do not want, are afraid of, or absolutely must stop, is an invitation to email. It is the *now* medium. Snail mail is the *soon-enough* medium.

Consider Jim Bob's email exchange.

> Jim, I just got your 26.1 disclosure statement—what a joke. I thought we had an agreement not to start that crap in this case. But you never change, do you? I refuse to engage in a costly discovery war with you just to get the facts, law, and theories that the rule demands from each of us. I will give you five days to send me a full and complete statement of your case. And I am not going to file my own statement until you comply with Rule 26.1. Let me hear from you.
>
> Bob.

Quite predictably, Jim emailed back, thirty seconds after opening Bob's email.

> Bob, having a bad day, are you? It's ain't my fault pal. My 26.1 is fully compliant with the cases, especially the one against you two years ago that Judge Antsy

> wrote. Yeah, we agreed to full disclosure and to avoid what you call a discovery war—but for you, it's always war, isn't it. Do whatever you think you need to do, but please file your 26.1 by Friday. If not, I'll have to tell Judge Antsy on you (again).
>
> Jim

Of course, the tort and its retort deserve one another; but the escalation inherent in the exchange is not so much a product of bad writing, as it is of the heretofore unheard of speed email brings to the table. In an all too real reality, we forget we are talking to the other lawyer, and act like we are talking to the other lawyer's machine. Not *mano a mano*, but *el machino y el machino*. Lawyers often moderate their oral speech to fit the circumstances. We often rewrite letters and motions because we have the luxury of time and distance. But email panders to emotional outbursts precisely because it is a right-now, in-your-face communication device. It is likely that neither Bob nor Jim would have used the dismissive taint in a phone call, or the threatening tone in a letter. Both urges would have withered with time, had either one taken advantage of the time they had. Neither did. As I said above, email is inevitably too fast.

Email Is Different in Four Ways

Email is different in at least four essential ways. Since it is a searchable, storable medium, it begs for special composition—different from any other written communication. Since it is electronic, it falsely sends an ephemeral message to the sender—seemingly less fixed, and not as binding as a formal letter, or a court pleading. Because of its worldwide reach, and its attraction to people who do not send regular letters, many emailers feel free to write poorly, begetting a who-cares-attitude on both ends of the Internet cloud. Lastly, email is overwhelming, with practicing lawyers receiving dozens if not hundreds of emails in a single day, some of which are extremely important, while others are new-age junk mail.

Its searchable, storable quality gives email messages a more permanent and restorative reality than a single original letter sent via traditional delivery systems. Snail mail letters often end up in files, which go into drawers, which might or might not be recalled, found, or accessed by others later. Email's electronic computers, servers, switches, routers, and temporary storage drives "process" our words, tainted and tony as they may be, moments before landing in someone else's e-inbox. On arrival, it's electronically redistributed, altered, cut, pasted, used, and

misused in ways the snails never even thought about. Simply put, email is riskier than snail mail. Risk demands concomitant care.

Because it is digital rather than analog, and because it is immediate, it feels less real than snail mail. Snail letters are things made of crisp, embossed letterhead, typed in black, formal fonts. We read them carefully before signing, often with a fountain pen, and then tri-folded, and enveloped into yet another rectangular parchment (lickable or press 'n stick), stamped, and handed over to the government for safe delivery. Snail letters feel real because they give off tactile responses, and because our history of letters is ancient, whereas email can trace its birth to the acceptance of the @ sign in 1971. Old always feels more real than new.

The utter implausibility of instantly zipping an email from Phoenix, with electronic switching in Seoul, rerouting in Sydney, in a packet with 999 other anonymous emails, and landing in Dallas within seconds, boggles the mind. The unfathomable process designed by and for the United States military and intelligence forces, accounts for why we do not think about it. The scary reality that our email, even though encrypted, hits so many other little boxes, before landing in our recipient's inbox, is globalization in its most haunting form. And it is exactly that whole-planet-feel that gives email an ether firmament. It is so cosmos that we can use it with impunity—*it is just email*—don't sweat it.

While some email programs enable "flagging" of high priority traffic, those designations rely upon the care and selectivity of the sender, not the recipient. A judge might send a flagless ruling, while a profit-seeking expert referral business red flags every solicitation. Spam filters become obsolete the day they are uploaded onto the network. Sorting the wheat from the chaff within the bundle of solicited and unsolicited email is a herculean task. The electronic challenge to competent representation lies in avoiding sending email that will be filtered out, or ignored because it is badly formatted, and poorly written,

Ways to Write Better Email

Email's seductiveness is its apparent ease. When we make communication instant, and when everybody's doing it, we let down our guard, and ignore common sense rules. Take vocabulary, grammar, and punctuation for example. Using sloppy vocabulary does more than just convey carelessness—it misleads recipients about who is sending. Is it the lead lawyer on the case, or a junior associate? Is the writer a trusted adviser, or a casual pass-along-information type? Is the vocabulary precise, or vague (setting either a professional, or a casual tone). Is it simple or complex (inadvertently signaling a who-cares attitude). Poor grammar is a "telling" characteristic—it trumps

good word choice. Using *ain't* instead of *is not*, might be appropriate if the sender intends to set a casual, colloquial, or "me young and cool" tone. More than anything else, grammar indicates the child in the man. Grammar can convey a sense of conversational tone, or an eloquent one—think George F. Will vs. George W. Bush. Email seems to encourage lax punctuation, while formal written discourse demands commas, apostrophes, and em-dashes in all the right places. It is accepted, even in legal offices, to be a little lax on email, if you are on familiar terms with the recipient. But when writing to judges, clients, or opposing counsel—punctuate like an educated adult. The old cliché about familiarity breeding contempt applies to email as well as cocktail conversations.

More Than Email

Email is not a stand-alone communication technology. You can greatly enhance its effectiveness by combining it with other ways to communicate. Formal letters, followed by telephone introductions, can set the right tone for subsequent emails that expand, rather than confuse relationships. Setting, confirming, or changing dates, schedules, and people, is often best done by email, while the content, expanse, and duration of those things might be better dealt with in attachments, hand-delivered notebooks, electronic exhibits, Power Points, or spreadsheets. Email can inform without inspiring, and summarize without intending a comprehensive treatment of the subject matter. For inspiration, comprehension, and impact, other written communications, when supported by email, can become a gangbusters strategy.

Email and Client Confidentiality

The most difficult ethical challenge for lawyers who communicate with clients via email is confidentiality. Internet eavesdroppers (hackers, crackers, spoofers, and sniffers) casually, and sometimes intentionally, pry into lawyer's electronic affairs. A hacker is intensely interested in complex computer systems. And much to the dismay of the so-called *legitimate* hacker, crackers take the black art one step further—their unauthorized entry into someone else's computer system includes modifying the drives, apps, and configuration. Legitimate hackers are often system operators and administrators who detect, repair, and prevent break-in and damage, by crackers.

Crackers can copy emails, alter them, delete, or just enjoy the legal conversations embedded in them. Woe to the lawyer who foolishly assumes that buying anti-spyware, anti-virus, or spam protection software solves the larger

problem of protecting the client's right to confidentiality in email communications. Nor do passwords themselves solve the ethical concerns. If the firm's email system is left open for exploration via a network outside the firm, the problem is not "fixed" by an electronic password. More complex measures are called for, including public key encryption, digital signatures, and sophisticated, frequently changed access codes. Sniffers capture electronic information as it traverses the frame cloud, which carries the potential for ethical dilemmas that yesterday's lawyer could not have even imagined, much less understood. Sniffers do not need your password to steal your client's secrets, your litigation strategy, the jury consultant's analysis of potential jurors, or your cost ledgers.

Unencrypted e-mail messages are an unnecessary temptation to sniffers. Just as some people occasionally pretend to be someone, they are not, so do computers. This is called "spoofing." Sniffers use data packet headers, and spoofers use recipient address's. Once obtained, spoofer computers configure and emulate the recipient's machine. The answers to these ethical dilemmas include proper physical security measures, staff screenings, firewalls, digital signatures, encryption, secure-socket layer technology, common sense, and heightened security when communicating electronically.

The concern over clear-text e-mail was first noted in a federal case in which the judge declared that the client's claim of privilege was lost when the documents were sent to the client in clear text, and was available through a state library portal on the Internet. The court held that the documents were in the public domain.[9] If lawyers use only encrypted email systems, they can substantially ensure that client e-mail messages will not be overheard, intercepted, altered, or otherwise misused while in transit over a network (private or public), or while they are resident on some off-site computer database or hard-drive.

Electronically Privileged E-Mail

ARSC, Rule 42 (ER 1.6) precludes a lawyer from disclosing "information relating to representing of a client unless the client consents after consultation.[10] Most state bar ethics committees, including Arizona, have considered the confidentiality question inherent in email. While it is beyond the scope of this seminar, the Arizona Rules of Professional Responsibility Committee, in its opinion 97-04, addresses many of the ethical concerns about email and other Internet communications with clients. In essence, the committee gave lawyers leeway in deciding whether to use only encrypted systems, or rely just on password protection in email transmissions. It recommended, at a minimum, that email

[9] Castano v. American Tobacco Co. 896 F. Supp. 590 (D.C. Est. La. 1995).

[10] MODEL RULES OF PROFESSIONAL CONDUCT 1.6.

transmissions to clients should include a cautionary statement indicating that the transmission is "confidential, attorney-client privileged."

The American Bar Association's Formal Opinion 99-413 on email confidentiality says, "A lawyer may transmit information relating to the representation of a client by unencrypted email sent over the Internet without violating the Rules of Professional Conduct because the mode of transmission affords a reasonable expectation of privacy from a technological and legal standpoint. The same privacy accorded U.S. and commercial mail, landline telephonic transmissions, and facsimiles applies to Internet email. A lawyer should consult with the client and follow her instructions, however, as to the mode of transmitting highly sensitive information relating to the client's representation." In short, don't email without client permission.

The Pluses of Email

Notwithstanding email's caveats and crevices, there are substantial advantages in electronically communicating with clients. Studies suggest that lawyers write thirty percent faster on email and that clients read email fifty percent faster than they do snail mail. Email often generates documents that clients actually *want* to read because it forces lawyers to think more strategically. Lastly, email is especially well suited for action items.

The table below contains a real email from a lawyer to a client. I disguised the lawyer's true identity and fictionalized the client's name to protect both. The right column is an edited form, which should display the strategic advantages that email can bring to short, important communications. The use of numbered bullet points, along with plain, simple language, can soothe as well as inform a worried client. Additionally, this format can quickly accomplish the lawyer's goal, and avoid the poor grammar, punctuation, syntax, passive voice, and general illiteracy of the original. Email's right-now environment is especially useful in these kinds of lawyer-client messages.

TO: Hapless Client FROM: Stated Lawyer DATE: April 1, 2009 RE: Your case's settlement	TO: Hapless Client FROM: Stated Lawyer DATE: April 1, 2009 RE: Settlement Details

Dear Hapless, Under the settlement agreement, our gray form "mild mitral" clients get $2000.00 each. You are one of those. Under the terms of the settlement, we are precluded from claiming more than $650.00 "regardless of what the original attorney fee or expenses was". The trust has now sent us hundreds of checks with regard to these clients, including you. However, $650.00 "the attorney share" was made out to the client and to the attorney. Our bank is willing to let us deposit this into our account, which is our professional responsibility to the client, you included, when they would have contractual right to this money but their name was put on it only because the trust saw fit to do so "for a reason I do not know". That is what we are going to do but you can object to this and tell us not to. Please advise of your intentions in the matter. Regards, Stated Lawyer	Dear Hapless, I enjoyed our telephone conversation this morning about finalizing the settlement in your case. The essential details are: 1. Each client in your group will receive the same settlement--$2000.00 each. 2. The agreed attorneys fee in each case is $650.00 3. All of the settlement checks are made out to the client and our law firm. 4. We will deposit each check into our client's trust account. Once the check clears, we will send you check for $1350.00, which is your net settlement after payment of the agreed $650.00 fee. 5. Of course, we can handle this in some other way if you wish. Just let us know as soon as possible. Very truly yours, Stated Lawyer

Genre, Memoir, Essay, and Poetry in Legal Documents

Gasp. Groan. Yes, I know. The very idea of this topical heading in a seminar about *legal* writing evokes a sense of heresy. But bear with me. In writing, *genre* categorizes fiction by popular tastes—action, adventure, science fiction, romance, western, and so on. In law, we categorize by the kinds of documents or communicative events—motions, briefs, contracts, opinions, offerings, demands, memoranda, and letters. Just as authors train within specific genre, lawyers follow structural rules, defined limits, and narrow expectations. The rationale behind each genre of legal document is a constraint on content, form, and structure. Memos must inform quickly, contracts must bind the parties, and briefs must outline issues, and present clear arguments. Letters must build loyalty, establish trust, and settle uneasy stomachs.

Client letters and court filings are uniquely constrained by ethical standards, which require sufficient information to allow clients to make informed decisions about whether and how to proceed, and courts to assume validity and authenticity. Very different motivators and goals move from, and even within, the genre of legal documents. Informing, persuading, assuaging, denying, and encouraging language comes from using the "right" diction, from a particular point of view, and with appropriate design choices. Unfortunately, a great many client letters and most legal briefs, are turgid and impenetrable because the construct is fossilized English. Fossilization happens when language freezes into specific meanings, but doggedly hangs on despite evolutionary language commonly used by non-lawyers. *Whereas* is a classic example of language fossilization. It could, and I argue should, be deleted 100 per cent of the time.

Memoir Writing in Legal Documents

A *memoir* is a history, a narrative composed from, which stresses personal experience and acquaintance with the events, scenes, or persons described. A *memoir* can be an autobiographical account which is anecdotal, or intimate in tone, and whose focus of attention is on the writer. While closely related to, and often confused with *autobiography*, a memoir differs chiefly in the degree of emphasis placed on external events. Writers of *autobiography* are concerned primarily with themselves as subject matters. Conversely, *memoirists* are usually persons who have roles in, or have been close observers of historical events and whose main purpose is to describe or interpret those events.

There was a time when literature separated autobiography from "personal narrative" in much the same way memoir is now separated from autobiography. While closely allied, the principal difference between autobiographical writing and "personal narrative" was the writer speaking with his own voice rather than through an invented character. The writer could convey her own personal and peculiar sense of life. And whereas autobiographical writing tended to

emphasize the person rather than her action or experience, the personal narrative emphasizes the action or experience rather than the person. Memoir is somewhere betwixt and between.

Memoir by lawyers, in the context of legal writing in cases, is a personal narrative in which there is greater stress on narrative and descriptive elements than on exposition of the author's personality. Put bluntly, the stress is greater emphasis on "*Look what I am doing*" than on "*See what I have learned*." One way to think of this distinction is to make the reader more intensely aware of the radiant external world of lawyering than of one lawyer's search for self-understanding. In a memoir by a lawyer dealing with a current legal experience, the reader should focus on the actual details of the law giving, and the law-learning experience, although incidentally, the writer reports the effect of the experience on his or her own personality.

Memoir writing in law practice is, and should be, a rare treat. Most legal documents will not lend themselves to this genre, but those that do, are greatly enhanced by the technique. Consider a letter to opposing counsel in a high-end personal injury case. The best settlement letters are written versions of closing arguments to the jury, honed down to a few pages, and chock full of ethos, pathos, and logos. While they must be factual, that element pales to the need for eloquence. While they must be reasonable, that requirement is softly trumped by rhetoric. Style and pacing are always key factors in memoir writing, and settlement letters. But all of that pales in comparison, when you *think* about what a memoir really is.

A memoir written by a lawyer is deep, emotional, but truthful recollection of an external event that demands delicate articulation of how, why, where, and what happened. But in the case of literary memoir, the author is at the center of the writing. A settlement letter is a deep, emotional, but truthful recollection of an external event that demands delicate articulation of how, where, and what happened *to the client.* See the difference? See the connection? The only difference, and the connection, is that the literary memoir is about the lawyer, and the settlement letter is about the client. But the client can't talk, or express himself in the same way that the lawyer can talk—about the client—or express the client's needs. Enter the lawyer. Enter the memoir.

Essay Writing in Legal Documents

An *essay* is distantly related to *memoir* chiefly because it is an analytic, interpretative, and often-critical literary composition. Essays are less systematic and formal than a dissertation or thesis. *Essays* usually deal with subjects from a limited and often personal point of view. Essayists offer their readers a very discerning view of history or events by interpreting those events without sacrificing the primary aim of presenting facts and ideas. But the

essayist succeeds by expressing his own personal vision. More precisely, the essayist *recreates* a vision of reality that parallels the creative vision of the novelist. Many essays accentuate the author's personal attitude toward facts. And sometimes as essay resembles "pure" scientific discourse in its effort the help readers understand the facts, processes, and relations of intellectual training.

While the essayist attempts to reveal the conflict of a character with nature, with other people, and with himself, he also aims to convey a truth of universal interest. Essayists present their own interpretation of truth. Fiction writers are free to *invent* characters and events to present visions of truth. Essayists must *discover* and explain the particular truths that lie at the heart of actual characters or actual events. This discovery process, rather than the magic of invention, also drives the essays and memoirs of lawyers for reasons that are unique to the law. The rule of law is a rule of truth and is the ultimate litmus test for acceptability and credibility of essays and memoirs *by* lawyers. At its core, lawyers cannot distort the truth, but can reveal it with all artistic flair. They can disregard irrelevant details, intensify crucial moments, and use imagination to rekindle the fire of old controversies.

How might the art of essay come into play in a modern office? Let me count the ways. Well, let me recount only one of many. Corporate counsel, transactional lawyers, and public interest lawyers are often required to assess and advise on very large issues affecting public or private clients. This weighty retainer often calls for an opinion letters that seek high-level resolution to legal challenges that threaten in ways that individual case never do. At this level, the essay form offers a perfect solution to writing that all end of game challenge.

What if the President of the United States asked you to articulate a policy response to the growing problem of interrogating foreign nationals who might know where the next nine eleven attack was coming from? What if the Chairman of Enron asked you to articulate a legal strategy to a mounting avalanche of demands for financial information? What if the Governor of Arizona asked you to help form a response to an unprecedented drop in state revenues? What if a physician client asked you to tell him about how healthcare changes, Medicare reimbursement, and declining fee-for-service realities might dictate office changes in the next five years. What if a recently widowed woman, with adult children, asked you changes in her estate plan, her obligations to her children, and her future needs for income and financial stability? Would you write a straightforward legal opinion, in any of these examples? Or would you use the unique form, style, and pacing of a *legal* essay?

Poetry in Legal Documents

Poetry is a composition in verse. Often characterized by artificial, or sentimentalized poetic writing, *poetry* seeks imaginative and expressive heights. Poets write with a special sensitivity to the medium. While widely loved, *poets* are often viewed with great suspicion by lawyers, because we fear the artist's penetrating insight into spiritual emptiness.

Matthew Arnold said, "Poetry is nothing less than the most perfect speech of man, that in which he comes nearest to being able to utter the truth." It is likely that no self-respecting lawyer in America believes that. After all, what would poets know of the Rule of Law, or of *Magna Carta*. The truth is more likely expressed in the minor poems of John Lydgate when he said, quite poetically in 1449, "Love has no law." Poetry's contribution to literature, and perhaps to the law, is its simple conveyance of the essential character of language. Like the law, poetry can be down to earth; Robert Burns proved that. It can be lofty as John Milton, or as complex as Alexander Pope. What it cannot do is convey social justice, define government, or announce the emancipation of citizens, in language that is at once historic and applicable to every living being. Poetry touches many but the law rings true for all.

That said, poetry's most characteristic emotional form finds expression through a variety of techniques, *all of which* are found in legal opinions, client letters, and written arguments. Poetry's most oft used devices can capture the tragedy of the law, it's unfortunate victims, its villains, and its heroes. The most universal of these techniques is the use of metaphor and simile to alter and expand the reader's imaginative apprehension through implicit or explicit sensation. Lawyers constantly conjure up images pictures or images by invoking different kinds of imaginative associations. Poets elicit in others something of their own feeling and consciousness. Why not combine the professional aspirations? Sparingly, of course. Maybe one or two poetic lines per legal document. It would not do to be too literary, would it?

Linking Memoir, Essay and Poetry to Legal Documents

Not all *memoirs* closely observe history and many consciously fail to interpret history. Most *essays* are limited, while *memoirs* are often quite expansive. *Poetic* expression is unnecessary in a *memoir* but can certainly add perspective and even hope to an otherwise dreary subject matter. Lawyer essayists, particularly when writing about the Internal Revenue Service, are the skimmed milk of the legal profession. Nonetheless, memoir, poetry, essay, and law cling together like fingers inside a mitten. What makes all of them work together is the thumb—the creative writer.

Of the three, the most helpful, *memoir,* is a forgiving medium that allows plain recollection to be elegantly phrased. It permits occasional poetic inspiration. It can be expanded by artistic choices or corralled by tight

adherence to labels. And it is essay by another name. That is precisely why memoir, as a genre, is well suited for some legal documents. *Memoir* will stretch the reach of the lawyer's pen quite beyond the humdrum of opinion, well past the beige color of memoranda, and might even relieve the paralyzing numbness of appellate briefs.

Nevertheless, lawyers must be particularly vigilant to restrict memoir, essay, or poetic techniques to only a few types of legal documents. Contracts, leases, securities offerings, title opinions, and many more such documents are ill suited to the kind of artistic impression and persuasive expansion commonly found in memoir. But letters to clients on sensitive and vital subjects can easily benefit from the voice of the lawyer, layered with experience, and presented with the necessary sensitivity that personal correspondence demands. Routine motions going to commonplace issues of jurisdiction, scheduling, or rule compliance do not need artistic touches or the level of insight found in memoir. But statements of the case in appellate briefs, or pleas for relief in dispositive motions, can be made more forceful, and attention grabbing, by the force of narrative often found in memoir.

I do not know of a single litmus test that will identify which particular legal document is suitable for memoir technique. But every lawyer is frequently challenged by writing something that keeps her up nights, invades her dreams, teases with scraps of fact, invention, idea, image and memory. All of us have faced a blank monitor at the outset of writing something for or to a client, or a court, that spoke to some core belief, law, remedy, or consequence. When that moment comes, it demands the very best writing in us. For most of us, it comes only a few times a month and most often takes the form of expressing a *big idea* in a written document. Sometimes it is a new point of law, something hinted at in precedent, implied in the penumbra of the Constitution, or a remedy whose time has finally come. Sometimes, it's the righting of a long-overdue wrong, or the lifting of a lifetime of abuse, or the wrenching idea that freedom brings to legal minutia.

Memoirists approach such challenges with humility, uncertainty, and doubt because they want to get it right and never underestimate the challenge. Lawyers who understand memoir, read essays, and enjoy at least some poetry, can rise above the norm and write moving, compelling prose.

The famous case of Miranda v. Arizona comes to mind. The government's brief in Miranda posed the issue before the United States Supreme Court in lawyer-like terms (just the facts). The petitioner's brief, written by John P. Frank, a gifted and prolific, posited it differently.

State of Arizona Brief	Petitioner's Brief
"Whether an arrested suspect's lack of the assistance of counsel at the time he makes a pre-arraignment statement renders the statement	"Whether the confession of a poorly educated, mentally abnormal, indigent defendant, not told of his right to counsel, taken while he is in police custody and without the assistance of counsel,

constitutionally inadmissible at trial."	which was not requested, can be admitted into evidence over specific objection based on the absence of counsel?"

Reading the opposing statements highlights the writing talents of one, and the traditional approach of the other. History faithfully records which side of that simple statement of law carried the day. We can all argue about which side had the better legal position, but there is no doubt about which side had the better writer.

Many of our most respected jurists are as famous for their eloquence as they are for their knowledge of the law. Oliver Wendell Holmes said, "Eloquence may set fire to reason." William O. Douglas noted, "free speech was not to be regulated like diseased cattle and impure butter." Warren Burger immortalized free speech by saying that it "carried with it the freedom to listen." Some of our most respected writers delved deeply into the law. Truman Capote might have had lawyers in mind when he said, "Writing has laws of perspective, of light and shade, just as painting does, or music. If you are born knowing them, fine. If not, learn them. Then rearrange the rules to suit yourself."

Traditional Legal Writing versus Creative Nonfiction

There is, of course, a difference between traditional legal writing and creative nonfiction. Part of the difference lies in the fact that the legal world has not yet recognized the legal, much less the literary, value of genre writing. Lawyers might write some documents in the style of the memoirist, or the essayist, or they might choose to remain with creative but safer, and less demanding forms for some legal documents.

The larger difference is best explained by looking at the writing exercise as an experience in the lawyer's life. If the lawyer does indeed *experience* the case, rather than merely *handling* it, that's different. Some note ought to be made of the fear, anxiety, compassion, and sensitivity that exist in every client's problem, no matter how small it may seem to the justice system. The mother who loses her child needs a lawyer who can define her case in terms that might not fit "plain, simple statement of the case" demanded in the rules of civil procedure. The homeowner whose home has been eminently domained needs an expression of feeling, as well as a statement about the public purpose to which his property might be put.

Commercial photographers provide an apt metaphor. A photo conceived for commercial gain will perhaps provide material enrichment but is unlikely to achieve literary worth. That is because in both photography and law,

motivation is important. The photo taken, like the letter written to preserve something significant, may lead to a genuine awareness of value. Both can become translators of realities, comfortably at ease with the art of representation, in service to others, and the word, or the photo, as the case may be.

Think Big—Think Memoir

When a lawyer thinks big, addresses a public issue of national significance, or posits a universal theme, no single genre of writing is going to be large enough to cover the territory. In that sense, the need to express a *big idea* demands memoir. Memoir depends very much on perspicuity, regularity, and order of thoughts. The secret of a good memoir is attention to detail. That turns on how deeply, and thoughtfully the lawyer connects the big idea to the essential facts needed to fully develop the big idea. We rarely forget things that have scarred or blossomed in our memory banks. Deeply impressed memories, carefully extracted, and laced with big ideas make memoir writing an art and an innovation in legal documents.

Anthony Lewis's *Make No Law,* about the Sullivan case and the First Amendment is, as Fred Friendly put it, "A superbly woven tapestry of First Amendment Law and how our written constitution fulfills the hope and promise of those who framed it." Louis Nizer's *My Life in Court* is a thundering stampede where words are bulls, defenses are wits, and the search for truth is a mighty battle to turn the herd away from the cliff. The distinguished author of *Go East Young Man,* a craggy-faced man with long, white hair, was a relic of an earlier, more optimistic era. William O. Douglas's classic serves high literary interest and the law because it induces a condition of unrest in young lawyers. *Go East Young Man* is nothing less than a lawyer's literary travelogue. Lewis, Nizer, and Douglas wrote grand books, even grander memoirs, and proved that creative non-fiction technique is exactly what lawyers need to tell our client's stories to judges, juries, opposing counsel, and the world.

Inaptly called an autobiography, Ephraim Tutt's *Yankee Lawyer,* makes clear the imperfection of court language, and distinguishes it from literature. Noting that the law only allows testimony about what it calls facts, Tutt decries the law that "won't allow the use of any simile, metaphor, or analogy. Homer wouldn't be allowed to talk about a 'wine-dark sea' or Shakespeare about the quality of mercy dropping 'as the gentle rain from heaven'."

The common thread running from Lewis, through Nizer, and Douglas and then bow-tied by Tutt is that you cannot express the truth without using every creative technique at your command. Memoir is an interpreter of truth and as such is superior to mere evidence of truth. Judge Cardozo may have said it best in his memoir on "Style,"

> There is an accuracy that defeats itself by the over emphasis of details. I often say that one must permit oneself and that quite advisedly and deliberately, a certain margin of misstatement. The picture cannot be painted if the significant and insignificant are given equal prominence. One must know how to omit.

The goal of creative writing for lawyers is remind all lawyers of the forgotten reality that made law pre-eminently a literary profession. There was a time when words were the lawyer's media of exchange. It could come back, but we must work hard to free ourselves from the legal goblins that hide in our briefs.

Appendices

Six Essential Skills For the Creative Legal Writer

1. Cultivate **The Active Voice**. Say, "The judge granted the motion." Do not say, "The motion was granted by the judge." If you are active, you do things. If you are passive, things are done to you. In general, you should use the active voice in all legal documents except where the party is either unknown or insignificant, or when you want to achieve special stylistic effects.
2. Frame **The Deep Issue.** The deep issue in every motion and brief is a summary of the three essential parts of all good analytical and persuasive writing: (1) The question, (2) the answer, and (3) the reasons for the answer. You must frame the deep issue on page one and it must meet a strict ninety-second test—if your reader does not understand the deep issue in 90 seconds, you did not frame it properly.
3. Cut out the legal **Hamburger Helper**. Cultivate a lean style, stripped of unnecessary words.
4. Build a **Literary Bridge** from one sentence to the next, from one paragraph to the next, and from beginning to end. Context is everything.
5. Write with the **Flowers Paradigm** in mind. Madman—Architect—Carpenter—Judge.

6. **Pacing and Progression** is the be-all-end-all of *creative* legal writing. When you reach the point where you cannot find anything wrong with the motion, when its voice is active, and you have deeply framed the issue, when it's lean, well bridged, and written according to the Flowers Paradigm; then look to pacing and progression. The document might be legally sound, factually accurate, and persuasive; but does it *read*? It might be on track, but is it *slow or boring?* Is it leading to anything? Legal motions must give the judge a satisfying sense of progression—but not too easily. Make the judge work—but not too hard. Every single word is either a hero or a villain. Even the slightest reverberation in the most remote corner shakes your reader. Each strand is separate, but each strand affects the whole.

Nine Little Rules for the Creative Legal Writer

There are scores of books on legal writing. I've read most of them. My personal preference is Bryan Garner's book, "*Legal Writing In Plain English.*" All of them encourage writers to develop a style I'll call the "wordsmith's vortex." A vortex is a whirling, spiraling mass of water that sucks everything near it toward its center. A wordsmith's vortex is a paradigm that draws you into its center. It can give you the deep writing that most lawyers long for, but few achieve. Practicing law will plunge you into a vortex of contractual words, client-pleasing phrases, judge-informing paragraphs, and briefs that free the innocent, and condemn the tortfeasor. If you expect your client to follow your advice, then draft, critique, and coalesce your writing. Each of these books are chock full of good ideas. I have narrowed the list down to twelve "little" rules.

Little Rule Number 1: Let Your Words Ring in His Head.

> Vigorous writing is concise. The only thing worse than unnecessary words in a sentence is an unnecessary sentence in a paragraph, each of which should narrow and focus the document they occupy. This requires not that the writer make all sentences short, or that he avoid all detail and treat his subjects only in outline, but that every word tell. *William Strunk, and E.B. White,* **"The Elements of Style"**

How do your words "sound" to you? Do they ring true or clang boringly? Can you hear what you read in the work of others? Do you think about how your writing sounds as you are writing? Sound is one of the most primal tools we have in evaluating any piece of writing. When an agent or editor gives your work a *read,* she enters your text and lets the words, for good or bad, ring in her head. What she hears determines the publishing fate of your work. A legal document that does not "sound" right might mean that your client's remedy is about to be denied.

There is a definite sound to legal prose, just as there is in fiction. It sounds authentic, justifiable, and honest. It reminds the judge, client, or opposing counsel that the rule of law is vital to all we do. Most importantly, it is not just about getting a story across, but also about *how* you get there.

Every lawyer has written an ill-sounding sentence; one that is technically correct, even grammatical, but still sounds wrong. There is a certain rhythm to a well-crafted legal document. It is never hesitant, or tentative because it "sounds" authentic, and real. While sound is a very judgmental characteristic, it still has a few common manifestations. They include:

- Poor sentence construction.
- Excessively long sentences, interrupted by short little nothings.
- Grammar, usage, and punctuation errors.
- Echoes (repetition of character names or unusual words).
- Alliteration.
- Resonance (the way a sentence resounds in the context of a paragraph).

Little Rule Number 2: Plan the Beginning, the Middle, and the End.

All of God's legal documents have three distinctly divine parts: the beginning, the middle, and the end. Most of the Devil's documents start at the end and have no middle. Plan all three parts. All that really matters is that they become whole.

Little Rule Number 3: Draft for the Judge's Secretary.

Draft for an ordinary reader, not for a mythical judge who might someday review the document.

Nothing expressed or implied in this Agreement is intended or shall be construed to give to any person or entity, other than the parties and the Buyer's permitted assignees, any rights or remedies under or by reason of this Agreement. [41 words]	This agreement does not give anyone, except the parties and assignees, any rights or remedies. [15 words-a 37% reduction]
The Corporation and the Executive explicitly agree that this Agreement has been negotiated by each at arm's length and that legal counsel for both parties have had a full and fair opportunity to review the Agreement so that any court will fully enforce it as written. [47 words]	The Corporation and the Executive have negotiated this Agreement at arm's length. Legal counsel has reviewed the Agreement. [18 words—a 39% reduction]
The employee explicitly acknowledges and agrees that the agreement not to compete, set forth above, is ancillary to an otherwise enforceable agreement and is supported by independent, valuable consideration as required by Texas Business and Commerce Code Section 15.50. The employee	The employee acknowledges that the agreement not to compete is ancillary to, independent of, and valuable consideration for the Agreement under Section 15.50 of the Texas Business and Commerce Code. The employee acknowledges that the geographical area and scope of restrained

further agrees that the limitations as to time, geographical area, and scope of activity to be restrained are reasonable and do not impose any greater restraint than is reasonably necessary to protect the goodwill and other business interests of the employer. [83 words]	activity are reasonable and intended to protect the employer's interests. [50 words—a 49% reduction]

Little Rule Number 3: Understand "Comparison"

> Muddiness is not merely a disturber of prose, it is also a destroyer of life, or hope. It is death on the highway caused by a badly worded road sign, heartbreak among lovers caused by a misplaced phrase in a well-intentioned letter, anguish of a traveler expecting to be met at a railroad station and not being met because of a slipshod telegram. *William Strunk* & E.B. White, "***The Elements of Style"***

An analogy is a likeness between things when the things are otherwise entirely different. For instance, "learning is to the mind what light is to the eye, enabling it to discover things hidden."

A simile is the likening of two things, generally by using the words "like" or "as," which however different, have some strong point of resemblance. For instance, "she danced lightly as a feather."

A metaphor is used when a comparison is implied, but not formally expressed, a short simile. Thus, "that lawyer is like a fox" is a simile; but "that lawyer is a fox," is a metaphor. This metaphoric comparison includes a buried gender comparison.

A comparison is an analogy, simile, or metaphor, which helps the reader grasp a difficult idea. The best analogies are the simplest ones. The best similes are poetic or imaginative comparisons. The best metaphors use the fewest words to express the same thing, the aim of all good writing. On the other hand, bad or cliché comparisons jump off the page.

Little Rule Number 4: Edit Yourself Systematically

- Edit words, then phrases, then sentences.
- One sentence at a time.
- One paragraph at a time.
- Edit for structure and flow.
- Then edit for clarity.
- Then edit for comprehensiveness.
- Then edit for style.

Little Rule Number 5: Love Thy Critic.

The following excerpt is from Bryan Garner's book:

> Agree with a colleague ~~that the two of you will~~ [to] do some mutual editing. ~~Each of you will then~~ [W]~~w~~rite a three-paragraph persuasive essay. ~~(Don't~~ [Do not] forget Section 30.~~)~~ Exchange the essays, edit them ~~within a specified period,~~ and ~~then~~ meet to discuss your edits. ~~Each of you should~~ [A]~~a~~gree to ~~(1)~~ listen open-mindedly to the other's edits, and ~~(2)~~ refrain from making unduly negative remarks[.] ~~on your colleague's essay. Each of you should~~ use your colleague's edits to revise the original.

Little Rule Number 6: Avoid Fancy Words

Lawyers, at least the best of 'em, are never pretentious, coy, or cute. Don't write to prove you ain't in with the best of 'em. The law is burdened by twenty-dollar words that lawyers, the best of 'em at least, can change into fifty-centers that are handy, ready, and able. Even ordinary lawyers are subtle, clever, and grounded. Write that way—use words that prove you do not have to prove anything, you do not need to grab attention, your words will speak for you. Hyperbole and melodrama are for sci-fi, or chick lit. If you are subtle, your words will be in no rush, you can pace the facts, prolong ever so slightly the tension, and even foreshadow a bit. You can leave some things unsaid and squeeze the judge, or your client, into coming into your conclusion, his or her way.

There is nothing "wrong" with fancy words, they have their place, along with "plain" words, in literature. But for lawyers, the line between the fancy and the plain, between the

ponderous and the quick understanding of the document is alarmingly fine. It is a matter of timing and sound. Plain words get into the reader's head quickly. Fancy words can be hard on the ear. Lawyers who are great writers tend to become great lawyers because they know when to use colloquialism and when to retreat to formal phrasing.

Little Rule Number 7: Hammer The Grammar

Grammar and sound are the oil and water of writing. We want to write grammatically and sound good, but sometimes one picks a fight with the other. Lawyers, particularly trial lawyers, know how to cock their ears. Some infinitives improve when split, just as some prepositions belong at the end of a sentence. It's a matter of ear—how does it sound? Contrary to grammar books, it is the ear, not the eye, that saves us from those little prose embarrassments. Decide with your ear when to omit "that" from a sentence ("She knew she could win the case," sounds better than "She knew that she could win the case," it is simpler and just as clear.

Little Rule Number 8: Stifle Thyself!

If there is one single, universal failing among lawyers, it is that we are too free with our words, and captivated by the length of what we write. Too many of us are too often guilty of babbling like politicians. Too often we think we will be heard if we utter, or write, lots of words. Deep down, the psychology of wordiness is nothing short of tyranny; we are fond of having a large superfluous establishment of words to wait upon us on great occasions. We think it looks important and sounds swell.

Other professionals, for example athletes, heroes, and lovers, do not talk all that much. Most of them cultivate taciturnity on purpose as an accepted signal how good they are at what they do. Samuel Butler said, "Brevity is very good, when we are, or are not, understood." Chekov said it best: "Brevity is the sister of talent." Talented lawyers, who have the gift of inspiring along with the gift of gab, would do well to stifle their words. That will put smiles on the faces of their judges, put clients at ease, and astonish the opposition.

Little Rule Number 9: Stay Out of the Mud

For traditional legal writing teachers, clarity is the gold standard; but it is rarely stylish, and always lacks punch. For lawyers, writing is essentially communication. It is not entertainment and certainly not just information. It is not about gathering the flock, or counting the votes; it is getting through, making your point, and earning your keep. To do that calls for much more than

simple clarity. Given the facts of your case, a little obscurity might be called for. There are occasions when one's mien is more overcast than clear.

But make no mistake, anything meritorious must also be clear. Words, sentences, even entire briefs can become hopelessly mired. When the mud is simply too deep to pull through, stop, take a deep breath, and start fresh. More often than not, it is an architectural defect in the design and structure of the document (or maybe only the sentence). It is muddy. Do not just scrape the mud off—hose it down and rebuild it starting with vowels, then consonants, use new verbs and nouns. As Strunk & White put it, "When you say something, make sure you have said it."

Recommend Books for the Creative Legal Writer

"Books must follow sciences, and not sciences books."[11]

This is a writing seminar. Accordingly, there is no required textbook. However, having reviewed nearly all of the available textbooks in legal writing courses, I recommend *Legal Writing In Plain English,* by Bryan Garner, Univ. of Chicago Press, 2001. Prof. Garner is a working lawyer, a widely published author, and a nationally recognized legal writing teacher. For those students with more time and a broader focus, I recommend adding the following books to your writer's toolbox.

1. *A Dictionary of Modern Legal Usage*, by Bryan A. Garner, Oxford University Press, NY 1987
2. *The Quotable Lawyer*, by David Shrager and Elizabeth Frost, Facts On File, Inc. NY 1986
3. *Legal Thesaurus*, by William C. Burton, MacMillian Publishing Company, NY, 1980
4. *The First Five Pages, A Writer's Guide to Staying Out of the Rejection Pile,* by Noah Lukeman, A Fireside Book, Simon & Schuster, NY, 2000.
5. *The Ethical Trial Lawyer*, by Gary L. Stuart, State Bar of Arizona Press, 1994.
6. *The Gallup 14*, a novel, by Gary L. Stuart, UNM Press, 2001.
7. *Miranda—The Story of America's Right to Remain Silent,* by Gary L. Stuart, Univ. of Arizona Press, 2004.

[11] Francis Bacon, 1561-1626, *A Proposal for Amending The Laws of England.*

8. *Aim For The Mayor—Echoes From Wounded Knee,* a novel by Gary L. Stuart, Xlibris, 2008.
9. *Their Word is Law; best selling lawyer-novelists talk about their craft,* Stephen M. Murphy, Berkley Books, NY, 2002.
10. *The Elements of Style,* Strunk and White, The Macmillan Company, NY, 1959.
11. *Garner's Modern American Usage,* Bryan A. Garner, First Edition, Oxford University Press, 2003.

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"Defeat is education. It is a step to something better."[12]

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[12] Louis Nizer, *My Life In Court,* 1960.