Do the Opposite for Better Legal Writing

Impress sophisticated legal professionals with writing that makes sense to laypeople

by Mark Cooney

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What can you do to make your readers think that you’re intelligent, analytical, and diligent? The secret may not be what you think. In fact, some of the writing techniques that will impress your readers the most may seem counterintuitive. They may sound like the opposite of what would impress sophisticated readers. So be it. Here’s my message to all law students learning the craft of legal writing: To be the most effective legal writer you can be, start doing the opposite of what you think will impress legal professionals—and the sooner the better. Here’s a list of some “opposite” approaches that will undoubtedly score points with your readers, whether they’re judges, clients, or bosses at a firm.

To Sound Smart, Make It Seem Simple

The watershed moment in my legal career happened before I ever set foot in law school. The summer before I started school, I worked for a prestigious law firm doing grunt work in its imposing law library. One day, somebody asked me to photocopy a memorandum that a young associate had written for the firm’s most senior partner. My curiosity got the better of me, and I read the memo. As I read, something amazing happened. I easily understood what I was reading despite having no legal training whatsoever. Even though written for a partner who’d been representing corporate giants in complex, high-stakes litigation for decades, the memo was broken down into a simple, step-by-step discussion of the events that gave rise to the lawsuit, the relevant law, and how that law applied to the facts. When I got done reading it, I felt smart—empowered.

Fast forward a few months to my first term in law school, when I had a chance encounter with the outgoing editor in chief of the law review, who was about to graduate first in his class. His words reaffirmed the value of the writing style I’d seen in that office memo a few months earlier. He told me that when taking exams, he always tried to write his essay answers so that his mother (a layperson) could easily read and understand them.

With these two experiences, the die was cast for me. Like the Blues Brothers at James Brown’s church, I had seen the light. I was to be, forever more, an ardent disciple of the make-it-simple doctrine. And when I finished law school and began practicing law, I soon discovered that busy judges and lawyers out in the “real world” craved documents written in this style.

Climb aboard! Resist the temptation to puff up the facts or legal principles that you’re writing about to make them seem complex or sophisticated. The best lawyers have a knack for doing just the opposite. So do the best intellects. They’re able to make complex, sophisticated principles seem simple and easy to understand. Your readers will usually be unfamiliar with the facts of your case and the relevant law. The best way to succeed as an advocate is to try your darndest to
help your reader digest it all with ease. You must do the hard work so that your reader doesn’t have to.

Making your prose seem simple is anything but simple. For every draft you write, you’ll need to go back later—with fresh eyes and your editor’s hat on—and ask yourself whether your reader will be able to easily understand what you’ve written. If not, start slashing away with the red pen until what you’ve written is very easy to grasp for someone unfamiliar with the law and facts. Even readers who are familiar with the law and facts (your boss, for instance) will appreciate this.

Making your reader’s job easy will always benefit you. You’ll build goodwill with your readers, and you’ll gain credibility. Your readers will think that you’re an excellent writer, thinker, and lawyer for making the complex and unfamiliar seem simple and accessible.

**To Impress Readers, Use Ordinary Words**

None of the champions of plain English would ever suggest that you abandon true terms of art. Whether it’s *res judicata* or the “fairly contemporaneous” element of a claim for negligent infliction of emotional distress, you’ll need to use the terms that define and embody the law. But for everything else, prefer ordinary words. Don’t ever consciously try to use a bigger word or a wordy phrase to impress your readers. Your readers will see right through it. It screams of insecurity. And it’s a distraction that makes it harder for your reader to stay focused on substance.

Hey, you got into law school. And when you’re out in practice, your reader will know that you graduated from law school and passed the bar exam. Your reader will assume that you’re smart. So don’t waste your time or bog down your writing style trying to prove this given. If a former employee sued XYZ Corp. for wrongful discharge, don’t tell your reader that the former employee commenced a cause of action against XYZ Corp. for wrongful discharge. If something happened after an event, don’t tell your reader that it happened subsequent to that event. If a court used a two-pronged test, don’t inflate the simple word *used* into the unnecessary *utilized*. And above all, avoid hard-core legalese: *said* as an adjective, *hereinafter*, *wherefore*, *pursuant to*, and all the rest.

Compare these two examples to see how simpler—and fewer—words can improve readability:

In the event that the attorney general commences a legal action against a polluter pursuant to the provisions of the Michigan Environmental Protection Act, the polluter can defeat the cause of action if the polluter can establish, inter alia, that there is “no feasible and prudent alternative” to the conduct that has given rise to the pollution.

Here’s a more readable version:

If the attorney general sues a polluter under Michigan’s Environmental Protection Act, the polluter can defeat the claim by proving, among other things, that there is “no feasible and prudent alternative” to its disputed conduct.
You get the point. Once you get past the legal terms of art that you cannot sacrifice, just write like . . . well, like a normal person. By avoiding unnecessarily inflated language, your writing will be crisp and clean, just the way your reader likes it. That’s the style of writing that will make you sound confident and intelligent to your reader. That fresh, direct style will impress your reader far more than the tired, overblown style that too many lawyers use.

As a law student, you’re at a critical fork in the road. Most lawyers who needlessly bog their writing down with extra words and inflated language adopted that style in law school, when they were trying desperately to “sound like a lawyer.” Reject that style now, and give yourself a chance to shine when you get out into practice.

To Prove You’re a Hard Worker, Make It Shorter
Your legal writing cannot be cursory or skip essential analytical steps. But your goal should be to write the shortest complete document that you possibly can. The more you research readers’ preferences, the more you’ll see this common theme.

Judges and their clerks must read lengthy briefs day after day, year after year. The chief judge of the Michigan Court of Appeals, William Whitbeck, has likened his workload to reading Tolstoy’s War and Peace every week. So it should come as no surprise that judges and their clerks have little patience for 40-page briefs that could’ve been written in 20 pages.

U.S. Court of Appeals Judge Harry Edwards once remarked that his court’s “worst problem . . . is overly long briefs.” Too many lawyers, he said, write “to the page limits” rather than presenting a tighter argument that’s “easier to read and much more impressive than a verbose offering.” U.S. Supreme Court Justice Antonin Scalia said the same thing in “Justice Scalia shares views on good style,” an interview in the January 2007 issue of Student Lawyer.

So you don’t have to take my word for it. Unnecessary length is not better—it’s far worse. If you don’t keep the length of your documents manageable, you’ll drown your strongest points in a sea of verbiage and lose your reader. This is true for office memos and court briefs alike.

When you’re an advocate, shortening is easier said than done. You’ll want to do your case justice and give it your all. Do that, but also do your best to avoid getting sucked into a “longer is always better” mentality. That will take discipline.

Unfortunately, keeping your documents relatively short won’t make them easier to write, and it probably won’t reduce the time needed to prepare them. In fact, it may take you longer to finish them. You’ll need to edit your documents carefully. The word “writing” is a misnomer when one considers how much editing time goes into producing a polished brief or memorandum. A modified version of an old adage aptly captures this dynamic: If I’d had more time, I would have written you a shorter brief. Make time for those extra edits.

To Argue Most Persuasively, Don’t Argue
In this profession, your readers are smart. They can easily spot overblown rhetoric, blatant spin, or attempts to cram bare conclusions down their throats. If you indulge in histrionics, your reader will be suspicious. And if you lay it on thick with the ol’ “clearly” this and “clearly” that,
without *making* it clear, your readers will see the red flags. Those methods don’t instill confidence in readers. After all, if the law and facts were on your side, you wouldn’t need to do any of those things, would you?

The writing style most apt to persuade your readers is a style that seems perfectly objective—more of a calm, teaching tone. Remember, judges and judicial clerks want to get it right. At some point, they’ll need to write an objective opinion explaining the outcome that they believe is correct. Courts cannot do this with histrionics.

This doesn’t mean that you shouldn’t write with flair. There will be plenty of opportunities for expressive language, fresh words, or well-chosen metaphors. This also doesn’t mean that you shouldn’t advocate your client’s position. When you’re writing a brief, of course you’ll emphasize the legal authority that favors your client and distinguish authority that favors your opponent. And of course you’ll emphasize the favorable facts and downplay the less favorable facts. But be subtle about it; maintain an even keel as you write. Again, stick to a more matter-of-fact, teaching tone, as if you’re simply helping your reader understand why your position is correct and why your opponent’s position is flawed. Try writing your briefs in a style and tone that you might use if you were the judge or the judge’s clerk, not in the style of an overzealous advocate.

**Don’t Save Conclusions for the Conclusion**
That heading was a bit of a gimmick, I confess. I needed a catchy way to end this article. But it’s true that the “Conclusion” section of a brief or memo is no place to state conclusions for the first time. You must state all of your conclusions—and fully support them—in the body of the brief or memo, before you get to your Conclusion heading. The Conclusion section should be a pure recap of conclusions you’ve already stated and explained thoroughly. Nothing more should appear there, other than perhaps a formal request for relief in a brief or a bit of practical advice in a memo.

I’ll take my own advice and recap. As strange as it may sound, you will often improve your legal writing the most by doing the opposite of what you think will impress readers. Make what you’re writing about seem simple. Use ordinary words. Keep it brief. Sound calm and objective when you argue. In short, do the opposite for better legal writing.

*Mark Cooney is an associate professor at Thomas M. Cooley Law School.*
Get Real About Research and Writing

Do you share the myths students often have about the role of research and writing in legal practice? If so, you’ll want to take your skills more seriously

by Mark Cooney

Mark Cooney (cooneym@cooley.edu) is an assistant professor at Thomas M. Cooley Law School.

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When I was a lawyer in private practice, I supervised student clerks at my litigation firm and taught research and writing as an adjunct professor. My conversations with students often turned to the role of legal research and writing in the “real world” of lawyering. Their comments often betrayed a number of common misunderstandings about everyday practice

Students expressed these mistaken beliefs time and again, so it’s a good bet you share at least some of them. If you leave these myths unchecked, brace yourself for a rude awakening once you start working at a firm.

To help you ease the transition from the classroom to the law office, I’ve developed a list of the top 10 myths law students believe about research and writing in the practice of law. Each is followed by a more realistic perspective. If you reject these myths, you’ll be well on your way to becoming a more valuable clerk or associate at your firm.

Myth 1: You can choose a practice area where you won’t need strong research and writing skills.

Despite what you’ve seen on TV and in movies, lawyering is primarily researching the law and writing about it. Every area of the law requires sound research and writing skills. Whether you’re a tax lawyer, commercial litigator, corporate lawyer, criminal defense lawyer, or trust specialist, you’ll spend hours on research. Statutes, codes, and regulations change and are interpreted in new opinions. Your clients will have questions that require you to understand the current state of the law and to communicate it in writing.

Whether it’s opinion letters, memos, or briefs, you will be writing. Even trial lawyers draft briefs of all kinds, including mediation summaries, trial briefs, and briefs for dispositive motions and motions in limine. Trial lawyers also draft contractual documents, such as releases and settlement agreements. You can’t hide from the fact that lawyers must know how to do legal research and write about the law. You’ll be a better lawyer by working on these skills throughout law school and after.
Myth 2: In legal writing classes, students learn only how to write.

Legal writing classes teach more than just how to write. They teach how to read, analyze, and form substantive legal arguments. First-year research and writing classes teach students how to analyze unabridged case opinions and statutes. Students also are introduced to the rules of statutory construction and contract interpretation. Advanced writing classes give new focus to the concepts of vagueness and ambiguity.

Learning to spot ambiguity in a contract or to break down a statute will translate into spotting legal arguments that may control the outcome of future cases. For instance, criminal defense lawyers always scrutinize the statutes and ordinances under which their clients are charged to see if they truly apply and if any ambiguity or excessive vagueness will enable their clients to avoid prosecution. In a contract dispute or insurance coverage case, the litigation often focuses on interpreting contractual language and making careless drafters pay for their lack of clarity. Students in research and writing classes learn how to spot and exploit poor writing to help their future clients.

Myth 3: New lawyers impress their bosses the most with oral advocacy skills.

It’s important for students to learn oral advocacy skills in law school and to continue developing them in practice. But, for new lawyers, good research and writing is the fastest and surest way to impress supervisors. Most new associates spend the bulk of their early years preparing memos and briefs. If that’s the case, your value as an employee will hinge largely on the quality of your research and written work.

What about those lucky new associates who are quickly sent to motion calls, mediations, depositions, and the like? Their supervisors are still likely to evaluate them primarily from their written work, because that’s probably all their supervisors will ever see. Bear in mind that supervising lawyers typically ask new associates to cover court hearings and depositions for a reason—the supervisors have scheduling conflicts and need to be elsewhere. Except in rare cases, no supervising lawyer will watch a new associate present an argument in court or cross-examine a deponent. But these same supervisors will carefully read the memos and briefs they’ve asked an associate to write for them. Thorough research reflected in a polished memo or brief is the single best way for a new lawyer to prove his or her mettle.

Myth 4: Research and writing doesn’t win cases--oral advocacy does.

Students often believe that briefs are just “primers” for judges, giving them background information on the case and the issues before the decisive oral argument of a motion or appeal takes place. Obviously, oral advocacy carries the day at trial, and law students and lawyers should strive to develop good oral advocacy skills. But when courts are presented with complex or dispositive legal arguments at the trial or appellate level, oral argument usually is far less important to the outcome than are the briefs and the research that went into them.

It's common for state and federal trial judges to issue opinions on dispositive motions without even hearing arguments. And more and more appeals are being decided without any oral
argument at all. State appellate courts often use “summary” panels to decide appeals without argument. Federal appellate courts often issue memorandum opinions without hearing arguments. These no-argument cases obviously are decided on the briefs alone.

What about the cases where the court hears arguments? Law students are surprised to learn that judges’ research clerks often prepare memos recommending an outcome, or even draft opinions, before the lawyers offer a single word of argument. Trial judges often admonish lawyers to limit their arguments to points that aren’t already briefed (or listen impatiently while lawyers orally rehash their briefs) and then read prewritten opinions onto the record. In appeals where arguments are allowed, there often is a 15-minute time limit. Appellate judges often comment privately that oral arguments rarely change the outcome of an appeal.

**Myth 5: Your primary reader will always be a judge with a good working knowledge of the area of law you’re writing about.**

Whether in a trial or appellate court, the first person to read your brief is likely to be a research attorney who’s less than three years removed from law school. This lawyer’s job is to carefully evaluate the briefs, check the research, and recommend the correct outcome--often in the form of a draft opinion. Don’t presume the reader has any level of experience or expertise in the area of the law you’re writing about. Because a relatively inexperienced lawyer probably will play a large role in the court’s decision, you must write briefs that clearly communicate the law, with a step-by-step approach that yields a logical flow of analysis. Therefore, always aim to educate your readers.

Adopt the same philosophy even if you’re confident that only the judge or judges will read your brief. Even the most experienced judges are required to be jacks-of-all-trades, often presiding over diverse criminal, civil, and family law cases. For example, a fine judge with decades of experience may never have presided over a Fair Credit Reporting Act case. Or that judge may have gone five years without seeing a Uniform Commercial Code case dealing with the specific issue that controls your case. Effective lawyers concentrate on educating even experienced judges with their briefs.

**Myth 6: Using simple words is not lawyerly and means you’re dumbing it down.**

Have you ever heard anyone complain that a brief, statute, ordinance, or contract was too easy to read and understand? Have you ever heard anyone criticize a lawyer because he or she used plain language in a brief? Of course not. If you avoid the inflated language and poor habits so often associated with lawyers, no one will think that a plumber broke into your law office, stole your letterhead, and decided to write a brief on implied contractual indemnity. In short, no one will think you’re a nonlawyer--or an unsophisticated lawyer--simply because they easily understood what you wrote. In fact, they’ll think you’re a good lawyer. You don’t lose credibility by writing "Mr. Jones sued Mr. Smith" instead of "Mr. Jones initiated a cause of action against Mr. Smith."

Simple, uninflated language sounds confident. Legalese and inflated language are the trappings of insecure writers, writers who feel compelled to cry out to the world, "Believe me, I’m a lawyer!"
Myth 7: It’s the reader’s fault if he or she misunderstands what you wrote.

When you start your first job as a summer clerk or lawyer, your bosses and co-workers will edit your work and suggest changes. You may feel a sting of disappointment, take offense, silently reject the criticism, or get defensive. You may try to explain to the reader that what you wrote really was clear. Don’t.

Adopt the attitude that the customer is always right—and your reader is your customer. Accept and embrace feedback at work.

Remember that if what you wrote was truly clear and seamless, the reader wouldn’t have felt the urge to suggest a change. A reader rarely will pick up the red pen unless something needs attention. If your reader can’t follow what you’re saying, you didn’t write it well enough—period. So even if you don’t agree with a specific edit, you’re on notice that you need to do something to clean up your document. And you’ll learn from the feedback.

Even the world’s best writers have editors. Don’t reject edits. Address the problem and learn from the feedback. And when you’re editing your own writing on the job, always strive to keep your future customer happy. After all, your reader will be deciding your case or issuing your paycheck.

Myth 8: Grammar, style, organization, and other details don’t matter because they’ll go unnoticed.

It’s true that readers won’t consciously notice that you’ve paid careful attention to style and mechanics while writing a legal document. No judge will read a brief and then announce to her clerk, "Hey, I liked that active-voice phrasing and those strong verbs!" But, if you’re diligent, the same readers who don’t consciously notice your editorial decisions will notice that your document was easy to read and understand. And they’re likely to read your document more carefully because it’s easy for them to do so. This will enhance your chances of persuading your reader and winning your argument.

Myth 9: All the research tools and resources readily available in law school will be readily available in practice.

Students are spoiled during law school: free Westlaw and Lexis, and a library with every resource a lawyer could ever want. But it’s often very different in practice. Law students often are shocked when they learn the typical per-minute charges for using Westlaw and Lexis. Not all firms subscribe to these services. And, even if they do, not all clients will pay those per-minute charges. For example, associates at insurance defense firms may be subject to a client’s "litigation guidelines," which often prohibit using computer databases outright or require special authorization to use them. And not all firms can afford, or want to pay, the flat-rate plans that can cost four figures a month and add substantially to a firm’s overhead. Add to this the uneven supply of hard volumes found in most law office libraries, and you’ll quickly realize you need to become much more resourceful than you had to be in law school.
Myth 10: You won’t need to research the controlling cases and statutory law.

Law students often get caught up in a canned-outline mentality. Whether it’s studying for a first-year contracts exam or reviewing for the bar exam, all the rules are served on a silver platter. If you’re like many students, you’ve purchased commercial outlines or found something from a student bar association outline bank. Just memorize and comprehend these easy-to-digest rules and all will be fine, right?

In practice, it rarely will be this easy. The general rules found in outlines will be a given, and you’ll need to dig deeper. New associates often have to hunt for cases on point, and at times it will take some work to find them. You’ll encounter new areas of law and new issues in familiar areas of law for which you’ll find no brief or outline to guide you. And you’ll often need to find cases that apply familiar rules in unique factual situations. In these situations, the thoroughness of your research can mean the difference between winning and losing a case.

When your state’s law is sparse on an issue, finding persuasive case law from other states or instructive secondary authority can give a judge who otherwise would be grasping at straws the confidence to accept your position. This extra research can take time, and it won’t be as easy as turning to a law school outline. But it may make all the difference to your client.

Don’t be lulled into a false sense of security just because the general rules of law always have been readily available to you in outlines. Take your research and writing classes seriously. What you learn in these classes will help you dig far deeper and excel as a law clerk or new associate.