

# 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.

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