

47 Litigation Writing Rules

By Peter R. Silverman



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I've compiled the following rules through the years while working with associates on litigation writing.

The First Rule

1. Rules are meant to be broken. Do it only knowingly and for a purpose.

Grammar and Word Choice

2. Don't insert "of" after "all"; it's an unnecessary junk word almost all [of] the time.
3. "In order to" has two too many words. Use "to."
4. Learn the difference between that and which and between than and from. "That" is different from "which," which is a difference that you should master.
5. In addition to the aforementioned rules, avoid "hereto," "wherefore," "hereinbefore," and any other word that ancient lawyers devised by gluing together normal words to create monster words.
6. In the hands of a gifted writer, a hackneyed phrase can ring the bell. When it comes to the rest of us, we're all thumbs when we use them. Avoid hackneyed phrases like the plague.
7. Use "only" immediately before or after only the word or phrase it's meant to modify. (Do this only if you want to say only what you mean.)
8. More generally, be aware of all misplaced modifiers. Just ask the mock turtle.
9. Use the possessive to avoid unnecessary words. While staying sensitive to nuance, become the rules' master rather than master of the rules.
10. The fact is that "the fact is" or its

variations are unnecessary clutter words. 11. It is often a sign of laziness to begin a sentence with "it is."

12. However much you want to start a sentence with "however," don't do it unless you mean "no matter how." Yeah, this is elitist, but it's a good tool that will help with rule 26.

13. In the event that you're tempted to use "in the event that" rather than "if," don't. It's pompous.

14. Before using "prior to," try to find a less pretentious one-word substitute.

15. Subsequent to reading "subsequent to," I usually have to think whether it means "before" or "after." Use "after" or "later."

16. Except for citation form, don't use Latin, e.g., "e.g.," "i.e.," "supra," "infra," or "inter alia." Use English; e.g., "for example." If you don't know a Latin word's or an abbreviation's English equivalent, definitely never use it. "Etc." is an exception, but that's because normal Americans use it, and it works better than "and so forth."

17. Use "plaintiff," "appellee," or the like only when you have a difficult time remembering the parties' actual names.

18. Your using the possessive with gerunds is elitist but will help avoid mush writing.

19. Having made that point, make sure to follow "ing" clauses at the beginning of a sentence with the proper subject. (Having finished this peeve, I hope you'll notice I erred by example.)

20. "Instant" refers best to oatmeal. When discussing the case you're litigating, try "our case" or "this case" or, if that doesn't work, the "present case."

21. Don't nounify verbs or verbify nouns. I don't like the way it impacts me.

Style

22. Don't Capitalize Words That Don't Need To Be Capitalized. Capitalize only proper nouns or defined terms.

23. Always use the active voice; the pas-

sive voice should not be used by you, even in certificates of service. Speaking of which, I want to retch when I read that something was served this 4th day of March in the year 2004. Try, "On March 4, 2004, I served . . ."

24. Use scoring, italics, bolding, and exclamation points sparingly. They are *used too often* as a substitute for making a point clearly!

25. Don't put time or parenthetical clauses, when you need to use them, at the middle or end of the sentence. When you need to use them, put them at the beginning of the sentence.

26. Improve your writing by striking 50 percent of your uses of "but," "however," and "although" from the start of your sentences.

27. Improve your writing by striking 50 percent of your commas. Use more short sentences. But not too many.

28. Great writers can be sarcastic, bombastic, humorous, angry, aggrieved, or bitter *and* use these tones to make their point more persuasively than they could with straightforward narrative. Most of us aren't great writers. Resist the temptation until you become one.

29. If you want to sound like a sophisticated corporate or real estate lawyer, stay away from litigation and get in the practice of marking up 50-year-old forms and using the earlier of long sentences or multiple clauses, whichever is later, and repeating and using over and over synonymous pairs of words and phrases that are duplicative and redundant. Use phrases, such as "witnesseth" and "our hands subscribeth," that no one has a clue what they mean and, in settlement agreements, start some of the agreement's numbered paragraphs with the phrase "the parties agree" or "the parties understand," but don't use those phrases in front of the agreement's paragraphs that the parties don't agree on or don't understand. Ignore rule 5. By the way, you'll have a leg up in doing all of this if you were swaddled too tightly at birth.

30. You are hereby notified that I prefer to be notified without trumpet fanfare announcing that the notice follows. Just say it.

Organization

31. If you can't write a convincing topic paragraph for a section, break up the section into coherent parts that can be described in a topic paragraph and a succinct heading. You don't need to keep the topic paragraph in the document, but you need to be able to write it. Paragraphs should express one idea, even if it means a one-sentence paragraph. I don't like long paragraphs. Do you? By the time I get to the end of a long paragraph, I can't remember the point the writer was trying to make at the beginning of the paragraph. Can you?

Half the time the problem with a bad sentence is that it's surrounded by an incoherent paragraph. Rewrite the whole thing.

32. The reason men don't like to ask for directions is that we don't like admitting we're lost. Don't put your brief reader in that dilemma. Right from the start, give clear directions as to where you're going. Directions should refer to landmarks, which are headings and sections. Real men like directions; they just don't like asking for them.

33. Pay attention to whether you want your headings phrased neutrally, to disarm the reader, or slanted, to move the reader along. Choose the more persuasive strategy. Either way, a reader should be able to read only your headings and understand your argument.

34. I'll criticize you for incoherent, complex, or too few headings, but never will I criticize you for too many single-topic,

clear headings.

35. Half the time the problem with a bad sentence is that it's surrounded by an incoherent paragraph. Rewrite the whole thing.

36. When you're done rewriting a brief (or even an article or other writing), go back and review the headings to make sure they're still appropriate for what follows.

37. Think through your arguments before writing. Then write clearly and don't skip any of the argument's logical steps. This forces you to rethink. Repeat—think, write, rethink, rewrite—again and again until every square of the Rubik's Cube is in place. I don't want to see the brief before then.

38. Any idiot can present facts in a straightforward, chronological narrative. Be an idiot.

Integrity/Persuasiveness

39. Be detached enough from your clever words, phrases, sentences, and arguments to know when they distract or detract more than persuade or add. Don't name the cow.

40. Unless a case's point is idiot proof, don't cite it without a parenthetical explanation. I don't want to drop the brief to read the case to figure out why you cited it, and the judge won't want to either.

41. Never, ever stretch the point of a case or the gist of deposition testimony without giving the reader fair warning as part of the citation or summary. If I read something and find you've tried to sneak by a stretched citation or summary, I won't trust any of your other citations or

summaries and neither will the judge.

42. Quotations are much better than paraphrases. When used in context (see rule 40), quotations let readers know you're not trying to spin.

43. It's important to note that, if you have to tell a reader that it's important to note something, then you probably haven't laid the proper foundation for the reader to reach that inference without your prompt. Readers appreciate being persuaded rather than lectured to. Ditto "it is certainly the case," "clearly," and the like.

44. Emotion is good but must be earned. We cry at the end of a good movie, not at the opening.

45. Don't start writing until you've figured out why we should win and until you've figured out the difference between which arguments are jabs and which are knockout punches. Knockout punches rarely connect the first time you throw them. Throw them well and often.

46. Express the guts of the case in the brief's first few sentences. Tie the guts back into the brief time and time again.

47. Persuasive legal writing, at its best, is persuasive storytelling. The writer masters the facts and the law and blends them seamlessly into a consistent, comprehensive, and compelling story. The reader is swept along, responding to each step of the tale with a heartfelt nod of the head: "Yes, yes, yes, this is the way it is." This requires hard work—organizing and reorganizing, adding and winnowing, writing and rewriting—until the pages sing. I don't want to see the brief before then.

The Final Rule

48. When you work with me, be as constructively critical of my writing as I am of yours. That helps me grow and serves the cause of advancing our clients' interests with all the talent and skill we can muster. ☺

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