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For as long as lawyers have existed, their writing has been a subject of scorn. Philosopher Jeremy Benthem described lawyers' writing as "excrementitious matter." Founding father Thomas Jefferson said one could write like a lawyer "by making every other word a 'said' or 'aforesaid,' and by saying everything over two or three times, so that nobody but we of the craft can untwist the diction." More recently, entertainer Will Rogers said, "The minute you read something that you can't understand, you can almost be sure that it was drawn up by a lawyer."

To be a lawyer is to write, but to say that someone writes like a lawyer is not typically a compliment. It implies an overly formal, verbose and jargon-ridden style that has disappeared from nearly every corner of American life but still surfaces in legal contracts, court briefs and judicial opinions.

Standards for what's considered good writing in the legal profession are changing, however, amid a broad cultural shift in the way we read, write and process information. The rise of email and other forms of instantaneous communication — from texting to Twitter — is causing the profession to slowly but

surely embrace a more direct, more forceful and ultimately more persuasive style, says Brian Paul, a partner at Faegre Baker Daniels LLP who has written about evolving legal writing styles.

Electronic word processing, time-pressed clients and shrinking attention spans are also pushing current tastes toward the cleaner style. And lawyers wedded to the ways of old run the risk of angering clients and judges as well as losing their edge on opponents who employ a more forceful and persuasive writing style.

“Judges are always telling us to get to the point, and that’s more important advice now than it ever has been,” Paul says.

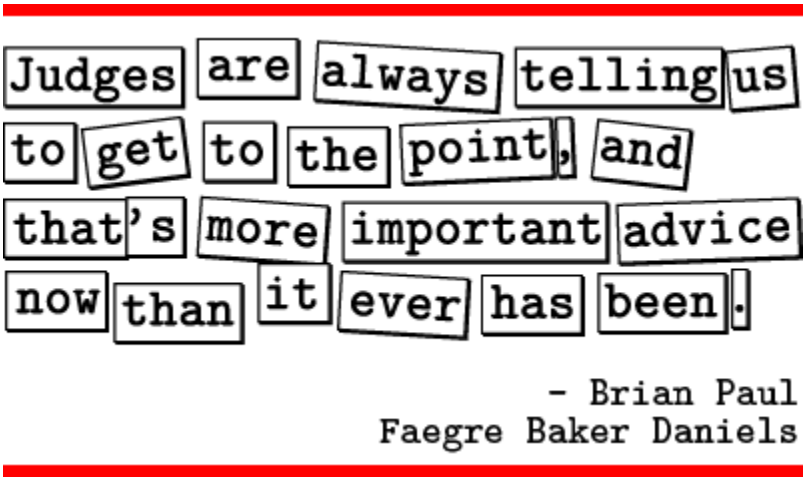
Getting to the Point

One factor heightening the demand for more concise legal writing is the diminishing attention spans associated with the internet age.

“We’re flipping back and forth to sports scores, emails are popping up on the screen — we’re the most distraction-prone generation in the history of mankind,” says Robert Dubose, the author of “Legal Writing for the Rewired Brain: Persuading Readers in a Paperless World.”

“Studies on multitasking have found that when we try to do more than one thing at a time, it reduces our performance. … The multitasking, the sheer volume of information and the constant interruptions have made us a less attentive people at a price to everyone.”

Getting to the point clearly and quickly is particularly important in the courtroom setting — and not only because judges need to understand an argument to support it. A rambling brief can render its writers the recipients of that most embarrassing of public callouts for a litigator, the benchslap.



In March 2015, U.S. District Judge William H. Pauley III of the Southern District of New York criticized overly lengthy filings from both sides in a trademark dispute before him.

UPS Store Inc. filed a 175-paragraph complaint with 1,400 additional pages of exhibits. In response, the franchisee defendant lobbed counterclaims in a 210-page answer with “voluminous” exhibits. UPS then filed a 303-page pleading “[brimming] with irrelevant and redundant allegations,” Judge Pauley noted.

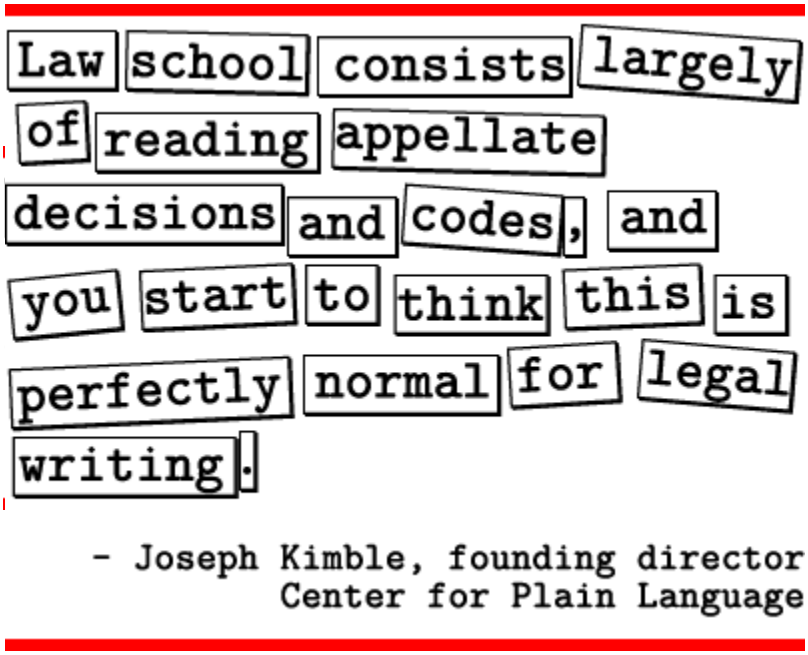
“A troubling trend toward prolixity in pleading is infecting court dockets in this district and elsewhere,” Judge Pauley commented. “Voluminous pleading is self-defeating. It chokes the docket and obscures otherwise meritorious claims and defenses.”

In another IP case, a party's overlong brief tanked a case against JPMorgan Chase & Co. The Federal Circuit nixed an appeal because Pi-Net International Inc.'s brief exceeded the court's 14,000-word limit, which its writers had allegedly tried to conceal by deleting spaces between words and employing odd acronyms. "It is so poorly explained that it is nearly incomprehensible," the court said of the offending brief.

Some judges see it as their duty to call out bad writing. Seventh Circuit Judge Frank Easterbrook once demanded a plaintiffs lawyer show cause why he should not be censured, suspended or disbarred for filing a particularly frivolous, incompetent, at times "wretched" brief, noting: "Judges are better able than clients to separate competent from bungling attorneys, and we have a duty to ensure the maintenance of professional standards by members of our bar."

Changing Client Appetites

The to-the-point approach is also in high demand by today's busy in-house counsel. Corporate executives and in-house attorneys are master multitaskers, scheduled to the minute, always connected and constantly interrupted. The Radicati Group found that email users sent and received an average of 122 business emails per day in 2015. The competition for clients' attention is great, whether they're fielding text messages or reviewing legal documents.



"If I send a five- or six-sentence email to a client and I wait until the last sentence to give that client a deadline to do something, nine times out of 10 they won't do it because they never read the last sentence of the email," Dubose says.

In client communications, Dubose says, the first sentence of an email is crucial. If emails have to be longer, they should contain visual cues like headings. The point is to make it easy for them to find the information they need to act on. Attorneys need to cut through the noise to deliver information and advice quickly and forcefully, and that's where to-the-point writing can play a role.

Consider, for example, counsel's role of translating complex legal concepts into understandable takeaways for a particular business.

"The goal with this form of writing is to simplify the expression and to drive home the point with concrete language and examples, and that sort of writing works particularly well with clients who may or may not have a legal background," Paul says. "And I tell people that it's helpful to write as if you're writing to a college-educated audience but not necessarily to lawyers."Plain English and clearly structured thoughts are generally preferable because they're easier, says Mark Herrmann, the chief

litigation counsel of Aon Corp. Herrmann calls the style of good, persuasive writing “Modern American Snowplow.” It consists of short sentences and short words, and it’s as simple and easy as can be. The writer gets in and gets out, Herrmann says, and so do the readers, whether they’re in corporate headquarters or chambers.

“If I get an email and I have to twist my way through the sentence and go back and reread and think about what they’re saying — why did you do that to me? Once through, I should get it,” Herrmann says. “So even in business communications it’s important. And for judges, who are ferociously busy and trying to decide way too many cases, they have to understand it; they shouldn’t have to fight their way through to it.”

These days, Herrmann says, he doesn’t encounter a lot of terrible writing from his own outside counsel — but only because he has weeded out the ones who couldn’t write.

Today’s corporate clients also have an eye on the bottom line. They’re the keepers of the corporate coffers, and they don’t want to pay for a painstakingly footnoted memo when a brief email will suffice. Cutting out the fat means fewer words on every read-through, and clearly structured writing saves time on the reader’s end. Efficient, understandable writing saves the client money.

“The clients at most firms are corporations, and to the degree that companies are pressing lawyers to be more efficient and do things more cheaply, all of that has had a substantial effect on how private law firms practice in a variety of ways, including how efficiently and therefore how crisply and concisely they communicate,” says Steve Armstrong, the founder of Armstrong Talent Development and co-author of “Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing.”

In the age of e-filing and iPads, it’s not just client emails that are read on a screen. Judges are more likely to read legal documents on a screen these days, and the body of research on screen-reading suggests that it dramatically changes the way we digest information.

Researchers have found, for example, that the eye moves differently on a screen than it does on a printed page, Dubose says. “We look for visual cues like headings, and we read the first few sentences of each paragraph before getting to the point and skipping to the next. In part because the internet has multiplied the amount of words we consume daily, we have learned to skim.”

Judges have told Dubose that they read much more quickly than they used to. They need more structure when they’re reading on screen, he says. Ninth Circuit Judge Alex Kozinski still has his staff print out his documents; he admits he’s now a rarity. He does it largely because it’s easier to navigate a lengthy paper document than a PDF.

So when they’re writing for the court, attorneys should be thinking about more than the integrity of their argument. Their main points should appear at the top of sections and paragraphs. Regardless of the judiciary’s legal chops and advanced literacy, the language should be plain and stripped of inessential words. Lawyers should insert headings, bullet points, outlines and clearly demarcated sections to help the judge through the document. Visual structure allows judges to grasp the point of an argument much more quickly than a line-by-line reading; it’s also easier to read and more inviting. To that point, wider margins help with readability too, providing a clean frame for the text.

Dubose suggests looking to the web for guidance. On well-designed websites, text is intensely visual, and it’s supported by visual information. While many lawyers use visuals in front of a jury, few use them

in visual filings, he says, but if it's recognized that online readers and jurors need visual structure, it makes sense that judges need it as well.

"The most important thing you can do to get your point across to judges and persuade judges is to use visible structure," Dubose says. "Your argument is buried if it isn't clear from the heading what the argument is or if the argument appears at the end rather than at the beginning of a paragraph."

Why Lawyers Have a Bad Writing Rep

In principle, lawyers accept that legal writing ought to be as simple and direct as possible, according to Joseph Kimble, a founding director of the Center for Plain Language and professor emeritus at Western Michigan University's Cooley Law School. Lawyers, for example, say they want shorter, clearer opinions from judges.

How to Write Like a 21st Century Lawyer

- **Cut the fat.** *If it's not essential, it's just a distraction.*
- **Imagine a nonlawyer audience.** *This will help to minimize jargon and legalese, and plain English should be the goal.*
- **Keep things short.** *Not just the overall length but also sentences, paragraphs and sections.*
- **Use visual cues like bullets, section breaks and bold headings.** *They provide a road map to the reader.*
- **Keep your main points at the beginning of sections and paragraphs.** *If you bury the lead, the reader may skim over your most important points.*

"The question is why [lawyers] persist in writing the way they have," Kimble says. "Well, it's hard to break a tradition that goes back centuries, for one thing. Part of it is simply inertia, and part of it is bad habit. … If they're doing a lease, they go to the form book and pull the form. Part of it may simply be the false notions of prestige that some misguided lawyers associate with the traditional legal style."

Bad writing has endured for centuries in the legal profession because in the other side of the ring is a powerful opponent: The Way Things Have Always Been Done. More than other professions, lawyering involves reaching into the past to cite legal doctrine and lift directly from time-tested forms and documents, all of which helps the old-fashioned style endure.

"The legal profession is a profession of tradition, and for a long time that is how lawyers have talked and written, and lawyers tend to emulate other lawyers," Paul says. "So the tradition perpetuates itself."

Judicial writing from the past sticks around, for example, typically providing law students' first taste of legal writing. And there's very little discussion in law school of how well-written a case is, says Jethro Lieberman, co-author of "The Lawyer's Guide to Writing Well" and a professor at New York Law School.

“Law school consists largely of reading appellate decisions and codes, and you start to think this is perfectly normal for legal writing,” Kimble says.

Law school lectures may break down the legal reasoning that led to an outcome, but not the ways a seminal case could have been better structured or phrased. And while every law school now has legal writing courses, Lieberman says it’s usually treated as a discrete subject rather than something that extends into every legal task, from contract writing to appellate motion practice.

Lieberman taught one law school class in which he would ask students about the way a case was written. Although they’d already taken writing courses, they would look at him puzzled.

“They should have had the vocabulary to talk about it, but it never occurred to them that a writing course applies, of course, to everything else they were doing,” Lieberman says.

The Other Extreme

In the swing away from unnecessary formality, there exists the danger of going too far, however. Too much informality rings unprofessional, and in the legal realm, certain turns of phrase live on for a reason. In litigation and in contract law, certain approaches and terms survive because they work.

How to Anger Judges and Clients

- **Use technical terms when plain English will do.** *If a nonlawyer can grasp any of it, you’re doing it wrong.*
- **Use a word or phrase just because it’s common in the law.** *Work in “heretofore” and “the instant case” wherever you can.*
- **Take informality too far.** *Toss that time-tested contract because it reads a little dry, and spice up your client communications with text-speak.*
- **Invent your own acronyms or use obscure ones.** *Your readers will waste their time trying to decipher them.*

“When you’re writing a contract, you can’t write colloquially,” says Aileen Atkins, the former GC of Napster and a corporate partner at Cowan DeBaets Abrahams & Sheppard LLP. “So much of communication in writing is colloquial now, so it’s a translation: How do you put it into concise, well-crafted language that isn’t overly burdensome from a legal language perspective?”

Doing so, Atkins says, means understanding enough of the substance to be able to cut out enough of the jargon to get to the core of the provisions you need, without losing the substance. But she says the biggest challenge in legal writing today is maintaining a sense of formality in a world that is increasingly informal. A contract written in conversational style will at best be seen as a risk compared to using time-tested forms. Similarly, in client communications, there can arise an informality that isn’t always appropriate, Atkins says.

Smartphone-sent emails beget uncapitalized emails beget abbreviations beget emojis beget casually dropping the F-bomb. There are lines you don't cross, and those lines vary in every working relationship. Atkins says the most important thing is that lawyers have the presence of mind to understand what's appropriate and self-filter as needed.

In more official venues, some level of formality in writing remains central to the job. It may be in formatting, in citations, and in crafting a proper legal argument or agreement, and it may be in the form of simple deference to the court.

Once, in a concurring opinion, D.C. Circuit Judge Laurence Silberman called out a petitioner's brief for being "laden with obscure acronyms," which he called "an aggravating development of the last 20 years" that sends judges flipping around a document to recall what an acronym stands for.

Good legal writing typically requires knowledge of the legal system and its vernacular. While plain English should be a goal, sometimes lawyers simply have to use certain phrases — there may be no way around using "summary judgment" in litigation or "indemnification" in a contract.

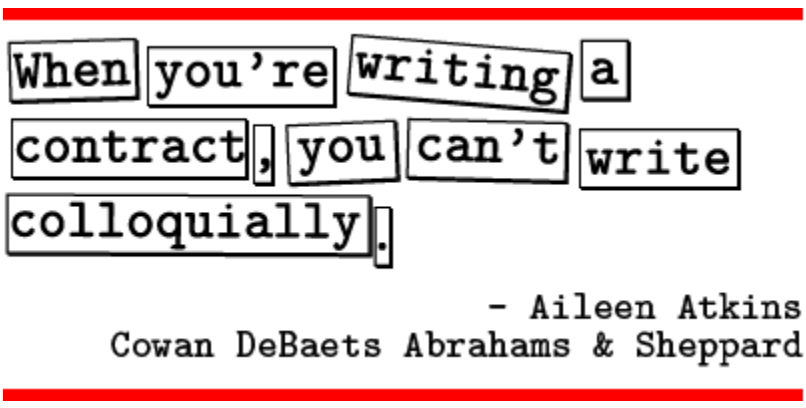
"You always have to separate out unnecessary formality from actual legal terms of art that have substantive value in the profession, and what's happened over time is both people in the profession and people outside of the profession mix those two categories up," said Ross Guberman, the president of training and consulting firm Legal Writing Pro LLC and the author of books including "Point Made: How to Write Like the Nation's Top Advocates." "They look at 'heretofore' as being the same problem as using a phrase like 'collateral estoppel,' and that's ridiculous: One is a term of art, and the other is legalese or undue formality."

Worth the Trouble

For an example of an institutional writing overhaul, the Securities and Exchange Commission's decadeslong push for simpler language in legal documents is instructive.

The Plain Writing Act of 2010 requires that agencies write their documents and rules in clear, concise language that the public can understand. The SEC's focus on plain English predates the legislation, with a major push in the 1990s for companies to write disclosures and other filings in plain language. Brian Lane, the former director of the SEC's Division of Corporation Finance, says the initiative faced resistance from Wall Street and the legal profession.

"It was very much a situation of doing the same thing over and over again, and everybody sort of agrees to a form, and once that form has been negotiated heavily, you never deviate from it because it was approved on 18 other transactions you've participated in," says Lane, who is now a partner at Gibson Dunn.



So what made the SEC push work? Well, it was persistent. Real change started to set in once the SEC began issuing comment letters in response to disclosures that didn't follow the

plain-language directive. The agency might tell a company to rewrite a paragraph because it doesn't make sense or to put a document in tabular form so investors can understand it. It might be blunter: "What is it you're trying to say here?"

The SEC also rolled out meaningful incentives to prod companies toward using a plain English vernacular in disclosures and other SEC filings. Companies filing an IPO received streamlined review if they wrote the prospectus in plain language, for example. That seemed to seal the deal.

Today, companies write their proxies plainly and include FAQs to walk investors through their documents. That's a direct result of the SEC's plain English campaign.

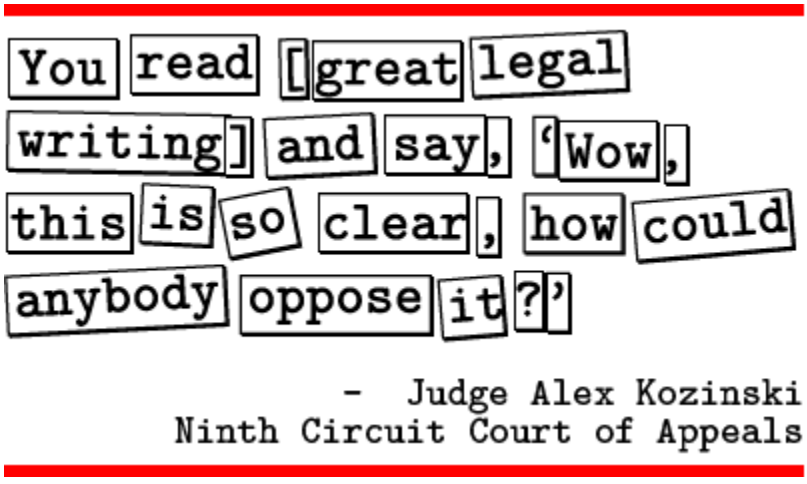
"If you look at disclosures that predate 1996, you would see sentences that were 500, 600 words long. It was really shocking — just horrible, legalese writing that you would need to consult an oracle to understand," Lane says. "It really is light years better than it was in the late '80s and early '90s. Is there room for further improvement? Yes. Have Wall Street and public companies shown that they can get the message and write plainly when they want to? Yes."

Lane says he wouldn't expect the same level of pushback to broadly instituted plain language standards today. "A lot of the resistance has sort of blown away," he says. "I don't encounter anybody who would stand up to me and say, 'I am not an advocate of plain English.' In the '90s I did. … So I think the war for plain English has been won, [but] there are still battles to fight. There are still instances where you can point to something and say, 'Really?'"

And the rewards for good legal writing are enormous. According to an analysis by Shaun Spencer, a University of Massachusetts School of Law, Dartmouth, professor, and Adam Feldman, a Columbia Law School fellow and University of Southern California Ph.D. candidate, clear writing can win cases. They compared opposing parties' briefs and found a statistically significant correlation between the readability of a brief addressing summary judgment and whether the judge grants it, even after controlling for attorney experience, law firm size and a lawyer's experience before the same judge.

The two measured readability using 50 different measures, including many that should be familiar by now (unless, of course, you merely skimmed this story): simple vocabulary, short sentences and paragraphs, obvious organization structure and the use of imagery, for example. Spencer and Feldman theorize that more readable briefs make it easier for judges to understand why a particular view of the relevant facts is undisputed.

"The results of our federal court sample are consistent with our two hypotheses. First, increased brief readability correlated with a greater likelihood of prevailing on a summary judgment motion. Second, when the moving party's brief was more readable than the nonmoving party's, we saw a statistically significant correlation with the likelihood of success by the moving party," the paper said.



In cases in which the moving party's brief was significantly more readable than the nonmoving party's brief, the study found that the likelihood that the moving party would prevail on its motion for summary judgment more than doubled, from 38 percent to 83 percent.

According to Feldman and Spencer, there are a number of possible reasons why more readable moving party briefs correlate with a higher likelihood of summary judgment.

They say that based on previous research, their primary theory is that more readable briefs increase the likelihood that the judge will understand the advocate's view of why the relevant facts are undisputed and why the moving party is entitled to judgment as a matter of law.

"Great legal writing is very persuasive," Judge Kozinski says. "I do see it once in a while, and it blows you away. It's very well done. It looks easy, like the case is obvious. You read it and say, 'Wow, this is so clear, how could anybody oppose it?' But I know producing something that looks easy is very hard."

Melissa Maleske is a senior reporter who frequently covers the legal industry for Law360. Additional reporting contributed by senior reporter Aebra Coe.