PLAIN ENGLISH

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From a pragmatic perspective, writing is good if it conveys what the writer wants it to convey to readers the writer wants to reach. This is obviously a relative standard. Technical jargon is good if its intended readers know the jargon so well that they hardly notice it. Scientists and engineers are entitled to write to other scientists and engineers in ways that only they can understand. Of course, the rest of us are grateful when they write in ways that we find interesting and easy to read. But there is no reason to hold specialists to this standard when they write for other specialists.

Why then do we complain when lawyers write about the law in a language that excludes non-lawyers?

Because law is rarely an exclusive preserve of experts the way science and technology are. Non-lawyers are expected to understand and abide by the law. Most people can get by without understanding physics or microbiology or cybernetics. But law touches other people's lives more directly than other disciplines, and ordinary people are understandably annoyed when lawyers write to them or about them in language that only other lawyers can understand.

There is another good reason for lawyers to write plain English: it enables them to understand one another. In fact, sometimes it enables them to understand themselves.

One of the great myths of the legal profession is that the language of the law is precise and scientific, hallowed and refined by centuries of precedent, as clear to lawyers as scientific and mathematical symbols are to scientists and mathematicians. Nothing could be farther from the truth. Ask a lawyer whether there is a significant difference between "Will" and "Testament." Not one in ten can tell you; but they will insist on using both words for fear that something might go wrong if they don't.

Legal language is not clear if no one understands it. Yet lawyers repeat it, like magical incantations passed from one generation of a secret society to the next, quarantined from the evolution that makes ordinary language intelligible to people who use it.

I sometimes test the notion that legal language is intelligible to lawyers by projecting the following passage onto a screen:

> The government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this court which might be understood to lay it down that activities such as "production," manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as a matter of law, only indirect.

At first, any roomful of lawyers will claim that the passage is perfectly clear. But then I remove it from the screen and ask, "OK, is the government concerned that the court is going to do something or concerned that the court is *not* going to do something?" Invariably there is no consensus among the group, often no response at all.

Notice that aside from the word "dicta," there is no technical language to blame for the obscurity. If we changed *dicta* (short for *obiter dicta*) to "asides" or "digressions," the passage would not be materially improved. The problem with legal language, then, is not just that it is laden with legalisms and Latin. The problem is that many lawyers get themselves tangled in syntax so knotty that they cannot understand it themselves.

The proof that lawyers *could* write about the law in plain English with precision is that some of them do. Good models abound. I don't mean just lawyers-turned-novelists, like Turow and Grisham. I mean lawyers who write lucidly about the law: Jeffrey Rosen in the *New Republic* and occasionally in the *New Yorker*; Linda Greenhouse in *The New York Times*. Every year lawyers publish books that are perfectly intelligible and even interesting to non-lawyers. Good examples include *Actual Innocence* (by Barry Scheck, Peter Neufeld, and Jim Dwyer); *The TV or Not TV: Television, Justice, and the Courts* (Ronald L. Goldfarb); *One Case at a Time* (Cass Sunstein); *Closed Chambers*(Edward Lazarus); *A Civil Action* (Jonathan Harr); *The Buffalo Creek Disaster* (Gerald M. Stern) and *Getting Away with Murder: The Canadian Criminal Justice System* (David M. Paciocco). *Law and Literature* (Richard A. Posner) is more scholarly in style, but light years ahead of most academic writing in clarity.

And Nina Totenberg of NPR. We may think of Totenberg as a newscaster rather than a writer, but her reports on the U.S. Supreme Court are invariably models of precision and clarity. Nothing in the nature of the law prevents lawyers and judges from communicating with the public in the same way.

Good legal writing is characterized partly by absences: an absence of unnecessary repetition, an absence of irrelevant detail, an absence of tangled sentence structure. In good writing, very word counts. Remove one and you miss it, just as you would miss a piece left out of a jigsaw puzzle. If you are an experienced reader of legal arguments, you know how tedious they can be, not because the concepts are difficult but because they have been obscured by verbiage that serves no purpose.

Good legal writing is also characterized by an absence of unnecessary jargon. Of course, every profession has its special language. Even non-lawyers have to accept expressions like "estoppel," *habeas corpus*, and arguably *decree nisi* if there are no handy equivalents in ordinary English. But there is no excuse for phrases like *inter alia* when there are handy English equivalents ("among other things"). And while it may be understandable that lawyers would speak to one another of filing a *pro hac* petition, *nunc pro tunc*, they should probably tell their clients that they are seeking permission, rectroactively, to practice in a jurisdiction other than their own.

Nor is there any reason for lawyers to use ordinary words ("such," "same," "said") in ways that ordinary people do not use them. In his "A Primer of Opinion Writing, for Four New Judges" (cite below), George Rose Smith of the Arkansas Supreme Court tells new judges to test for legalisms by imagining how a phrase would sound if in ordinary conversation. You would never say "I have mislaid my keys, dear, have you seen same?" You would never say "Sharon Kay stubbed her toe. Such toe is mending now." You would never say, "May I have another slice of pie? Said pie is the best you ever made." Nor would you say, "Let me tell you something funny about our dog, hereinafter called Mo." This sort of mumbo jumbo may impress the uneducated; but it makes lawyers the laughing stock of literate society.

To be fair, lawyers sometimes have the good grace to laugh at themselves. Hardly a year goes by without someone sending Christmas greetings that parody the worst habits of the profession. One year it was a card that began, "From us ('the wishor') to you (hereinafter called 'the wishee')." Another year it was a well known Christmas tale that began, "Whereas, on or about the night before the Holiday of which one can take judicial notice is commonly called Christmas."

To write parodies like these, someone, presumably a lawyer, has to say "How can I modify perfectly lucid language to make is sound as though a lawyer wrote it?"

The cure for legalese is to reverse this process. Rules for plain English may heighten your awareness, but the main thing is attitude and determination. If you want to sound like an ordinary person instead of like a lawyer, ask yourself at every turn, "How would I say this if I were speaking to my next door neighbor or to my mother-in-law?"—assuming, of course, that your next door neighbor and your mother-in-law are not lawyers.

I. VISIBLE ELEMENTS OF STYLE

The rules below will help you identify legalisms and locate situations in which you could tighten up your flabby prose. Follow these rules and your prose will be visibly improved.

1. AVOID LEGALESE AND FOREIGN LANGUAGES. Legal writing has a few legitimate terms of art—words or phrases that either cannot be easily translated or perhaps *should* not be translated because the original language triggers a doctrine that lawyers might not recognize by any other name (e.g., *habeas corpus, estoppel*). Aside from exceptions like these, however, however, the law works best even for lawyers when non-lawyers can makes sense of it.

INSTEAD OF THIS:

Hotstuff has to establish (*inter alia*) that the peppers were delivered to the right place and at the right time.

DO THIS:

Hotstuff has to establish, among other things, that the peppers were delivered to the right place and at the right time.

2. SUBSTITUTE ORDINARY ENGLISH FOR LAWYERLY ENGLISH.

INSTEAD OF THIS:

He confessed prior to being advised of his rights.

Mr. Noto signed the contract. Said contract specified a price and a schedule of payments.

DO THIS:

He confessed before he was advised of his rights.

Mr. Not signed the contract that specified a price and a schedule of payments.

3. CALL PARTIES BY NAME RATHER THAN BY THEIR POSITIONS IN COURT. Calling parties by positions often requires readers to skip back and forth between the text and the cover sheet ("style of cause" in some jurisdictions).

INSTEAD OF THIS:

Respondent and two other shareholders set up Lakeside Realty in 1978.

INSTEAD OF THIS:

Plaintiff claims that Defendant had failed to provide payment for sixteen carloads of chile peppers delivered over a six week period.

DO THIS:

John McIntyre and two other shareholders set up Lakeside Realty in 1978.

DO THIS:

Hotstuff claims that Kiwimart had failed to provide payment for sixteen carloads of chile peppers delivered over a six week period.

Referring to people by their proper names can help avoid confusion on appeal, particularly when the position of the litigants has changed from moving party to responding party. Sometimes, of course, it is impossible to call parties by individual names, particularly when there are multiple plaintiffs or multiple defendants. Then you have no choice but to resort to their positions in court or to group them under some other appropriate heading (e.g., "the survivors," or "the victims," or "the Joneses").

Practice varies regarding subsequent references to persons named in the opening paragraphs. Should you call them by their first names only—which some litigants might regard as excessively familiar? Or by last names only, which some litigants might regard as unmannerly?

Some lawyers think that by calling opposing parties by their positions before the law (e.g., "applicant " or "defendant"), they mask the humanity of opposing parties and make them less sympathetic in the judge's eyes. Most judges, however, having practiced law themselves, are likely to see that ploy for what it is.

Certainly the most polite option is to refer to litigants with their ordinary titles, (e.g., Mr., Miss, Ms., Lieut., Rev., etc.). This is standard editorial practice in *The New York Times*, even when dealing with the most heinous criminal. Oddly enough, treating opposing litigants with this semblance of respect may be paradoxically persuasive. If you call someone *Mr.* Capone, and then calmly explain the irregularities in his tax returns, or Mr. bin Laden, and then present compelling evidence of his complicity in terrorism, you seem to be above politics, passion, and personal vendetta. You seem to be a servant of the law, serenely objective, rather than a crusader whose reason may be clouded by emotion.

Using conventional titles for all parties, particularly when there is a legitimate argument at issue, endows judgments and pleadings with a kind of magisterial dignity and mitigates the losing party's embarrassment. And when the losing or opposing party is patently undeserving of respect, there is little danger that a proper title will convey it; if anything, the subtle irony of unmerited deference is persuasive in itself.

INSTEAD OF THIS:

Hemphill responded that McIntyre should either invest more capital or personally guarantee a loan.

CONSIDER THIS:

Mr. Hemphill responded that Mr. McIntyre should either invest more capital or personally guarantee a loan.

Subsequent references to parties in family law are particularly difficult to manage. If the parties are divorced, they may object to being called "the husband" and the "wife," or "Mr. Jones and Mrs. Jones" (though in this situation, the modern Ms. Jones serves a useful purpose because it implies nothing about marital status). In custody disputes, it is often possible to refer to the parties as "the mother" and "the father." Depending upon the culture and on the parties, first names might seem friendly or inappropriately chummy. It's all a matter of perception. All you can do is consider the options and chose the one that best suits the circumstances.

Whatever you choose, be consistent. Give everyone proper titles, or call everyone by last names alone, or call them by their positions in court; but do not switch from one convention to another just for the sake of variety.

14. AVOID PARENTHETICAL ALIASES.

INSTEAD OF THIS: Hotstuff Chile Pepper, Ltd. (hereinafter called "Hotstuff") seeks judgment for breach of a contract. Hotstuff had agreed to . . . (18 words)

DO THIS: Hotstuff Chile Pepper, Ltd. ("Hotstuff") seeks judgment for breach of a contract. Hotstuff had agreed to . . . (16 words)

OR BETTER YET, THIS: Hotstuff Chile Pepper, Ltd. seeks judgment for breach of a contract. Hotstuff had agreed to . . . (15 words)

Sometimes the identity of parties can be easily inferred from the facts. For example, there is no need to waste sentences identifying a father and mother if this information can be easily conveyed in telling the story.

INSTEAD OF THIS:

The applicant is John Smith (hereinafter called "the father"). The respondent is Cheryl Ellis (hereinafter called "the mother")

DO THIS:

John Smith and Cheryl Ellis have been trying for years to agree on contact rights that would be satisfactory to themselves and to their three daughters.

5. USE AS FEW WORDS AS POSSIBLE.

INSTEAD OF THIS:

He underwent three evidential breath tests by means of an evidential breath-testing device.

INSTEAD OF THIS:

It is also necessary to make clear that Officer Rigby accepted that there was no reason to stop the defendant in the first place.

INSTEAD OF THIS:

McFarland made the acquisition of three buildings.

DO THIS:

He took three breath tests.

DO THIS:

Officer Rigby admitted there was no reason to stop the defendant in the first place.

DO THIS:

McFarland acquired three buildings.

6. AVOID THE VERB "TO BE" WHEN IT CAN BE REPLACED BY A MORE SPECIFIC VERB. To apply this rule, you should memorize all the forms of the verb "to be"—which is the most irregular verb in English. It has eight basic forms:

am, are, is
was, were
be, being, been.

This verb has legitimate uses, of course; but your writing will be more forceful and more economical if you replace it with a more specific verb lurking elsewhere in the sentence, disguised as an adjective or an abstract noun.

INSTEAD OF THIS:

Boeing's contention is that those shares are worth $100 million.

INSTEAD OF THIS:

Mr. Bledsoe has been resistant to the advice of her counsel.

INSTEAD OF THIS:

The argument advanced by Stevens was that . . .

DO THIS:

Boeing contends that those shares are worth $100 million.

DO THIS:

Mr. Bledsoe has resisted the advice of her counsel.

DO THIS:

Stevens argued that . . .

7. AVOID "IT" AND "THERE" AS DUMMY SUBJECTS. "It" and "there" are considered dummy subjects ("It was" or "There were") where they stand in for words that might be the real subjects of the sentence. Like the verb "to be," dummy subjects have their legitimate uses. Sometimes, however, they can be replaced by a real subject and a stronger verb.

INSTEAD OF THIS:

It was submitted by counsel for the plaintiff that the extension was not qualified by the proviso.

DO THIS:

Plaintiff's counsel submitted that the extension was not qualified by the proviso.

8. AVOID PASSIVE VOICE. In passive voice, the grammatical subject receives the action (e.g., "John was kissed by Mary"), as opposed to the active voice, in which the grammatical subject performs the action (e.g., "Mary kissed John). The passive voice has legitimate uses, but lawyers tend to lapse into it unnecessarily when active voice would be more direct and economical. Active voice is always more economical and forceful.

INSTEAD OF THIS:

No other evidence was called by the Defendants to give support to the allegations.

DO THIS:

Defendants called no other evidence to support the allegations.

9. AVOID USING WORDS WITH OVERLAPPING MEANING IN THE SAME SENTENCE.

INSTEAD OF THIS:

On appeal, appellant argues that . . .

The building was round and circular in shape.

DO THIS:

Appellant argues that . . .

The building was round.

10. IF IT GOES WITHOUT SAYING, LET IT GO UNSAID.

INSTEAD OF THIS:

The parties are agreed that this appeal comes before the High Court pursuant to § 26 of the Taxation Review Authorities Act 1994 and Part XI of the High Court Rules.

DO THIS:

(Just leave it out.)

If the parties had *not* agreed to this, it would have been raised as an issue. Because it has not been raised as an issue, it belongs among hundreds of other conceivable issues that might have been concocted from the facts—none of which need mentioning.

INSTEAD OF THIS:

A special meeting was called and held to reconsider the resolution.

DO THIS:

A special meeting was held to reconsider the resolution.

Ordinarily, readers will presume that if a meeting has been held, it must have been called. Only the exception to this presumption—an uncalled meeting, a surprise meeting, a secret meeting—would have to be signaled.

INSTEAD OF THIS:

Mr. Justice LeDain, for the majority, considered the issue of when the relevant provision took effect as well as how the effect of the words was to be characterized. LeDain J. held that the phrase "whether or not he believes that she is fourteen years of age or more" defined one of the constituent elements of the offence, the *mens rea*, at the time of the offence, not at the time of the trial.

DO THIS:

LeDain J. held that the phrase "whether or not he believes that she is fourteen years of age or more" defined one of the constituent elements of the offence, the *mens rea*, at the time of the offence, not at the time of the trial.

If Mr. Justice LeDain held that the phrase was relevant, it would be safe to assume that he gave the issue some thought.

11. AVOID BLOCK QUOTATIONS. As readers, most judges and lawyers skip over block quotations, hoping to glean their essence from what precedes or follows. As writers, however, they seem to imagine that their readers will be more

patient than themselves, carefully examining what they themselves would skip, searching for a nugget of authority buried within a mound of dross.

The best way to avoid this problem is to trust your ability to paraphrase. You, after all, have done the hard work. You have read and deciphered the authority, and you have reached a conclusion about its relevance to the issue at hand. Why make your reader repeat that task? Just say what the passage means, in your own words, instead of pasting the original passage in a form the reader is sure to skip.

If you trust your ability to paraphrase—and if you think your reader trusts your ability—you need not quote. On the other hand, if you would like to provide your readers with the original text for their convenience, just in case they might like to check your paraphrase, then go ahead and quote it. But *precede* the quoted material with your own paraphrase. The paraphrase will assist your readers in deciphering what may be difficult language, like Lord Diplock's in the passage below; and it will ensure that readers who are inclined to skip the quoted material will not miss the inference that you want them to draw from it.

INSTEAD OF THIS:

All the authorities confirm the fundamental doctrine stated by Diplock LJ in Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 at 503 in these terms:

> An "apparent" or "ostensible" authority … is a legal relationship between the principal and the contractor created by a representation, made by the principal to the contractor, intended to be and in fact acted upon by the contractor, that the agent has authority to enter on behalf of the principal into a contract of a kind within the scope of the ("apparent") authority so as to render the principal liable to perform any obligations imposed upon him by such contracts. To the relationship so created the agent is a stranger. He need not be (although he generally is) aware of the existence of the representation but he must not purport to make the agreement as principal himself. The representation, when acted upon by the contractor by entering into a contract with the agent, operates as an estoppel, preventing the principal from asserting that he is not bound by the contract. It is irrelevant whether the agent had actual authority to enter into the contract.

DO THIS:

Normally, a company is not bound by contracts entered upon by agents who have no authority to do so. However, if someone represents himself or herself as an agent of a company with authority to sign contracts for that company, and if the company does anything that would give the impression that the employee did in fact have that authority, the company may be considered bound by those contracts. (See Diplock LJ in Freeman & Lockyer (A Firm) v Buckhurst Park Properties (Mangal) Limited [1964] 2 QB 480 at 503.)

If you pleading or judgment includes paraphrases of more than a few pages, consider attaching the original passages in an appendix instead of in the main text. If your jurisdiction allows you to file pleadings electronically, you might also use hyperlinks to lead readers from the citation to the full text and back again.

12. AVOID QUOTING THE CHARGE (UNLESS THE LANGUAGE OF THE CHARGE IS AT STAKE). The language of official charges or complaints is often clumsy and antique. Normally there is no need to quote it, least of all at the beginning of a judgment or pleading, where a short paraphrase is all the reader needs. If you say that "John Jones has been charged with grand larceny," or that "Mary Callahan is suing her employer for hazardous conditions at work," you need not quote the charge verbatim. Save the exact language for the body of the argument if it is necessary to prove a point.

INSTEAD OF THIS:

Erik Causewell is charged with two offences under the Road Traffic Ordinance 1960 (hereafter referred to as "the Ordinance"). Firstly, that at Eggerston on 8th May 1998 being the driver of a private car number 13646, negligently drove that motor vehicle on Vaitele Street and did thereby cause death to Kristi Posoli, contrary to s.39A of the Ordinance. Secondly, that on the same day and place, when driving the said vehicle, he was under the influence of drink to such an extent that he was incapable of having proper control of the said vehicle, (hereafter referred to as the "drink and drive charge") contrary to s.40(1) of the Ordinance.

DO THIS

Erik Causewell is charged with negligent driving causing death and with driving under the influence of alcohol.

The extra detail in the charge may be necessary in the discussion of a particular issue, especially if the charge is defective or the meaning of the language is at issue. But it is rarely necessary in an opening paragraph. There all a reader needs is a generic description of who did what to whom—just enough detail to provide a context in which the issues will make sense.

13. DON'T PUT DATES, TIMES, OR PLACES IN THE JUDGMENT JUST BECAUSE THEY HAPPEN TO BE IN THE RECORD.

> On 21 January 1998 the wife commenced proceedings under the Matrimonial Property Act in the Family Court at Auckland. Various conferences and orders followed and on 26 February 1999 the Court directed that the matrimonial property application be set down for a 2 day hearing.

Specifics like these burden the reader for no purpose. Better not to put them in unless they affect the resolution of the case.

INSTEAD OF THIS:

The defendant was driving his private car—a two-door sedan registered number 13646.

DO THIS:

The defendant was driving his car.

Unless there is some question of identity to be settled by the registration number, or some reason to distinguish a private car from some other sort of car, these details should be omitted. Details of this sort distract readers, who think for a moment that they must be significant, or else they would not be there.

The court reporter's job is to reproduce the record. The job of the attorney and the judge is to *interpret* the record. By the time you write the facts, you should have drawn some inference from them. It is a mistake to deploy the evidence as if you were a secretary recording minutes—a blow by blow summary of what one side said followed by what the other side said.

Your disposition of the facts, then, should be designed to lead the reader to the same inference. In practical terms, this requires distinguishing between essential facts—facts that support the inference you consider important—and everything else in the record.

14. WRITE SHORT SENTENCES? I put a question mark after this rule, because some of the finest sentences in law and literature are long ones. A more accurate rule would be, "If you don't know how to write a good long sentence, stick to short ones."

The problem with many legal sentences is not their length, but their tangled syntax—clauses and phrases jumbled like a spilled box of toothpicks. The obvious solution is to break long sentences into two or three short ones. It also helps to look for suppressed narratives in long sentences. If the sentence contains two or three events, try putting the events in short sentences arranged chronologically.

> *INSTEAD OF THIS:*
>
> The government's concern lest the Act be held to be a regulation of production or consumption rather than of marketing is attributable to a few dicta and decisions of this court which might be understood to lay it down that activities such as "production," manufacturing," and "mining" are strictly "local" and, except in special circumstances which are not present here, cannot be regulated under the commerce power because their effects upon interstate commerce are, as a matter of law, only indirect.
>
> *DO THIS:*
>
> In the past, this court has held that production, manufacturing, and mining are local activities, which are normally not subject to the commerce power. Now the government is concerned that we will exempt marketing from federal regulation, on the theory that is a local activity with only indirect effects on interstate commerce.

15. AVOID FAULTY PARALLELISM. When you write a series of any kind, make sure the elements in the series are parallel in form and content.

> ***INSTEAD OF THIS:***
>
> None of these cases involved patients who were terminally ill, a process hidden from the public, involving secrecy, lies, the destruction of evidence or the treating physician acting alone.

DO THIS:

None of these cases involved patients who were terminally ill. None of them involved secrecy, lies, a decision process hidden from the public, or the destruction of evidence. None of them involved a physician acting alone.

16. AVOID REDUNDANT DOUBLETS AND TRIPLETS. Some conventional doublets and triplets (e.g., "Will and Testament," "give, bequeath, and devise") can be traced to historical periods when English law was an unstable mixture of Old French, Latin, and Anglo-Saxon. Lawyers back then were careful to cover all bases. In modern usage, if the second and third words are intended to signal a distinction, that distinction is likely to have been lost in the annals of history.

INSTEAD OF THIS:
null and void

ordered, ajudged, and decreed

changed or altered

rest, residue, or remainder

DO THIS:
void
ordered

(choose one)

(choose one)

II. INVISIBLE ELEMENTS OF STYLE

Punctuation and grammar are invisible elements of style. People will never congratulate you for correct grammar, any more than they would recommend a book for its flawless punctuation. But make a mistake, even a trivial one, and the damage to your credibility can be completely out of proportion to the error.

In some cases, punctuation and grammar are more than cosmetic flaws. The rules, which are not nearly as absolute as one might imagine, are often invoked to determine the precise meaning of a clause in a contract, a statute, or a precedent—the presumption being that the judge or lawyer or legislator actually knew the rules. Sometimes millions of dollars hang in the balance. Sometimes, in fact, it is a matter of life and death.

Rule books about punctuation and grammar are too numerous to mention. Some are more comprehensive than others, some are easier to use than others, but they all agree about the essentials. The important thing is choose one or two favorites and keep them close at hand when you write.

One frequently overlooked source is somewhat misleadingly called "A Handbook of Style," which you can find at the back of every *Webster's Collegiate Dictionary*. It does not have a thumb tab, so you have to check the Table of Contents at the front of the dictionary to find it. Once you do, glance at it quickly just to get a sense of what it covers. Then, when you have a punctuation question, you will know where you can find an answer.

The *American Heritage Dictionary* has no comparable guide to punctuation, but it does offer more explicit guidance in matters of usage. If you worry about whether *data* should be singular or plural, for example, or when you should use *between* as opposed to *among*, this dictionary will let you know what its usage panel prefers. A usage panel is no more scientific than a focus group, but you might find its opinion worth considering when you have no strong opinion of your own. Even more useful in these matters, however, is *A Dictionary of Modern American Usage*, now available in a much improved edition by Bryan Garner (see below, "Recommended Reading"), who is also the editor of the current edition of the indispensable *Black's Law Dictionary*.

In addition, every court system, law review, legal reporter, publishing house, or newspaper may have its own set of rules or its preferred rulebook. Consult these when you write for publication.

There is no point repeating here the rules you already know: begin every sentence with a capital letter, end it with a period or question mark (you won't find many exclamation points in legal writing), put quotation marks around quoted material. Everybody knows these things. The rules below are intended to cover just those situations that seem to be common problems for lawyers and judges. .

1. DON'T USE COMMAS UNLESS YOU NEED THEM. This rule presumes that you know where you *do* need commas. Ordinarily commas are used in three situations:

1) To set off clauses or phrases tucked within a sentence.

Justice O'Connor, in a passionate dissent, reviewed the history of *habeas corpus*.

The defendant, who had twice escaped custody, was escorted into the court with chains on his hands and feet.

2) To set off clauses and phrases at the beginning or the end of a sentence.

In a passionate dissent, Justice O'Connor reviewed the history of *habeas corpus*.

When the defendant entered the courtroom, the jurors were startled to hear a chain rattling between his feet.

At the date of separation no formal appraisal was available, although the parties had some rough estimates.

3) To separate independent clauses joined by *and*, *or, but, for*.

The accident occurred in California, but the suit was filed in Oklahoma.

The defendant rose slowly from his chair, and the foreman intoned the verdict in a tone reeking of self-satisfaction.

Competent editors disagree about whether you should put a comma before *and* or *or* joining the last two elements in a series of three or more.

The judgment was verbose, obscure, and just plain wrong.

The judgment was verbose, obscure and just plain wrong.

I prefer the comma in this situation because it seems more "normal" to me—that is, I see it more often than not in what I read. Both versions are defensible; it's a matter of personal preference. But be consistent: don't switch randomly from one convention to the other.

2. PUT A PAIR OF COMMAS AROUND CLAUSES BEGINNING WITH "WHICH."

The appraisal, which was filed at this hearing, indicated a value of $13,000.

One comma is enough if the *which* clause occurs at the end of a sentence.

The wife signed the agreement , which was then signed by the husband.

3. DON'T CONFUSE "WHICH" WITH "THAT." When you *cannot* put a comma before a *which*, you probably should have written "that."

The agreement satisfied all claims, which either party might have against the other under the Matrimonial Property Act. (WRONG)ma before *and* or *or* joining the last two elements in a series of three or more.

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> The agreement satisfied all claims, which either party might have against the other under the Matrimonial Property Act. (WRONG)

W*hich* is normally used to insert non-essential information into a sentence. This is why *which* clauses are normally set off by parenthetical commas. But because the final clause in the example provides *essential* information, the comma should be omitted and the *which* changed to *that*.

> The agreement satisfied all claims that either party might have against the other under the Matrimonial Property Act. (RIGHT)

This may strike you as an obscure and pedantic rule, but in some circumstances it affects the meaning of a sentence. Notice the difference between the following two examples.

> The appraisal, which was filed at this hearing, indicated a value of $13,000.

> The appraisal that was filed at this hearing indicated a value of $13,000.

The first version implies that there was only one appraisal. The second suggests that there may have been others.

4. DON'T PUT ELLIPSIS DOTS AT THE BEGINNING OF QUOTED MATERIAL.

> According to the police officer's report, the defendant's jeep
> ". . . would have been travelling at least 80kph." (WRONG)

The ellipsis dots are unnecessary because the initial lower case *w* in "would" indicates that words have been omitted at the beginning of the quoted sentence.

> According to the police officer's report, the defendant's jeep "would have been travelling at least 80kph." (RIGHT)

5. AVOID MISPLACED MODIFIERS. A modifier is misplaced if it seems to describe the wrong word.

> The Constable, based on previous experience with the defendant, felt it best to contain him in the vehicle. (WRONG)

> Based on the foregoing testimony I find that the defendant intentionally concealed the marijuana. (WRONG)

These sentences suggest that the constable and the judge were themselves somehow based on what they observed.

6. MAKE SURE SUBJECTS AND VERBS AGREE.

The limits of police powers to stop a vehicle on a road are not entirely clear and has been debated for some time. (WRONG)

The subject of "has been" in this example is "limits." Every competent speaker of English knows that "limits has been" is wrong, but writers sometimes get confused when the subject and the verb are separated, as they are in this case, by intervening words.

The limits of police powers to stop a vehicle on a road are not entirely clear and have been debated for some time. (RIGHT)

7. MAKE SURE THE VERB AGREES WITH THE SUBJECT, EVEN IF IT LINKS A PLURAL NOUN WITH A SINGULAR NOUN.

Defenses based on sovereign immunity has become a vexed question. (WRONG)

Defenses based on sovereign immunity have become a vexed question. (RIGHT)

If the correct version seems awkward to you, rephrase the sentence entirely.

The courts have given mixed signals regarding sovereign immunity.

8. MAKE SURE OBJECTS ARE IN THE OBJECTIVE CASE.

The Master asked my learned opponent and I to submit additional evidence. (WRONG)

Between you and I, there are no significant issues in this case. (WRONG)

Linguists call this error "hypercorrectness": trying too hard to get it right—a result, no doubt, of the unfortunate writer's having been corrected by schoolmarms and schoolmasters for saying things like "Mickey and me went to the movies."

The error normally occurs when there are words between the verb or preposition and first person pronoun (I/me). The solution is to remove the intervening words and trust your ear. You wouldn't say, "The Master asked I to submit additional evidence." Nor would you say, "Between I and you" in any context. So don't let the intervening words confuse you about the correct form of the pronoun.

The Master asked my learned opponent and me to submit additional evidence. (RIGHT)

Between you and me, there are no significant issues in this case. (RIGHT)

9. USE POSSESSIVES BEFORE GERUNDS. A gerund is the –ing form or a verb used as a noun. (It is not to be confused with a present participle, which is the –ing form of a verb used as an adjective or part of a compound verb.)

> This agreement was conditional upon the plaintiff securing suitable premises in the North Mall in Ulster Street Hamilton. (WRONG)
>
> Constable Brew remained on the property despite the defendant telling him to leave. (WRONG)
>
> Officer Noble, almost as an afterthought, mentioned that he felt the defendant's driving warranted him being stopped and spoken to." (WRONG)

This is a rule few people understand; but those who do will take notice if you get it wrong. Notice that in the last example, the writer gets it right at first ("the defendant's driving"), but then errs at the end ("him being stopped").

> This agreement was conditional upon the *plaintiff's* securing suitable premises in the North Mall in Ulster Street Hamilton. (RIGHT)
>
> Constable Brew remained on the property despite the *defendant's* telling him to leave. (RIGHT)
>
> Officer Noble, almost as an afterthought, mentioned that he felt the defendant's driving warranted *his* being stopped and spoken to." (RIGHT)

If the correct version sounds awkward, rephrase the sentence entirely.

> Constable Brew remained on the property even though the defendant had told him to leave.

10. DON'T SPLIT INFINITIVES. An infinitive is the form of a verb preceded by "to" (e.g., "to file," "to argue," "to grant," "to deny," etc.).

> Was there a lawful basis to initially search the defendant's apartment? (WRONG)t

This is a silly rule, but it has been around for so many centuries that people are accustomed to seeing it observed. It is based on a faulty analogy with Latin, in which infinitives consist of one word instead of two and are therefore impossible to split. If you can avoid splitting an infinitive, you should do so rather than risk distracting those few readers who would care.

> Was there a lawful basis to search the defendant's apartment initially? (RIGHT)

When the correct version strikes you as awkward, rephrase the sentence. Sometimes, however, you may choose to defy convention and split an infinitive just because you prefer it that way.

11. DON'T END SENTENCES WITH PREPOSITIONS. Prepositions are words that show relationships, including relationships in time, space, or agency (e.g., "by," "for," "with," "before," "on," "upon," etc.).

The rule against ending sentences with prepositions is also based on a faulty analogy with Latin, and it occasionally does violence to the natural idiom of English. In Latin and in languages derived from Latin, prepositions are a group of words that just don't make any sense unless they have a noun after them. That's why these words are called "pre-positions." They *must* have another word after them. You can't imagine a sentence ending with *cum* in Latin any more than you could imagine one ending with *avec* in French or *con* in Spanish.

But English is different from these other language. It is basically a Germanic language, and in Germanic languages, words that sometimes behave like prepositions *can* in fact occur at the end of a sentence, as illustrated in the following example, which occurred in the highly respected *New York Tmes Book Review*:

> One is Heidi Franklin, an art historian whom he observes to be as homely as himself and whom he resolves to later hit upon.

Even though it makes no sense to subject English to the rules of foreign languages, the notion that we *should* imitate Latin in this matter has been with us for so long (since that eighteenth century) that many people accept it as sacred. Violating this rule, then, is likely \to distract people who happen to know it.

At times, though, following the rule is more awkward than violating it. Robert Stone, the author of the example above *could* have written the following sentence instead:

> One is Heidi Franklin, an art historian whom he observes to be as homely as himself and upon whom he resolves to later hit.

That's a bit stilted and antique. Stone, was right to follow the natural inclinations of the English language and ignore the artificial rule.

You may have noticed that Stone also splits an infinitive: "to later hit." So to be perfectly "correct," he should have written this sentence:

> One is Heidi Franklin, an art historian whom he observes to be as homely as himself and upon whom he resolves to hit later.

If you read this sentence aloud, you will probably agree that the rules were broken with good reason. Still, it is good to know the rules, so you can observe or break them by choice rather than by accident.

III. TESTING FOR PLAIN ENGLISH

Give your best draft to a non-lawyer who knows nothing about the case, and ask that reader to circle any words or phrases that she or he has to read twice, along with any words or phrases that she or he does not understand. Translate these words or phrases to plain English if you can—unless they belong to the handful of exceptions that can be justified as terms of art. Do not defend yourself by saying, "Oh, lawyers would know what I mean." That's an excuse the best legal writers avoid. Law is not just for lawyers. And even within the law, legal documents routinely find their way to lawyers who may not be familiar with terms that seem ordinary to those who are working within a specific subspecialty.

Proofreading normally requires a second pair of eyes. Give your draft to someone who knows the rules. Give that person free reign with a blue pencil—the tool editors traditionally use to repair faulty punctuation and grammar, and to banish words that do not earn the space they occupy.

IV. RECOMMENDED READING

Garner, Bryan A. *A Dictionary of Modern American Usage*. New York: Oxford UP, 1998.

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