

**WRITING FOR LAWYERS  
USE PLAIN ENGLISH**

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## INTRODUCTION

Lawyers spend a lot of time writing, but have a poor reputation as writers. Writing is a technology. Writing skills are basic to being a good lawyer. They are skills that all lawyers must master, but few make the effort to do so. Good writing is an art that requires diligent practice. The lawyer who masters the art of writing generally will use plain English in legal documents.

Writing is the product of expressing an idea on paper. The trouble begins with the assumption that writing is nothing more than the reproduction of speech. Writing has little relationship to speech. People talk faster than they write. Writing is slow work and requires precise grammar and structure. Speech is seldom precise. Speech involves an array of pauses, drawls, tone and physical inflections, and eye and hand movements which are not producible in written form. Speech is often characterized by all things writers should eliminate in the interest of clarity: repetition, contradiction, exaggeration, fragments, clichés, bad grammar and poor structure. Writing uses punctuation and paragraphs. Speech lacks commas, semicolons, periods and paragraphs.

People can talk at length about the subject without uttering a concise, well-structured sentence. Yet the listener instantaneously understands the speaker perfectly. The illusion persists that speech can be effectively converted verbatim into print with its expressiveness intact. Words on paper may have little resemblance to the thoughts the speaker intended to express.

Lawyers are wordy—not only when speaking but also when writing. It takes them forever to get to the point.

Drafting a document involves more than using good grammar, choosing sentence structure and organizing a group of paragraphs. Good drafting encompasses the entire range of decision making, word selection and the mundane but essential role of sentence and paragraph structure and correct punctuation. Attention to those details will convert complex, difficult thoughts into simple, intelligible sentences.

Simply stated, effective writing must be concise and coherent. The goal is clarity. The writer must make every word count. Each sentence and paragraph should logically lead to the next.

Be forewarned—there is no formula for effective legal writing. You will not learn to write by taking this or any other course. You must learn not only what to write but also what to omit. You must work at it regularly, consistently applying the elements of plain English to your writings.

## HOW TO BEGIN

You must organize your thoughts and know what you want to write before you begin. There is no single rule how to do that. You select the process that works for you. Expressing your thoughts onto paper—i.e., writing—is the second stage.

1. The planning process.

Organize your notes and material. Know what the client expects—this will require you to obtain information from or about the client as well as the transaction. Keep the reader and purpose in mind. The organization method will differ, depending on the type of document. An agreement is different from a letter, and your style and approach will be different.

2. Outline or checklist.

I do not prepare an outline or checklist before dictating my first draft of an agreement. You can use an outline or checklist as a planning tool; it is not essential. The outline or checklist will save time if it helps you organize your thoughts and the chronological sequence of the document. This is a personal choice.

3. Previously used agreement.

There is nothing wrong with using a previously-used agreement as a guide. Many "boiler plate" provisions will be substantially the same for similar agreements. Each transaction, however, is different and no other agreement can be used without careful analysis. The previous agreement should never be your transaction document because it will likely misstate your economic goals. Determine whether the prior agreement was prepared for a person similarly situated as your client, e.g., not for a seller if you represent the buyer. Then decide which boiler plate provisions should be revised or even deleted to protect your client's interests.

4. The first draft.

(a) Your goal is to get your thoughts on paper.

(b) I dictate my first draft without preparing an outline. You may prefer to prepare your first draft on a word processor or yellow pad. I may refer to an earlier agreement for some provisions. Decide on your layout (sections, headings, etc.). Try to indicate punctuation, paragraphing, indentation, capitalization, parentheses and apostrophes. Don't worry about word selection, sentence structure or that perfect word, phrase, sentence or paragraph. That comes later—when you begin the difficult stage of editing and revising.

- (c) Your first draft will not be a nice, clean document and, if dictated, may not be a clear or concise document. This process helps you express what you want to say, and, in the subsequent revisions, you will preserve intelligent ideas and eliminate stupid ideas, redundancies and unnecessary words.
- 5. Even if you are convinced that your dictation is terrible, keep talking until you are done with that first draft. Never go back to correct a problem—dictate the correction wherever you are on the tape. Eliminate the problem when you revise the draft.
- 6. Do not be discouraged with that first draft. It will generally contain your important thoughts, however poorly expressed. I may dictate my second draft or mark the first draft with deletions and inserts. In either case, the result is a better organized document which will resemble the final agreement. I am then ready to concentrate on word selection and sentence structure.

## BASIC RULES

1. Good legal writing does not differ from simple English. The client should actually understand the document.
2. Writing is communication—the purpose is to focus the reader's attention on the document, not on the author.
3. Use the fewest words that accomplish the purpose. Beyond that, the words are worthless. Try to keep sentences to fewer than 20 words. Break complicated ideas into simple sentences.
4. Choose shorter, familiar words; sentences should be simple and direct and generally should convey one thought at a time. Using defined terms and placing the definition section at the beginning will help achieve that objective.
5. Eliminate ambiguous words and provisions.
6. Use the active voice, not the passive voice. The subject of the sentence does the acting in the active; in the passive voice, the subject is acted upon. A passive sentence generally has more words than the same thought will have if expressed in the active voice. For examples: "Buyer must complete its inspection of the property before- September 30, 2006" is an active sentence, but "Inspection of the property must be completed by Buyer before September 30, 2006" is passive. "Jim breached the agreement" is active. "The agreement was breached by Jim" is passive.
7. Be positive. Make definite statements. A positive statement has more force than the same thought expressed negatively or passively.
8. Punctuate properly. Punctuation can affect meaning and will affect clarity.
9. Use orthodox spelling—e.g., "through", not "thru". Uncommon spelling distracts the reader.
10. Use proper grammar. The rules of grammar have survived the test of time. Poor grammar is a distraction and often creates ambiguity where clarity is required.
11. Use simple words. Avoid fancy, elaborate, coy and cute words. Do not use a complicated word when a simple word is available. Fancy words may satisfy the writer's ego, but the reader may not get the message.
12. Do not show off your IQ by using words that will send the reader to his dictionary. Words should not be used in your agreement if they sound stilted when spoken.

13. Be concise and coherent. Choose words that are strong. Avoid word clutter, repetition and unnecessary adjectives and adverbs. For example, "void" is preferable to "null and void"; "correct" is preferred to "true and correct"; "free" or "clear" is preferable to "free and clear".
14. Unnecessary words cloud the message and distract the reader. For example, use "they met" not "they held a meeting".
15. Modifiers should be placed next to the word or phrase being modified. Eliminate dangling modifiers. These are examples of dangling modifiers (and passive voice): "Prior to closing, the money was deposited in escrow". "Money" did not close. This should be written: "Buyer deposited the money in escrow before closing". Another example—"By reversing the sequence, the meaning became clear". "Meaning" did not reverse the sequence. It should be written: "The meaning became clear by reversing the sequence".
16. Do not take shortcuts at the cost of clarity.
17. Write with nouns and verbs, not with adjectives and adverbs. Use a pronoun as a substitute for a name to simplify a sentence. An adjective does not strengthen a weak noun.
18. Do not convert nouns into verbs; e.g., he gave, not he gifted.
19. Do not substitute a noun for a verb. People "act" is better than take "action" and "assume" is better than "make assumptions".
20. Avoid long sentences and long paragraphs. The former lack clarity, take too much of the reader's attention and present obstacles that the reader is reluctant to tackle. The latter are a visual distraction even if well written. Break up long paragraphs. The reader will appreciate your effort.
21. Rid your document of all unnecessary words. For example, many lawyers begin the agreement with a wordy recitation of consideration<sup>1</sup> when the simple "the parties agree" says it all. Some lawyers sprinkle words like "the parties agree" or "Seller agrees" throughout an agreement. The expression should appear at the beginning, with "The parties agree" and not be repeated throughout the agreement. I also attempt to purge phrases like "as follows".
22. Do not overstate. A single overstatement diminishes the whole.

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<sup>1</sup> I cringe when I read: "Now, therefore, in consideration of the premises and the representations, warranties and covenants of the parties hereinafter set forth, and other good and valuable consideration, the receipt of which is hereby acknowledged, the parties, intending to be bound, agree as follows:"

23. Place the most important words or phrases at the end of a sentence.
24. Revise, edit, revise. Do not fall in love with your words, however impressive they sound to you. Your goal is not to intimidate the reader or send him to a dictionary. Ask yourself—is there a clearer or more concise way to say this?
25. Ask a colleague to review the document. If you must explain its meaning, go back and change the written material to reflect your explanation.
26. If your client does not understand your document—don't try to convince him that your prose is perfect. Revise the document so that the client knows what is written.
27. Be careful when using spell check, which can lull you into a false sense of security, not correcting sound-alike words. For example: "The wild fire wrecked (instead of wreaked) havoc in the town"; "The news reports peaked (instead of piqued) her interest"; or "She poured (instead of pored) over the book".
28. Finally, producing an excellent document requires perseverance. It takes discipline and careful proofreading for you to spot and correct problems in your own writing.

## WORDS AND PHRASES FREQUENTLY MISUSED

1. "Alternative" should only be used with two choices.
2. "And/or" is an ambiguous, but sometimes useful, term. Define it if you use it:

"And/or" means each and all of the persons, words or provisions connected by the term and imports a joint and several meaning.
3. "Any" and "either"—use "any" to refer to more than two choices. Use "either" if only two choices are involved.
4. "Can" and "may"—"Can" means "am able" and is not a substitute for "may". "May" expresses a contingency or possibility ("it may be sunny") or permission ("you may leave").
5. "Different than"—The correct term is "different from".
6. "Disinterested"—"impartial" is a better word.
7. "Due to"—The proper synonym for "due to" is "attributable to". "Due to" should not be used in place of "through" or "because of" in adverbial phrases such as "he lost the case because of his carelessness".
8. "Effect" and "affect"—When used as a noun, "effect" means "result"; when used as a verb, "effect" means "to accomplish". When used as a noun, "affect" means "feeling" or "emotion"; when used as a verb, "affect" means "to influence".
9. "Either" – "or" - should only be used with two choices.
10. "Farther" and "further"—"Farther" refers to distance; "further" refers to time or quantity. You may hit the ball farther, but you pursue the subject further.
11. "Fewer" and "less"—Fewer refers to number; less to quantity; or to simplify that definition, "fewer" is used for countable items"; "less" is used for things that cannot be counted. For examples, "the closing date will be not more than 30 days nor fewer than 10 days after . . ."; or "there is less food in the refrigerator".
12. "Forego" and "forgo"—"Forego" means precede; "forgo" means do without.
13. "Former" and "latter" – these terms, like "either" – "or" should be used only with pairs and should not be used when referring to more or less than two choices.
14. "Forthwith" is ambiguous and should not be used. Be precise as to the time for performance.

15. "Hereby"--It is unnecessary. Don't use it and don't substitute another word for it. "Seller conveys" is preferable to "Seller does hereby convey".
16. "However"—Do not start a sentence with "however" when you mean "nevertheless". "However" is better used as part of the sentence, not as an introductory word. When "however" introduces a sentence, it means "no matter how" or "in whatever manner"; for example, "However you advise him, he will do as he pleases".
17. "Interesting"—This is an unconvincing word often used as a means of introduction. It is not necessary to inform the reader that you are about to write something interesting. Just do so. Instead of beginning a sentence with "It is interesting to remind you that . . .", begin the sentence with the words that follow "that".
18. "Irregardless" and "regardless"—There is no such word as "irregardless", but it is regularly used in speech and too often in writing. The correct word is "regardless".
19. "Leave" and "let"—Do not use "leave" in place of "let". For example, plaintiff may "leave" the room, but plaintiff "lets" defendant's argument stand unanswered.
20. "Lend" and "loan"—Lend is a verb; loan is a noun, although its use as a verb by money lenders has become so common as to be acceptable in that limited context. Mark Anthony did not say "Friends, Romans, countrymen, loan me your ears".
21. "Like" and "as"—"Like" is not a synonym for "as". The word "as" is used before phrases and clauses as when comparing unsimilar things. For example, "as the sun set, she came in from the beach"; the word "like" governs nouns and pronouns, and is used when comparing similar things. For example, "like her friend, she came in at sunset", "his house, like my house" and "we spent the day at his house as we have often done".
22. "Literally" is high on the list of misused words. "Literally" means true or as a matter of fact. "Figuratively" is the right word in most cases.
23. "Me" and "myself"—"Me" is the correct object of a verb. "The argument involved Jim, Joan and me", not "Jim, Joan and myself". "Myself" may be used for emphasis when referring to the subject., e.g., "I, myself".
24. "Most" and "almost"—"Most" is often used incorrectly as a substitute for "almost".
25. "None"—the word will generally, but not always, require a singular, not a plural verb.
26. "One of the"—This is a feeble phrase. It should be avoided. For example, "plaintiff's witness, John Smith, testified" is better than "one of plaintiff's witnesses, John Smith, testified".
27. "Possess"—Not a good substitute for "have" or "own".

28. "Promptly"—See "forthwith".
29. "Said" as an adjective is an unnecessary word that lawyers seldom use when speaking but sprinkle throughout their writings.
30. "Such"—One of the most misused words. "Such" is an adjective and requires a clear antecedent. Do not use it in place of "the", "this", "that", "these" or "those". If you use "such", do so because it is the right word and use it correctly. If you are not sure, eliminate "such" from the document but be forewarned that you may incur the ire of opposing counsel.
31. "That and which"—see paragraph 22 under "Drafting Suggestions".
32. "That" and "who" – "that" refers to things; "who" refers to people.
33. "Then" and "than"—"Then" is an adverb referring to time or a result. "Than" is a conjunction used for comparison.
34. A plural used when the intention is singular. "They will deliver their financial statements" should be written "Each party will deliver the party's financial statement".
35. "Very"—avoid its use. If emphasis is necessary, use strong words.
36. "While"—generally "and", "but", or "although" is a better word. If you prefer not to use a connective word, use a semicolon.
37. "Who" and "whom"—"Who" is a subjective pronoun; "whom" is objective. The correct word is "who" in the sentence "the witness who the defendant said testified" because it is the subject of the verb "testified", not the object of the verb "said".
38. "Will" and "shall"—Be consistent in the use of these words. "Will" is more commonly used in speech. Use one or the other but do not use both interchangeably in the same document, unless you follow the old formal rule that "shall" is used with the first person and "will" with the second and third person. I use "will" in an agreement unless the agreement amends an earlier agreement in which "shall" was used. I will respect that lawyer's choice but still insist on consistency. You might consider including "will" and "shall" in a usage section (see page 23). You can also substitute "must" for "will" or "shall".
39. "Willful": Does it mean intentional or malicious or in bad faith? Courts disagree. Use of that word can lead to avoidable litigation.
40. Use the word "must" if you want to create a condition.

## LEGAL LANGUAGE v. COMMON USAGE

Lawyers may think that they write in ordinary English. Clients are not sure that is the case. There are words commonly used in agreements and pleadings that have uncommon meanings. These words mean one thing to the client and may mean something else to the lawyers. While the words may be readily understood by lawyers, they may be confusing to clients. Some of those words are:

<u>Word</u>	<u>Legal Meaning</u>	<u>Common Meaning</u>
action	lawsuit	doing something
alien	transfer	foreign
avoid	Cancel	keep away from
consideration	benefit to a person	thinking; reflecting
demise	to lease	death
hand	signature	lower part of the arm
instance	this	now; immediate
instrument	legal document	mechanical device
letters	authority to act	written communication
party	person contracting or litigating	social gathering or political organization
presents	this document	a gift
provided	word introducing a proviso	furnished
said	mentioned before	oral communication— past tense of "say"
save	except	rescue
tenement	estate in land	dwelling; generally associated with inferior quality
virtue	by authority of	merit; excellence
without prejudice	without loss of rights	without bias

Quit using archaic terms like "witnesseth"; "whereas" and the classic "in witness whereof" at the end of the agreement. I banned them from my documents, although opposing lawyers often include them in revisions.

## DRAFTING SUGGESTIONS

1. Question yourself. Keep asking yourself whether the sentence (paragraph) correctly expresses what you intend to say and whether it can be improved. Using fewer words will often improve clarity.
2. Don't be married to any specific words or phrases. Delete or change much (if not all) of what you have written if you are not satisfied.
3. Discard a sentence that defies your efforts at clarity and start over with an entirely new effort at expressing the thought.
4. Define terms that are repeatedly used in the document. This will avoid the need of continuous definition of the same word or phrase. A definition section should be part of every long agreement.
5. Delete every word, phrase and sentence that does not add anything. It is surprising how much can be deleted by following this simple rule.
6. Eliminate unnecessary adjectives, adverbs and meaningless modifiers. Delete words such as "very", "quite", "really", "truly", "actually", "clearly" and "obviously".
7. Use prepositions, not prepositional phrases. The preposition "if" should be used in place of the prepositional phrase "in the event that" and it is better to use the preposition "to" in place of the prepositional phrase "in order to".
8. Do not use redundant prepositional phrases. For examples: a box is "filled" not "filled to capacity"; the witness is "present", not "present in person"; "each" is preferable to "each and every"; and there is a "consensus", not a "consensus of opinion".
9. Use common language. "Before" is preferable to "prior to". "After" is better than "subsequent". The average person will know what "before" and "after" mean.
10. Do not use "hedge" words (such as "perhaps", "rather", "fairly" and "probably"). They weaken your writing. Write "the alternative is preferable", not "the alternative is probably preferable".
11. Eliminate unnecessary clutter: "now" is better than "at this time"; "although" is better than "in spite of the fact that"; "whether" is better than "the question as to whether"; and "most" is better than "a substantial majority of".
12. I don't know when the practice began, but agreements are now cluttered with redundant numbers. Why write "three (3) choices"; when "three" will suffice.

13. Do not use unnecessary introductions such as "the purpose of this memorandum is" or "the issue in the case is".
14. Avoid clichés. "For all intents and purposes" adds nothing to the document. "Goes without saying" is generally followed by what did not have to be said. If you must use it, begin with the words "it should". The "exception proves the rule" probably more accurately is written with "tests" instead of "proves".
15. Delete the term "best efforts" from your vocabulary. Courts do not agree on its meaning. Some suggest that it requires a higher standard than "reasonable efforts". Most generally hold that the "best efforts" standard is equivalent to "reasonable efforts". Avoid the cost of litigation by using "reasonable efforts". You can further qualify it by using "commercially reasonable efforts".
16. Use strong verbs that express action. Don't write "Mr. Smith's actions constituted a breach of the terms of the noncompetition agreement"; instead, write "Mr. Smith breached the noncompetition agreement".
17. Use active, not passive language. The passive takes more words than the active voice and often is ambiguous. For example, "The noncompetition agreement was breached by Mr. Smith" is a passive sentence. The same sentence, in the active voice, would be "Mr. Smith breached the noncompetition agreement". You merely add an active subject to convert passive sentences to active sentences. Nothing more is required than turning the sentence around so that the "doer" becomes the "subject".
18. Use affirmative, not negative statements. Affirmative statements are forceful and easier to understand. Most rules have exceptions and negative statements properly used and clearly understood can also be forceful. The sentence "He has not engaged in any activity that is prohibited by the noncompetition agreement" could more forcefully be expressed "He did not breach the noncompetition agreement".
19. Avoid double negatives. They add confusion and ambiguity to the document and distract the reader.
20. A participial phrase at the beginning of a sentence must refer to the subject of the sentence. No rule more clearly dispels the illusion that the spoken word can somehow be carried over into print. For example, when spoken "Being dilapidated, John bought the house very cheap" is generally understood speech, but when written, the misplacement of the participial phrase is apparent. Who or what was "dilapidated"—was it "John" or "the house"? Literally construed, the sentence means John, not the house, was dilapidated.
21. Eliminate unnecessary repetition. Relevance is not the test. The test is whether the word or sentence adds anything to the document.
22. Properly use "that" and "which". "That" is restrictive and refers to specific information necessary to understand the sentence. "Which" is nonrestrictive and the clause is not

needed to clarify the sentence. Examples: "She read all of the author's books that were in the library" and "She read all of the author's books which were in the library". The author wrote many books but in the example using "that", she only read the books that were in the library. In the second example, she read all of the author's books and the clause "which were in the library" is not necessary.

23. Make your pronouns clear to the reader. A pronoun should stand for a specific noun. Replace the pronoun with the noun if the antecedent is not clear. Ambiguity is distracting and weakens the document.
24. Be careful how you address a letter. You should address a letter to the party to be bound by the contents and not to the person with whom you have been dealing. For example, escrow instructions should be addressed to the escrow company, not the escrow officer. Do not use the salutation "Dear Mr. Brown" in a letter addressed to a company and "Attention: Mr. John Brown".
25. Avoid sexist language by using sex neutral words, but do not use created words. Do not substitute "workperson" for "workman", but instead use "workers". Try substituting a noun for the pronoun "he" or "she". Some writers prefer "he/she". You should, if you use that term, add it to your "usages" section (see page 23).
26. The salutation "Gentlemen" is sexist when the letter is addressed to a company. Use "Ladies and Gentlemen".
27. Exercise the same care whether writing an agreement or a letter. Letters should be concise. Use as few words as are necessary to communicate your thoughts. I receive many letters from lawyers whose writing style can best be described as vague, verbose and pompous.
28. I generally include a "usage" section in an agreement. See page 23. It eliminates the need to repeat certain explanatory clauses (such as "but not limited to" after the word "including").

## REVISING

Revising is part of writing. It is necessary if you want your writing to be clear, concise and convincing. It is what you do after your first draft that makes the difference between mediocrity and good writing.

Most of us struggle with words. Our dictation (speech) is wordy; the sentence structure is loose; and the early drafts will contain adjectives, adverbs and participial phrases that should be deleted. Revising starts with cleaning out the clutter. The effort will produce a stronger, cleaner and more precise product.

Do not be afraid to cut the early drafts to ribbons. Don't fall in love with your cute catch phrases. It is not a sign of weakness or incompetence. You can always restore original thoughts when you receive the next draft (if that seems best).

You become the editor when revising your document. As the editor, you must eliminate words, phrases, sentences and paragraphs that confuse, are ambiguous or just don't belong, and you must be willing to change what is left. A poorly constructed sentence can obscure your thoughts. If a sentence defies your best efforts at revision, delete it and try a new approach.

Your revisions may often make a draft indecipherable. (That is my experience, even with "simple" letters.) Don't worry—all that is important at this stage is that your legal assistant can read what you have written. Dictate the next draft if she cannot read or understand your revisions. The next draft may not look like the previous one. Do not be disappointed if the second draft also requires many changes. The end result is worth the effort and the final product will be more effective.

Fixing the agreement takes time. Don't underestimate the challenge involved in selecting clear, concise language. It requires more than making the deal. Indifferent drafting, overuse of archaisms, redundant provisions and bloated prose will make it harder to construe when the inevitable dispute arises. It may not reflect even the agreement of the parties.

Constantly ask yourself – Is there a more concise or clearer way to write this? You will be surprised how often the answer is "yes".

## THE ART OF REVISING

- Convert passive sentences to active sentences—use an active subject.

<u>Passive</u>	<u>Active</u>
Buyer will be indemnified by Seller if	Seller will indemnify Buyer if
The withdrawal of money from plaintiff's account was made by defendant without plaintiff's consent	Plaintiff did not consent to defendant's withdrawal of plaintiff's money
The agreement was approved by the defendant	Defendant approved the agreement

- Use "strong" not "weak" verbs.

Strong verbs express action and make writing more effective.

Weak verbs include forms of "be", "have", "make," "do", "give", "provide", etc.

Instead of "plaintiff gave her consent to the withdrawal", write "plaintiff authorized the withdrawal".

You do not "provide a summary of the agreement"; you "summarize the agreement".

- Pronouns are wonderful one to four (occasionally five) letter words that if properly used, are excellent substitutes for nouns. The writer can use a pronoun to avoid repetition—"the quarterback thought he could complete the pass" reads (and sounds) better than "the quarterback thought the quarterback could complete the pass".
- Pronouns are subjective, objective or possessive, depending on the context, but always use the proper form. Substitute a noun or rewrite the sentence if the proper pronoun sounds too formal or stilted.

### Subjective Case

I  
he  
she  
they  
we  
who

### Objective Case

me  
him  
her  
them  
us  
whom

### Possessive Case

my, mine  
his  
hers  
their  
our, ours  
whose

Any form of the verb "be" is generally followed by a subjective pronoun and an active verb is followed by an objective pronoun. Nevertheless, a compound sentence may require careful thought, and the proper use of "who" and "whom" can be troublesome.

5. Don't fall into the common trap of substituting "myself" for "I" or "me". For example, "the argument was between her and myself" is wrong—it should be "her and me". The same rule applies to mixing the subjective and objective pronouns as "her and I went to the dance", instead of "she and I". It is bad enough when I hear pronouns so used in speech but it is inexcusable to find them improperly used in a document.
6. A singular antecedent requires a singular pronoun and a plural antecedent requires a plural pronoun. The rule sounds clear and simple, but consider these examples:

"That group of workers decided that they would leave the meeting" is incorrect—the "group of workers decided that it would leave the meeting". Although a group is composed of more than one person, the word "group" is a single unit.

"Tonkon Torp LLP held their retreat at Skamania Lodge" should be "Tonkon Torp LLP held its retreat . . ." Tonkon Torp LLP is singular and needs a singular pronoun.
7. Convert negative statements to affirmative statements. Affirmative statements are more forceful and convincing, and are generally easier to understand.
8. Rewrite sentences containing more than one negative—they confuse the reader.
9. Eliminate dangling or misplaced modifiers. A modifier, at the beginning of the sentence, refers to the subject. In the sentence "To earn the additional payment, the work must be completed on time", the phrase "to earn the additional payment" refers to "the work" which is not the intended meaning. The sentence should be "The contractor must complete the work on time to earn the additional payment".
10. Eliminate compound constructions—multiple words when one or two work. Examples:

<u>Compound</u>	<u>Simple</u>
a large number of	many
are in accord	agree
at such time as	when
at that time	then
at the present time	now
almost every one of them	most
a small number of	few
by reason of	because
filed a motion	moved
filed an application	applied

<u>Compound</u>	<u>Simple</u>
during such time as	while
for the purpose of	to or for
for the reason that	because
in accordance with	under
in a majority of cases	usually
in the event of	if
in the immediate future	soon
in relation to	about
in the event that	if
is able to	if
in the nature of	like
placed a limitation upon	limited
performed a search of	searched
prior to	before
provided assistance	helped
was in compliance	complied
subsequent to	after
with reference to	about

11. The modern rule is that a split infinitive can be used to avoid an awkward sentence or emphasize an adverb. "to partially resolve" sounds better than "to resolve partially".
12. The use of nouns and verbs is similar to the use of antecedents and pronouns (see paragraph 6). The subject and verb must agree in number. Singular nouns require singular verbs. Plural nouns require plural verbs. A singular subject and a plural subject in the same sentence require a verb that agrees with the subject nearest to the verb. Ignore intervening words: The use of nouns and verbs "is" not "are"—"use" is singular and requires a singular verb. You correctly ignore "nouns and verbs".
13. There is no substitute for a well written sentence. Use long sentences sparingly and only if their structure is clear and they contain no unnecessary words.
14. It will often improve clarity if a long sentence is broken apart and replaced by two or more sentences. Each sentence should express only one idea. Revise a very long sentence (which expresses only one idea) by
  - eliminating all unnecessary or repetitious adjectives, adverbs, words and phrases (phrases like "it is", "there is", "in order" carry no meaning and should be eliminated)
  - eliminating prepositional phrases
  - eliminating introductory words and phrases that add nothing
  - changing passive or negative phrases to active affirmative phrases

15. Keep paragraphs short but vary the length. Too many short paragraphs in a row can be upsetting—but short paragraphs interspersed throughout the document can emphasize important thoughts.
16. Use headings or captions for sections and paragraphs to make it easier for the reader to understand the material.

## PUNCTUATION

### Punctuation, Properly Used, Makes Your Writing Clearer

1. A sentence containing words in parentheses is punctuated exactly as if the parenthetical expression were absent.
2. A comma and a semicolon are not interchangeable.
3. Commas (or their absence) cause more confusion in legal documents than any other punctuation mark. Many writers either omit commas where they are appropriate or gratuitously add commas where they don't belong. Commas, properly used, not only eliminate confusion but also clarify the document. A comma is the appropriate punctuation:
  - to separate an introductory modifying phrase and the primary message

"During the morning meeting, the speaker used diagrams to make his points".
  - to separate a series of more than two words:

"Time may be measured in hours, days, weeks and months".
  - between dependent clauses:

"He took the code, read the applicable section, and summarized its provisions".
  - between independent clauses only if they are joined by a conjunction:

"The records were destroyed, thus their contents can no longer be determined".
  - to set off nonrestrictive elements. A nonrestrictive element (usually beginning with words like "which" or "although") may be descriptive but is not essential to the meaning of the sentence.

"The movie, although exciting, did not win any awards".
  - restrictive elements (usually beginning "that", "before", "if", "while" or similar words) are essential to the meaning of the sentence and are not set off with commas.

"His testimony that was long and contradictory upset the judge".

- A gratuitous comma is an unnecessary comma after added because the writer is uncomfortable with the sentence's syntax. For examples:

"Approximately, 30,000 students were at the game".

"Managing partner, Mike Morgan, opened the meeting".

All the commas in those sentences should be deleted. (No commas are necessary around the words "in those sentences".)

- Words added in the middle of a sentence should be separated by commas. For example:

"The applicant, when interviewed by the senior partner, was very nervous."

4. A semicolon should be used between independent clauses if a conjunction (such as "and" or "but") is not used. An independent clause, on its own, is a complete sentence.

"The records were destroyed; their contents can no longer be determined".

For clarity, use a semicolon between independent clauses where a connecting word is used if either of the clauses contains a comma.

"Zach Wright, the trial lawyer; Ryan Bledsoe, his assistant; and Max Miller, the environmental lawyer were present at the deposition".

5. A colon is handy and indicates that what follows may elaborate on the preceding material or may be an exact quotation. It may be preceded by words such as "the following" or "as follows", but they are not necessary and I generally omit them.
6. Dashes may be used for added emphasis.
7. Use parentheses when the information is incidental or subordinate to the rest of the sentence.
8. Quotation marks enclose the exact words of a speaker or material taken from another document. Quotation marks may also enclose defined terms when first used, such as:

The term "Business Day" means any calendar day that is not a Saturday, Sunday or legal holiday.

Lawyers use quotation marks to enclose a term in parenthesis to identify a preceding term, such as:

Jonathan S. Wright (the "Seller")

I cannot find any authority for that use of quotation marks and will not use them in that context if I control the document. It is not an important issue if the other lawyer insists on adding the quotation marks. The meaning is clear in either case and there are more important points to win.

## WRITING AN AGREEMENT

Good legal minds today favor plain English. Unnecessary, complex jargon – or "legalese" – is the source of many problems. It doesn't communicate efficiently to clients, the other lawyer and, when litigation ensues, to the judge.

The contract language should never be an after-thought. The real work begins once an agreement is reached at the negotiating table. The parties, and especially the lawyers, often are in complete disagreement when trying to reconcile the language used to express the earlier agreement.

You must punctuate properly and use good grammar and sentence structure whether you are writing an agreement, letter, memorandum, brief or pleading. Each of those documents, except an agreement, is unilateral. The reader may be a client, an adverse party, opposing counsel or the court.

An agreement is a mutual document. It contains provisions prepared by you and by opposing counsel. The "reader" will usually not receive the agreement unless a dispute requires an interpretation of its language. Nothing is more embarrassing to a writer than having a court determine that the writer's language is ambiguous and then construe the language to mean something that the writer never intended.

Every agreement is different although the "boiler plate" provisions may be similar. Use a form carefully; you seldom have two identical transactions and should seldom have identical agreements. Some drafting suggestions:

1. The proper use of defined terms can make a document easier to read and sentences shorter. They can have the opposite result if not properly used. Common errors include words that are defined but not used; inconsistent capitalization of defined terms; and misuse of defined terms in the document.
2. Define terms which are repeated throughout an agreement and use defined terms only when you intend the defined meaning.
3. Use captions (or headings) for descriptive purposes only. They help you find a specific provision. If you use captions, include a section reading:

"The captions used in this Agreement are for convenience only and will not be construed to limit or affect the meaning of any provision of this Agreement."

4. Some words carry baggage. Although they may be common legal terms, they often have uncommon legal meanings that survived the general adoption of modern English in the 16th Century. For example, legal documents regularly contain the antecedents "here", "there" and "where" (e.g., "herein", "therein" and

"whereas"). They may give the agreement a legal smell but they have little legal substance. Non-lawyers use those words infrequently, but they are part of many lawyers' vocabulary and, without clarification, are often used in an ambiguous or contradictory manner. For example, does the word "herein" mean in this agreement, in this section, or in this sentence?

I try to avoid the problem by including a "usages" section in the "definitions" section of an agreement. You must be as specific in your use of those terms as you are in your use of defined terms. Some helpful clauses are:

- (a) The terms "hereof", "herein", "hereunder" and any similar term refer to this agreement.
- (b) The term "hereafter" means "after" and the term "heretofore" means "before" the date of this agreement.

Be consistent. Do not use "hereafter" to refer to subsequent provisions of the agreement (e.g., "except as hereafter provided"). It is better to refer to specific sections (e.g., "except as provided in Section \_\_\_\_"). If you must use a "here" word, the correct one in this case is "hereinafter".

- (c) Each of the words "include", "includes", "included" and "including" are deemed to be followed by the words "without limitation".
- (d) Words of the masculine, feminine and neuter gender mean and include correlative words of the masculine, feminine and neuter gender and words importing the singular number mean and include the plural number and vice versa.
- (e) References to any agreement, document or instrument refers to that agreement, document or instrument as amended, supplemented or modified from time to time.
- (f) The term "and/or" means all and each of the persons, words or provisions connected by that term and imports a joint and several meaning.
- (g) The terms "shall" and "will" are synonymous and each is mandatory and neither is permissive or constitutes a condition.

Some words and phrases are unique to legal agreements. Many lawyers, including experienced ones, misuse words when writing an agreement. They may resent any suggestion that a term is ambiguous or not properly used or that a different word should be used. Do not be intimidated into accepting bad terminology, misused words or ambiguous or contradictory sentences and, if accused of nitpicking, accept it as a compliment.

There are some common problems:

1. There is a difference between a representation and a covenant. Even experienced counsel often use the phrase "Seller represents and covenants" in agreements. The proper phrase is "Seller represents". A representation is a statement that certain facts are true. It should never be used with respect to future conduct or matters of law. A covenant is a promise to do something in the future.
2. Know the difference between a remedy for the breach of an agreement and an indemnity. The former arises because of a party's failure to perform the agreement. An indemnity relates to a third party claim. It has become common for lawyers to include a provision that "Seller will indemnify Buyer for damages caused by Seller's breach of this Agreement" in the indemnity section. It does not belong there and should not be accepted. Nevertheless, I may acquiesce in opposing counsel's insistence on using that provision, although I do so with reservations. There are often more important issues about which I am concerned.

Courts will construe words against the author. The following clause may protect the author against that construction:

The parties and their attorneys have mutually negotiated and prepared this Agreement. No provision of this Agreement will be construed against any party on the basis that the party is the author of the specific provision or in favor of any party on the basis that the other party is the author of the specific provisions.

Every agreement should contain a "notices" provision describing with specificity where and how to deliver notices.

References to specific time periods should not be ambiguous. Some agreements do not satisfy this requirement. Does the word "month" mean a calendar month? I may, if appropriate, include provisions substantially as follows:

References to Days. All references in this Agreement to "days" are references to calendar days and all references herein to "business days" are references to calendar days excluding Saturdays, Sundays and legal holidays.

References to Months. All references in this Agreement to "months" are references to a period beginning on the first day and ending on the last day of a calendar month<sup>2</sup>.

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<sup>2</sup> The agreement may distinguish between calendar months and months beginning after the first day of the month. I might use the following provision in that case: "All references in this Agreement to "calendar month" are references to a period beginning on the first day and ending on the last day of a calendar month and all references herein to "month" are references to a period beginning on a day other than the first day of the calendar month and ending at midnight on the day immediately preceding the corresponding day of the next calendar month".

References to Years. All references in this Agreement to "calendar year" are references to a period beginning on the first day and ending on the last day of a calendar year and all references herein to "year" are references to a period beginning on a day other than the first day of the calendar year and ending at midnight on the day immediately preceding the corresponding day of the next calendar year.

Parties may be presumed to act "in good faith". I often add the following:

Good Faith Obligation. Each party will perform all of its obligations and responsibilities under this Agreement in good faith and with due diligence.

## WRITING A MEMORANDUM OR BRIEF

A memorandum has a different purpose than a brief. Often, a memorandum will be prepared for a client or another lawyer in the office. In that case, it should contain favorable and unfavorable material so that the reader can decide whether to proceed. The purpose of a brief or a memorandum for opposing counsel is to convince the reader that your position is the only correct one. A brief is not a law review article in which the writer presents all sides of the argument. You should not ignore unfavorable cases, but carefully distinguish them or, if necessary, attach their conclusions.

Use quotations effectively. Follow these rules, whether writing a memorandum for a lawyer in the office or a brief:

Long quotations aren't effective. Many readers will either skim them or skip them entirely.

Do not use a quotation when you can state the material more concisely or more effectively in your own words.

A direct quotation is useful (i) to inform the reader of the specific language of the statute or regulation; (ii) when paraphrasing changes the meaning; (iii) if your restatement may be disputed; or (iv) when a court's language is directly relevant and helpful to your case.

Be selective—use only those quotations that are necessary and helpful. Quote only the most important or most relevant language—and only if you think it adds to your argument. Summarize the rest and do not be unnecessarily repetitive.

If the quotation is worth including, you should let it speak for itself.

It may be necessary to quote statutes and regulations verbatim, but that does not apply to court opinions. It is more effective to explain how an opinion supports your analysis—how the case's facts fit your facts—than to set out a long quotation. Bad writers have a tendency to quote lengthy paragraphs. The reader has a corresponding tendency to skip the mountains of prose.

It is best to state the principle of law followed by the case name and citation at the end of the sentence.

Your reader may need more than just a case name and citation. If a case is important to your argument or your analysis, you may need to tell the reader something about the facts of the case and how the law was applied. Emphasize why the case you cite should apply. You must also explain why the case your opponent cited does not apply, especially if you cannot cite a case on the issue. Include the exact page on which the proposition or quotation can be found.

Carefully check your citations. When you cite a case for a principle that is not the clear holding of the majority, include the appropriate parenthetical, for example: (dissenting opinion), (dictum), (plurality).

Avoid unnecessary string citations. (A string citation is a citation of two or more cases for the same principle of law.) Unnecessary string citations diminish the power of your good cases. They also demonstrate an inability or unwillingness on your part to select the most pertinent cases. If one case provides the reader with the authority for your statement, one citation is all you need.

Use only citations that are best for your purpose—don't bury your best citations. Relevance is not enough. The question should be "Does the cited case add something of value?"

Follow the same rules that apply to an agreement. Avoid being wordy. The simple English word "stop" is often preferable to "cease and desist".

Lawyers use many words to say too little. Brevity is an independent factor. What is brief may also be precise, but that does not necessarily follow. Do not sacrifice clarity for brevity. Brevity minimizes the possibility of error that is inherent in the use of too many words. Every unnecessary word in a brief puts a strain on the court and diminishes the writer's analysis. It takes more time to write briefly but it will take the reader less time to understand the argument. That should be the writer's goal.

## POSTSCRIPT

There are many courses and books containing good advice to the aspiring writer. Most of those authors are better qualified than I to teach the subject. I have one recommendation and it has stood the test of time. It is a thin book. "The Elements of Style" by William Strunck, Jr., with Revisions, an Introduction and a new chapter on Writing by E. B. White, was privately published in 1918, revised by the author in 1935, and by E. B. White in 1957. If you are lucky enough to find a copy, treasure it and use it as a constant reference source.

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