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Improve Your Legal Writing

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Improve Your Legal Writing

Christine Pagano of Golden Gate University School of Law suggests some helpful resources for attorneys wishing to hone their drafting skills.

Christine Pagano

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Litigators write demand letters, prepare pleadings, motions, affidavits and declarations; organize trial presentations and compose appellate briefs. Transactional attorneys draft contracts and opinion letters and conduct business correspondence. Judges write opinions, dissents and concurrences. Law students and law clerks prepare case briefs, research memos and law review comments. And law professors organize course outlines, lesson plans, lectures and presentations; write articles, books and *amicus* briefs; and read, edit, correct and comment upon reams of student writing.

To do all this, we need dependable guides to current legal writing tone and style. We can benefit from suggestions on organization, logic, mechanics, usage and grammar, and tips on editing, proofreading and revision. Many of us may have our favorite handbooks, perhaps from college or law school. I liked "The Harbrace College Handbook" and "The Random House Handbook" for grammar and organization respectively in college and graduate school. Somewhere during that time, I read William Zinsser's "On Writing Well," and I have used his sample of editing from the chapter on "Simplicity" as a guide ever since. In my first law school writing class, our professor introduced us to "Politics and the English Language," George Orwell's polemic on the misuse of language for political effect and public anesthesia. And Strunk and White's "The Elements of Style" is a perennial favorite. My current favorite edition of that book is a version illustrated by Maira Kalman.

"The Elements of Legal Style" (2d edition, Oxford University Press 2002) by Bryan Garner follows many of the basic principles of good English writing found in Strunk and White's popular work. However, Garner's focus is on adapting those values to the particular requirements of the legal writer. In seven brisk chapters, he covers aspects of legal writing from basic grammar, punctuation and matters of legal form, to usage, style and tone, word choice and effective use of rhetorical devices.

For example, in chapter three, "Fundamental Principles of Legal Writing," Garner states that basic goals of legal writing include clarity and brevity. One key to achieving these values is organization. The bulk of the chapter explains how to create a simple structure in a legal argument, how to construct paragraphs that have (as we learned in high school) unity, coherence and emphasis, and how to arrange sentences for continuity of thought within paragraphs. In this chapter, as in all the chapters in the book, Garner offers illustrations (good and bad) from legal writing by judges, professors and practitioners. One of the most entertaining examples is the opening of a probate opinion demonstrating the pyramid structure of organization, combining what some might consider a dusty topic with a lively narration.

In chapter two, Garner offers advice on usage, word choice and how to develop a legal style that provokes thought and avoids "legalese" and cliché. Recognizing that style is sometimes considered a matter of choice, whereas usage is more controlled by rules, Garner observes that the line between the "term of art" and jargon is not always clear. Lawyers use words precisely, and their meanings are often different in law than in daily usage. Moreover, some words in law have multiple meanings, or meanings that have evolved over time, so lawyers have a duty to avoid ambiguity while at the same time not testing the patience of the

reader with lengthy explanations.

In a brief section on grammar and syntax, Garner tackles prescriptive "rules" including commands to use the active voice; to avoid dangling modifiers and split infinitives; and never to use "and" or "but" to begin a sentence, or a preposition to end one. He offers examples and common sense advice about when breaking those rules makes legal writing more effective. He quotes Fowler's guidelines, and warns that you must have a good ear to distinguish such departures from simple carelessness. Reading your work aloud often reveals awkward constructions or plain bad grammar.

While lawyers must follow legal rules of usage, within that discipline there are many ways to make a legal point. Chapters one and seven include discussions of several styles of legal writing, from the formal, classical or "Asiatic" decorative prose of Cardozo through the plain "Attic" prose of Holmes. Garner includes examples of each style plus excerpts from the lively debates that have taken place over which is the proper legal style. He concludes that perhaps the 21st century will favor an even more informal style, with specific and concrete examples, plainer word choices and a more leisurely pace. On the value of concrete illustrations to nail the point of an abstract argument, he quotes Holmes' "The Common Law" on the concept of legal intention: "[E]ven a dog distinguishes between being stumbled over and being kicked."

Tone is an important element of legal style; Garner cites the jarring example of a cheery opening to an opinion in a case about an automobile accident that killed five people. Tone suffers, too, from empty words and phrases, cliches that have lost their ability to create a mental picture, and tics or fads in usage, such as the "not un" construction. He quotes Orwell's famous sentence, urging us to swear off this pretentious habit by repeating to ourselves: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."

Chapter five contains an excellent glossary of particularly troublesome words and expressions often confused or misused in legal writing.

As a former teacher of Shakespeare's plays, I particularly enjoyed chapter six, "Rhetorical Figures in Law." This is one of the most comprehensive treatments of classical rhetoric I have seen in popular law writing guides. Most surprising about the selections in this chapter is how commonly rhetorical figures occur in legal writing. It is not surprising that they give a spark to even the most dreaded of legal topics. Here is the legal writing itself, personified: "The law is a fat man walking down the street in a high hat. And far be it from the law reviews to be any party to the chucking of a snowball or a judicious placing of a banana peel." (Fred Rodell, 48 Va. L. Rev. 279, 281 (1962)).

Garner concludes this edition with the admonition to "be yourself." Good legal writing is composed not only of logic and reason, with the head, but also with heart. Invest yourself in your writing; establish your tone and stick with it. He cites the magnanimity and empathy in Justice John Marshall Harlan's lone dissent in *Plessy v. Ferguson*, part of which reads, "the Constitution of the United States does not, I think, permit any public authority to know the race of those entitled to be protected in the enjoyment of such rights." These are words from the heart, which today can be applied not only to race, but to many other human conditions.

Also in chapter seven are many practical tips and checklists of legal jargon with suggested substitutions. There's a terrific section on issue statements that challenges some current practice. For experienced legal writers who enjoy thinking about writing and working to improve their skills, "The Elements of Legal Style" would make a nice desk book gift. This book is one of several I use as desk books and reference books for teaching legal writing, legal method and literature and the law. For college graduates who will attend law school in the fall, or for law students and graduates this book will be useful as well.

Perhaps those who need a more basic introduction to legal writing will benefit from "The Redbook, A Manual on Legal Style 2d ed.," a Thompson-West textbook also by Bryan Garner. The sections on basic grammar, pronunciation and legal forms are more comprehensive, showing younger lawyers clear examples of the many mistakes beginning legal writers make, and offering corrective suggestions. The expanded glossary of troublesome terms and terms of art is particularly useful. A supervising attorney might want to prepare a rubric from the table of contents, as I did, to offer when correcting the work of law clerks and associates.

And finally, for the hard-core word lovers among us, I recommend "A Dictionary of Modern Legal Usage, 2d ed." (Oxford University Press). Nearly a thousand pages in encyclopedic format, this book tells you all you ever wanted to know about legal writing, and a great deal you didn't much think about before, as well.

Good writing style, according to Garner, may help you win your case, by making the judge's work easier, and by instilling confidence in your reader that you must know your substance well to write this lucidly and feelingly about it. He reminds us that strong rhetorical skills helped Winston Churchill inspire his countrymen to persevere and win in World War II. As lawyers, we may not face World War II daily, but we can certainly arm ourselves well by employing a robust legal style to persuade our readers.

Christine C. Pagano teaches literature and the law, and legal methods at Golden Gate University School of Law, where she was the founding director of the LLM US Legal Studies Program. She has contributed to "Black's Law Dictionary" and "A Dictionary of Modern American Usage," both edited by Bryan A. Garner.