

# Preface

When a major Boston law firm first asked me to teach writing to young lawyers, I eagerly agreed. I loved the intellectual rigor of legal argument and the symmetry of a finely crafted brief. How hard could teaching writing to talented young lawyers be? I had surely found the easiest law-related job in town.

Then I confronted my first paper. It was a research memorandum on a contract issue and a dense and tangled web. In other words, typical lawyer stuff—much like the dense prose I myself had often written as a young lawyer. So just as I once struggled to correct my own bad habits, I now struggled with my student's paper. I cut the clutter, rewrote paragraphs in plain English, crafted lead sentences, reorganized thoughts, and deciphered a conclusion. The editing took hours—far more time than it would have taken to write the paper from scratch. I was exhausted, but the paper was much improved.

The next day, the earnest young lawyer who had written the paper sat down for a review session. As I walked him through my suggestions, I found myself struggling to explain *why* I had suggested those changes. I realized then that my new role required me to work with the writer, not just the writing—to teach, rather than simply edit. What could I offer my student that would enable him to improve not just this paper, but the hundreds of papers he would write in his legal career?

Indeed, what is good legal writing? We all know it when we see it, but are there rules or best practices? Or is writing too personal and complex for rules?

So I began to study the papers I reviewed. I deconstructed papers that worked to determine why they worked. I searched

for best practices. I noted common pitfalls. And I tried to look beyond the common admonition to “use plain English” and to focus instead on the structure and substance of legal writing.

Since that long-ago meeting with my first student, I have coached over a thousand lawyers. I have learned that I must explain not just *what* changes I suggest, but *why* I suggest those changes. My years of coaching have left me with strong convictions about what makes for powerful legal writing and an even stronger belief that legal writing is a skill that can be taught and learned.

This book shares the many lessons my students have taught me—lessons that should guide others lawyers, whether they are solo practitioners, government prosecutors or globe-trotting international lawyers. I hope these lessons nurture your talent for writing and encourage you to nurture that talent in others.

May this book help you find your own voice.

# Why Writing Matters

# 1

*For I am a bear of very little brain and long words bother me.*

—A. A. Milne, *Winnie the Pooh*

NOBODY UNDERSTANDS US. We lawyers are the topic of late-night jokes, the species most frequently compared to sharks, the supplicants least likely to pass through the pearly gates. We make too much money. We bill for breathing. And we dress like clones.

But the bigger problem, or perhaps the root of our problem, is that nobody can *understand* us. We speak in code or, as the columnist Dave Barry has written, in Martian. Our writing sounds pompous and superior. While the civilian world tweets away, we run on and on in circular marathons of words. We write documents, not papers. And those documents are not just baffling. They are ugly too.

Lawyers have always lived and died through their words. But today, those words are almost always written. Virtually everything we do—our negotiations, our legal arguments, our advice to clients, even our exchanges with colleagues—we now do in writing. Yet we often belittle the skill required to write masterfully. How often have we suggested that something be “*reduced to writing?*” But now that all lawyers are essentially in the writing business, the ability to write clearly and efficiently has become a survival skill. You cannot be an effective lawyer today if you cannot write.

Why is legal writing so important? Because legal writing drives deals, molds thought, sets rules, and governs relationships. Because once legal thought is *promoted to writing*, it becomes a permanent guide and reference. Because our writing

represents both our clients and our firm. And because our writing reflects on each of us as an advocate and a person. Our writing defines who we are.

Writing skills are particularly essential for young lawyers. Young lawyers' careers often rise—or fall—based on their ability to write. Therefore, writing is any young lawyer's best tool for advocating for his or her own skills. Writing is the way young lawyers build their reputations and begin to create their own story as sharp legal thinkers and promising advocates.

Our poor writing costs us dearly in both time and results. Indeed, it often seems contagious. New lawyers agonize over their writing. Senior lawyers waste years of their lives revising poorly written work from those junior attorneys. Clients struggle to decode their own lawyers' missives. Meanwhile, judges turn gray deciphering convoluted briefs, while lawyers struggle to make sense of dense judicial opinions.

And we haven't even mentioned the plight of the public. The people of a nation founded on the rule of law are entitled to understand the laws and rules that govern their society. Poor legal writing leads to poor decision making. So the least we can do for a nation that often questions the value of lawyers is to try to speak in a language that adds value—a language that makes legal thought accessible and that regular folks can understand. Open, readable language promotes justice and order.

We lawyers are not alone in our writing woes. The plague of poor writing infects the business world, as well. The recent National Commission on Writing reports that American businesses spend as much as \$3.1 billion annually to address writing problems in the workforce.

In the legal profession—where anxiety seems to run in our blood—we are particularly anxious about writing. But when lawyers fret about legal writing to me, they often focus only on the obvious concerns: the typographical errors, the occasional grammatical mistake, or the failure to proofread. But the real factors that drive excellence in legal writing are much more substantive.

What is excellent legal writing? Strong legal writing speaks a modern language—plain English. It respects our readers' time and intelligence by being concise but thorough. It takes complex ideas and makes them clear. It leads from the top. It builds on the mind's innate love of pattern and it tells our readers what to do next. The best legal writing earns both the readers' trust and the right to the readers' time. Above all, strong writing leads to easy reading.

Today, technology and the emergence of the Internet challenge us to find new ways to keep legal writing relevant and meaningful. Information now moves instantaneously. E-mail has become the engine for business communication, and PowerPoint has emerged as the leading medium for

presenting information. But while information on the Internet has become faster, flashier and more visual, legal writing often remains stuck on paper—even though that paper may be filed electronically—and mired in its ancient forms.

It is long past time for change. The same technologies that challenge our old ways of writing also provide the opportunity to bring legal writing into the modern age. Technology should make it possible to abolish cumbersome citation formats, to deep link to relevant information, and to redesign legal documents in new mediums that have the functionality of web pages and read like letters, rather than term papers.

But we must do more than simply adapt our traditional forms to take advantage of modern technology. The modern lawyer must also be fluent in modern mediums, such as newsletters, blogs, e-mail and PowerPoint. Fortunately, the techniques that make for powerful writing apply to all our forms of communication, from the lowly e-mail, to a casual blog or newsletter, to a weighty appellate brief.

It's a fast, loud world—a world in which virtually everyone has a voice in the collective conversation that is the Internet. Our fancy law degrees are no longer enough to make people listen to us, so we may no longer hide behind time-worn conventions of legal writing. We lawyers will forfeit our voice in the collective conversation—and much of our influence—if we don't learn to communicate more clearly.

Because English is the language of the Internet and international business, we English speakers are uniquely positioned to flourish in our Information Age if we can make ourselves heard through the noise. But we will be heard only if we speak clearly and with confidence, authority and integrity. Today more than ever, our times challenge us to be lawyerly—to play a thoughtful, useful role in our changing world and to be advocates for our clients and our causes, even when a cause may be as mundane as writing a clean, crisp motion or drafting an easily understood contract.

And if we can learn to communicate clearly, people may begin to understand us. If they understand us, they may begin to trust us more and, perhaps, even listen to and learn from what we say. We will have joined the conversation.

After all, communication, at its best, is about community.

# *The Three Essential Principles for Powerful Writing*

*The beginning is the most important part of the work.*

—Plato, *The Republic*

ALL MY SUGGESTIONS for powerful writing boil down to three guiding principles. And these principles apply not only to briefs and memoranda, but to the many mediums in which lawyers work today, including letters, e-mail, blogs, client advisories, newsletters, and even PowerPoint.

## **Principle One: Use Plain English**

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Let your readers know that you speak a modern language. Our clients speak plain English and you should too. If you would not use a word or phrase when speaking with a colleague, don't use it in your writing. Say your sentences aloud to edit for plain English and to cure clutter. Your prose must be crisp and clean. Speak human. (Chapter 4, *Plain English and Other Tricks to Help You Sound Human*, discusses plain English.)

## **Principle Two: Lead from the Top**

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Leading from the top is the single most effective tool for strong, persuasive writing. News editors know this and push their reporters to write the perfect lead. All my suggestions on how to structure a paper boil down to this one rule: lead from the top.

Why is leading from the top so important? Because leading from the top primes your reader about what to look for in the rest of the paper. If you begin your paper by telling your reader what is important, they will look for that information as they read. When you present that information later, the reader will seize on it and it will click quickly, like a puzzle piece snapping into the space that you have already prepared for it. Leading from the top is like the literary technique of foreshadowing. It prepares the reader for what happens later.

And the principle of leading from the top is like a fractal because it applies on large and small scales. Leading from the top means that your paper as a whole—and each part of your paper, as well—must begin with a “lead” that summarizes the point of that section. We’ll discuss the techniques for leading from the top throughout this book, but let’s begin with an overview of those techniques. (Again, Chapter 15, *Using Structure to Lead from the Top*, explains the principle of leading from the top in detail.)

- ◆ **Lead with a clear descriptive title.** Your title must explain the purpose of your paper in plain English. The title is also the key to finding the paper later. Choose a strong, working title or your paper may never be read. And if your work will be posted on-line, consider the terms someone might use to search for your topic. Include those terms in the title to improve the paper’s rankings in search engines.
- ◆ **Lead your paper with a strong opening.** You will win or lose your readers in the first one or one-and-a-half pages of your work, often in the first paragraph. Therefore, your opening paragraph or paragraphs are the most important part of your paper and must lead for the whole paper. An opening must explain three things: the background facts, the issue and the conclusion.
- ◆ **Lead your paper with your conclusion.** Put your conclusion on your first page, if possible. Better yet, put the conclusion in the first paragraph, write it in neon lights, or tattoo it on your forehead. Readers—particularly lawyers—are not known for their patience. (Chapter 19, *The Conclusion or Brief Answer*, discusses how to write conclusions.)
- ◆ **Lead each section with a substantive heading.** Substantive headings break your paper into workable pieces and allow your readers to choose whether to even read a section. Even an eager reader will appreciate headings as a roadmap for your paper. (Chapter 20, *Substantive Headings in the Analysis or Argument*, discusses headings.)
- ◆ **Lead each paragraph with a short, introductory sentence.** Within each paragraph, lead from the top by beginning with an original,

topic sentence. Although the body of the paragraph may simply refer to case law, statutes, or documents, the first sentence must be your *original* writing and it should summarize the paragraph completely. Your readers should be able to understand your paper by reading only the first sentence of each paragraph. (Chapter 21, *The Analysis or Argument: General Thoughts*, discusses how to structure paragraphs in the body of your paper.)

### **Principle Three: Tell Your Readers What to Do Next**

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Most professional writing, including legal writing, is meant to help your readers decide what to do next. Ask yourself, why did your colleague ask you to write the memorandum? What is your reader going to use the information for? What should the client do next? Does your research or analysis suggest specific discovery? What are you asking the court to do? Always finish by telling your readers what to do next.

# *The Conclusion or Brief Answer*

# 19

*You're on your own and you know what you know. And you will be the guy who'll decide where to go.*

—Dr. Seuss

## **Reach a Conclusion**

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Again, clients and assigning attorneys don't appreciate spending several thousand dollars to learn that the answer to their question is *maybe*. You must take a stand. If your research discloses a dispositive answer, conclude with *yes* or *no*. *Yes if* and *no if* are also acceptable provided that the *ifs* are fact specific, as in *The client may pursue his discrimination claim if he files his notice with the agency by February 1*. If the answer really is *maybe*, at least be definitive about being hesitant. Explain any split in the authority, state which view is the weight of the authority, and analogize and distinguish the facts that characterize each line of reasoning.

## **Assume Your Conclusion or Brief Answer Is the Only Thing Your Reader Will Read**

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Because it probably *is* the only thing your reader will read.

## Again, Use Your *Conclusion* or *Brief Answer* to Prime Your Reader

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Again, a *Conclusion* or *Brief Answer* in the opening primes your reader about what to look for in the body of the paper.

## State Your Conclusion in Plain English

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Imagine running into the partner who assigned you an issue as she is getting off the elevator and you are getting on. You have only a few seconds to answer her question, *How is the Widget research coming?* Your one-sentence answer is your conclusion.

## Say the Conclusion Aloud

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Saying the conclusion aloud will force you to use plain English and simplify. Again, imagine a quick conversation with a colleague on the elevator.

## Do It Early

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Put your conclusion at the beginning of your paper—usually on the first page, either in the *Introduction* or immediately after the *Issue* in a *Brief Answer*. Legal writing should not unfold like a mystery novel.

## Explain Why

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Your answer should not only state your conclusion. It should also explain *why* you reached that conclusion. Your readers cannot decide whether they agree with your conclusion unless you tell them how you reached it. Telling why in the *Answer* builds your credibility early.

## Organize Your Conclusion to Correspond to Your Issue

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For example, if you have presented your issue in two parts (*I* and *II*), you should also present your conclusion in two parts (also numbered *I* and *II*). Your *Analysis* or *Argument* should then use corresponding headings.

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## Make Your Conclusion Fact Specific

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Avoid legal abstractions and explain what your conclusion means for *this* client. Don't say *the store owner will be found negligent for not maintaining his sidewalk with reasonable care if she reasonably should have known that pedestrians were likely to use that sidewalk by 7:00 a.m.* Be specific and say *Ms. Jones is negligent for not having shoveled the sidewalk because she knew that customers walked in front of her store early every morning.*

## Write Your Conclusion after You Have Written Your Analysis

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You will learn as you write, so draft your *Conclusion* last even though it will go at the beginning of your paper.

## Do It Once

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A second *Conclusion* at the end often leaves the reader wondering whether that second *Conclusion* is different than the earlier *Brief Answer*. The reader often ends up comparing the two—effectively undercutting the authority of the earlier *Brief Answer*. Except in a very long paper, once is enough. Instead of restating your conclusion at the end of your paper, conclude with your *Recommendations* about what the client should do next.