



A short reckoning of good legal writing

Demonstrate your virtuosity from the very first word – you’re writing for a tough audience

BY HOWARD S. SHERNOFF

I proceed from the presumption that you already know why your writing should shine. That you know your audience – trial judge, appellate panel, opposing counsel, supervising attorney, mediator – is swamped with work and strapped for time. That your reader comes to your written pages grudgingly. And that, if you have any hope of winning over this tough crowd, you must demonstrate virtuosity from the very first word.

But what does *virtuosity* in writing mean? It’s a word that grammar-and-usage authority Bryan Garner uses to describe the work of authors whose prose is unmistakably immaculate, like those who publish in Harpers, The New Yorker, The Economist and other top-shelf periodicals. Or think of the crystalline output of such novelists as Vladimir Nabokov and David Foster Wallace. What separates these scribes from the rest of us is their mastery of grammar, dexterity of diction, command of syntax, pursuit of pith and perhaps most of all, religious reliance on editing, rewriting and proofreading. Add to these qualities the discipline required to achieve and sustain them in pursuit of a supposedly free-spirited process such as writing, and you have a decent definition of virtuosity.

As Garner observes, we can detect the presence or absence of virtuosity immediately. You need see only one backhand of Roger Federer to grasp that you are in the presence of a virtuoso, whereas my backhand might cause you to run for cover. The accomplished scholar and law professor Arthur Miller virtually intones virtuosity from his opening words at the podium, while a nervous associate at

counsel table for the first time elicits, at best, sympathy. Writing is no exception. The deployment of words in your first few sentences will either earn your reader’s immediate respect or bring about your summary dismissal.

I’ve been a writer for a while and have worked as an English teacher, but I lay no grandiose claim to virtuosity. On a good day I can turn a decent phrase. I don’t presume to offer anything here beyond simple pointers, or reminders, on some attributes of solid writing. Below are ten tips that can help you send the message that you are a writer to be reckoned with.

- **Sentences can and should begin with transitions words such as *and*, *but* and *yet* – without a comma after them.** But this can’t be, you say. Yet I just did it. And I will keep doing so throughout this article.

These transitions give your writing professional flow. Legalese transitions, on the other hand, constipate ideas. For example, if this paragraph were advocating legalese transitions, I would have written: However, this can’t be. Nonetheless, I just did it. Notwithstanding the foregoing, I will keep doing so hereafter. Not so smooth.

- **The word *of* should be omitted much of the time.** The New York Times has called the overuse of this preposition “a virus.” It’s difficult to articulate a hard-and-fast rule, so exercise skepticism when using *of*. You don’t strive to please all of the judges all *of* the time in all *of* the courts. You strive to please all the judges all the time in all the courts. And it’s not for all *of* the reasons in all *of* the grammar books in all *of* the libraries. It’s for all the reasons in all the grammar books in all

the libraries. And let’s not bicker over whether it’s that big *of* a deal. Let’s just ask whether it’s that big a deal.

- **The reason isn’t *because*; the reason is *that*.** Some people are fortunate to have come of age with grumpy high-school English teachers who beat this rule into their heads, saving them from this grammatical vulgarism. (Unfortunately, one of the worst offenders of note, our current US president, isn’t one of them.) You can say, “I eat green eggs because I’m hungry.” Or, “The reason I eat green eggs is that I’m hungry.” Or even, “Because I’m hungry, I eat green eggs.” But you should not – would not, could not, on a train, in the rain, on a boat, with a goat – ever say, “The reason I eat green eggs is because I’m hungry.” Think of it this way: the words *reason* and *because* are both causation words that explain an effect. If you use both in the same sentence, you’re stating two causes: “The reason I eat is owing to the reason that I’m hungry.”

- **Know thy comma usage.** Commas are just a matter of style, right? Wrong. No more so than question marks. Commas do not merely adorn word strings; they convey meaning. You can learn a lot from commas. Consider their use in creating restrictive versus nonrestrictive clauses. If *Ida’s sister, Lara, is a lawyer*, we can be reasonably sure, barring further context, that Ida has one sister, whose name is Lara. This is because the commas around *Lara* make the word nonrestrictive, i.e., it doesn’t identify or define the antecedent noun but rather provides incidental information. By contrast, if *Ida’s sister Lara is a lawyer*, we can assume that Ida has other sisters. This is because the omission of the commas makes *Lara* restrictive, thereby defining Lara and distinguishing



her from Ida's other sisters. And if one reads that *Ida's sister, Lara is a lawyer*, then he knows only that the writer is confused.

There are, of course, other comma rules that demonstrate the author's erudition and consideration for his reader. A thoughtful writer traditionally places a comma before a conjunction introducing an independent clause: *The jury has deliberated for ten hours, and the foreman has not submitted any questions for clarification.*

Demi-Hemingways often take liberties with this rule, but they usually end up achieving only inconsistency, sprinkling commas before conjunctions here and leaving them off there. It comes across not as stylistic flair, but as editorial neglect. Papa would not approve.

• **Which-hunting is never out of season.** I slip in this point because it relates to the restrictive/nonrestrictive discussion above. E.B. White famously wrote, "Careful writers, watchful for small conveniences, go *which*-hunting, remove the defining *whiches*, and by so doing improve their work." When providing incidental, nonrestrictive information, you're likely to rely properly on *which*: "The court, which was beleaguered by filings, granted more summary judgments." Problems arise when careless, or clueless, writers treat the nonrestrictive *which* as synonymous with the restrictive *that*: "The law which I am citing is still good." That's bad. Garner supplements White's *which*-hunting

prescription with a nifty instruction: "If you see a *which* with neither a preposition nor a comma, dash, or parenthesis before it, it should probably be a *that*."

• **To be or not to be? If that is the question, choose not "to be."** My law school writing professor placed a draconian restriction on the verb *to be*. For all writing assignments, she permitted students only one use of *to be*, *is*, *was* or *be* per page. Your grade dropped incrementally for each occurrence over this allowance. It seemed like a rule better suited to a fiction-writers' workshop than to a third-year law-school course. But it dramatically improved the writing. Purging *to be* from the page forces better diction and kindles vibrancy of expression. As an intended byproduct, it requires recasting passive-voice constructions in the more dynamic active voice.

• **Infer that which is implied.** As lawyers, we live and breathe inferences. We must know the difference between implying and inferring. To imply is to insinuate or suggest. To infer is to deduce or conclude. They're practically opposites. It destroys our credibility to get this wrong.

• **Dangling modifiers sound ridiculous.** Learn to recognize these ambiguous grammatical constructs that occur when modifiers miss their mark. Then hunt them down and correct them before someone actually reads such unintended absurdities as, "Having lost all value, the

plaintiff had to sell his car" or "Heading home, the traffic signal unexpectedly changed" or "With ten years' experience in the plumbing business, the court should certify the expert."

• **Break rules right.** A confident writer with a reasonable command of the craft can break the rules to good effect. Take sentence fragments. In the writing of a fourth-grader, they merely require correction. In the writing of a college sophomore, they cause us to despair for the state of our educational institutions. But in the writing of a capable author, they can inject life and conjure rhythm. All the same, perhaps it was impudent of me to use three consecutive fragments in the opening paragraph of this article. Which brings up a related sub-tip: take occasional risks to show that you're not another boring lawyer.

• **Prepositions at the end are ok.** Ending with a preposition generally does not produce powerful sentence structure. But sometimes it works. Especially if you are a writer to be reckoned with.



Shernoff

Howard S. Shernoff is managing attorney of the Los Angeles office of Shernoff Bidart Echeverria Bentley. He practices insurance bad faith, business litigation and personal injury. He can be reached at hshernoff@shernoff.com.