

When Your Boss Wants It the Old Way

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After taking my seminar called “Improving Your Motions,” one participant sent me this note:

Professor,

Why are so many attorneys wedded to the old ways of writing motions? How can I make them (supervising attorneys, for example) not insist on using COMES NOW and “this its motion”?

This article is an expanded version of my response to that participant. I think lawyers use the old-fashioned styles for several reasons.

A Misconception About What Judges Want

I used to teach a summer course at the University of Texas School of Law called Writing for Litigation. As I lectured once on how to write a motion, I said that lawyers should use plain language and contemporary formatting, and should abandon archaic styles and phrases. A student asked me: “But so many lawyers still use the old-fashioned way of introducing a motion, they must think judges prefer that. Do they?”

No. As part of a 1987 survey of judges (and lawyers) in Michigan, readers were asked to mark their preference between these two sentences:

1. Now comes the above-named John Smith, plaintiff herein, by and through Darrow & Holmes, his attorneys of record, and shows unto this honorable Court as follows:
2. For his complaint, plaintiff says:

Michigan judges preferred version 2 by 84% to 16%.¹ When the same survey was sent to Florida judges, 88% preferred the simpler version.² Judges in Louisiana and Texas have also replied to the same survey; again, about 75% preferred the simpler version in court documents.³

Inertia

It's easier to drag out the old form, copy it, and file it. It's harder to justify the cost or the time to reformat the old form into contemporary style and revise it into plain language. Most lawyers are working against a deadline on every document. Most lawyers are busy with a heavy workload. And too many think that if it was good enough before, it's good enough this time.

Fear

No lawyer wants to be the one who “updated” the standard form and fouled it up. Why risk having the document rejected by a judge or criticized by opposing counsel? Or worse yet, why risk

¹ Steve Harrington and Joseph Kimble, *Survey: Plain English Wins Every Which Way*, 66 Mich. B.J. 1024, 1026 (1987).

² Barbara Child, *Language Preferences of Judges and Lawyers: A Florida Survey*, 64 Fla. B.J. 32, 34 (Feb. 1990).

³ Joseph Kimble and Joseph A. Prokop, Jr., *Strike Three for Legalese*, 69 Mich. B.J. 418, 420 (1990); Kevin Dubose, *The Court Has Ruled*, *The Second Draft* (newsletter of the Legal Writing Institute) 8, 8 (Oct. 1991).

having the document fail in its legal function because you changed it? Especially for a young lawyer who is just learning about litigation, it just feels too risky, both for legal practice and for job security, to start changing the old forms that the boss has been using.

A Misguided Sense of Professionalism

Far too many lawyers believe that an overformal tone, archaic usage, and traditional formatting are hallmarks of a professional. That's no longer true, if it ever was. In fact, the trend is the opposite. The more formal, legalistic, and archaic the document, the more likely the audience is to perceive the writer as inexperienced, ignorant, or provincial.

Sadly, there are still many lawyers who use archaisms, unnecessary jargon, and stodgy formats because they believe that doing so will impress — or perhaps intimidate — clients.

So What Can You Do?

I'll offer three suggestions that may help if you work for someone who insists on the old way.

First, don't take a stand at the expense of your job or your relationship with your boss. The ideas of the plain-language movement and the modern trends in legal writing are designed to make your writing clearer, easier to read, and precise. Those are important goals for legal writing. Though as a legal-writing teacher it pains me to say this, they are not important enough to risk your job over. And I don't think they are important enough to antagonize the person you work for. That relationship is more

important than document format or word choice. As I often tell my students: “You should write it the way I’m telling you, unless your boss wants it another way.”

Second, when you have control over the documents, write them the way you want to. Sometimes you are able to handle a case or matter on your own. When I practiced law in a large law firm’s bankruptcy department, I was usually at the mercy of the attorneys I worked for. The documents we filed — even if I wrote them — looked the way my boss wanted them to look and used his language. But one time I was given a small bankruptcy case and told to handle it on my own. I tried new formats for the pleadings, new language for the introductions, and a more relaxed tone in the text. (By the way, nothing imploded.) I used that case to experiment with newer, plainer legal writing. So when you’re in charge, write it the way you want; you’ll learn, and you won’t risk offending your boss.

Third, take a stand occasionally. If your relationship with your boss is a good one, then you’ll sometimes be able to persuade him or her that your way — the contemporary way — is better. But don’t take a stand without backup. Be sure that recognized experts on legal writing support your point of view. And be sure your boss knows that.

For example, you can rely on Bryan Garner’s authoritative *Dictionary of Modern Legal Usage*.⁴ If you’re in litigation practice, check out the entries on archaisms, brief-writing, document design, formal words, and plain language. And over time, you’ll want to acquire other good reference sources on usage, style, and plain language.⁵ You can also visit my website: [http:// legalwriting.net](http://legalwriting.net). I

⁴ Bryan A. Garner, *A Dictionary of Modern Legal Usage* (2d ed., Oxford U. Press 1995).

⁵ For a select list, see Joseph Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* app. 2 (Carolina Academic Press 2006).

offer plain-language guidelines, model documents in contemporary formats, and legal-writing tips. You can reach me through the site, and I'll try to provide support for you if you need it.

Old ways die hard, but they may yield to good sense and good authority.

