A Style Sheet for *Litigation*

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The cover letter was short and simple. It was from the editor-in-chief of *Litigation*, asking me to take care of a minor problem he was having with one of his authors.

Of course I would. That was my job. As executive editor, I was next in line as editor-in-chief, and in charge of clearing up things like this as well as getting my own issues under way.

So I turned to the letter from the author to see what the problem was. Instead of paraphrasing it for you, here are the first two paragraphs—verbatim, unaltered, and "unsic'd":

> I have your misdirected letter of August 15, received by me on September 6, but requiring a reply by me before September 1. The letter contained the wholesale and unjustified rape of the manuscript I submitted as requested by your publication, along with various high handed and arrogant statements regarding the editorial policy of your publication.
>
> I assume that you personally are the anonymous hack who turned his crippled hand and mind to "editing" my article. Regardless, your letter makes clear that the product has your approval. The best I can determine, your editorial policy is reflective of an incredible disdain for the average intelligence of your reading audience, the trial lawyers of this country. You evidently assume that they are incapable of digesting any sentence containing a dependent clause. Their attention span and mental acumen can hold for but simple declaratory sentences. A small-town daily newspaper is written with more elegance than what you have submitted to me. Further the article has been butchered so that in various particulars there are antecedents with no corresponding precedents leaving the reader to speculate that they sprung, all of a piece, like Minerva from the

> brow of Jove. I could go on but shall pay due homage to your presumed limited attention span.

Apparently he was unhappy with what we had done with his article. Three hours of long distance telephone calls and five hours of editing later, the article was ready to go, with the author's approval. If not entirely gruntled, at least he was not as disgruntled as before.

How had the problem arisen in the first place? Apparently *Litigation*'s "Statement of Editorial Policy" (itself a charming little essay on journalism by one of the cofounders of the magazine, Douglas D. Connah, Jr., of Baltimore) and the instruction sheet we sent authors were not enough to tell people what we were going to do with what they wrote. Here is the editorial policy as it appears on the back cover of *Litigation*:

> *Litigation* is a journal for lawyers who try cases and judges who decide them. Whatever their fields—whether antitrust or accidents, business torts or maritime torts, libel or labor relations—and whatever the forum, trial lawyers have common problems and interests. They also have skills and stories worth sharing. In *Litigation*, published quarterly by the Section of Litigation of the American Bar Association, those problems and interests will be examined, those skills highlighted, those stories told.
>
> The litigator's arena is the adversary system. Often when the litigator steps into that arena, he is swept up in controversy. He is called upon to align himself with and defend unpopular causes. He is frequently required to support positions that he himself might not personally espouse. Like the litigator, *Litigation* will not shun controversial or unpopular viewpoints. Indeed, *Litigation* expects and welcomes controversy. Just as the goal of the adversary system is justice, the goal of *Litigation* is to provoke serious thought about how justice may be reached through advocacy. The editors believe that

confronting issues from all sides rather than avoiding them is the surest route to that goal.

A serious journal does not have to be dull, and scholarship need not be presented with a long face. *Litigation* seeks to be practical and concrete, not abstract and theoretical; lively and readable, not somber and sesquipedalian. The editors want *Litigation* to come to a halt on its journey across the desks of busy lawyers and not to flow past like a leaf on a stream, unnoticed and untouched.

The Section of Litigation and the American Bar Association do not necessarily share or endorse any particular views expressed in articles published in *Litigation*. The views are those, however, of thoughtful members of the litigation bar and the judiciary—people concerned about the state of American trial and appellate advocacy and willing to share those concerns with their colleagues.

If Connah's essay on *Litigation's* style and our warnings about vigorous editing in the instructions for contributors were not enough, we would have to do something more. A style sheet, I thought, would be just the ticket. The idea was to produce something that was neither an editor's manual nor a set of instructions to contributors, but a little of both. Of course it contained a format for manuscripts and an explanation of the magazine's policies on editing and accepting articles for publication.

But that was not all. Telling authors and editors what we were trying to accomplish did not tell them how to do it themselves. So the style sheet had a short discussion on simplicity and organization as well as a section on style. Here are those parts of the style sheet as they originally appeared.

WRITING FOR *LITIGATION*

Simplicity

Simple, thoughtful writing is elegant. That elegance is the antithesis of most modern legal writing. Legal texts are usually dull and verbose, while law reviews tend to be obscure, pretentious, and pedantic. Those qualities are subconsciously chosen because they give the superficial impression of weighty ideas, careful analysis, and awe-inspiring accuracy.

Actually, those good attributes are an illusion. Awkward language is not precision and obscurity is not great insight. Even complex ideas can be expressed plainly. In fact, clarity is often a good test of an author's understanding; the better the author understands an idea, the more likely it is that he will be able to explain it to others.

The heart of a good writing style is the ability to write short, simple sentences. They take more time to write than longer ones, but are worth the effort.

An important warning. Simple does not mean simplistic. It is a mistake to talk down to your readers, or to assume they can follow only pap. Most lawyers have excellent vocabularies. They read carefully and enjoy writers who know how to use the right words. At the same time, lawyers—especially trial lawyers—enjoy lean, vigorous writing that is not larded with puffed up words

Organization

Writing is easier and more enjoyable if you organize your thoughts before you start. When you were in high school, what you wrote was simple enough—usually a page or two—so that you could organize it in your head. When you

were asked to turn in an outline, you usually wrote it after the paper (even if the outline was due first).

But legal matters are not so easily organized. It helps to do it on paper. Here is the system I have used in writing "Trial Notebook" for the past ten years:

First write down every idea you have on the subject. Work fast. The point is to record fleeting thoughts before they get away. Do not worry about being accurate or complete, much less which words you will eventually use. Just get the ideas on paper as quickly as you can. Write them down as they come to you; organization will come later. It will help later if you number your ideas as you go. The chances are you will find yourself listing important points two or three times—often in slightly different ways. Do not worry about that either. Just get them all down. You want every idea on this list.

Second, write an introductory paragraph. You will probably rewrite it several times. Do not worry, that is natural. You will also probably return to rewrite your lead paragraph after you are all done. That is natural, too. The purpose in writing the lead is to start you thinking about how you are going to organize what you have to say.

At this point you will be tempted to go ahead and write the article. Do not start writing yet. If you do, you will short-circuit yourself and cut out several good ideas you wanted to include in your article. Later on, they will be hard to work in, so you will either leave them out or put them in where they do not quite fit.

With your list of ideas in hand and your lead paragraph on your desk, write a simple outline. The Roman numeral method is easy if you know how to use it. But if you are more comfortable with some other way, use it instead. This outline is for you—not anyone else. Check off the points from the idea list as you write the outline.

When you have finished your outline, you will discover there were some gaps in your list of ideas. You will have to do some additional thinking, and perhaps some additional research as well. These are the holes this method is designed to expose. They are the missing points that lesser writers cover up. If you find them before you start writing, your article will be better for it.

Now you are ready to write. You will be surprised how quickly it goes. As you write, you may think of additional ideas that did not occur to you when you were doing your outline. That is fine. But because you have an outline, you will not let these new ideas crowd out the ones that you know belong in your article, and that already have a place set aside for them.

One tip about organization as you write: Let your organization show. This does not mean your article should be in outline form. That is not suitable for *Litigation*. It does mean that it helps to let your reader know where you are, where you are going, and (sometimes) where you have been.

When you are done, go over the article several times, looking for awkward spots as well as words and phrases you have overworked. Each time you polish your manuscript, it should become simpler and easier to read. Try reading it aloud to anyone you can make listen—preferably a nonlawyer. Nothing exposes poor wording or an imprecise idea as well as reading aloud. And if a layman can understand your article and likes your ideas, you have probably done a good job.

LITIGATION STYLE

This is a list of some of the stylistic and grammatical choices that make *Litigation* distinctive. Pay attention to them because they are guidelines for how your article will be

edited as well as suggestions for how to write it in the first place.

We want *Litigation* to be informal and readable as well as literate and grammatical. Articles should be brisk, interesting, and informative—but not breezy, cute, or superficial. We want writers who know their subjects and have something to say about them. It is our job to help them say it well.

in order to

An unfortunate way of saying *to.*

> In order to make the machine work, it is necessary to plug it in.
>
> Plug in the machine to make it work.

the _____ process

A pretentious way to make a noun sound thoughtful. *The decision-making process* and *the election process* are examples. Avoid this construction in the writing process, even when you are actually concerned about the process.

in terms of

The phrase has a superficial interdisciplinary ring. For example, "in terms of economics" seems to suggest that some noneconomics problem is going to be discussed using economics lingo, and that somehow the borrowed words will bring new understanding (a doubtful proposition). But the phrase is almost never used that way. Instead, it is used to introduce new topics: "In terms of procedure, you must be careful about the statute of limitations." In terms of writing, it is a bad phrase. Do not use it.

Contractions

Think of contractions as spoken, not written English. Contractions are not acceptable unless you are directly quoting what somebody said.

Split Infinitives

Split infinitives are not acceptable. The intruding modifier can almost always be moved. If the verb is a good one, the modifier can usually be eliminated.

> He started to quickly run down the street.
> He started to run down the street quickly.
> He started to run down the street.

Some writers defend the Star Trek Split: "To boldly go where no man has gone before." If you have a split infinitive you think belongs in your article, apply for a Special Split Infinitive Variation Ruling from Mr. Charles Wilson [one of the cofounders of *Litigation*]. Applications must be submitted at least six months before the article deadline.

not un

It is not unlikely that you will observe that *Litigation* strives to avoid convoluted expressions. Every time you see "not un," think of Doug Connah quoting George Orwell: "A not unblack dog was chasing a not unsmall rabbit across a not ungreen field."[1]

That will cure you.

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1. G. Orwell, *Politics and the English Language*, in 4 THE COLLECTED ESSAYS, JOURNALISM AND LETTERS OF GEORGE ORWELL 127, 138 (1968).

Adjectives

If you know how to use verbs and nouns, you will not need many adjectives or adverbs. Choose adjectives carefully. When you polish your article, they should be among the first words to go.

Intensifiers

A recent study of courtroom language showed what good writers already know—intensifiers often have the opposite of their intended effect:

> August was very, very hot.
> August was hot.

perceive and *observe*

Fancy law professor talk. Unless there is a need to discuss perceptions, use words like *see* and *hear*.

Serial Commas

> He came home hot, tired, and disgusted with the fruits of twentieth-century breweries.

If a comma will help comprehension, use it. Our style is to use the comma after "tired."

Capital Letters

Some Lawyers like to Capitalize Important Words. It is a Germanic Habit that Should Be Avoided. *Litigation* is conservative about capital letters. Capitalize only when you must.

Capitalize the first word following a colon if what follows could be a complete sentence.

> He gave a good example: Always be careful about punctuation.

Quotation Marks

Some writers like to put quotation marks around anything that is "cute," or "slangy." *Litigation* is neither cute nor slangy. Use quotation marks only around direct quotations, not around words and phrases just to dress them up.

Compound and Complex Sentences

Avoid them. Long sentences are sometimes the best way to say something. Usually they are not.

Paragraph Breaks

A long paragraph looks like something that is better to avoid than to wade through. Since our two- and three-column printing tends to stretch things out, be liberal with paragraph breaks. Two or three for each 8 1/2 x 11 inch double spaced typewritten page is about right.

Foreign Languages

English is the language our readers use. We should use it, too. This means you should avoid saying something in French or Italian, even if it is the *mot juste*. *Capice*?

Latin

Many lawyers feel a special kinship for Latin phrases. We at *Litigation* do not. Usually ideas that can be expressed in Latin can be stated in English, too. Do it.

Abbreviations

Abbreviations are usually acceptable only in citations. Only GS-14s with the FAA and NLRB are worse than lawyers

when it comes to writing with acronyms and abbreviations. The interesting thing is that abbreviations tend to be self-defeating. Instead of speeding up communication, they slow it down, forcing many readers to translate strings of letters into real words. Make it easy on your readers. Use real words to start with.

Prepositions and Conjunctions

And do not begin sentences with conjunctions or end them with prepositions unless you feel you have to. This rule is not absolute, but break it too often and your article will seem breezy or chatty—the kind of piece that readers do not take seriously.

Cases—Citation Form

Follow the Harvard *Bluebook* style. Give the full citation, with the official citation first, followed by the West Reporter and the year.

Books—Citation Form

Give the first name, middle initial, and last name of the author. The title should be in large and small capitals—indicated by triple and double underlines. Unless it is a standard reference work, give the name of the publisher and date of publication in parentheses following the title. Include any other publication information that will be helpful, particularly if it has been reprinted by a new publisher. Lloyd P. Stryker, *The Art of Advocacy* (Simon & Schuster, Inc., 1954; reprinted 1979, Zenger Pub. Co.).

On the other hand, if it is a standard reference book, omit the name of the publisher, but include the author's full name. When in doubt, include the extra information. We want our citations to be helpful.

Books—Reference in Text

Italicize the name of the book. Lloyd Paul Stryker's *The Art of Advocacy* is a classic in the field.

supra and *infra*

Pretentious law review conventions.

Footnotes

Anything worth saying is worth putting in the text. Unfortunately, most footnotes are silly—even in university law reviews. They are awkward and forbidding; they slow down the reader with little reward in return. We do not use footnotes, so do not even bother submitting them to us.

Conditional Mood

We would argue. I would contend. I should be surprised if.... You may think that such conditional phrases are pleasant understatements designed to avoid a dogmatic tone.

Actually they are not. They are phrases used by law teachers in class. They always say what they "would do" because they are not doing it. The fascinating part is that their ex-students copy the construction when talking or writing about what they are actually doing. That does not make sense. Avoid the conditional mood.

Passive Voice

> The passive voice is avoided by good writers.
>
> Good writers avoid the passive voice.

Actually, the passive voice is sometimes just the ticket to give the emphasis you want. It lets you shift the subject, emphasizing it rather than the object.

Example:

> Mr. Justice Douglas wrote the opinion in *Palmer v. Hoffman.*
>
> The opinion in *Palmer v. Hoffman* was written by Mr. Justice Douglas.

Conventional wisdom suggests that you prefer the first example over the second. On the other hand, the first example emphasizes Mr. Justice Douglas, while the second stresses the name of the case—*Palmer v. Hoffman.* If that is your topic, then use the passive voice, rather than confusing your reader with a new subject and then not doing anything with it.

It adds up to this: Avoid the passive voice unless you have a good reason for using it.

Second or Third Person—*you* or *one*

One is not too formal for *Litigation* and *you* is not too informal. But either can be overused. "One should do this" and "one must avoid that" grow tiresome. "You should watch out" or "you should be careful about that" can sound too chummy.

So what is the answer?

Use either construction when you must, but use neither very often. Your writing will be better without many *you*s or *one*s. But whichever you choose—*you* or *one*—do not jump from one to the other in the same article.

author

Author is a noun—not a verb. The verb is *write.*

which

Which is not a substitute for *that*. It is a common mistake because some people think *which* has a more literate ring to it.

Wrong.

Use *that* to introduce a limiting or defining clause and *which* to introduce a nondefining or parenthetical clause. Theodore M. Bernstein says, in *The Careful Writer*:

> If the clause could be omitted without leaving the noun it modifies incomplete, or without materially altering the sense of what is being said—or if it could reasonably be enclosed in parentheses—it would be better introduced by *which*, otherwise, by *that*. For example: "The Hudson River, *which* flows west of Manhattan, is muddy." (A nondefining clause; it could be omitted or parenthesized.) But: "The river *that* flows west of Manhattan is the Hudson." (The clause defines "river" and could not be omitted.)

If you are not sure which to use, pick *that*, and you will make fewer mistakes. If you become a dedicated "which hunter," your writing will improve.

instant, divers, and *where as here*

The stuffy language of some judicial opinions has no place in *Litigation*. *Instant* is a fine word for talking about coffee or a moment in time, but not acceptable as a substitute for *this* or *particular* in referring to a case. Do not write about the "instant case." *Divers* means people who dive—*diverse* ends with an "e." *Where as here* sounds like a judicial clerk in his first few months on the job.

pleaded

The past tense of *plead* is *pleaded. Pled* ain't a real word.

utilize

Use is a perfectly good word. Utilize it in the writing process.

are in accord

Use *agree* instead.

with respect to* and *with regard to

When they are introductory signals, these phrases are best eliminated and the rest of the sentence gently rearranged:

> With respect to unnecessary words, they can be eliminated.
>
> Unnecessary words can be eliminated.

In other situations, *with respect to* can usually be replaced by *with*, or *about*:

> The concern with respect to the motion to strike was whether it would educate the defense lawyers.
>
> The concern about the motion to strike was whether it would educate the defense lawyers.

If you feel this is still not very good writing, I agree. There are more interesting ways to get the point across:

> We were worried about the motion to strike. It might educate the defense.

clear

If you never use this word again except to describe a physical condition, you will be a better writer.

abundantly clear* and *crystal clear

These are worse than *clear* because they carry useless baggage with them.

on balance

Sadly overworked, this phrase suggests a thoughtfulness that is usually not there.

is violative of

An awkward way to say *violates*.

obtain

Lawyers use it to mean *apply*. Actually it means "to have firm footing" or "to be well established."

> In that instance a different rule obtains.

Unless you want to sound like a parody of a 19th-century English judge, use *apply* instead.

bottom line

Legal writing is bad enough without borrowing phrases from accountants.

manifest

A pompous way to say *obvious*, which you probably should not say anyway.

pellucid

A pompous way to say *clear*, which you definitely should not say anyway.

it must be remembered

Like the phrases *it must be noted* and *it must not be forgotten, it must be remembered* looks like an intensifier that says important information is on the way. But that is not why most writers use these phrases. They are actually used as false connectors. They imply that there is a logical relationship between what went before and what will come next. The trouble is, that relationship is usually not there—or at least the author cannot think of one. Better just to change subjects than to imply you are not when you really are. The point is, do not use these phrases.

Conclusions

Formal conclusions are usually not worth the trouble. Start at the beginning, go to the end, then stop. If you really want a note of conclusion, you can start your last point with *finally.*

EPILOGUE

My term as editor-in-chief was for two years. During that time I made notes for additional entries in the section on style, but never got a chance to add them until now. Here are some of the better ones.

note, state, assert, and other substitutes for *say* or *said*

Say and *said* are not dirty words; you need no euphemisms to take their place. The reader's eye will take in *say* or *said* without a hitch, but will slow down for a substitute.

needless to say

If it is needless, then do not say it.

former* and *latter

Why not just mention the ideas a second time? Apparently the point is to save ink, or use generalities when specific words are at hand. Whatever the reason, the former consideration is silly and the latter is counterproductive. Do not use *former* and *latter* because they force the reader to go back to see which points you are talking about.

this article will explain

If you need an extra essay to explain the meaning of your essay, then something is wrong.

he/she* and *s/he

These are subliterate conventions that have nothing to do with politics or sexist writing. If you want to use *she*, use *she*. If you want to use *he*, use *he*. If you want to use *she or he*, or *he or she*, those are fine, too. But using a slash instead of a word is lazy writing that stops the eye.

prior* and *subsequent

Fancy talk for before and after.

thereof, whereof, wherein, herein, wherefore,* and *hereinafter

Surely you know better.

opt* or *opt for

You should opt for *choose* instead.

Finally, did it work? Did the style sheet help authors write better? Did it help *Litigation* editors edit better? Did it keep authors from blowing up when they saw the mustaches we had drawn on their Mona Lisas?

There is no way to answer those questions without knowing what might have been. But the style sheet did not keep a Chicago lawyer from calling me and screaming obscenities for a handful of changes that shortened some of his sentences and got rid of a few awkward words.

At least he did not accuse me of being an anonymous hack who had raped and butchered his article.