WRITTEN ADVOCACY

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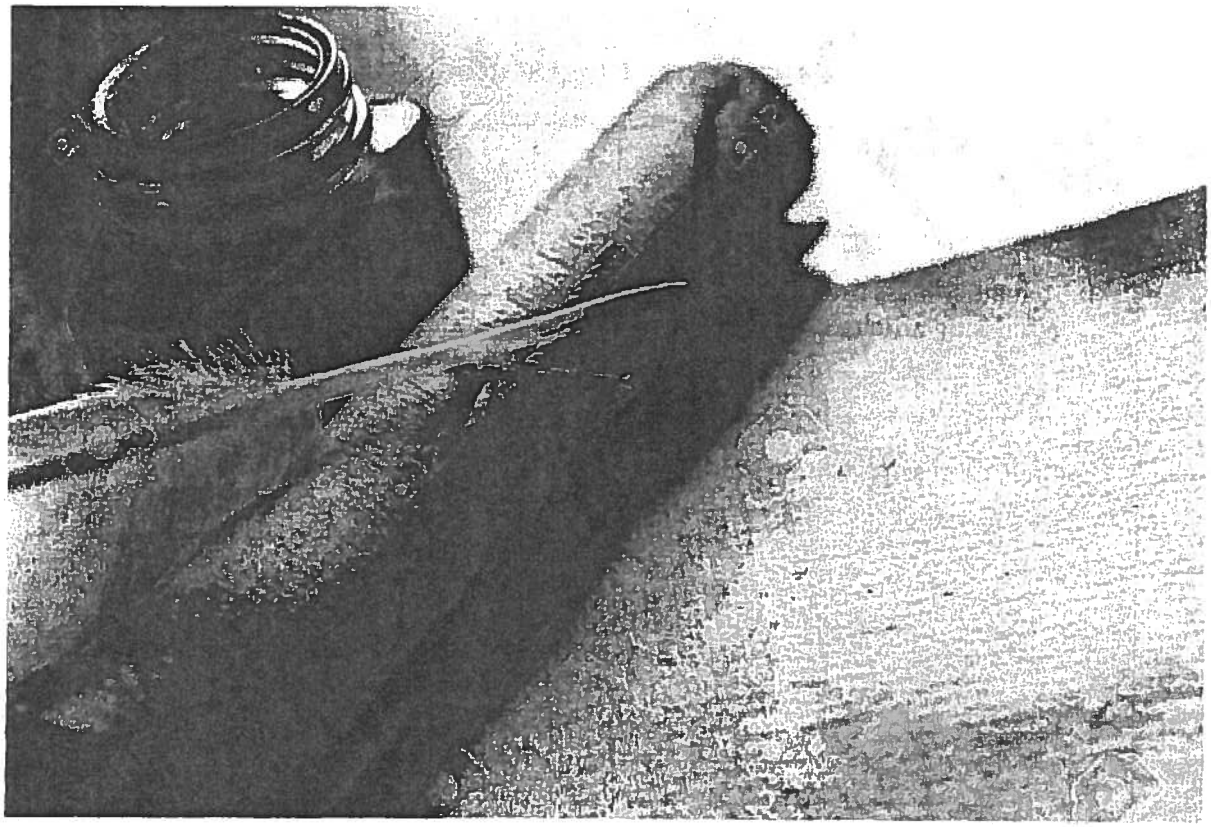

Law Students, Beware

Mark Mathewson

In *One L*, that classic account of life during the first year at Harvard Law School, author Scott Turow describes his first assignment, a four-page case for his Legal Methods class. Only four pages? They must be going easy on us, he thought — until he began reading. "It was," he wrote, "something like stirring concrete with my eyelashes."

It may seem ironic that Turow, a writer and teacher of writing before law school, felt so frustrated upon confronting what were, after all, mere words. But that's the irony of legalese: the more you know about words and how to arrange them, the more frustrated you are by a "language" that violates nearly every principle of good writing. For the most part, the substance of the law — the stuff you thought would be difficult — is easy compared to the words, phrases, clauses, sentences, and paragraphs under which it is buried.

Chances are that legalese is burying you, too, especially if you're a first-year law student. Chances are you are spending precious hours each day digging out from under it, hours that you'd rather spend struggling with some challenging legal concept, or pondering the public-policy implications of some legal doctrine, or playing with your kids or your lover.

I empathize. Rest assured that you will learn the language of the law after a fashion, and I hope you learn it quickly. But I also hope you never learn it so well that it ceases to frustrate and anger you. God forbid that it should someday sound elegant to you, as it did to the charming southern gentleman who taught me contracts. (He was an undergraduate English major, speaking of ironies.) I hope that you stay angry and that you channel your anger into a willingness to undertake in your professional lives the hard and thankless — but valuable — labor of translating legalese into standard English.

Let me address some fundamental questions. First, what exactly *is* legalese? If it's an "ese" — a language as I've suggested — it must

have identifiable, recurring characteristics that set it apart. Some distinctive features of legalese include the following:

- Arcane and archaic vocabulary: Lawyers use outmoded words and phrases (*know ye by these presents*) and Latin and French words and phrases (*habeas corpus*), and they give unfamiliar meanings to familiar words and phrases (*complaint, consideration, assault*). Not surprisingly, unfamiliar vocabulary is a barrier to comprehension.

- Overspecificity and redundancy: Legal writing is full of such doublets and triplets as *will and testament, cease and desist,* and *remise, release, and forever discharge* that waste time and space.

- Abstraction and indirectness: Legal language shares these weaknesses with scholarly and bureaucratic prose. Legal writers overuse the passive voice, producing sentences that are longer and less straightforward than they should be — for example, "It can be argued that the property was not owned but was leased by our client," instead of "We argue that our client did not own the property, but leased it." Lawyers also transform direct, vital verbs — the workhorse words of the English language — into long, languid nominal (noun-based) constructions glued together with helping verbs, articles, and prepositions. Thus "Bob determined that" becomes "Bob made the determination that" (or, more likely, "the determination was made by Bob that"). Multiply these transgressions several hundredfold, and you'll see how they can sap your prose's — and your reader's — vitality.

- Grammatical complexity: This heading describes a multitude of sins that together constitute the most serious barrier to comprehension in legal writing. Indeed, other character-

istics of legalese are mere annoyances in comparison. Many examples come to mind, but I'll point to the complex construction I find most frustrating: the long sentence made up of a series of subordinate clauses that appear before the main clause they modify, thus putting the grammatical cart before the horse and suspending the core meaning of the sentence until the end. Here's an example from a set of jury instructions:

> It will be your duty, when the case is submitted to you, to determine from the evidence admitted for your consideration, applying thereto the rules of law contained in the instructions given by the court, whether or not the defendant is guilty of the offense as charged.

Here's a simplified version, and notice how quickly it gets to the point:

> Your duty is to determine whether the defendant is guilty of the offense charged. You must do this by applying the law contained in these instructions to the evidence admitted for your consideration.

- Long sentences: Complex, convoluted constructions go hand in hand with long sentences. When your high-school English teacher told you that each sentence should contain a single thought, he or she was giving sound, if simplistic, advice. You know from mind-numbing experience that 200-word sentences are endemic in legal writing. All are harder to read than need be.

By now you should be getting a fix on the enemy; on the other hand, you may be wondering whether legalese really is the enemy. I mean, isn't legalese a necessary evil? Aren't legal terms of art a shorthand that actually makes it easier for lawyers to communicate

with each other? Surely, our good professors wouldn't make us work these verbal Chinese puzzles if it weren't necessary.

Legalese may indeed be a necessary evil, depending on what you mean by "necessary." If you mean that legalese is necessary because your boss will berate you or your law professor will lower your grade if you refuse to use it, you may be right. In the same sense, bosses and law professors are necessary evils.

But is legalese necessary for purposes other than reinforcing the prejudices, and quieting the fears, of your "superiors"? The answer is yes (rarely) and no (usually). Yes, terms of art are useful under some circumstances. *Res ipsa loquitur* is a time-saving shorthand for the concept it represents, as is *proximate cause*. But terms of art are harmful, not useful, in consumer contracts and other documents designed for public consumption. The lawyer's shorthand is the public's gobbledygook.

More important, terms of art, which are sometimes useful, do less to impede comprehension than the long strings of archaic phrases or tortuous sentences for which there is *no* excuse. Tangled sentences are not a shorthand for anything. They waste time and cause confusion, which in turn causes needless litigation. Antiquated formalisms are similarly useless. To use Professor David Mellinkoff's example, there is no rational justification for writing "in consideration of the agreements herein contained, the parties hereto agree" instead of "we agree."

There are reasons for these affronts to good English, of course. For example, archaic formalisms are frozen into legal prose by the inherent conservatism of the legal process. When a judge upholds the words of a contract, those words become winners. Cautious lawyers will choose them time and again over untested words, even though the "winning" words fell from common usage centuries ago.

As legal drafters, you will have to live with these reasons, just as you must live with bosses and law professors and judges. More than most writers, lawyers must be sensitive to the needs of their varied readers and must learn to write for their audience. I'm simply asking that you put up with as little legalese as you can. If your boss won't

let you draft contracts in standard English, at least don't write client letters in legalese. At least don't permit yourself to write some 300-word boa constrictor of a sentence — and if your boss makes you do *that*, get a new boss. Finally, when *you* become the boss, create an environment in which standard English flourishes. You will be rewarded many times over.

How so? you ask. Why, now that you've gone through or are going through such agony to learn legalese, should you join the crusade to revise it into something that approximates standard English? (Incredibly, legalese does have its defenders.)

There are many reasons for casting arms against bad legal writing, including the hardship that legalese works on laypeople who must interpret it and the damage it does to our profession's already tarnished image. But if you're persuaded by no other reason, consider this: legalese will continue to waste your time and energy even after law school, and your time will be more valuable then, at least in monetary terms. Translating legalese may get easier, but "easier" is a comparative adjective — easier than what? Easier than stirring concrete with your eyelashes, maybe. Maybe. Stay angry. Stay tuned.

Eschew Exaggerations, Disparagements, and Other Intensifiers

Kenneth F. Oettle

An advocate's instinct is to disparage the other side. Motivated by indignation at the perceived insult to our intelligence and to the cause of truth, we say the other side's position is "obviously" or "clearly" wrong, their reading of a statute is "preposterous," and they cite no law "whatsoever." We almost cannot help ourselves.

Such characterizations of the other side's arguments are not effective writing. They are more likely to trigger disbelief than agreement because they are the known refuge of persons whose positions are weak. They are a way of pounding the table when you cannot pound the law or the facts. If you pound the table with *clearly*, *obviously*, and *whatsoever*, the reader may figure that you have nothing substantive to say.

Just as bad, if not worse, are statements disparaging the opposing advocate. In the following examples, the italicized words should be eliminated:

1. Plaintiff's *disingenuous* reading of the rule is inconsistent with the public policy that supports the rule.

2. Defendant *blithely* ignores the fact that he was present when the statements of which he claims ignorance were made.

3. *In an outrageous show of chutzpah,* the plaintiff blames his injury on the defendant rather than on his own inattention.

Words should speak for themselves — you should not have to speak for them. Consider the following intensifier in a brief submitted by a condemnee appealing for the third time from a trial court's refusal to value the condemned property fairly:

> An appalling ten years after the taking, condemnee comes before the Appellate Division for the third time.

The word *appalling* is unnecessary because the egregiousness of the condemnee's having to wait ten years for a shot at justice is evident merely in the recital, without need of editorial gloss. The passage of time speaks for itself, and the point is made just as well without *appalling*:

> Ten years after the taking, condemnee comes before the Appellate Division for the third time.

Some writers vigorously defend the use of "strong language," deeming it a matter of taste and contending that those who shy from the practice are wimps. This view has some merit, but not much. Aggressive writing may intimidate a few adversaries, and more importantly, it may give some clients the sense that you are vigorously advocating their cause. But experienced lawyers are not easily intimidated, and they frequently turn strong language back on the writer, portraying the writer (and, by dint of association, the writer's client) as offensive rather than thoughtful or thorough.

Judges are largely unmoved by intensifiers. If the words are ad hominem attacks on the other side (e.g., contending that an argument is "disingenuous"), the court may deem it unseemly. If they are used to pump up your own argument (e.g., contending that your point is "clear" or that a delay was "appalling"), the court may be insulted because you consider it necessary to point out the obvious (e.g., that a ten-year odyssey in court is appalling). If the

facts don't speak for themselves, they probably aren't good enough facts.

Though you may wish to express indignation if the other side is caustic, don't sink to their level. In the end, the best way to persuade the client that you are a dedicated and effective advocate is to prevail in court, and the best way to prevail in court is to make your point and back it up with authority.

Persons who use intensifiers are often trying to make up for a failure to highlight good facts. Consider the following first sentence in the preliminary statement to our condemnee's brief, where the condemnee argued that the trial court had undervalued the condemned property. Which version would you use, A or B?

> A. Condemnee seeks a redetermination of fair market value based on the value that a hypothetical willing buyer would have paid for the property at the time of the taking.
>
> B. Condemnee seeks a determination that a person buying into the Jersey City waterfront real-estate boom in April 1986 would have seen the potential of this choice parcel and would have paid a premium for it.

The best fact for the condemnee is that its condemned property was situated in the midst of a waterfront real-estate boom, so a willing buyer would have paid a premium for the property. Using version B, the writer integrated the most important fact (waterfront real-estate boom) into the first sentence of the preliminary statement. With version A, the writer would have presented nothing more than a statement of the law. Thus, version B is persuasive, and version A is not. The facts in version B supply the "intensity" for which intensifiers are a poor substitute.

Just as someone always votes for the other side in an election, some writers would use version A anyway, reasoning that (1) they don't want to appear to be too much the advocate too soon or (2) it's important to invoke the key terms — such as *fair market value*, *hypothetical willing buyer*, and *time of the taking* — in the relevant principle of law. These rationales are unimpeachable as general statements, but taken in context, they are outweighed by the more important principle that persuasion begins with good facts.

Tips for Writing Less Like a Lawyer

Mark L. Evans

Upon entering the profession, too many lawyers start imitating the worst writing they saw in law-school casebooks and law journals. This, they imagine, is the kind of dense, dreary prose that lawyers are supposed to write. In working with new lawyers over the past three decades, I've compiled this list of tips and other admonitions — many of them familiar to anyone who cares about legal writing. Their goal is to turn new lawyers around before bad writing becomes habitual.

1. Empathize. Put yourself in the reader's shoes. Sensitivity to the reader animates every other rule of effective writing. Your objective is to lead the reader through the problem, step by step.

2. Make your writing self-contained. The reader should not feel the need to look at the statute or read the cases to understand your analysis. Bare citations are rarely enough. Draw from the statute or case what is significant (and only what is significant). Quote the crucial language. Don't let the reader wonder what the case is about.

3. Draw parallels. As you develop the authorities, draw the parallels explicitly. Don't leave it to the reader to figure out how the case helps or hurts.

4. Face weaknesses openly. Don't ignore the soft spots in your analysis. What adverse authorities will your opponent cite? How can your cases be distinguished? How will your opponent read the statute? Frame your arguments with the anticipated response in mind. If there is bad news, deliver it yourself

and place it in the most favorable context. Don't risk your credibility by letting the other side offer up a surprise.

5. **Provide road maps.** Transitions should be neither abrupt nor obscure. Tell the reader how one topic follows from the last and leads to the next. The flow should be gradual; the analytical links should be explicit.

6. **Use examples.** You can breathe life into abstract principles by illustrating your point.

7. **Always start with the basics.** Spell out the regulatory context, the key statutory phrase, the central legal or practical problem. Even a sophisticated reader will be comforted by your retracing a familiar path.

8. **Don't expect too much of the reader.** Write with the assumption — which is almost always accurate — that you have thought far more about the problem than your reader has. Your writing will be better even if the assumption is wrong.

9. **Rewrite.** Be your own toughest critic. You've never written a draft that couldn't be improved.

10. **Make your logic explicit.** Put down on paper every analytical step you have taken in your head. Be vigilant about this. Take no shortcuts. Leave no gaps.

11. **Care about style.** Style cannot be divorced from substance. If it can be said better, say it better. It is not enough to have good ideas, not enough to get your good ideas down on paper. You have to express those ideas effectively.

12. Don't skip over the rough spots. You know where they are. Force yourself to rework the bumpy sentence, the awkward paragraph, the loose analysis.

13. Don't write an abstract thesis. Apply the law to the facts at hand. Solve the problem.

14. Don't limit yourself to direct authority. Good advocacy and effective counseling are driven by analogies.

15. Logic is more important than authority. If you have a compelling argument but can't find support for it, make the argument anyway.

16. Pay attention to detail. Don't underestimate the importance of grammar, spelling, citation form, general aesthetics. Sloppy work suggests a disorganized mind. Careless mistakes not only distract and irritate a reader but may undermine her trust in you.

17. Use subheadings liberally. Good subheadings give the reader cues that aid comprehension. They can help make a long brief digestible. They can also assist the writer by exposing organizational weaknesses. If you can't frame a good subheading, you may have jumbled ideas that should be treated separately.

18. Omit superfluous details. Ask yourself whether a reader needs a particular fact or detail to understand the problem or the analysis. Editing out what isn't necessary will strengthen your writing. Be particularly brutal in striking out dates and numbers. Each conveys the impression that it has special significance.

    - If a number is unnecessary, leave it out. If it must be included, use a round number unless a more precise one is crucial. "$37 million" is far easier to absorb than

"$37,000,000" or (even worse) "$37,468,139.27." Don't distract and tire the reader with pointless precision.

- If a date is not pivotal, leave it out. When you tell a story, all that usually matters is the sequence of events. That can be conveyed by the order of the sentences, occasionally supplemented by a cue word such as "then," "subsequently," or "meanwhile." If you must use a date, keep it as general as you can: try "a year later," or "in 1997," or even "in March 1997," any of which is preferable to "on March 14, 1997."

19. Use short paragraphs. Two or three paragraphs per typed page are about right. Don't be afraid to use one-sentence paragraphs where they seem to work. Paragraph breaks are like breaths of air. They make your writing more hospitable to the reader.

20. Use short sentences. The simple, declaratory sentence should be the staple of your writing. Compound and complex sentences should be used for variety.

21. Don't try to jam too many thoughts into one sentence. If you have more than one connecting word — "although," "if," "because," "and," "but" — you should probably break the sentence into two or three shorter ones.

22. Minimize footnotes.

- Footnotes interrupt the flow of your writing and impede communication. They ask the reader not only to drop his eyes to the bottom of the page, but also to absorb information that the writer did not consider important enough to include in the text.

- Use footnotes only for essential material that would be more disruptive in the text than in a footnote.

- Place footnotes at the most obvious break points. The end of a paragraph is the best possible spot; the end of a sentence is second best. If you must place a footnote in the middle of a sentence, put it where there is a natural break — for example, at a comma or a semicolon.

23. Eliminate unnecessary words.

- Avoid adverbs such as "very," "clearly," "plainly," and "extremely." They weaken rather than strengthen. In place of "very strong," just say "strong." Or try substituting a vigorous adjective such as "powerful."

- Don't hide behind weasel words like "fairly," "rather," and "somewhat." You will inspire greater confidence if you omit needless qualifiers.

24. Avoid legal-sounding words and phrases. Good lawyers don't sound like lawyers.

- Stay away from Latin phrases like "inter alia" and "vel non." They communicate little and impress no one.

- Don't let Latin abbreviations infect your writing. In place of "i.e.," "e.g.," and "viz.," substitute "that is," "for example," and "namely."

- Whip yourself if you find "above-mentioned" or its relatives in anything you've written. Administer similar punishment for "hereinafter," "heretofore," and all the other words that lawyers have invented to scare the lay public.

- Don't use a big word when a small one will do. Use "city" instead of "metropolis," "get" instead of "obtain," "have" instead of "possess," and "give" instead of "bequeath.

- In general, use language that a nonlawyer member of your family can understand. Avoid language that would subject you to ridicule if you were to use it in a personal letter.

25. Don't write in law review style. Be practical, not academic. Cryptic citations do not advance the analysis.

26. Be sparing in your use of parentheticals. They disrupt your rhythm and make for hard reading. It is usually better to characterize the case in front of, not behind, the citation.

27. Don't pile on the cases. Pick the one or two most potent authorities and develop them fully and compactly. Adding weaker authorities dilutes rather than strengthens your argument.

28. Don't paraphrase critical language. Tell the reader precisely what the legislature or the court said.

29. Minimize the use of long block quotations.

    - It is rarely necessary to give the reader the entire quotation. You should do the hard work of extracting the key sentences or phrases and weave them into your own text with quotation marks.

    - If you must use a block quotation, tell the reader why she is being asked to wade through it. Otherwise, her eye is likely to skip right over the quotation.

30. Use underscoring or italics conservatively.

    - Typographical emphasis in text is the equivalent of shouting. Use it only where truly necessary to aid comprehension. When you edit your work, take out as much of the underscoring or italics as you can.

    - In quotations, underscoring can sometimes be helpful in drawing the reader's attention to the key language. But ask yourself whether the rest of the quotation is essential. If not, paraphrase it, and draw attention to the important material by making it the only part that is quoted.

31. Avoid computer jargon. "Input" and "interface" have crept into casual discourse. Don't let them infiltrate your legal prose.

32. If you must use technical terms, define them.

33. Avoid unpronounceable acronyms.

    - There are some obvious exceptions: "IRS," "FBI," "FCC," "FOIA," "NAACP."

    - If you need a short handle for "The National Committee for the Protection and Promotion of Free Market Economic Principles," don't use "NCPPFMEP." That is a false economy. Though it takes up less space than the full name, the reader's eye stops at each letter, and the acronym conveys nothing that any normal person can remember. A much better alternative is "the Committee" or "the National Committee" or the "the Free Market Committee." For the "Telecommunications Act of 1996," use "1996 Act" or "Telecom Act," not "TA."

    - Tell the reader what shortened name you will use only when necessary to avoid confusion. There is ordinarily no

need, for example, to say "Federal Communications Commission ('FCC' or 'Commission')." No one will wonder what "FCC" or "Commission" refers to.

34. Use pinpoint citations. Letting the reader know which page to look at not only will save her time but also will inspire confidence in your analysis.

35. Be alert to sexist terminology.

- "He or she" and "his or her" are acceptable alternatives to "he" and "his." "He/she," "his/her," "s/he," and all other similar mutations are out of bounds.

- In some situations, a succession of "he or she" phrases can be cumbersome. Try rewriting the sentence to eliminate the need for a pronoun, or use a plural noun and a plural pronoun. Or try alternating "she" and "he" as I have done here.

- Under no circumstances is it permissible to mix a plural pronoun with a singular noun. Everyone can choose his or her (not their) own solution to the problem, so long as it does no violence to the fundamental rules of grammar.

36. Keep good resources at hand. Read and reread Strunk & White's *The Elements of Style*. For a desktop bible on writing rules, invest in Bryan A. Garner's *A Dictionary of Modern Legal Usage* (2d ed. 1995). For an excellent thesaurus, try Rodale's *Synonym Finder* (Warner Books ed. 1978).

37. Write with flair. Don't be afraid to use colorful, vigorous language. Legal writing doesn't have to be deadly.

Editor Man

By Mark Cooney

Joe Lawyer lay in a heap on his office floor, unresponsive. His eyes were frozen wide open, his mouth agape. A crowd of panicked coworkers surrounded him.

"Call 9-1-1!"

"What happened to him?"

"I don't know," said Joe's secretary. "I think he was working on the Jones file."

"That's the Emergency Medical Services Act case," said a partner. "Look, there's a printout of the statute on his desk. He must have been reading it when, well…" Her voice trailed off.

"Let me read it," said the firm's mild-mannered new associate, Kent Clark.

"No!" said a distressed coworker. "We can't afford to lose two lawyers in one day. We're just a midsize firm."

Precious time was slipping away. Kent ducked unnoticed out of Joe's office, ran down the hall, and slipped into the file room. He emerged seconds later, but no longer wearing his gray business suit. In a flash, he was back in Joe's office.

"Stand aside, good people. Editor Man is here!" said a masked man wearing a disturbingly tight spandex bodysuit. "I fight for truth, justice, and clarity!"

"Editor Man! Oh, thank goodness you're here. It's the qualified-immunity provision of Michigan's Emergency Medical Services Act."

"I see." The fearless crusader strode to Joe's desk with purpose, stepped over Joe's body, and sat down. He brushed his cape aside and pulled a red pen from his utility belt. Then he faced his foe:

> Unless an act or omission is the result of gross negligence or willful misconduct, the acts or omissions of a medical first responder, emergency medical technician, emergency medical technician specialist, paramedic, medical director of a medical control authority or his or her designee, or, subject to subsection (5), an individual acting as a clinical preceptor of a department-approved education program sponsor while providing services to a patient outside a hospital, in a hospital before transferring patient care to hospital personnel, or in a clinical setting that are consistent with the individual's licensure or additional training required by the medical control authority including, but not limited to, services described in subsection (2), or consistent with an approved procedure for that particular education program do not impose liability in the treatment of a patient on those individuals….[1]

"Wait a minute. This is 135 words in a single sentence, and the sentence isn't even finished," said Editor Man. "It continues, adding *or any of the following persons*, which is followed by a long list of people and entities.[2] All told, the block leading into that list is a single 141-word sentence, and it contains two complex series."

"Poor Joe never had a chance," cried Joe's secretary.

"We must be strong, good citizens," said Editor Man. "I just need to attack this methodically. I need to diagnose its flaws."

"Well, duh, sentence length," said an impatient partner.

"True, sir. Sentence length is a big problem. And the drafter's attempt to cram so much information into a single sentence creates a bunch of problems. For instance, it's hard to figure out what some of those modifying words and phrases are supposed to modify. Does that crucial phrase *while providing services*—and the related language that follows it—modify only the final series item referring to *an individual acting as a clinical preceptor*? Or does it modify every person in the long series that preceded it?"

Editor Man paused to look at the text again.

"I also worry about word choice and consistency. Is the *individual* acting as a clinical preceptor in the middle of the sentence the same *individual* whose licensure or additional training is mentioned more than 40 words later? It wouldn't seem so. And I see *providing services to a patient* in one place and *the treatment of a patient* in another. Is *treatment* the same thing as *services*? If so, why two different terms?"

> "Stand aside, good people. Editor Man is here!"…"I fight for truth, justice, and clarity!"

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"Oh, Editor Man, what can we do?"

"Well, first things first. I've got to find the subject and the verb."

The crowd gasped. No ordinary mortal would dare attempt it.

Editor Man studied the statute and, after a moment or two, circled a phrase on the second line. "Well, I've got the subject. As this thing is written, the subject is *acts or omissions*."

He continued reading, but he didn't raise his pen again for some time.

"Where's the verb, Editor Man? For heaven's sake, find the verb!" urged someone in the crowd.

Editor Man's eyes darted back and forth at a fever pitch. A bead of sweat lingered for a moment on his left temple and then rolled down his cheek. The battle was truly joined—one courageous mind against a wall of dense, impenetrable legal text.

"There it is!" proclaimed Editor Man.

"Thank goodness," said a relieved onlooker.

"It's down at the very bottom of the block—a good ten lines down in this printout. The subject's main verb is the phrase *do not impose*. Yes, that's the sentence's core: *the acts or omissions do not impose liability*."

"But that verb phrase is in a different zip code than the subject," said an exasperated associate.

"Indeed. And the farther a subject is from its verb, the harder it is for readers to understand a sentence. That's especially true when the writer forces a bunch of interrupting phrases or a complex series between the subject and its verb, as we have here."[3]

"So we need to put the subject and the main verb closer together?"

"That's a great start, yes," replied Editor Man. "But it's not a completely satisfying cure. If possible, I'd prefer a concrete subject—an actual person—rather than the abstract concept *acts or omissions*."

"But you can't do that here because the statute is designed to protect so many categories of people. You'd have to list them all before the verb, and that would leave the same mess we have now."

"It's a challenge, for sure, but there are a number of things we might try. One possibility is to get vague."[4]

"Get what? Vague? But vagueness is always bad, especially in legal drafting," said a skeptical partner.

"Don't mistake vagueness for ambiguity. Ambiguity—being forced to choose between two possible meanings—is always bad. But some vagueness is necessary in drafting. Imagine making it illegal to drive *a station wagon* faster than 70 miles per hour. Now it's perfectly legal for other kinds of cars to exceed 70 miles per hour. That probably wasn't the drafter's intent. The original is too specific, too precise. It isn't vague enough. So you might broaden your term—perhaps making it illegal to drive *a motor vehicle* over 70 miles per hour. Now you've captured all kinds of cars, as well as trucks and motorcycles. That's a rough example, mind you, but you get the point. Legislative drafters must shape vagueness appropriately, and it's not easy."

"But how does that help here?"

"Well, I wonder if we might create an appropriately vague term for our main subject—perhaps *emergency medical responder*. I'll also pull those buried qualified-immunity elements out of the dense text and organize them with a vertical list.[5] And I'll create separate sections and subsections, with informative headings, for added clarity:

(1) **Immunity.** An emergency medical responder is not liable for his or her act or omission if:

(a) it occurs while treating a patient outside a hospital, in a hospital before hospital personnel take over the patient's care, or in a clinical setting; and

(b) the treatment is consistent with the responder's licensure or required training, or with an approved procedure for the responder's educational program.

(2) **Exception.** This immunity does not apply if the emergency medical responder's act or omission amounts to gross negligence or willful misconduct.

"I'm happier with this, but our work isn't quite done," said Editor Man. "Even though creating appropriately vague terms can often do the trick by itself, here we'd better define *emergency medical responder* to explicitly capture the six types of emergency medical workers listed in the original; each type, I believe, has a unique license and statutory job title:

(3) **Definition.** 'Emergency medical responder' means a medical first responder; an emergency medical technician; an emergency-medical-technician specialist; a paramedic; a clinical preceptor; or a director of a medical-control authority, or his or her designee.

"But what about the long list that follows the qualified-immunity provision, Editor Man?"

"That seems to list people and entities protected from vicarious liability. I like the original drafter's instincts in using a vertical list, but we can be clearer—and avoid a rambling lead-in sentence—if we put that list in a separate subsection. Now, I'm not familiar with all these people and organizations, and I wasn't privy to the discussion and debate that—"

"Get on with it! We've got a man down," shouted someone in the crowd.

"Right. The 14-item vertical list in the original seems endless. But when I read it carefully, it looks like we might capture those people and entities within slightly broader terms:

(4) **Others Protected.** If under subsection (1) an emergency medical responder is not liable, then the following people and entities also are not liable for the responder's act or omission:

(a) an employer, trainer, or supervisor;

(b) an educator or education-program sponsor;

(c) a state department or state advisory body, or any person affiliated with either;

(d) a hospital or any person affiliated with it;

(e) a physician or a physician's designee;

(f) a medical-control authority or any person affiliated with it;

(g) a life-support agency or any person affiliated with it;

(h) a dispatcher;

(i) a governmental unit or officer;

(j) an emergency medical worker from another state.

"This is still a bit long, but it's a first draft, at least. If I really had my way, instead of this long list, I'd use an existing statutory term—'emergency medical services system'[5]—and try to streamline things, like this:

(4) **Others Protected.** If under subsection (1) an emergency medical responder is not liable, then no person or entity affiliated with an emergency-medical-services system is liable for the responder's act or omission.

I suppose this might cast too broad a protective net. And again, I'd need to research and recheck all this to—"

But the crowd cut him off. "Print it! Print it!"

Editor Man clicked the print icon, and Joe's secretary ran to the printer. In moments, she was back in Joe's office, waving the redraft in the air. She handed it to Editor Man, who held it in front of Joe's eyes. A tense silence gripped the room. But then Joe blinked. His pupils returned to normal. He shook his head with a start, gathered himself, and then grabbed the paper and started reading.

"Why, this is…but it can't be. It looks like the qualified-immunity provision from the Emergency Medical Services Act, but it's… it's comprehensible."

After the onlookers exhaled, they cheered Joe's miraculous revival.

"Editor Man, how can we possibly thank you?" said Joe's secretary.

But Editor Man was nowhere to be seen. Young Kent Clark later claimed that Editor Man had slipped out of Joe's office during the commotion, rushing off to redraft a turgid local ordinance. "So much legalese," rang Editor Man's words as he shot away down the hall, "so little time." ■

Mark Cooney is a professor at Thomas Cooley Law School, where he teaches legal research and writing. Before joining the Cooley faculty, he spent 10 years in private practice as a civil litigator, most recently with Collins, Einhorn, Farrell & Ulanoff, P.C., in Southfield.

FOOTNOTES

1. MCL 333.20965(1).
2. See MCL 333.20965(1)(a) through (n).
3. See Kimble, *Lifting the Fog of Legalese: Essays on Plain Language* (Durham: Carolina Academic Press, 2006), p 146.
4. See *id.* at 146–147.
5. See *id.* at 147.
6. MCL 333.20904(6).

Version 1

CAUSE NO. 09CV46548

DON ADAMS, ET. AL *Plaintiffs,*	§	IN THE DISTRICT COURT
VS.	§	HOWARD COUNTY COURT
ALON USA, LP, ET. AL *Defendants.*	§	118TH JUDICIAL DISTRICT

BENCH BRIEF: COLLATERAL ESTOPPEL

ISSUE: Does collateral estoppel apply in this case?

RESPONSE: Collateral estoppel prevents relitigation of particular issues already resolved in prior suit. *Resolution Trust Corp. v. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992) (citing to *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). Specifically, collateral estoppel precludes relitigation of identical issues of fact or causes of action which were actually litigated and essential to prior judgment. *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721-22 (Tex. 1991) (citing to *Dyke v. Boswell, O'Toole, Davis, & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985)). However, as a general rule, a judgment on the merits in a suit on one cause of action is not conclusive in a subsequent suit in a different action, except as to issues of fact actually litigated and determined in the first suit. *Sunbelt Fed. Sav.*, 837 S.W.2d at 629 (citing to *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973)). The policies behind the doctrine reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. *Sunbelt Fed. Sav.*, 837 S.W.2d at 629.

first sentence doesn't give answer; it is unhelpful

same with sentence

by end of para, provides no hel information

In order for collateral estoppel to apply, the party bringing forth the motion must establish: 1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; 2) those facts were essential to the judgment in the first action; and 3) the parties were cast as adversaries in the first action. *Eagles Properties, Ltd.*, 807 S.W.2d at 721 (citing to *Bonniewell*, 663 S.W.2d at 818). "Due process requires that the rule of collateral estoppel operate *only* against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial." *Eagle Properties, Ltd.*, 807 S.W.2d at 721; *Benson v. Wanda Petroleum Co.* 468 S.W.2d 361, 363 (Tex. 1971) (finding collateral estoppel did not apply to plaintiff bringing forth a separate lawsuit from another plaintiff where both plaintiffs were involved in a three car collision with defendant – plaintiff bringing forth a separate lawsuit

Repetitive and introducing 3 fs this way is poor style; doesn't co context or significance

except for this critical third part- which is buried

was emphasis in orig?

Overall, the reader is just exhausted reading this long, boring, poorly-formed paragraph.

gained during existence of the first trial is imputed to the second client). Moreover, remaining Plaintiffs' interests were not represented by a party in action nor are the remaining Plaintiffs succesors in interest to the trial Plaintiffs.

one of many examples of unnecessary language

To get a better understanding of the last two elements of privity, Plaintiffs point the Court towards the opinion in *Myrick v. Moody Nat'l Bank of Galvston.* 590 S.W.2d 766 (Civ.App. – Houston [14th Dist.] 1979). In *Myrick*, ~~the issues revolved around a prior lawsuit where~~ defendant's former wife brought suit against the trustee, Moody National Bank of Galveston, for garnishment for child support, which was owed by the benificiary, the defendant. *Id.* at 767. The trial court concluded that the trust account could be and was garnishable. *Id.* In a later lawsuit, Defendant attempted to retry the issue of the trust account being open to garnishment of monies owed. *Id.* at 767-68. Defendant ~~stated he~~ was not party to the first lawsuit; thus, collateral estoppel did not apply. *Id.* at 769. The ~~Appellate~~ Court found ~~otherwise, stating the beneficiary of~~ the trust was in privity with the trustee~~, the bank,~~ because his interests ~~are~~ were represented by the trustee. *Id.* at 769. Other relationships which would satisfy the second and third elements are: parents/children, decedents/heirs, insurer/insured, and possibly even employer/employee. In this instance, privity does not exist between trial Plaintiffs and the remaining Plaintiffs. In addition, remaining Plaintiffs do not have a propriety or financial interest in the first trial. *Benson*, 468 S.W.2d at 364. Thus, collateral estoppel does not apply to this case.

aarghl no transition; conclusory assertion

why not lead with this instead of that crazy discussion of Myrick?

A case on point which addresses this issue as a matter of law is *Benson. Benson*, 468 S.W.2d 361. *Benson* is a case that involved a three car collision. *Id.* The defendant was the driver of a tractor and trailer owned by Wanda Petroleum Company, which collided with the plaintiff and a third party. *Id.* at 362. The third party and the plaintiff brought separate suits against the defendant. *Id.* The third party had a trial, and the jury found the defendant to be free of negligence. *Id.* In the suit involving the plaintiff and the defendant, the defendant brought forth the rule of collateral estoppel to estopp the plaintiff's suit because the matter regarding the defendant's negligence was already tried in the prior law suit involving the third party. *Id.* The Texas Supreme Court found that the doctrine of collateral estoppel did not apply because the plaintiff never had her day in court on the critical issues for which her suit was premised upon. *Id.* at 364. She was not a party to the former action. *Id.* She was not in privity with the third party because her rights did not derive from the third party. *Id.* She had no voice (control) in the conduct of the prior suit. *Id.* She had no right to examine the witnesses or to take action to protect her own interests. *Id.* Nor did she have any beneficial interest in the recovery of damages for personal injuries on behalf of the third party. *Id.* As such, collateral estoppal does not apply. That case is exactly like this case.

writing is so tilted; and point hat is critical s left for end

The facts in *Benson* regarding the position of the remaining Plaintiffs are identical. *Id.* The remaining Plaintiffs were not parties to the former action; thus, they have yet to have their day in Court. Their rights do not derive from those of the trial Plaintiffs. They had no control in the proceedings or events which took place in the first trial. They did not participate in

Version 2

CAUSE NO. 09CV46548

DON ADAMS, ET. AL *Plaintiffs,*	§	IN THE DISTRICT COURT
VS.	§	HOWARD COUNTY COURT
ALON USA, LP, ET. AL *Defendants.*	§	118TH JUDICIAL DISTRICT

PLAINTIFFS' BENCH BRIEF ON COLLATERAL ESTOPPEL

Issue #1: Does collateral estoppel bar nonparties from relitigating the first jury's determination regarding gross negligence in the trial of *Beverly Smithie, Ronnie Walker and Debra Walker v. Alon USA*?

Answer: Absolutely not. The Texas Supreme Court has consistently held that one who was not a party or in privity with a party in a prior case is never collaterally stopped from relitigating an issue that was determined in the prior case. *See, e.g,. Sysco Food Serv. v. Trapnell*, 890 S.W.2d 796 (Tex. 1994) (observing that for collateral estoppel to apply it is "necessary that the party *against whom* the doctrine is asserted was a party or in privity with a party in the first action") (emphasis in original); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714 (Tex. 1991); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). This is understood to be a basic principle of due process. "Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy. . . ." *Benson*, 468 S.W.2d 361, 363. The U.S. Supreme Court has underlined the point as emphatically: "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor v. Sturgell*, 553, U.S. 880, 892-93 (2008) (internal citations omitted). Simply put, "collateral estoppel cannot be asserted against a party who was not a party or in privity with a party in the prior litigation." *Eagle Properties*, 807 S.W.2d 714, 721-22.

Moreover, this fundamental limitation on issue preclusion law applies in all cases, from the simplest car-wreck suit, *see e.g. Benson*, 468 S.W.2d 361, to the most complex multi-party litigation. *See, e.g., Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984) (litigation arising out of airplane crash, involving five different actions and multiple parties); *Young v. City of Corpus Christi*, 2006 WL 1360842 (Tex. App.—Corpus Christi, May 18, 2006, no pet.) (mass action against city involving 243 plaintiffs); *Owens Corning Fiberglas Corp. v. Sitz*, 970 S.W.2d

Comment [LH1]: Notice that very first words emphasize the argument to come

Comment [LH2]: A definitive, early answer/argument

Comment [LH3]: Notice that the case cite is accompanied by a parent that describes why the case is being cited and, includes as appropriate, facts & key quote from the case

Comment [LH4]: Normally, string cites are overused but do you see why citing multiple authorities works well here? What does it convey to reader?

Comment [LH5]: Having made a big con law statement above, this is a helpful sentence for grounding the abstract idea

Comment [LH6]: Esp relevant given this case

103 (Tex. App.—Eastland 1998, rev. denied) (products liability asbestos exposure). Focusing specifically on the mass tort context, numerous courts and commentators explain that collateral estoppel may only be applied against one who was a party or in privity with a party from the prior suit in which the determination was made. *See, e.g., In re TMI Litigation*, 193 F.3d 613, 724-25 (3d Cir. 1999) ("[T]he District Court's extension of the Trial Plaintiffs' summary judgment decision to the Non-Trial Plaintiffs' claims adversely affected the substantive rights of the Non-Trial Plaintiffs. ... The District Court could not properly extinguish the substantive rights of the 1,990 Non-Trial Plaintiffs merely because all of the cases had been consolidated."); Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 65 (1988) (discussing mass tort litigation and noting that "subsequent plaintiffs are not bound to a finding *against* the first plaintiff. Each subsequent plaintiff has a due process right to a day in court on that question") (emphasis in original); Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 CORNELL J. L. PUB. POL'Y 523, 543 (2000) ("This privity requirement prevents a defendant who prevailed in an action to collaterally estop a non-party plaintiff. Suppose, for instance, a victim of an automobile accident sues the manufacturer of an automobile alleging a defectively designed gasoline tank. The manufacturer then prevails on the defectiveness issue. This judgment does not preclude a different plaintiff from relitigating the identical issue in a different cause of action.").

Comment [LH7]: Again, notice use of descriptive parens and quotes from authorities.

There can be no doubt, of course, that as a matter of law the other individual plaintiffs are not in privity with Plaintiffs Beverly Smithie, Ronnie Walker, and Debra Walker. The Texas Supreme Court has underlined time and again that privity connotes those who are so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right. *See, e.g., Amstadt v. U.S. Brass Corp.*, 919, S.W.2d 644, 653 (Tex. 1996). Further, privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. *Avre v. J.D. Bucky Allshouse, P.C.*, 942 S.W.2d 24, 27 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Instead, parties are only found to be in privity for purposes of collateral estoppel and res judicata when: (1) they control an action even if they are not parties to it; (2) their interests are represented by a party to the action; or (3) they are successors in interest, deriving their claims through a party to the prior action. *HECI Exploration, Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998).

Comment [LH8]: This para anticipates an argument that the other side may be making. So it is clever preemptive approach without looking defensive.

Nor can it be argued that the other plaintiffs are in privity with Plaintiffs Beverly Smithie, Ronnie Walker, and Debra Walker because they have the same attorneys. This identical argument has been repeatedly rejected, by state and federal courts in Texas. *See, e.g., Tex. Capital Sec. Mgmt., Inc. v. Sandefer*, 80 S.W.3d 260, 267 (Tex. App.—Texarkana 2002, pet. strkn.); *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978). Moreover, as the Fifth Circuit noted in *Pollard*, since privity depends on control, and control of a case fundamentally rests with the *client*, not the *lawyer*, privity can never be established for preclusion purposes based solely on the fact that two parties share a common attorney. *See Pollard*, 578 F.2d 1002, 1009 ("Representation by the same attorneys cannot furnish the requisite alignment of interests in light of the well established ethical rule that, in areas affecting the merits of the cause or substantially affecting the rights of the client, 'the authority to make decisions is exclusively that

Comment [LH9]: Another argument anticipated.

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of the client and, if made within the framework of the law, such decisions are binding on his lawyer'. American Bar Association, Code of Professional Responsibility, EC 7-7 (1971)").

Indeed, even when two persons are in virtually the identical factual situation, privity will not be found when none of the formal legal requirements for privity exist. For instance, in *Benson*, there was an automotive collision involving a tractor owned by the defendant. Inside the other car was the driver, his wife and the car's owner. The driver and his wife (the Porters) first brought suit against the tractor owner but lost when the jury found that the tractor owner was not negligent. Thereafter, when the owner of the car (Mrs. Benson) brought suit, the tractor company argued that her claim was collaterally estopped by the jury's finding of no negligence in the first case with the Porters. The Supreme Court fully dismissed the company's argument underlining that even when the facts are identical, collateral estoppel cannot preclude relitigation of issues against one who was not a party (or in privity with a party) in a prior case.

Comment [LH10]: Sentence introduces the block quote and justifies why it's such a long quote to come.

> The suit at bar is a separate and distinct action for redress for personal injuries. Mrs. Benson was not a party to the former action instituted by the Porters following her non-suit and they did not represent her in her claims against Wanda, respondent here. It was not shown that Mrs. Benson participated in, or exercised any control over, the trial in the Porter suit, or that she had any right to do so. She was not shown to have any beneficial interest in the recovery of damages for personal injuries on behalf of the Porters. In our view, the requirements of due process compel the conclusion that a privity relationship which will support application of the rules of res judicata does not exist under these circumstances. Accordingly, we hold that the fact findings and judgment in the Porter suit do not bar Mrs. Benson, and that she is entitled to her day in court in prosecuting this action in her own right.

Benson, 468 S.W.2d 361, 364.

In sum, the law is clear: subsequent parties not in privity with any party from a prior case are not collaterally estopped by an issue decided in the prior case when the subsequent parties have not, as the Supreme Court has put it, "had their day in court." *Bonnhwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). Beverly Smithie, Ronnie Walker, and Debra Walker were the only individuals who had their day in Court. No one else has had their claims adjudicated and so no one else is collaterally stopped by the jury's finding regarding gross negligence in the trial of *Plaintiffs Beverly Smithie, Ronnie Walker and Debra Walker v. Alon USA*.

Comment [LH11]: Source, or explain.

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Version 1

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RUSSEL WASHINGTON *Plaintiff,* v. LA MARQUE INDEPENDENT SCHOOL DISTRICT, *Defendant.*	§ § § § § § § § § §	Civil Action No. 3:12-cv-00041

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

COMES NOW RUSSEL WASHINGTON, Plaintiff in the above referenced matter, filing Plaintiff's Response to Defendants' Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)[1] and would respectfully show the Court as follows:

Nature and Stage of Proceedings

This lawsuit arises from the violation of due process given to the Plaintiff Washington ("Plaintiff" and/or "Plaintiff Washington"), when Defendant La Marque Independent School District ("Defendant" and/or "Defendant LMISD") terminated Plaintiff's employment as the Chief of Police for the Defendant and Defendant violated the Texas Open Meetings Act ("TOMA") by failing to provide adequate notice to the public of the subject of the possible termination of the Plaintiff.[2]

Comment [LH1]: Unnecessary legalese.
And cookie cutter beginning; squandering opportunity.
And repetitive of title of document.
And note that we still have no idea what this motion or response is about or what argument will be.

Comment [LH2]: Due process rights?

Comment [LH3]: Is this ever necessary?

Comment [LH4]: Two acronyms in one sentence!

Comment [LH5]: Don't put anything substantive in footnotes! If important enough to say, put it above the line. Or if not important, then don't say it at all.

[1] This response is co-wrote and co-briefed by Professor Lonny Hoffman of the University of Houston Law Center. Professor Hoffman is a chaired professor and expert in the area of federal civil procedure. Professor Hoffman is a nationally recognized legal expert in all areas relevant to this response.

[2] In Plaintiff's Original Complaint, Plaintiff brought causes of action against La Marque Independent School District ("LMISD") and the La Marque Independent School District Board of Trustees ("LMISDBT"). As Defendant points

In response to Plaintiff's Original Complaint, Defendant has filed its Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("Motion").[1] Plaintiff's deadline to respond to Defendant's motion is on April 4, 2012. Oral hearing has not been set at this time pertaining to Defendant's motion.

Comment [LH6]: Why include any of this?

Statement of the Issues

- Defendant incorrectly claims that Plaintiff has not pled a viable Fourteenth Amendment claim.
- Defendant incorrectly claims that Plaintiff has not pled any of the essential elements of municipal liability to bring forth a viable Fourteenth Amendment claim.
- Defendant incorrectly claims that Plaintiff's pre-termination procedural due process claim is barred by the Parratt/Hudson doctrine.
- Defendant incorrectly claims that since Plaintiff was given a post-termination hearing, that the violation of due process given to the Plaintiff at the pre-termination hearing is not a valid claim.
- Defendant incorrectly claims that Plaintiff does not have a viable procedural due process claim because Plaintiff did not exhaust all administrative appeal procedures available to him.

Comment [LH7]: Instinct good (to try to identify 2 multiple issues) but is this really an effective argument technique?

- Defendant incorrectly claims that Plaintiff has not pled a viable post-termination violation of his procedural due process claim because board member Cynthia Malveaux did not demonstrate actual bias and board member Donna Holcomb's unqualified vote had no affect on the termination of the Plaintiff.
- Defendant incorrectly claims that it provided sufficient notice under TOMA for the meeting where Defendant terminated Plaintiff's when Defendant informed the public that it would only "***consider the recommendation*** to propose the termination of the contract and employment of the LMISD Chief of Police"—not actual termination.

Comment [LH8]: No emphasis added unless nec for readability (and, hint, it almost never is)

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out in its Motion, Defendants are not separate entities. As such, Plaintiff has corrected this issue in his First Amended Complaint. *See* Exhibit 8. Thus, in Plaintiff's response to Defendant's Motion, Plaintiff refers to Defendants properly as one entity.

Standard of Review

Comment [LH9]: When see, make a standard of review section work for you. Don't just offer a bland, blackletter law summary that does not advance argument.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007)) (internal quotations omitted). The pleading standard does not require detailed factual allegations, but it demands more than un-adorned accusations. *Iqbal*, 129 S.Ct. at 1949.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* at 1949. The court is to accept all well-pleaded facts as true when viewing those facts in the light most favorable to the plaintiffs. *Gonzalez v. Kay*, 577 F.3d. 600 (5th Cir. 2009). The claim has facial plausibility when the plaintiff pleads content that allows the court to draw reasonable inference that the defendant is liable for the misconduct that is alleged. *Iqbal*, 129 S.Ct. at 1949. This standard is not a "probability requirement"—the facts in a complaint merely must propose more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* Moreover, the court may not look beyond the pleading in ruling on the motion. *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996).

The Supreme Court in *Iqbal* explained that a court must first identify well-pleaded factual allegations because threadbare recitals of elements of a cause of action that are supported by conclusory statements do not suffice. 129 S.Ct. 1937, 1949-50. While legal conclusions can provide a framework of a complaint, they must be supported by factual allegations. *Id.* When well-pleaded facts are contained in a complaint the court ***shall assume*** their veracity and determine the plausibility of an entitlement to relief. *Id.* A well-pleaded complaint may proceed even if it appears "that a recovery is remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1827 (1974).

Relevant Facts

Defendant LMISD employed Plaintiff Washington as its Chief of Police under the terms of a two-year written employment contract. Complaint at p.4 ¶ 10; *see* Multi-Year Employment Term Contract, attached hereto as Exhibit 1. During his employment for the Defendant, Plaintiff Washington was wrongfully indicted in September of 2009 for crimes he did not commit. Complaint at p.5 ¶ 11. After the indictment, Plaintiff Washington was placed on administrative leave. Complaint at p.5 ¶ 11.

Comment [LH101]: Careful about arguing in a non argument section. Indeed, this is a major recurrent problem throughout this section

In March 2010, Superintendent Burley placed the following item on the agenda for the March 25, 2010 public meeting: "***Consider recommendation*** to propose the termination of the contract and employment of the LMISD Chief of Police." Complaint at p.5 ¶ 12; *see* March 25, 2010 Agenda, attached hereto as Exhibit 2. ***Actual termination was not on the agenda.*** Complaint at p.5 ¶ 12; *see* March 25, 2010 Agenda, attached hereto as Exhibit 2.

At the meeting, Defendant's seven member Board voted four to three to terminate Washington's employment due to the pending indictment even though such action was not on the agenda for the March 25, 2010 meeting. Complaint at pp. 5-6 ¶13, p.7 at n.10. Furthermore, prior to the vote, Plaintiff was not allowed to present his side of the story or introduce contradictory evidence. Complaint at pp. 10-11 ¶ 22. Moreover, two board members, Mrs. Cynthia Bell-Malveaux and Mrs. Donna Holcomb, should have either recused themselves or have not been allowed to vote on the termination of Plaintiff.

Prior to the meeting, Mrs. Malveaux had filed a lawsuit against Plaintiff for defamation. Complaint at p.6 n 7; *see* Cynthia Bell-Malveaux's Original Petition against Russel Washington filed in the 212th Judicial District Court of Galveston County, Cause No. 09 CV 0768, attached hereto as Exhibit 3. Moreover, it was known in the community that Mrs. Malveaux was

attempting to get Plaintiff fired and that she was worried that Plaintiff would report a possible fraud that she had committed to the authorities. Complaint at p.6 n 7; *see* Affidavit of William Ray, attached hereto as Exhibit 4; *see also* Affidavit of Pastor Harris, attached hereto as Exhibit 5. Due to Mrs. Malveaux's actual bias, she should have recused herself from the vote pertaining to Mr. Washington's termination. As such, if Mrs. Malveaux properly recused herself, her vote would have never counted against Mr. Washington at the March 25, 2010 meeting.

Additionally, Mrs. Holcomb should not have been allowed to vote due to the fact that she no longer lived in the district. Complaint at pp. 6-7 ¶ 14; *see* Galveston Appraisal District document pertaining to the residence of Mrs. Holcomb, attached hereto as Exhibit 6. Since Mrs. Holcomb lived outside of the district, her voting capacity should have been disqualified.

On April 22, 2010 the Defendant's board ("The Board") held a post-termination hearing to consider the dismissal of Plaintiff. Complaint at p.6, ¶ 13. The Board voted four to three against the reinstatement of the Plaintiff. *See* April 22, 2010 Board Minutes, attached hereto as Exhibit 7. However, the same members that should have been disqualified from voting at the March 25, 2010 meeting again voted at the April 22, 2010 meeting. *See* Exhibit 7. Specifically, the board members who should not have voted that did vote were both Mrs. Malveaux and Mrs. Holcomb. *See* Exhibits 3, 4, 5, 6 and 7. As discussed above, Mrs. Malveaux should not have voted due to her actual bias against the Plaintiff. *See* Exhibit 3, 4, and 5. Furthermore, since Mrs. Holcomb no longer lived in the district at that time of the meeting, her vote should have been disqualified. *See* Exhibit 6. As such, if both votes from both Mrs. Malveaux and Mrs. Holcomb were not allowed to be entered, then the vote would have been 3-2 in favor for reinstatement.

Finally, in 2011, the criminal case against the Plaintiff, which was the sole basis for the Plaintiff's termination, was dismissed. *See* Order from the Court dismissing criminal charges

against the Plaintiff, attached hereto as Exhibit 9. As is Plaintiff's right, Plaintiff filed suit against the Defendant on February 9, 2012.

A. Plaintiff has brought forth well-pleaded facts that entitle him to relief because Defendant violated his procedural due process.

Comment [LH11]: Bold, underline and italics all used here. Crazy. Sometimes there are rules when there aren't, go for readability and consistency's...

1. Washington has plead a viable Fourteenth Amendment Procedural Due Process Claim, which is supported by 42 U.S.C.A. § 1983 brought forth in Complainant's First Amended Complaint.

Comment [LH12]: Notice that the first time this brief makes any argument at all, it appears here at page 6.

Defendant alleged in its Motion that Plaintiff did not bring forth a viable claim because the Court lacked subject matter jurisdiction because Plaintiff's could not bring forth his claims directly under the U.S. Constitution. However, in response, Plaintiff has amended his original complaint and brought forth his violation of procedural due process claims under both the Fourteenth Amendment and 42 U.S.C. § 1983. *See* Complainant's First Amended Petition, attached hereto as Exhibit 8; The Public Health and Welfare Act § 1983, 42 U.S.C. § 1983 (West Supp. 2011). Plaintiff has satisfied his pleading requirements in his First Amended Petition by alleging that Defendant acted under the color of state law, and that the conduct deprived the Plaintiff of his rights and privileges secured by the Constitution without due process of law. *Parratt v. Taylor*, 451 U.S. 527, 101 S.Ct. 1908, 1912-13 (1981), *overruled on other grounds, Daniels v. Williams*, 474 U.S. 327, 106 S.Ct. 662 (1986); *see also* Exhibit 8.

Furthermore, under the Federal Rules of Civil Procedure, Plaintiff is allowed to amend his complaint when the Defendant has not filed a responsive pleading. Fed. R. Civ. P. 15(a); *Smith v. Blackledge*, 451 F.2d 1201, 1202-03 (4th Cir. 1971). A motion to dismiss is not considered a responsive pleading for the purposes of Rule 15(a). *United States v. Newbury Mfg. Co.*, 123 F.2d 453 (1st. Cir. 1941). Thus, Plaintiff is allowed to amend his complaint without

Version 2

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RUSSEL WASHINGTON *Plaintiff,* v. LA MARQUE INDEPENDENT SCHOOL DISTRICT, *Defendant.*	§ § § § § § § § § §	Civil Action No. 3:12-cv-00041

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Right out of the gate, Defendants move to dismiss this case and their argument essentially goes like this: The Court should find that (1) we were unable to provide adequate due process prior to terminating Mr. Washington (their *Parratt/Hudson* argument); or that, in any event, (2) he was provided all the process he was due (their *Gilbert* argument); or, making their final pitch, that (3) our failure to provide adequate procedures both before and after we terminated him is excusable because he didn't appeal to the Texas Education Commissioner before filing suit. It's a sort of three-headed argument that manages to be wrong on the law in three different ways.

Comment [LH1]: A memorable start. Because this is a long response (20 pages total), helpful to have a long but quick reference summary right here at beginning.

Comment [LH2]: A slight jab - meant to wrap up prior long sentence in paragraph. Not meant to make argument fully! Just a transition line.

Defendants' first argument undervalues the minimum due process protections that, under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), are constitutionally owed to claimants at the pre-termination stage (such as allowing him some opportunity to defend himself before they fired him), protections the state undeniably was able to provide in this case. Defendants' second argument pays no mind to the critical distinction the cases draw between the process that is due when a temporary suspension is contemplated and the even greater process that is owed before a permanent termination is decreed. As to their third and final argument,

Comment [LH3]: Then, argument tracks 1, 2 and 3 points made above.

Defendants' position is flatly wrong: there is no exhaustion of administrative remedies requirement for actions under 42 U.S.C. §1983. Each of these points will be fully explored but before getting to Defendants' arguments a brief summary of Mr. Washington's factual allegations and legal claims is helpful.

Comment [LH4]: See, hard to resist empty words.

Summary of Factual Allegations

This lawsuit arises from the violation of Russel Washington's procedural due process rights by the La Marque Independent School District and the La Marque Independent School District Board of Trustees when he was terminated from his job as Chief of Police for the school district. Mr. Washington began work for the La Marque School District in 1992 as a beat cop. He worked his way up through the ranks, receiving numerous accolades and awards along the way. The school district promoted him to police chief in 1997 under the terms of a two-year written employment contract. Since 1997, his contract has been renewed every two years, like clockwork. His last two-year term contract was renewed on April 20, 2009, after another good evaluation. All of the above allegations are made in Plaintiff's First Amended Complaint at ¶¶ __, __.

Although the school district renewed Mr. Washington's employment contract in 2009 as it had routinely done many times before, by 2007 relations had already begun to sour between Mr. Washington and the school district's superintendent, Ecomet Burley. In October 2007, Superintendent Burley sought to have Mr. Washington indicted for the alleged forcible restraint of a student. He was actually successful in convincing then-district attorney Kurt Sistrunk to seek an indictment against Mr. Washington but the grand jury no-billed the indictment. All of the above allegations are made in Plaintiff's First Amended Complaint at ¶¶ __, __.

...

Argument

...

3. Mr. Washington was not provided all the process he was due either at the March pre-termination hearing or the April post-termination appeal hearing.

The second major argument for dismissal Defendants make is that Mr. Washington was, as they put it in their motion, "provided all the process he was due in light of the felony indictment and the prompt post-termination hearing." Motion to Dismiss, at 10. In essence, Defendants are saying *We didn't need to look at any other facts before we fired him. He was indicted, so he must be guilty. And, we scheduled the post-termination appeal hearing promptly after we fired him, so what's he complaining about?*

Comment [LHS]: Effective technique here... parodies their argument in an attention grabbing and effective way.

A. Defendants miss the basic distinction *Gilbert* draws between temporary suspension and termination.

Attorney for Russel Washington

Checklist for Legal Writing:
Some Questions to Consider

Professor Lonny Hoffman
Written Advocacy for Litigators
Spring 2017

After teaching this class for several years, I realized that some students would find it helpful to be able to refer to a checklist as they work on their writing. That led me to jot down this catalogue of questions that you may want to consider when taking on a writing project. Of course, this is necessarily an incomplete and idiosyncratic list. Over time, you would do well to add to or customize it with your own items. My list also is not meant to be digested in one sitting; it is too much to take in all at once. That's why I have grouped the questions by discrete writing tasks—so they could be digested in smaller bites.

Ultimately, however, even strict attendance to every item in this checklist won't make you a good writer. You should be aware of good writing rules but effective writing is about so much more than knowing—and sometimes knowingly breaking—those rules. Perhaps more than anything, it's about hard work. As Louis Brandeis once put it, "There's no such thing as good writing—there's only good rewriting." So use this checklist as one step, but only one step, along your way.

Some Things to Think About Before Writing

1. Get a good handle on the writing project you are about to start by talking with everyone who can help, and by carefully considering the written materials you have.

2. Figure out what research needs to be done, and where you need to look. (And a related consideration: how much research should you do before you begin writing?)

3. Think about the most effective way to organize your research.

Note: The traditional writing process steps are pre-writing, writing and revising, but it does not always make sense to follow the traditional approach. Early drafting of an outline or of some part of the narrative argument may make more sense than waiting until after all your research has been done before starting to write.

The First Sentence

1. Does it succinctly convey the argument that follows? If not, did you purposefully draft it to serve a different purpose?

2. Is every word necessary?

3. Are there any words that might inadvertently distract the reader, trigger needless skepticism or otherwise undermine your ultimate persuasive goal?

4. Is the entire sentence of readable length?

5. If it is possible to use appropriate, memorable language, have you?

The Rest of the Introduction

1. What else do you need to say to succinctly convey the argument that will follow?

2. For any document, like a motion or brief, in which you will ultimately ask something of the reader, have you summarized what it is that you want?

Factual Background section

1. Do you need one? If you do, are you including only necessary facts? Ask yourself: What would happen if I left those particular facts out?

2. A related thought experiment: Is it realistic to think that the facts you are including will have the effect on the reader that you intend?

3. Did you include in this section only facts and not argument?

Analysis section

1. Did you justify your starting point and each subsequent step taken, in the order you took them?

2. Does each portion of the argument adequately defend that the law you cite is controlling?

3. Relatedly, did you make sure not to cite more than was necessary?

4. Does each part succinctly analyze the law you have shown to be controlling, without citing/quoting unnecessarily?

5. Did you do more than just rely on direct authorities? Logic and reasoning by analogy are not used enough in lawyer's arguments.

6. Do your facts tell a story?

7. Does each part persuasively respond to any anticipated counter-arguments?

8. Is a conclusion in this section necessary or would it be redundant? Keep in mind that argument summations are often unnecessary. If you are worried that your prior analysis did not already persuade the reader, instead of adding a summation, go back and make your analysis stronger.

9. Have you used appropriate headers throughout the argument to give a roadmap of what you are arguing and where you are going?

10. Make sure any citations or other references you make are understandable. Bare citations are badly overused; quoting the critical language is usually helpful to the reader.

Writing Style Overall

1. Is the entire document no longer than necessary to be persuasive?

2. Is each sentence as brief as possible?

3. Did you avoid empty words? Look not just for the easy ones to spot ("clearly" "flatly" "plainly") but also ask if your chosen words are likely to have the persuasive effect you intend.

4. Did you avoid the bad lawyer habit of adding emphasis through underscoring, bold or italics? Only do so if it aids readability (hint: it rarely does).

5. Did you use the most accessible language and vivd imagery you could? With legal writing, it is especially hard to avoid excessively abstract language and jargon.

6. Did you minimize use of acronyms?

8. Did you limit the use of footnotes to those instances when it was necessary to improve readability? And a good reminder is that substantive arguments made in footnotes are unlikely to persuade. If the point is important enough to make, make it above the line.

9. Did you avoid using block quotes or, in the rare instances when you decided you had to indent quoted language, did you first give the reader a heads up about what to be on the lookout for in the block quote?

10. Is there any way to avoid sharp characterization of the other side or its argument?

11. Have you made certain that typos, misspellings or other careless mistakes are not undermining all of the work you have put into this project?

12. Assuming you are not bound by a different rule, did you use a readable font designed for books, with a serif face type?

13. Finally, keep in mind that it can be helpful to ask someone else who is entirely unfamiliar with the subject to read what you have written before you finalize it. Having a professional colleague do so is very valuable. Of equal or greater value is also asking someone who is not a lawyer to read your work.

Conclusion

Before you begin drafting the conclusion, assume that the reader already has been persuaded by the prior discussion. What is the minimum you should do at this point to conclude?

Now assume that the reader has not yet been persuaded. What is the first thing you should do? If you don't go back and make the analysis more persuasive, is there much chance that even a masterful summary of what you have already said will change the reader's mind?

Self-Evaluation Questions for Students in Written Advocacy

Professor Lonny Hoffman

Questions to answer after you finish a draft but before we have talked about it

1. What are its strengths?
2. What are its weaknesses?
3. Did you build in enough time for this project, including all necessary time for re-writing to take into account the feedback others gave you before it was due? If not, how could you better allocate your time in the future?
4. The next time you have a similar project, what will you do differently?
5. What other pre-writing or writing challenges would you like to talk about based on having done this exercise?

Questions to answer after you finish your draft and after we have talked about it

1. Do you understand all the feedback you have received?
2. Do you have a general idea how you will go about using the feedback (either to improve this paper or on your next project)?
3. How was our discussion helpful? How could it have been made more helpful?

Peer Evaluation

I use peer evaluation to help you become a better critic of other people's work. Improving how you give constructive feedback can also help you become more self-aware about your own writing.

Your classmates will receive your evaluation of their work. The Golden Rule certainly bears recollecting as you give feedback, as does the reminder that what matters is the quality, not quantity, of your comments. A single good suggestion is worth more than a page of redlined edits.

Written Advocacy Spring 2017
Children's Rights Case
Assignment: Rewrite Introduction to Plaintiffs' Reply Brief

The questionable arguments that Defendants Governor Rick Perry, Texas Department of Protective Services and Commissioner John Specia (hereinafter referred to as "Defendants") elaborately set forth in their motion opposing class certification rely on gross mischaracterizations of Plaintiffs' claims and misstatements of the law. The governing authorities that must guide this Honorable Court's decision, *M.D. ex re Stukenberg v. Perry*,[1] *Wal-Mart Stores, Inc. v. Dukes*,[2] and *Comcast Corp. v. Behrens*,[3] all make crystal clear, beyond any shadow of a doubt, that the Plaintiffs' minimal burden at the certification stage is to show this Honorable Court that FRCP 23 has been satisfied and their burden is obviously ***not*** to prove the merits of their claims. Plaintiffs readily meet their burden, which is why the Defendants' above-mentioned arguments should be summarily disregarded. Their complaint targets specific "policies and practices" that the courts have previously identified as amenable to being adjudicated on a classwide basis. Defendants' argument must be rejected and a class certified in this case.

[1] 675 F.3d 832 (5th Cir. 2012).
[2] 131 S. Ct 2541 (2011)
[3] 133 S. Ct 1426 (2013).

REASONS FOR DENYING THE PETITION

The Claim In The Petition Could Have Been But Was Not Timely Raised In Federal Court

The Mandamus Standard

This Court has described the standard for issuing a writ of mandamus in the following way:

> The common-law writ of mandamus against a lower court is codified at 28 U.S.C. § 1651(a): "The Supreme Court and all courts established by Act of Congress may issue all writs necessary or appropriate in aid of their respective jurisdictions and agreeable to the usages and principles of law." This is a "drastic and extraordinary" remedy "reserved for really extraordinary causes." *Ex parte Fahey*, 332 U.S. 258, 259-260, 67 S.Ct. 1558, 91 L.Ed. 2041 (1947). **"The traditional use of the writ in aid of appellate jurisdiction both at common law and in the federal courts has been to confine [the court against which mandamus is sought] to a lawful exercise of its prescribed jurisdiction."** *Roche v.*

Evaporated Milk Assn., 319 U.S. 21, 26, 63 S.Ct. 938, 87 L.Ed. 1185 (1943). Although courts have not "confined themselves to an arbitrary and technical definition of 'jurisdiction,'" *Will v. United States*, 389 U.S. 90, 95, 88 S.Ct. 269, 19 L.Ed.2d 305 (1967), **"only exceptional circumstances amounting to a judicial 'usurpation of power,'"** ***ibid.*****, or a "clear abuse of discretion,"** *Bankers Life & Casualty Co. v. Holland*, 346 U.S. 379, 383, 74 S.Ct. 145, 98 L.Ed. 106 (1953), **"will justify the invocation of this extraordinary remedy,"** *Will*, 389 U.S., at 95, 88 S.Ct. 269.

As the writ is one of "the most potent weapons in the judicial arsenal," *id.*, at 107, 88 S.Ct. 269, three conditions must be satisfied before it may issue. *Kerr v. United States Dist. Court for Northern Dist. of Cal.*, 426 U.S. 394, 403, 96 S.Ct. 2119, 48 L.Ed.2d 725 (1976). First, "the party seeking issuance of the writ [must] have no other adequate means to attain the relief he desires," *ibid.* -- **a condition designed to ensure that the writ will not be used as a substitute for the regular appeals process**, *Fahey, supra*, at 260, 67 S.Ct. 1558. Second, the petitioner must satisfy "'the burden of showing that [his] right to

> issuance of the writ is "clear and indisputable."'" *Kerr, supra*, at 403, 96 S.Ct. 2119 (*quoting Bankers Life & Casualty Co., supra,* at 384, 74 S.Ct. 145). Third, even if the first two prerequisites have been met, the issuing court, in the exercise of its discretion, must be satisfied that the writ is appropriate under the circumstances. *Kerr, supra*, at 403, 96 S.Ct. 2119 (*citing Schlagenhauf v. Holder*, 379 U.S. 104, 112, n. 8, 85 S.Ct. 234, 13 L.Ed.2d 152 (1964)). These hurdles, however demanding, are not insuperable. This Court has issued the writ to restrain a lower court when its actions would threaten the separation of powers by "embarrass[ing] the executive arm of the Government," *Ex parte Peru*, 318 U.S. 578, 588, 63 S.Ct. 793, 87 L.Ed. 1014 (1943), or result in the "intrusion by the federal judiciary on a delicate area of federal-state relations," *Will, supra*, at 95, 88 S.Ct. 269, (*citing Maryland v. Soper* (No. 1), 270 U.S. 9, 46 S.Ct. 185, 70 L.Ed. 449 (1926)).

Cheney v. U.S. Dist. Court for Dist. of Columbia, 542 U.S. 367, 380-381 (2004) (emphasis added). The *Fahey* Court described the issue as follows:

> Mandamus, prohibition and injunction against judges are drastic and extraordinary remedies. We do not doubt power in a proper case to issue such writs. But they have the unfortunate consequence of making the judge a litigant, obliged to obtain personal counsel or to leave his defense to one of the litigants before him. These remedies should be resorted to only where appeal is a clearly inadequate remedy. We are unwilling to utilize them as a substitute for appeal. As extraordinary remedies, they are reserved for really extraordinary causes.

Ex parte Fahey, 332 U.S. 258, 259-260 (1947). This case is far from extraordinary, and has none of the characteristics that would support issuing a writ of mandamus directed to the Court of Appeals. The only conceivable legal theory Herring can use is that the denial of his motion for leave to file a successive habeas petition is a "clear abuse of discretion" -- that is a showing that he cannot make.[5]

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[5] To find an "abuse of discretion," this Court would have to find that the Eleventh Circuit abused its discretion in refusing to hear a claim that (1) could have been but was not raised in Herring's initial habeas petition, and (2) had been denied on the merits by the State courts. Either fact standing alone is sufficient to justify refusing to allow a

In the
United States Court of Appeals
For the Seventh Circuit

Nos. 11-1382, 11-1492

ATA AIRLINES, INC.,

Plaintiff-Appellee, Cross-Appellant,

v.

FEDERAL EXPRESS CORPORATION,

Defendant-Appellant, Cross-Appellee.

Appeals from the United States District Court
for the Southern District of Indiana, Indianapolis Division.
No. 1:08-cv-00785-RLY-DML—Richard L. Young, *Chief Judge.*

ARGUED NOVEMBER 2, 2011—DECIDED DECEMBER 27, 2011

Before EASTERBROOK, *Chief Judge*, and POSNER and WOOD, *Circuit Judges.*

POSNER, *Circuit Judge.* ATA filed this diversity suit for breach of contract against Federal Express (which the parties call "FedEx," as shall we, even though it's actually a subsidiary of FedEx Corporation), and obtained a jury verdict in the exact amount it had asked for: $65,998,411. FedEx has appealed. ATA has filed a cross-appeal that is conditional on our reversing the judgment; the cross-appeal challenges the district court's refusal to let ATA

present evidence that it incurred $27,842,748 in unrecoverable costs in reliance on a promise by FedEx in the alleged contract, and that it is entitled to recover these costs as reliance damages, either as an alternative to the expectation damages awarded by the jury or pursuant to the doctrine of promissory estoppel. The parties agree that the substantive issues are governed by the law of Tennessee, FedEx's principal place of business, except that FedEx defends the district court's ruling that ATA's promissory estoppel claim is preempted by the federal Airline Deregulation Act. See *American Airlines, Inc. v. Wolens*, 513 U.S. 219 (1995); *Morales v. Trans World Airlines, Inc.*, 504 U.S. 374 (1992).

We begin there, and can be brief: the ruling was incorrect. Although the Act forbids a state to "enact or enforce a law, regulation, or other provision having the force and effect of law related to a price, route, or service of an air carrier," 49 U.S.C. § 41713(b)(1), it does not "afford[] relief to a party who claims and proves that an airline dishonored a term the airline itself stipulated. This distinction between what the State dictates and what the airline itself undertakes confines courts, in breach-of-contract actions, to the parties' bargain, with no enlargement or enhancement based on state laws or policies external to the agreement." *American Airlines, Inc. v. Wolens*, *supra*, 513 U.S. at 232-33.

Promissory estoppel, as the word "promissory" implies, furnishes a ground for enforcing a promise made by a private party, rather than for implementing a state's regulatory policies. A garden-variety claim of promissory estoppel—one that differs from a conventional breach of

contract claim only in basing the enforceability of the defendant's promise on reliance rather than on consideration, *In re Fort Wayne Telsat, Inc.*, No. 11-2112, 2011 WL 5924446, at *2 (7th Cir. Nov. 23, 2011); *Garwood Packaging, Inc. v. Allen & Co.*, 378 F.3d 698, 701-02 (7th Cir. 2004)—is therefore not preempted. "We do not read the [Act's] preemption clause . . . to shelter airlines from suits alleging no violation of state-imposed obligations, but seeking recovery solely for the airline's alleged breach of its own, self-imposed undertakings . . . . A remedy confined to a contract's terms" is not preempted. *American Airlines, Inc. v. Wolens*, *supra*, 513 U.S. at 228-29. Not so tort claims that override contract claims, see *United Airlines, Inc. v. Mesa Airlines, Inc.*, 219 F.3d 605 (7th Cir. 2000), rather than just seeking a remedy "confined to a contract's terms." But ATA is not alleging a tort; it is trying to hold FedEx to a promise that it contends FedEx made to it. We'll see later that ATA's promissory claim fails, but not because of preemption.

We turn to the conventional contract issues, on which ATA prevailed in the district court.

In the event of a national emergency, the Department of Defense can use commercial aircraft drawn from what's called the "Civil Reserve Air Fleet" to augment the Department's own airlift capabilities. See Air Mobility Command, "Factsheets: Civil Reserve Air Fleet," www.amc.af.mil/library.factsheets.factsheet.asp?id=234 (visited Dec. 21, 2011). Composed of aircraft owned by commercial air carriers but committed voluntarily to the Department for use during emergencies, the Fleet is divided into separate "teams" of airlines, each with a "team leader."

The teams pledge portions of their fleets for use by the Department during an emergency; the leader assembles the team and submits the team's bid to participate in the Civil Reserve Air Fleet.

The team members are not compensated directly for their commitment, but are compensated indirectly because in exchange for a team member's commitment the Department awards the member "mobilization value points" in proportion to the scale of the commitment. The more points a member has, the more non-emergency air transportation for the Department the member can bid on. The points are transferrable within teams. Smaller carriers value providing non-emergency service to the Department (for which of course they are compensated) more than the bigger ones (such as FedEx) do. So they want the larger carriers' points and are willing to pay for them, and as a result end up doing most of the non-emergency flying. The team leader—invariably a large carrier that therefore has a large number of mobilization value points because of its commitment to provide copious emergency service if needed—transfers points to the members of its team in exchange for a commission on their non-emergency military flights. The commission rate is the price term in the contractual arrangements between the team leader and each of the team's smaller carriers. (This case concerns the contractual relations among the members of one team rather than the contracts between the teams and the Department.)

FedEx is the leader of one of the teams, which before the alleged breach of contract included ATA and Omni Air International—small passenger and charter airlines that

split between them the team's allotment of non-emergency military passenger service (as distinct from cargo service). The FedEx team's annual revenues from the provision of non-emergency services to the Department amount to about $600 million.

Relations among members of FedEx's team are defined in three separate contracts, each with a one-year term. One contract fixes both the allocation of military business among the team members and the commission rate for the team leader. This contract is negotiated separately between the leader and each team member (so actually it's more than one contract, but we can ignore that detail). A second contract identifies the team members and the aircraft they will commit to the military if the team's bid is accepted. A third defines the liability and insurance obligations of the team members. There are additional provisions in these contracts, but we can disregard them. We'll call the three contracts as a group the "tripartite contract."

The tripartite contract has as we said only a one-year term. (The year is the federal fiscal year, which runs from October 1 of the previous calendar year to September 30, so that the 2002 fiscal year, for example, began in October 2001. All our year references are to fiscal years.) But it was the team's practice to enter into a separate three-year agreement concerning the distribution of business among the team's members. Implementation of the agreement depended on the Defense Department's accepting the team's bid; otherwise there would be no business to divide among the team's members. And

if the Department decided it wanted more or less service from the team than had been bid, this might affect the division of business, since a particular team member might have insufficient capacity to provide its allotted share of service if the service requirement increased, or alternatively might be badly hurt by a reduction in that requirement if its share were unchanged—there might for example be limited demand for or profit in a participant's nonmilitary business. The agreement also assumed that the parties would all end up on the FedEx team, though there was no contractual stipulation to that effect.

With so many contingencies, especially ones dependent on decisions entirely within the power and rights of each party, the agreement was a planning document rather than an enforceable contract. We have pointed out that "if any sign of agreement on any issue exposed the parties to a risk that a judge would deem the first-resolved items to be stand-alone contracts, the process of negotiation would be more cumbersome (the parties would have to hedge every sentence with cautionary legalese), and these extra negotiating expenses would raise the effective price." *PFT Roberson, Inc. v. Volvo Trucks North America, Inc.*, 420 F.3d 728, 731 (7th Cir. 2005). Contract law "permits parties to conserve these costs by reaching agreement in stages without taking the risk that courts will enforce a partial bargain that one side or the other would have rejected as incomplete." *Id.*; see *EnGenius Entertainment, Inc. v. Herenton*, 971 S.W.2d 12, 17-18 (Tenn. App. 1997); *Restatement (Second) of Contracts* § 27, comments b, c (1981).

ATA's suit is based on one of these three-year "contracts," signed in 2006, in which ATA and (maybe) Omni agreed with FedEx that during the following three years (2007 through 2009) the team's passenger business would be divided equally between those two carriers. The "contract" is in the form of a letter from FedEx to them that reads as follows:

> The letter will serve as the agreement for the distribution between ATA and Omni of both fixed and expansion for both wide and narrow body passenger business in the AMC Long Range International Contract for FY07-FY09.
>
> It is agreed that the distribution for the above passenger segments will be fifty-fifty (50%-50%) respectively for both wide and narrow body and for both fixed and expansion.
>
> Please indicate your concurrence by signing as indicated below and returning to the undersigned.
>
> We look forward to a continued successful relationship over this period.

There is a space below the writer's signature for signatures by representatives of ATA and Omni. Although only ATA's representative signed, the evidence indicates that Omni concurred, and if so the omission of a signature by a representative of Omni is immaterial.

The tripartite contracts for 2007 and 2008 incorporated the 50/50 division—but with a change in the 2008 contract: ATA's allotment was reduced by 10 flights per month to enable them to be allotted instead to Northwest Air-

lines, a much bigger carrier, which wanted to start flying for the Civil Reserve Air Fleet. Northwest was already a participant in the FedEx team, but like FedEx (though without FedEx's responsibilities as team leader) had heretofore been a guarantor of emergency service to the military and thus a seller of points to the smaller airlines; 2008 would be the first time it would be a flying member of the team.

The change turned out to be pregnant with menace for ATA. For later that year FedEx decided to drop ATA from the team and, beginning in 2009, give the mobilization value points that would have gone to ATA to Delta, which had acquired Northwest shortly after the signing of the 2008 tripartite contract. FedEx's decision to replace ATA in 2009 caused ATA to withdraw from the team prematurely, in the middle of 2008 (we're not sure why). The withdrawal precipitated it into bankruptcy because it had very little nonmilitary business to fall back on.

ATA's breach of contract claim should never have been permitted to go to trial. Courts interpret and enforce contracts; they don't make contracts. A contract is unenforceable if it is "indefinite" in the sense of missing vital terms, such as price, that can't be readily supplied by a court, for example by reference to a price formula agreed on by the parties. *Doe v. HCA Health Services of Tennessee, Inc.*, 46 S.W.3d 191, 196-97 (Tenn. 2001); *Four Eights, LLC v. Salem*, 194 S.W.3d 484, 486-87 (Tenn. App. 2005); *Restatement (Second) of Contracts* § 33 (1981); 1 E. Allan Farnsworth, *Farnsworth on Contracts* § 3.27, pp. 417-20 (3d ed. 2004). If the price or other vital missing term can't

be reconstructed in that way, the "contract" shouldn't be called a contract at all, but an attempted contract; its indefiniteness renders it unenforceable.

We've already seen that a great deal was missing from the so-called contract to allocate the FedEx team's passenger business for 2007-2009 between ATA and Omni. True, "the fact that a contract is incomplete, presents interpretive questions, bristles with unresolved contingencies, and in short has as many holes as a Swiss cheese does not make it unenforceable for indefiniteness. Otherwise there would be few enforceable contracts. Complete contingent contracts are impossible. The future, over which contractual performance evolves, is too uncertain." *Haslund v. Simon Property Group, Inc.*, 378 F.3d 653, 655 (7th Cir. 2004). But "a contract is rightly deemed unenforceable for indefiniteness when it leaves out (1) a crucial term that (2) a court cannot reasonably be asked to supply in the name of interpretation." *Id.*

The proper division of responsibility between the contracting parties, on the one hand, and a court asked to enforce a purported contract, on the other, requires the parties to decide on the key terms of the contract (or at least on a methodology that generates the key terms more or less mechanically), such as price, and leaves the court to resolve only issues that, being unlikely to arise, the parties should not be required to have foreseen and provided for. To require parties to negotiate every contingency that might arise during performance would be impossible, because as we said not *every* contingency can feasibly be foreseen and provided for—the future is

too uncertain. Contract law supplies a set of standard terms that the parties can change if they wish but that if they don't change supply a substitute for negotiation. But there is no standard price term, and no agreed-upon formula for calculating the price, for the service provided by the leader of a team of the Civil Reserve Air Fleet.

The doctrine of indefiniteness that makes a contract unenforceable when it omits a crucial term that cannot be supplied by interpretation has particular force when the contract is one between sophisticated commercial entities and involves a great deal of money. *PFT Roberson, Inc. v. Volvo Trucks North America, Inc.*, *supra*, 420 F.3d at 730; *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810, 815 (7th Cir. 1987); Farnsworth, *supra*, § 3.8, pp. 224-26. That describes the letter agreement; ATA's share of the revenues that the tripartite contract generated each year was, at its peak, $406 million, and in 2007 its profits from the contract exceeded $90 million. Even if we assumed—unrealistically—that all the other holes that we mentioned in the team structure for 2007-2009 could be filled by a court from industry standards, course of dealing, trade usage, or some other objective source of guidance that enables judicial completion of an incomplete contract, the price term—FedEx's compensation for providing team leadership and transferring mobilization value points to team members—could not be supplied from any such source. That compensation was the result of ad hoc negotiations and thus was determined by the parties' circumstances each year at the time of contracting. It had usually been 7 percent but one year had plunged to 4.5 percent.

unless the court orders a response.

(f) Call for a Vote. A vote need not be taken to determine whether the case will be heard or reheard en banc unless a judge calls for a vote.

CIRCUIT RULE 35. Petitions for Rehearing En Banc

Every petition for rehearing en banc, and every brief of an amicus curiae supporting or opposing a petition for rehearing en banc, must include a statement providing the information required by Fed. R. App. P. 26.1 and Circuit Rule 26.1 as of the date the petition is filed.

FEDERAL RULE OF APPELLATE PROCEDURE 40:

RULE 40. Petition for Panel Rehearing

(a) Time to File; Contents; Answer; Action by the Court if Granted.

(1) *Time.* Unless the time is shortened or extended by order or local rule, a petition for panel rehearing may be filed within 14 days after entry of judgment. But in a civil case, unless an order shortens or extends the time, the petition may be filed by any party within 45 days after entry of judgment if one of the parties is:

(A) The United States;

(B) a United States agency;

(C) a United States officer or employee sued in an official capacity; or

(D) a current or former United States officer or employee sued in an individual capacity for an act or omission occurring in connection with duties performed on the United States' behalf- including all instances in which the United States represents that person when the court of appeals' judgment is entered or files the petition for that person.

(2) *Contents.* The petition must state with particularity each point of law or fact that the petitioner believes the court has overlooked or misapprehended and must argue in support of the petition. Oral argument is not permitted.

(3) *Answer.* Unless the court requests, no answer to a petition for panel rehearing is permitted. But ordinarily rehearing will not be granted in the absence of such a request.

(4) *Action by the Court.* If a petition for panel rehearing is granted, the court

may do any of the following:

(A) make a final disposition of the case without reargument;

(B) restore the case to the calendar for reargument or resubmission; or

(C) issue any other appropriate order.

(b)**Form of Petition; Length.** The petition must comply in form with Rule 32. Copies must be served and filed as Rule 31 prescribes. Unless the court permits or a local rule provides otherwise, a petition for panel rehearing must not exceed 15 pages.

CIRCUIT RULE 40. Petitions for Rehearing

(a) *Table of Contents.* The petition for rehearing shall include a table of contents with page references and a table of cases (alphabetically arranged), statutes and other authorities cited, with reference to the pages of the brief where they are cited.

(b) *Number of Copies.* Fifteen copies of a petition for rehearing shall be filed, except that 30 shall be filed if the petitioner suggests rehearing en bane.

(c) *Time for Filing After Decision in Agency Case.* The date on which this court enters a final order or files a dispositive opinion is the date of the "entry of judgment" for the purpose of commencing the period for filing a petition for rehearing in accordance with Fed. R. App. P. 40, notwithstanding the fact that a formal detailed judgment is entered at a later date.

(d) *Time for Filing after Decision from the Bench.* The time limit for filing a petition for rehearing shall run from the date of this court's written order following a decision from the bench.

(e) *Rehearing Sua Sponte before Decision.* A proposed opinion approved by a panel of this court adopting a position which would overrule a prior decision of this court or create a conflict between or among circuits shall not be published unless it is first calculated among the active members of this court and a majority of them do not vote to rehear en banc the issue of whether the position should be adopted. In the discretion of the panel, a proposed opinion which would establish a new rule or procedure may be similarly circulated before it is issued. When the position is adopted by the panel after compliance with this procedure, the opinion, when published, shall contain a footnote worded, depending on the circumstances, in sub-stance as follows:

This opinion has been circulated among all judges of this court in regular active service. (No judge favored, or, A majority did not favor) a rehearing en banc on the question of (e.g., overruling Doe v. Roe.)

XXVII. PETITION FOR REHEARING

A party may file a petition for rehearing within 14 days after entry of the judgment. In all civil cases in which the United States or an officer or agency thereof is a party, the time within which any party may seek rehearing shall be 45 days after entry of judgment unless the time is shortened or enlarged by order. Fed. R. App. P. 40(a). The petition must be physically filed with the clerk by the due date. The "mail box rule," which deems briefs filed upon mailing, Fed. R. App. P. 25(a), does not apply to petitions for rehearing and answers to petitions for rehearing. In appeals decided from the bench, the 14-day time limit runs from the entry of the court's written order. Cir. R. 40(d). (This written order in such cases is usually entered within a week of the oral argument and is mailed to all parties to the appeal.) Note that in the case of a decision enforcing an administrative agency order, "the date on which the court enters an order or files an opinion holding that an agency order should be wholly or partially enforced, is the date of the entry of judgment for the purpose of starting the running of the 45 days for filing a petition for rehearing in accordance with Rule 40(a), Fed. R. App. P., notwithstanding the fact that a formal detailed judgment is entered at a later date." Cir. R. 40(c).

A motion to extend the time for filing a petition for rehearing may be made only during the 14-day period. Because of the interest in expediting the ultimate resolution of appeals, such motions are not viewed with favor.

Petitions for rehearing are filed in many cases, usually without good reason or much chance of success. Few are granted. The filing of such a petition is not a pre-requisite to the filing of a petition for writ of certiorari in the Supreme Court of the United States. However, the time for such filing in the Supreme Court is tolled by the timely filing of a petition for rehearing in the court of appeals. Time for filing a petition for writ of certiorari does not begin to run until the court of appeals has disposed of the petition for rehearing. S. Ct. Rule 13.3.

Only 15 copies of a petition for rehearing must be filed, except that 30 copies must be filed if the petitioner suggests a rehearing en banc. Cir. R. 40(b). The petition may be no longer than 15 pages. Fed. R. App. P. 40(b). The cover to the petition should be white. Fed. R. App. P. 32(c)(2)(A). No answer may be filed to a petition for rehearing unless the court calls for one, in which event the clerk will so notify counsel. Fed. R. App. P. 40(a). A 10 day time limit for the answer is usually set. In the absence of such a request, a petition for rehearing will "ordinarily not be granted." Fed. R. App. P. 40(a)(3).

Upon filing, the petition is circulated to the same panel of judges that decided the appeal originally. These judges vote on the petition; a majority rules. There is no oral argument in connection with a petition for rehearing.

In the relatively rare instance in which a petition for rehearing is granted, the procedure is discretionary with the court and parties will be directed by court order how to proceed.

Written Advocacy
Assignment: *ATA v. FedEx*
*Contract Enforceability/*Erie *Problem*

In declaring the contract between ATA and FedEx unenforceable, the panel opinion cites three Seventh Circuit cases as controlling authority. Op. 9-10 (citing *Haslund v. Simon Property Group, Inc.*, 378 F.3d 653 (7th Cir. 2004); *PFT Roberson, Inc. v. Volvo Trucks North America, Inc.*, 420 F.3d 728 (7th Cir. 2005); and *Skycom Corp. v. Telstar Corp.*, 813 F.2d 810 (7th Cir. 1987)). None of these cases applied Tennessee law. *Haslund* (Illinois law); *PFT Roberson* (Illinois law); *Skycom* (Wisconsin law). The argument we will make is that the panel erred by applying either the wrong law, or some sort of impermissible general federal common law of contracts inconsistent with *Erie R. Co. v. Tompkins*, 304 U.S. 64 (1938). Tennessee law governs in this case and under Tennessee law the contract was enforceable. [For purposes of this short assignment, it is not necessary to cite to specific Tennessee law to make this point.]

Begin by re-reading the relevant portion of the panel's opinion (pp.1-10 of the opinion). You may also want to look up and skim through the three cited cases, but that is certainly not necessary. You should read the relevant parts of the Federal Rules of Appellate Procedure and Seventh Circuit Rules (they are in your course materials) that apply to requests for panel rehearing.

Draft the argument for panel reconsideration. As always, write no more than you need to be persuasive; in any event, do not exceed two or three pages (double-spaced).

McElhaney on Litigation

The Plain Truth: Go for Simple Words if You Want to Communicate Effectively

Posted Sep 1, 2012 1:40 AM CST
By Jim McElhaney

Photo of Jim McElhaney by Rick Allred.

Editor's Note: Jim McElhaney's 25-year run as Litigation columnist for the ABA Journal comes to a close with this issue. During those years, McElhaney's straightforward advice on trial practice became one of the most popular features in the magazine. To recognize McElhaney's contributions, the Journal has been reprinting some of his "greatest hits" from the past quarter-century. This article, which originally appeared in the Journal's December 2001 issue under the headline "Empty Words," sums up one of his most enduring themes: the importance of simplicity.

I stopped in at the Donut Hole on Monday morning for a cup of Dark Mountain Roast, and Nick Wheeler was there talking to Angus about a training program for the new lawyers at Randolph and Wheeler. "How," said Nick, "could anyone write something like this:

" 'Manifestly, the failure of the respondent timely to reply to petitioner's written demand for compliance with the terms of the aforesaid agreement requiring delivery of the Interface Prototype before Aug. 1 was ample justification for the application of the doctrine of anticipatory breach which operated to free the petitioner to seek and obtain a source for substitute performance.' "

"Who's the petitioner?" said Angus.

"Arrowhead Electronics," said Nick.

"And the respondent?" said Angus.

"Metropolitan Circuitry," said Nick.

"But what does it mean?" I said.

"I don't know," said Nick.

"What I think it means," said Angus, "is that when Metropolitan Circuitry ignored Arrowhead's letter, Arrowhead decided it needed to hire someone else to make its Interface Prototype—whatever that is."

"Who wrote this mystery sentence, anyway?" I said.

"That's what hurts," said Nick. "It's an inside job. One of our associates did a draft of a brief for a partner who went berserk when she read it. And she's right. It's bad enough that it's incomprehensible, but it was actually supposed to be persuasive.

"So I want to ask you, Angus, would you be willing to give our new associates a course in effective legal writing? Teach them how to avoid this kind of polysyllabic obfuscation?"

Angus thought for a second, and then said, "OK, but on condition that ..."

"Anything!" said Nick. "Whatever you want."

"That it won't be just a writing course," said Angus. "That it will be a writing and speaking course. After all, lawyers are supposed to be wordsmiths. Whether or not we ever go to court or even write a brief, all of us are professional writers and speakers. It's what we do for a living."

"But aren't you biting off too much?" said Nick. "Seems to me that the skills involved in good writing and good speaking are so different that you'll wind up taking far more time than it would take to teach two separate courses. Like they say, write to the eye and speak to the ear."

"Not me," said Angus. "I write to the ear and speak to the eye. When people read what I write, I want them to hear me talking; and when I talk, I want them to hear what I'm saying. I think good writing and good speaking are deeply intertwined."

HARVARD AND HOGWARTS

A few days later, Angus started his first session at Randolph and Wheeler with a talk before breaking up the class into small workshops. Here are my notes on what he said.

Today, most lawyers in the United States share the common burden of having gone to law school. This is a difficult rite of passage—not because the legal concepts are so hard but because law school requires conforming to a strange new culture and learning a remarkably different way of thinking and speaking.

Law school is as much obscure vocabulary training as it is legal reasoning. At its best, it can teach close thought and precise expression. But too often law school is reverse Hogwarts—where Harry Potter trained to be wizard—that secretly implants into its students the power to confuse other people instead of sowing the magic seeds of clarity and simplicity.

How does that happen?

Actually, it's unintentional.

The unspoken but central message of law school is: If you want to be a lawyer, learn to write like the judges who wrote the opinions in your casebooks. And even worse, learn to talk like a law professor.

As students anxious to try on our robes and pointed hats and wave our wands, within days we start mimicking the mediocrity of our mentors. "Hey, I got a date Saturday night," says one new student. "Oh, yeah?" says the other. "Are you the datee or the dator?"

And our minds become obsessed with words and phrases like *egregious, contumacious, manifestly, clear beyond peradventure, vel non, with respect to, failure of consideration, subsequent remedial measures, voir dire, cause of action* and *meretricious.*

So we lard our speech and writing with words and phrases of awkward obscurity that rarely have anything to do with legal precision but that unmistakably say, "This was written—or said—by a lawyer."

The difficulty with legalisms is not just that they're strange and hard to follow. It's not just that they're often put together backward: "What next, if anything, did you do with respect to the operation and control of the motor vehicle in question?"

The problem is that they are hollow, empty words that—even put together properly—don't tell us a story. To prove that point, Angus read the one-sentence paragraph that Nick had used to lure him into teaching the course. Go back and read it again yourself, and puzzle over what the story is until you read Angus' translation.

JUST TELL THE STORY

Because we are professional communicators, it is our obligation to be plain and simple. It's not our readers' and listeners' jobs to try to understand us. It's our job to make certain that everything we write and say commands instant comprehension.

And because we weren't turned out that way by our law school training, we have to reprogram ourselves if we want to become effective communicators.

You might think that the right way to clear the clutter out of your personal verbal warehouse would be to make a list of the words that you swear you will never use again.

But the difficulty is that every word in your vocabulary has its own set of habits that bring it out when your subconscious thinks it might fit the situation. You can't just roam through your mind, pushing the delete button every time you find oddities such as "indicate for the benefit of the jury" and "failed to elicit a satisfactory response." It won't work.

When you test your case against the rules that might apply to it, you pour the facts into the legal box to see how they fit. Of course, the tops and bottoms and slats and sides and the corner reinforcements of every box are made out of legal jargon. Squeeze your case into the legal box, and it will hand you the list of words it expects you to use.

But you don't need to do that, even when you're writing a brief. If you concentrate on the human story instead of the legal box, the story will pick the right words for you.

Why? Because it's easier to play a different game that's governed by different rules than it is to change all the rules in the game you're playing.

The first step in becoming a good writer and speaker is to concentrate on the story. Let the story—not the legal theory—pick the words.

That's when one of the young associates in the class asked whether Angus' story theory—as she described it—could possibly work in a legal argument like the Arrowhead case.

"I'm glad you asked," said Angus, "because it's a chance to compare the power of facts with the power of legal buzzwords. I'll just add a few details of the sort you would know if you were actually in the case.

"Arrowhead Electronics had come up with a brilliant new idea for linking computers together without anything except a simple cable. No modems, no fancy switches, no tangle of wires. Arrowhead had invented what eventually became the network interface card that lets computers talk directly to one another.

"But the problem was that Arrowhead couldn't make the first model of its own invention. The company had it all on paper, but their people couldn't prove it would work until they could actually test it.

"So for $369,000, they hired Metropolitan Circuitry to build the prototype—the first model of Arrowhead's new interface. And Metropolitan Circuitry promised to get the job done in less than six months—by Aug. 1. But despite an initial payment of $120,000 for three months, Metropolitan did nothing, made no progress.

"Arrowhead was worried. Other companies were rumored to be working on similar projects. Would someone else beat them in the race for a new kind of computer card?

"So Arrowhead's people called Metropolitan but never could talk to the folks in charge. They left phone messages, but Metropolitan didn't return their calls. They sent emails that Metropolitan ignored. Finally, Arrowhead sent a certified letter to Metropolitan saying it had to have the prototype by Aug. 1, or it would be too late.

"And Metropolitan didn't answer that letter, either.

"That's when Arrowhead knew it couldn't count on Metropolitan to do the work its people had already taken $120,000 for and hadn't even started."

Angus stopped and looked around the room. "In law school," he said, "I think that's what's called an anticipatory breach."

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Eschewing Comfort Words in Legal Writing

by Matthew Salzwedel on September 26, 2012 in Lawyering Skills

Sam Glover recently extolled Bill Clinton's oratory at the Democratic National Convention. But given the focus of this weekly column, I was more interested in the convention speakers' grammar and usage bungles.

Time, it's neither new nor notable for a politician to mangle the English language. For example, who can forget George W. Bush's malapropisms, or President Obama's teleprompter-induced mispronunciation of Navy corpsman?

But Vice President Biden's convention speech illustrated the problems comfort words pose to persuasive legal writing-*literally*.

Joe, I Literally Understand You

In his convention speech, Vice President Biden used *literally* 10 times to intensity metaphorical claims like: "We now find ourselves at the hinge [sic] of history, and the direction we turn is not figuratively, it's literally in your hands."

The Vice President's repeated misuse of *literally* set Twitter ablaze with snarky anti-*literally* comments. And the post-speech commentary was also devastating, though some commentators feigned a minimal defense of the Vice President.

The Vice President's speechwriters weren't to blame-the word *literally* literally didn't appear in his prepared remarks. In any event, *literally* is the Vice President's favorite intensifier, and is no recent verbal tic:

What's wrong with the word *literally?* Nothing-when it's used correctly. The problem with *literally* is when a speaker or writer substitutes it for figuratively, or uses it to overemphasize a contention.

As Patricia T. O'Conner-a former editor of the *New York Times Book Review-writes* in Woe is I: The Grammarphobe's Guide to Better English in Plain English, literate writers don't substitute *literally* for *figuratively,* or use it for overemphasis:

> If you want to be absolutely correct, use literally to mean "to the letter" or "word for word." ... People often use it loosely in place of *figuratively*, which means "metaphorically" or "imaginatively." No one says *figuratively*, of course, because it doesn't have enough oomph .... A lot of people do it, but beware that if you use *literally* in a less-than-literal way (*Grandma literally exploded*), you'll sound less than literate.

Other usage authorities concur with O'Conner's view, despite a modicum of dissent:

- Wilson Follett, Modem American Usage: "Writers are so often besought by rhetoricians not to say *literally* when what they mean is *figuratively* that one would expect them to desist in sheer weariness of listening to the injunction. The truth is writers do not listen; and *literally* continues to be seen as a mere intensive that means *practically, almost, all but.*"
- Eric Partridge, Usage & Abusage: "literally, when used, as it often is, as a mere intensive, is a slovenly colloquialism, its only correct use being to characterize *exactness to the letter.*"
- William Safire, On Language: "'Literal' means 'actual,' without exaggeration, no fooling with metaphors. But for more than a century, it has also been misused to mean just the opposite; now, 'literally' is reaching a critical mass, when it will become a Humpty Dumpty word, meaning whatever the speaker chooses it to mean."

Comfort Words Figuratively Kill Persuasive Legal Writing

In two post-convention posts called Actually, Literally, What Your Crutch Word Says About You and A Literal Epidemic of Crutch Words, Jen Doll of The Atlantic Wire corrected identified *literally* as a "crutch word":

> [T]hose expressions we pepper throughout our language ...to give us time to think, to accentuate our meaning (even when we do so mistakenly), or just because these are the words that have somehow lodged in our brains and come out on our tongues the most, for whatever reason. Quite often, they do little to add meaning, though. Sometimes we even use them incorrectly. Almost always, we don't need them at all, which doesn't mean we won't persist in using them

essentially, going forward, in the final analysis, obviously, really, seriously, ultimately, and *very.*

In legal writing, I call these "comfort words." They're words lawyers trot out so they can feel like they're writing persuasively, but that instead detract from their writing. Consider two of my favorite lawyer comfort words: the sentence adverbs *clearly* and *obviously.*

As Bryan Garner points out in Garner's Modern American Usage (3rd ed.) and The Redbook: A Manual on Legal Style, sentence adverbs like *clearly* and *obviously* are "weasel words" that degrade persuasive legal writing:

> Exaggerators like *[clearly]*, along with its cousins *(obviously, undeniably, undoubtedly,* and the like). Often a statement prefaced with one of these words is conclusory, and sometimes even exceedingly dubious. As a result-though some readers don't consciously realize it - *clearly* and its ilk are weasel words....
>
> [Weasel words] may reassure the writer but not the reader. If something is clearly or obviously true, then demonstrate that fact to the reader without resorting to conclusory use of these words.

As Garner notes, lawyers routinely use *clearly* to emphasize their factual and legal contentions. But when a lawyer feels the need to use *clearly* to emphasize a contention, the contention is usually *not* clear, and the added intensifier only alerts the reader to be wary about it.

The same is true for *obviously.* A lawyer might use *obviously* to emphasize a desired factual or legal conclusion, and to persuade the reader to agree with it. But if a lawyer claims that a conclusion is obvious, most readers will ask themselves, "If what he says is obvious, why are the parties disputing it?"

Strengthen Your Legal Writing by Cutting Comfort Words

I hesitated to make light of the Vice President's illiterate use of *literally.* But as President Obama likes to say, the Vice President's misuse of *literally* is teachable moment for lawyers who want to improve their legal writing.

Though it might feel good to use comfort words, try to eschew them. Comfort words like *literally, clearly,* and *obviously* alert your reader that what you're contending isn't literal, clear, or obvious, and they have the perverse effect of sowing doubt in your reader's mind about the merit of your arguments.

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SPEAKING OF ELEPHANTS, MODIFIERS WERE MISPLACED

Phillip M. Sparkes
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One morning I shot an elephant in my pajamas. How he got in my pajamas, I'll never know. – Capt. Geoffrey T. Spaulding (as played by Groucho Marx in *Animal Crackers*).

The meaning of an English sentence depends largely on the position of its parts. Readers thus expect the subject, verb, and object of a sentence to be closely linked and expect modifiers to be close to the words they modify.[1] Someone reading the quotation above naturally wants to associate "in my pajamas" with the nearest word rather n with the word it is supposed to odify. The sentence forces the reader to choose between its technical meaning nd its intended meaning. Groucho did his deliberately with entertaining effect, ut ordinarily modifiers should point learly to the words they modify.

Modifiers are words, phrases, or lauses that qualify, identify, or lescribe other words. Modifiers come n two varieties: adjectives, which modfy nouns, pronouns, and noun phrases; nd adverbs, which modify verbs, djectives, other adverbs, and even hole clauses. A misplaced modifier is modifier placed so awkwardly as to ause ambiguity (and an occasional huckle).

Chief Judge Claire Eagan chuckled loud in *Baum v. Faith Technologies, ic.* At the outset of her decision on laintiff's "Motion to Strike Certain efenses with Authority," she noted, The misplaced modifier renders the ecise nature of the relief requested lear, but humorous."[2] The greater ger is that a misplaced modifier will sult in a serious legal dispute. For ample, a misplaced modifier in an dispute between an insured and an insurer over a claim for costs of defending and settling a class action lawsuit in a Fair Labor Standards Act case.[3] In another instance, a misplaced modifier was partly responsible for a split decision about Kentucky's domestic violence exception and its application to a convicted murderer.[4]

Modifiers Misplaced

The root of the ambiguity created by a misplaced modifier lays partly in the ways languages combine elements such as words, phrases, clauses, and sentences into more complex forms.[5] Linguists call these processes coordination and subordination. As shown below, coordination relates the elements to one another in a way that treats them as essentially equal; subordination relates them by combining dependent elements with independent ones.

Coordination: Frank was listening to the radio. He heard the news then. His mother was killed in an automobile accident. The accident had occurred at ten o'clock.

Subordination: Listening to the radio, Frank heard that his mother had been killed in an automobile accident at ten o'clock. [A participial phrase, a noun clause, and a prepositional phrase replace three simple sentences.]

Coordination: Some students cheat, and they receive high grades, but they should be caught and penalized.

Subordination: Students who cheat should be caught and penalized instead of receiving high grades. [An adjective clause and a preposition with a gerund phrase object replace two main clauses.][6]

English has shifted over time from a coordinate structure to the more sophisticated subordinate structure, and with this shift its syntax has become more complex. The effective use of subordination is now one of the marks of a

mature writing style. In truth, today's English is highly subordinated and deeply embedded (that is, consisting of clauses within clauses). This increased level of complexity adds to the ambiguity of many sentences and is why it is necessary that modifiers be as close to the words they modify as idiomatic English will allow.

This need is especially strong in idiomatic legal writing. Legal writing is even more highly subordinated and deeply embedded than everyday writing, as every lawyer who has struggled to read a sentence full of complicated, embedded strings of phrases will attest. Moreover, the more formal style used in legal writing, together with the foreign phrases, archaic words, and technical expressions used, adds still another level of complexity. Consequently, misplaced modifiers are prevalent in legal writing, enough so that, to help resolve ambiguities, courts created a rule of construction known as the Doctrine of the Last Antecedent.[7] The rule is, in effect, a presumption that drafters place modifying words next to the language they intend to modify.

Three simple steps can correct a misplaced modifier. First, find the modifier. Second, identify the word the modifier is supposed to modify. Third, place the modifier as close as possible to the word, phrase, or clause it is supposed to describe. Try it with this sentence from a student paper: *In* Fraser, *a student was punished for delivering a speech at a school assembly that was full of sexual innuendos.* At step one, the modifier is the phrase "that was full of sexual innuendos." At step two, the modifier is closest to the word *assembly*; thus, the sentence reads as though the assembly, not Fraser's speech, was rife with sexual innuendo. At step three, to correct the misplaced modifier, place the phrase closer to the word *speech: In* Fraser, *a student was punished for delivering at a school assembly a speech full of sexual innuendos.*

Modifiers That Limit

Generally, a writer has a certain amount of freedom in deciding where in a sentence to place modifiers, but the careful writer places modifiers to give precisely the meaning and emphasis desired. This is especially important with limiting words like *only, almost, just, even, hardly, nearly, merely,* or *solely,* which are easy to misplace. A nice example comes from the *Aspen Handbook for Legal Writers.*[8] Begin with this sentence: *The witness identified Jack as the burglar.* Now, consider how the placement of the word *only* alters the sentence's meaning in the following variations.

- *Only* the witness identified Jack as the burglar.
- The *only* witness identified Jack as the burglar.
- The witness *only* identified Jack as the burglar.
- The witness identified *only* Jack as the burglar.
- The witness identified Jack *only* as the burglar.
- The witness identified Jack as *only* the burglar.
- The witness identified Jack as the *only* burglar.

Each of the sentences is grammatically correct, but the writer's intent determines the proper placement of the word *only.* This example also reveals a difference between spoken English and written English. In spoken English the tendency is to position limiting words before the verb (as in the third variation) and prevent ambiguity by stressing the word to be modified. In written English, as seen above, the better approach is to put limiting words immediately before the words they modify.

Modifiers That Dangle and Squint

The opening quotation and the motion in *Baum* are examples of a common misplaced modifier, the misplaced prepositional phrase. Another common misplaced modifier is the dangling modifier. Technically, any word can dangle when it does not refer clearly and logically to some word in the sentence; however, dangling is associated most often with dangling participles and dangling infinitives, as in the following examples.

Dangling participle: Employing a clever disguise, the police abandoned their search for the thief.

Dangling participle: Disappointed by the verdict, an appeal is likely.

Dangling infinitive: To mount an adequate defense, thorough investigation is needed.

With a dangling modifier, the writer takes for granted that the reader will know the meaning – an obviously poor strategy in legal writing.

Dangling modifiers are generally easy to find and easy to fix. They are

sentence. In the case of dangling participles, the sentence starts with a verb form ending in –ing or –ed used as an adjective. In the case of dangling infinitives, the sentence starts with to + a verb phrase, and the sentence tends to be in the passive voice. Either of two methods will fix the dangling modifier. In the first method, leave the modifier as is and change the main part of the sentence so that it begins with the term modified:

Employing a clever disguise, *the thief* caused the police to abandon their search.

Disappointed by the verdict, *both parties* are likely to appeal the case.

To mount an adequate defense, *a lawyer* must make a thorough investigation.

In the second method, change the dangling modifier to a subordinate clause and leave the rest of the sentence as is:

The police abandoned their search for the thief because he employed a clever disguise.

Since the verdict disappointed both parties, an appeal is likely.

Before a lawyer can mount an adequate defense, thorough investigation is needed.

Another common misplaced modifier is the squinting modifier, as in this sentence: *I told my family when the trial was over we would take a vacation.* A squinting modifier sits mid-sentence and can be read either to refer to what precedes it or to what follows it. In the example the phrase *when the trial was over* squints; it might refer to the timing of the announcement or to the timing of the vacation. As with other misplaced modifiers, a squinting modifier is easy to fix. One way is to rearrange the sentence to avoid the ambiguity:

When the trial was over, I told my family we would take a vacation. I told my family we would take a vacation when the trial was over. In the right situation, another solution might be to substitute a word or phrase that does not squint.

Conclusion

Writers use modifiers make their and more interesting. A sentence with a misplaced modifier loses clarity, precision, and impact. *Eletelephony*[9] by Laura Elizabeth Richards is a humorous take on an ultimately unsuccessful struggle with precision in language. At the midpoint of the poem, the speaker frets, "Dear me! I am not certain quite/ That even now I've got it right." To get it right when it comes to modifiers, place them so that readers can see at a glance what they modify.

ENDNOTES

1. For a discussion of the importance of word order in modern English, see Phillip M. Sparkes, *New Word Order*, 76 Bench and Bar 38 (March 2012).
2. *Baum v. Faith Technologies, Inc.*, 2010 WL 2365451 (N.D. Okla. 2010) at fn. 1. If plaintiff's attorney was not already sufficiently chagrinned, the judge denied the motion with this admonition: "The parties are also advised that the mischaracterization of authority is not helpful." *Id.* at fn. 9.
3. *Payless Shoesource, Inc. v. Travelers Companies, Inc.*, 585 F.3d 1366 (10th Cir. 2009). The sentence at issue read: "The Insurer shall not be liable for Loss on account of any Claim made against any Insured ... for an actual or alleged violation of the *Fair Labor Standards Act* (except the Equal Pay Act), the National Labor Relations Act, the Worker Adjustment and Retraining Notification Act, the Consolidated Omnibus Budget Reconciliation Act of 1985, the Occupational Safety and Health Act, the Employee Retirement Security Act of 1974, any workers' compensation, unemployment insurance, social security, or disability benefits law, *other similar provisions of any federal, state, or local statutory or common law* or any amendments, rules or regulations promulgated under any of the foregoing; provided, however, this exclusion shall not apply to any Claim for any actual or alleged the exercise of rights pursuant to any such law, rule or regulation." (Emphasis by the court.)
4. *Com. v. Vincent*, 70 S.W.3d 422 (2002). In part, the dissent argued that the majority misread this sentence in KRS 439.4301(5): "This section shall not apply to a person who has been determined by a court to have been a victim of domestic violence or abuse pursuant to KRS 533.060 with regard to the offenses involving the death of the victim or serious physical injury to the victim." 70 S.W.3d at 428.
5. Another part of the problem is the result of English having become more an isolating language than an inflecting language. As English words lost their inflections (that is, while its semantics became simpler), English sentence structure (its syntax) became more complex. Added to this is the fact that writers today are increasingly removed from the audience by physical distance, by age, and by educational differences. Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 Legal Writing: The Journal of the Legal Writing Institute 81, 84-85 (1996).
6. These examples come from John C. Hodges and Mary E. Whitten, Harbrace College Handbook 263-64 (6th ed. 1967).
7. See Terri LeClercq, *Doctrine of the Last Antecedent: The Mystifying Morass of Ambiguous Modifiers*, 2 Legal Writing: The Journal of the Legal Writing Institute 81 (1996). Professor LeClercq argues that the doctrine is ultimately unsuccessful as a solution to the problem of ambiguous modification. "English does not have a set of rules that eliminates ambiguity; it has linguistic principles that help readers unravel meaning." *Id.* at 86.
8. Deborah E. Bouchoux, Aspen Handbook for Legal Writers 11 (2005).
9. Available at Poets.org, http://www.poets.org/viewmedia.ph

Acronymania

By Mark Cooney

I'm defending Northern Food Processing Corporation (NFP) against an Environmental Protection Agency (EPA) Clean Water Act (CWA) claim alleging that NFP's discharges into a publicly owned treatment works (POTW) had higher concentrations of Biochemical Oxygen Demand (BOD); Fats, Oil, and Grease (FOG); and Total Suspended Solids (TSS) than allowed by its National Pollutant Discharge Elimination System (NPDES) permit. If I can convince the EPA ALJ that under the CWA, NFP's BOD, FOG, and TSS levels meet its NPDES permit for POTWs, I'll be a BMOC. (LOL)

This is a ridiculous example, of course, and our profession is hardly facing a scourge of teenager text-talk in legal documents. Yet we legal writers should think carefully before starting down the acronym path. A HUD here or a CPR there won't stop the earth from spinning on its axis. And some well-known acronyms, like NAACP, can be reader-friendly. But if you pile on the acronyms, you risk exasperating your reader.

I should clarify something before we go any further. Some of the so-called "acronyms" that I used above are actually initialisms, where each letter is pronounced (like CIA or SEC).[1] In a true acronym, the first letters of multiple words are combined and pronounced as a new word, like HUD or NASA.[2] For ease, I'll refer to both styles as acronyms in this article.

Acronyms—The Help Readers Don't Want

Any doubts about whether heavy acronym use puts off readers are easily dispelled. Courts have long bemoaned briefs containing an "abundance of pesky acronyms."[3] As one judge noted, acronyms are "difficult for ordinary readers to keep straight."[4] A litigator's overuse of acronyms is the legal-writing equivalent of telling an inside joke. Consider these comments, written by a federal judge presiding over a postal worker's discrimination suit:

> Plaintiff (and, to a lesser extent, Defendant) makes reference, without explanation, to certain acronyms and industry jargon that, although likely intelligible to members of the Postal Service community, are not exactly terms of common usage. Unfortunately, included among the Court's powers is not omniscience. The parties should bear this in mind in the future.[5]

Judges sometimes use a bit of sharp-edged humor to vent their vexation over acronym-laced briefs:

> Opinions addressing federal environmental statutes customarily employ acronyms. What once was a useful tool now has the force of tradition and acronyms are now used whether they aid or obscure communication....I occasionally daydream of writing an opinion employing only acronyms, patois, jargon and scientific terms. If done properly, such an opinion, like many of the briefs I receive, would not be subject to criticism for being in a foreign language, but nonetheless, would be utterly incomprehensible.[6]

One appellate court went so far as to strike a brief filled with unfamiliar acronyms, initialisms, and number strings. The court did "not appreciate this heavy reliance on shorthand notation, nor [did it] find such briefing proper under the rules of appellate procedure."[7] The court complained that it took "[t]remendous effort" to understand the brief because most sentences contained at least one acronym.[8]

Supreme Court Justice Antonin Scalia and legal-writing expert Bryan Garner strike the same tone in their book *Making Your Case: The Art of Persuading Judges*, which includes this briefing tip: "Avoid acronyms. Use the parties' names."[9] In the text that follows, they point out that acronyms are "mainly for the convenience of the writer" yet burden readers.[10]

In short, acronym-filled briefs can drive judges up a chambers wall. So it's not surprising that some courts are reluctant to do the same thing to their readers. For instance, the Missouri Court of Appeals began an opinion by announcing that it would describe the case "[s]hort as many abbreviations, acronyms and jargon as possible."[11]

Yet some courts, like lawyers, seem resigned to their presumed acronym fate. For example, a New York court deciding a water-pollution case lamented that "[a] wave of environmental acronyms and jargon, and the 'high tech' complexity of this matter, could easily becloud the fundamental issue."[12] But the court nevertheless used seven different acronyms in its opinion.

Another court was downright apologetic for its acronym use: "[T]he Court apologizes in advance for the proliferation of acronyms and jargon, which regrettably is unavoidable in this case."[13]

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But acronyms are avoidable, even in complex cases.

What to Do?

You always want your brief to be the most readable in the pile, so heed the words of frustrated judges and think about strategies for minimizing acronym use.

To start, take your lead from judges who've taken pains to avoid acronyms in their opinions: use real words or shorthand phrases instead. (Or as a leading commentator channeling his inner John Lennon put it, "Give words a chance."[14]) Consider the federal judge who was hearing a dispute over phone rates, which involved the "total element long-run incremental cost method" of calculating rates. He avoided the common industry acronym TELRIC by instead referring to this method as the "total element" method.[15]

For party references, follow Scalia and Garner's advice and refer to parties by name (or a shortened version of their names) rather than using the "alphabet soup" approach.[16] For instance, they suggest "the Commission" rather than "the CPSC" when referring to the Consumer Product Safety Commission.[17] Notice how the Second Circuit used this approach to simplify its opinion in an environmental case:

> Cases under the Act apparently require use of a bewildering profusion of acronyms, which makes it difficult to remember what the unlikely combinations of capital letters actually mean. In an effort to minimize the use of acronyms in this opinion, we will call the Environmental Protection Agency the "Agency" rather than "EPA", The Connecticut Fund for the Environment, Inc. the "Fund" rather than "CFE", and the Connecticut Department of Environmental Protection the "Connecticut Department" rather than "DEP".[18]

These choices aren't that difficult, and they can make life much easier for your readers. You'll see some of them at work in the appendix that follows this article.

Closing Thoughts

Courts and commentators have debunked the notion that readers appreciate acronyms and that there's no way to avoid them. And now that you see how courts view acronym-filled briefs, isn't it worth considering other approaches? Often, this style choice comes down to a question of writer convenience versus reader convenience. And when your reader is a court deciding your case, a boss reading your memorandum, or a client paying your bill, the choice should be easy, IMHO. ■

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FOOTNOTES

1. Garner, ed., *The Redbook: A Manual on Legal Style* (Berkeley: West Group, 2006), 2d ed, p 45.
2. *Id.*
3. *Natural Resources Defense Council, Inc v BP Products North American, Inc*, unpublished opinion of the US District Court for the Northern District of Indiana, issued June 26, 2009 (Docket No. 2:08-CV-204); 2009 WL 1854527 at *2.
4. *TDS Metrocom, LLC v Bridge*, 387 F Supp 2d 935, 939 (WD Wis, 2005).
5. *Phongsavane v Potter*, unpublished opinion of the US District Court for the Western District of Texas, issued June 24, 2005 (Docket No. CIVASA05CA0219-XR); 2005 WL 1514091 at *1 n 1.
6. *Louisiana Pacific Corp v Beazer Materials & Services, Inc*, 842 F Supp 1243, 1246 n 1 (ED Cal, 1994).
7. *Cognata v RW Johnson Const Co, Inc*, unpublished memorandum opinion of the Court of Appeals of Texas, issued April 13, 2006 (Docket No. 13-05-234-CV); 2006 WL 949964 at *1.
8. *Id.*
9. Scalia & Garner, *Making Your Case: The Art of Persuading Judges* (St. Paul: Thomson/West, 2008), p 120.
10. *Id.*
11. *Missouri v Public Service Comm of Missouri*, 897 SW2d 54, 55 (Mo App, 1995).
12. *Industrial Liaison Comm of the Niagara Falls Area Chamber of Commerce v Williams*, 527 NE2d 274, 275 (NY App, 1988).
13. *Constellation Power Source, Inc v Select Energy, Inc*, 467 F Supp 2d 187, 190 (D Conn, 2006).
14. Joseph Kimble, *A Modest Wish List for Legal Writing, in Lifting the Fog of Legalese: Essays on Plain Language* 151, 155 (2006).
15. *TDS Metrocom*, 387 F Supp 2d at 939.
16. Scalia & Garner, n 9 *supra*.
17. *Id.*
18. *Connecticut Fund for the Environment, Inc v Environmental Protection Agency*, 696 F2d 169, 171 n 1 (CA 2, 1982).

Appendix

The example below compares a court excerpt to a possible revision. (The paragraph appears near the end of the court's opinion, and it shows how acronyms and initialisms accumulate and litter the text long after the author's explanatory parentheticals have come and gone. To keep the same feel as the original, the revised version likewise has no explanatory parentheticals.)

Original (an excerpt from the court's opinion in *Constellation Power Source, Inc v Select Energy, Inc*, 467 F Supp 2d 187, 201 (D Conn, 2006)):

> Following execution of the Select/CL & P Letter Agreement, CL & P filed an action with the DPUC to allow CL & P to recover from its customers the increased costs associated with the LMP Differential Amount. The DPUC authorized CL & P to recover the LMP Differential Amount from its customers for sixty days and directed CL & P to file a petition for a declaratory order with the FERC. CL & P filed this petition on May 27, 2003, requesting FERC to order Select and other suppliers to bear SMD-related congestion costs and losses charges incurred in transmitting to its retail purchasers the energy CL & P purchased from suppliers. The petition bore Docket No. EL03-129-000 (the "FERC Proceeding"). See Def.'s Ex. 609. Thereafter, the DPUC allowed CL & P to continue to collect the LMP Differential Amount from its customers while the FERC Proceeding was pending and ordered that the monies be held in escrow pending resolution of the FERC Proceeding.

Revised Version (with the acronyms replaced and a few other judicious edits):

> After Select and Connecticut Light signed the letter agreement, Connecticut Light filed an action with the Department to recover from its customers the increased costs associated with the pricing-differential amount. The Department authorized Connecticut Light to recover that amount for 60 days and directed Connecticut Light to file a petition for a declaratory order with the Federal Energy Regulatory Commission. Connecticut Light did so on May 27, 2003, asking the Commission to order Select and other suppliers to bear market-design charges for congestion costs and losses that Connecticut Light incurred in sending to its retail purchasers the energy purchased from suppliers. The petition bore Docket No. EL03-129-000. See Def.'s Ex. 609. After that, the Department allowed Connecticut Light to continue collecting the pricing-differential amount from its customers—but ordered that the moneys be held in escrow while the case was pending.

Legal Writing: How to Write For Partners

(http://abovethelaw.com/career-files/how-to-write-for-partners/)

By: ROSS GUBERMAN (HTTP://ABOVETHELAW.COM/AUTHOR/ROSS-GUBERMAN)

With the help of many clients, I recently surveyed thousands of law-firm partners about the writing skills they want to see associates develop.

Across the country and across practice areas, partners agree on what they'd like to change about associate drafts. I've organized their responses according to my four Steps to Standout Legal Writing (http://www.legalwritingpro.com/services/four-steps.php). I've also included a fifth category that covers usage and mechanics.

A few sample responses follow.

Step One: Concision

Partners say they spend too much time cutting clutter and other distractions from associate drafts. Anything that interrupts the message-wordy phrases, jargon, legalese, redundancy, blather, hyperbole- is a candidate for the chopping block.

- "Get to the point, no 'throat clearing.'"
- "[Avoid] unnecessary or inaccurate phrases such as in order, at this point in tome or almost. unique. Similarly, avoid using words such as utilize when use is sufficient."

Step Two: Clarity

Partners acknowledge that most legal topics are dry and complex, but they still believe associates could do much more to produce clear, active, and direct writing.

- "Your sentences [should not] average more than 25 words."
- "Sound like a human being."

Step Three: Structure

In associate drafts, partners find that the structure often tracks the associate's research rather than the reader's likely questions. Many partners long for the days when attorneys mapped out their sections and paragraphs before writing a single word.

- "Don't save the punch line for the end. Let your reader know the point you are making up front."
- "This is not an academic exercise; keep the consumer's goal in mind and deliver what it is they need to know efficiently."

Step Four: Using Authorities

These days, nearly all associates find the authorities they need. But partners want associates to do more than just copy or summarize those authorities; they want to know how each authority supports the associate's points explicitly.

- "This may be as much an analytical skill as a writing skill, but I have been struck by how often junior associates think sending you five cases is an appropriate response to a research assignment."
- "[A]ssociates should work on better integrating their discussions of the facts and the law in briefs, i.e., doing more than just stating the facts and stating the law, but explaining how the facts apply to the law"

Usage and Mechanics

The painful truth: At even the best firms, many partners want associates to work on grammar, usage, and proofreading. Although these "mechanical" skills may not matter much in law school, they are priceless on the job.

- "Proper grammar! It is quite disappointing how many incorrect usages and constructions many of our incoming (and experienced) lawyers demonstrate in their writing."
- "Even first drafts should be polished- no typos, poor grammar, or incorrect citations."

See more: What Makes for Brilliant Writing (http://abovethelaw.com/career-files/legal-writing-what-makes-for-brilliant-writing/) and Legal Writing's 3 Biggest Mistakes (http://abovethelaw.com/career-files/legal-writing-pro-3-biggest-mistakes-and-how-to-fix-the/)