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Expert Analysis

# Top 10 Techniques For Crafting A Dazzling Brief

By **Daniel Karon** June 28, 2019, 4:03 PM EST

*“The world is a hellish place and bad writing is destroying the quality of our suffering. It cheapens and degrades the human experience when it should inspire and elevate.”*

—Tom Waits, singer, songwriter, musician, composer and actor

Daniel Karon

I crafted my last Law360 article, "Simple Secrets For Writing A Killer Brief," to broadly discuss brief-writing techniques. I emphasized the organizational and persuasive necessities of brief writing, channeling my instruction through fiction-writing and storytelling conventions because these approaches invariably make writing more readable.

My last essay also explained what it didn’t examine. “[G]rammar, syntax, usage, punctuation, organization, typography and an ear for what makes writing sing,” I wrote, were technical issues that “I [couldn’t] even begin to address[, instead] suggest[ing] you study every day and pick [them] up from other good writers.”

Then, I came across Tom Waits's quote. It made me think about how legal writing often falls flat not because it's unorganized but because it's technically unsound. A lot of legal writing suffers not because it's thoughtless and disorderly but because it's riddled with recurring technical gaffes that cheapen and degrade it.

This essay, therefore, will describe legal writing's top 10 lowlights, from least aggravating to most — lowlights that cheapen our prose and unfavorably influence the only reader who matters — our judge.

**10. To smartly split infinitives is fine. Whoever said to always avoid it was wrong.**

"To boldly go where no one has gone before."[1] This sentence contains the most famous split infinitive ever — "boldly" dropped into the middle of "to go." And we'd have it no other way.

Let's begin with the rule that instructs against splitting infinitives. Actually, there is none. The allegation of a rule derives from "The Queen's English," penned in 1864 by Henry Alford, the Dean of Canterbury. But Alford never stated a rule against splitting infinitives. Rather, in response to a correspondent who liked phrases such as "to scientifically illustrate," Alford merely said he saw "no good reason" to split the infinitive.

One reason Alford gave for his belief was that nobody was splitting infinitives. The "Oxford English Dictionary" disagreed, reporting that split infinitives were widespread at the time. Alford's non-rule has coaxed centuries of writers into torturing their prose to avoid splitting infinitives. "To go boldly where no one has gone before." Seriously?

**9. You can begin a sentence with a conjunction. And good writers do.**

I wonder when the following antiquated soundbite will expire: "We all had a middle-school teacher who taught us not to begin a sentence with a conjunction." That notion is from, like, the '50s, yet it lingers and renews itself continually.

But it's OK to start a sentence with a coordinating conjunction (and, so, but) and even a subordinating conjunction (after, although, because). If you don't believe me, pick up today's Wall Street Journal or New York Times. Don't even open it; just look at the front page. You'll see at least half a dozen sentences beginning with conjunctions. And why?

Because they make such wonderful and varied transitions between sentences and paragraphs. So if you've never started a sentence with a conjunction, give it a try. Mrs. Wilson won't mind.

**8. Nominalization is an indication of poor brief writing.**

Nominalization means turning an active verb into a boring noun. One of the most popular nominalizations in legal writing is "Defendant filed a motion." The writer has converted the verb "moved" into a boring noun—"motion." That's nominalization. Verb-based writing would rework this sentence to read, "Defendant moved." Now, the verb does the work; plus, the sentence is half as long.

Here are a few more examples to chew on: "Plaintiff conducted an investigation" becomes "Plaintiff investigated"; "The Court issued a ruling" becomes "The Court ruled"; and, of course, "Nominalization is an indication of poor brief writing" becomes "Nominalization indicates poor brief writing."

**7. Lead-ins.**

What's this section about? Its lead-in doesn't suggest anything. Lead-ins — meaning introductions to block quotations — frequently convey nothing.

Before we fix that problem, a word on block quotations. Avoid them. Like footnotes, long and crippling block quotations are an invitation for the reader to skip them. Admit it — the last thing you ever want to read is a block quotation. To account for this, summarize the block quotation's essential message and quote only the language necessary to drive home your point.

But if you're intent on coopting some else's thoughtfulness, at least do it invitingly and with a lead-in that does the reader's work, in case (or when) the reader bails out. Don't precede a block quotation (of 50 or more words — that's the minimum for a block quotation) with a sentence like this: "As this Court acknowledged in Commerce Bank:".

Instead, introduce the block quotation like this: "In Commerce Bank, this Court described its practice of liberally construing a plaintiff's complaint when considering dismissal under Rule

12(b)(6).” The second lead-in tells the judge what the block quotation says before ever reading it. This makes your judge’s life easier, and that’s a good thing.

**6. Proper personal-pronoun usage is essential to you and I.**

I know brief-writing doesn’t tend to involve personal pronouns. But personal-pronoun misuse is so rampant in emails and letters that I needed to include this section.

Pronouns take the place of nouns. Personal pronouns have what is called case. Case means a different form of a pronoun is used for different parts of the sentence. Three cases exist — nominative, objective and possessive. Most pronoun mistakes involve confusing the nominative and objective cases.

For instance, take this incredibly common sentence: “This is an issue for you and I to decide.” It should read “for you and me to decide.” But why? Because “me” is the object of the preposition “for.” Therefore, the objective case pronoun, “me,” is required. If this explanation is a mouthful, here’s an easy test: Drop the “you and” and reread the sentence. The proper personal pronoun quickly becomes apparent.

**5. What’s the rule which governs restrictive and nonrestrictive clauses?**

A restrictive clause is a type of adjective clause that limits or identifies a preceding noun. If you remove a restrictive clause, the sentence’s meaning changes. A nonrestrictive (or nonessential) clause, on the other hand, is a type of adjective clause that describes a noun in a nonessential way.

You can remove a nonrestrictive clause without affecting the sentence’s meaning. Importantly, you must use “that” for restrictive clauses and “, which” — yes, “comma which” — for nonrestrictive clauses.

To discern the difference, consider these two sentences: “The company that was unprofitable went bankrupt,” and “The company, which was unprofitable, went bankrupt.” In the first sentence, we’re discussing two companies and noting that the unprofitable one went bankrupt. In the second sentence, we’re discussing a bankrupt company and noting, incidentally, that it was unprofitable. You could remove the second sentence’s adjective clause, and the sentence would retain this meaning.

**4. The Oxford comma is important, necessary, and essential.[2]**

The Chicago Manual of Style, which we professional writers employ, instructs to use the Oxford (or serial) comma. We use the Oxford comma (named as such because it was traditionally used by the Oxford University Press) after the penultimate item in a list of three or more items, before “and” or “or.” If you don’t agree that an Oxford comma enhances readability, check out the best ever explanation of its necessity.

If you’re still not convinced, talk to the Maine dairy that recently paid $5 million to settle its truck drivers’ federal overtime lawsuit that hinged on the use of the Oxford comma.[3] According to the New York Times, the dispute gained international notoriety “when the United States Court of Appeals for the First Circuit ruled that the missing comma created enough uncertainty to side with the drivers, granting those who love the Oxford comma a chance to run a victory lap across the internet.”

The drivers sued the dairy for overtime pay. Maine law requires time-and-a-half pay for each hour worked after 40 but includes exemptions for “The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of: (1) Agricultural produce; (2) Meat and fish products; and (3) Perishable foods.”

Because no comma appeared in the statute’s “packing for shipment or distribution” language, the drivers argued that “distribution” referred back to “packing.” This meant employees engaged in distribution but not packing weren’t exempt from overtime. Had a comma appeared after “shipment,” the meaning would have been clear, and the dairy would have saved $5 million.

**3. Can we discuss how to punctuate requests.**

Like No. 6, this concern routinely appears in emails and letters, not in briefs. But it’s so widespread that I needed to include a section on it, too. “Can you send me the brief?” “Will you tell us when the deposition begins?” Writers often end these sentences with a question mark, believing these sentences are questions. But they’re not — they’re requests.

To be polite, we often phrase requests, suggestions and commands as questions. But that doesn’t mean we’re intending to give our reader a choice — as in the option to say “no.” We’d use a period to end this kind of sentence if we expect our reader to respond by acting.

That said, you must be careful to use a period only when you're sure your reader is not likely to consider your request presumptuous. For instance, asking — not telling — your boss to send you the brief might require an awkward, but politically essential, question mark. If you're not sure whether to use a question mark or a period, reword the sentence to ask a question or make a statement: "Would you be able to send me the brief?" or "I would appreciate your sending me the brief."

**Two (2). Writing numerals in parentheses.**

Who repeats numbers in parenthesis? "Please let me know in seven (7) business days." Have you ever asked yourself why you do this?

There used to be a reason. Eons ago — before word processing, PDFs and ECF — legal documents were handwritten. And because of that, they were subject to unauthorized modification. So if, in the 1700s, I'd written "seven," a fraudster could have changed it to "seventy" (space permitting). Or if I'd written "7," this fraudster could have more easily changed it to "70." Because we no longer circulate handwritten documents, we no longer need to employ this redundancy.

So if you're no longer going to include both formats, which format do you use? The "Chicago Manual," §§9.2–4 and 9.8, instructs to spell out whole numbers up to (and including) one hundred (zero, one, ten, ninety-six, 104). Alternatively, it says to spell out whole numbers up to (and including) nine and to use numerals for the rest. That's right, you have a choice.

And if you're wondering whether any legitimate bastion remains for redundancy, one does: Check writing. This is still a handwritten process subject to fraud, which concern justifies writing numbers in both formats.

**1. The passive voice should be used thoughtfully.**

Easily, this is lawyers' most common grammatical mistake, and it routinely appears in the worst possible place — a brief's conclusion: "For the foregoing reasons, Defendant's motion to dismiss should be denied."

Technically, passive voice is a “be” verb followed by a past participle. Colloquially, it’s a sentence construction that disguises the actor. Sometimes you want to disguise your actor. This is popular in politics (“mistakes were made”). Or sometimes your actor’s identity is unimportant (“legal documents were handwritten,” from four paragraphs up).

But more often, you’ll want to identify your actor, as in your brief’s conclusion where you’re asking the court to act. So how would you rewrite the preceding conclusion (in addition to making it more robust, of course)? “For the foregoing reasons, Plaintiff asks this Court to deny Defendant’s motion to dismiss.”

Simply put, grammarians and judges across the English-speaking world malign the passive voice as bad writing. The active voice makes your writing stronger, more direct and — you guessed it — more active.

**Conclusion**

So those are my top 10 legal-writing blunders. If you’ve enjoyed this lesson and want to elevate your writing to an even higher plane, you’ll need to work hard. But if you’re committed to that journey, I’m convinced the best place to begin is by visiting www.lawprose.org and finding out when famed legal grammarian Bryan Garner will be in your town or nearby. I’ve studied writing with Garner for over 20 years, and he’s responsible for most of what I know. Do yourself a favor and study with him, too. You’re a professional writer, and you deserve the best professional training. Better yet, your clients do.

Legal writing is intended to persuade. Its job is to make your judge trust you and believe what you’re saying. No judge will do these things if your brief is riddled with grammatical gaffes. Like Tom Waits, judges suffer enough from bad writing. Ease their pain through mindful, thoughtful and careful writing — writing that keeps them interested, encourages them to turn the page and, most importantly, makes them trust you.

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[1] Although some people would suggest that feminism doesn't require revisionist history, (1) I can't help gender neutralizing this line, and (2) the introduction to "Star Trek: The Next Generation" adopted this gender-neutral approach anyway.

[2] You will see the Oxford comma featured only in this section of my essay. As a journalistic organization, Law360 follows the AP Stylebook, which eschews the Oxford comma.

[3] O'Connor v. Oakhurst Dairy, 851 F.3d 69 (1st Cir. 2017).