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Do's, Don'ts, and Maybes: Legal Writing Don'ts — Part I

In the last two columns, the Legal Writer discussed 26 things you should do in legal writing. We continue with a baker's dozen of things you shouldn't do: 13 things writers should hate.

1. Hate Boilerplate. Boilerplate is laziness. It's boring and intimidating at the same time. Readers know when you do a cut-and-paste job. They won't read boilerplate. Don't recycle your legal arguments. If you or the person from whom you've copied your boilerplate made errors in the original document, you'll repeat them in your boilerplate. Each client and case is unique. Boilerplate won't be specific to your case. Boilerplate is fine for contracts or forms. It's unacceptable in a legal argument.

2. Hate Clichés. Avoid clichés like the plague. Clichés make writers look as if they lack independent thought. They're banal. Eliminate the following: "all things considered," "at first blush," "clean slate," "exercise in futility," "fall on deaf ears," "foregone conclusion," "it goes without saying," "last-ditch effort," "leave no stone unturned," "lock, stock, and barrel," "making a mountain out of a molehill," "nip in the bud," "none the wiser," "pros and cons," "search far and wide," "step up to the plate," "tip of the iceberg," "wait and see," "wheels of justice," "when the going gets tough," and "writing on a clean slate."

3. Hate Misrepresentations and Exaggerations. Be honest. Mistakes are excused. Purposeful misstatements and negligent misquoting aren't. Honesty is the best policy. It's also the only policy. To prevent misrepresentations,

cite fact and law accurately, using the record for facts and original sources for law. But don't obsess. Obsessing over accuracy leads to including irrelevant details. Obsessing will make you overly cautious, force you to over-explain, cause you to submit a document late, and lead you to hate being a lawyer. Exaggerating is a form of misrepresenting. Understate not only to show integrity but also because understating persuades. Understating calls attention to content, not the writing or the writer. Also, concede what you must to make you honest and reasonable.

4. Hate Expletives. "Expletive" means "filled out" in Latin. Avoid expletives: "there are," "there is," "there were," "there was," "there to be," "it is," and "it was." Examples: "There are three issues in this case." Becomes: "This case has three issues."

Readers know when you do a cut-and-paste job. Don't recycle your legal arguments.

"There is no fact that is more damaging." Becomes: "No fact is more damaging." "The court found there to be prosecutorial misconduct." Becomes: "The court found prosecutorial misconduct." Also eliminate double expletives: "It is obvious that it will be my downfall." Becomes: "My mistake will be my downfall." Exceptions: Use expletives for emphasis; for rhythm; to climax (end with emphasis); or to go from short to long or from old to new. Emphasis examples: "It was a full metal jacket bullet that killed John." Here, the author emphasizes the object that killed John, not that John was killed.

"It was Judge Beta who wrote the opinion." Here, the author emphasizes Judge Beta's authorship even though it would have been more concise to write "Judge Beta wrote the opinion." Rhythm example: "To everything there is a season."¹ This example would have been different had the author written "To everything is a season." Climax example: "There is a prejudice against sentences that begin with expletives" is better than "A prejudice against sentences that begin with expletives exists." The climax should not be on "exists."

5. Hate Mixed Metaphors, Puns, Rhetorical Questions, and False Ethical Appeals. Metaphors compare two or more seemingly unrelated subjects. Metaphors make the first subject equal to the second: "All the world's a stage/ And all the men

and women merely players."² In this example, Shakespeare compared the world to a stage, and men and women to actors. Mixed metaphors combine two commonly used metaphors to create a nonsensical image: "He tried to nip it in the bud but made a mountain out of a molehill." Puns fail because they transform formal legal writing to informal writing. Puns are for children, not groan readers. A pun is a figure of speech that uses homonyms as synonyms for rhetorical effect. Examples: "Whom did the mortician invite to his

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party? Anyone he could dig up!"³ "Families are like fudge. Mostly sweet with a few nuts."⁴ "Madness takes its toll; please have exact change."⁵ "Some people are wise, and some, otherwise."⁶ Are rhetorical questions effective? What do you think? Readers want answers, not questions. Some writers use rhetorical questions to make readers think or to involve them. Do you agree? Rhetorical questions fail because you don't know how the reader will answer the question or how involved the reader wants to be. False ethical appeals are attempts to convince a reader that you're credible, ethical, honest, or meticulous because you

sequent to." Legalese makes for bad lawyering: I am, inter alia, an attorney, hereinafter a per se bad attorney, for utilizing said aforementioned legalese.

7. Hate Pomposity. Be formal but not over the top. Stay away from IQ or SAT words. No one will be impressed. You'll look bovine, fatuous, and stolid, not erudite, perspicacious, and sagacious. The fewer syllables in a word, the better. Prefer simple and short words to complex and long words: "Adjudicate" becomes "decide." "Aggregate" becomes "total." "Ameliorate" becomes "improve" or "get better." "As to" becomes "about" or "according to." "At no time" becomes "never." "Attain" becomes "reach." "Commence" becomes "begin" or "start." "Complete" becomes

nouns like "myself," "yourself," "yourselves," "ourselves," "herself," "himself," "themselves," and "itself." Consider this dialogue between A and B. *Incorrect:* A: "How are you?" B: "Fine. And yourself?" *Correct:* A: "How are you?" B: "Fine. And you?" Why would anyone say "How are yourself?"

8. Hate Abbreviations, Contractions, and Excessive or Undefined Acronyms. Don't use these abbreviations: "i.e.," "e.g.," "re.," "etc.," and "N.B." Be formal: use "facsimile," not "fax." Leave contractions, which are friendly and sincere, for informal writing, e-mails, and Legal Writer columns. Eliminate "aren't," "couldn't," "don't," "haven't," "it's," "isn't," "shouldn't," "wouldn't," and "you're." An acronym is an

Legalese makes for bad lawyering.

say so. Instead of telling the reader that you exhaustively researched the law, discuss your research exhaustively. Let your writing speak for itself. Some false, unnecessary appeals: "It is well settled that"; "it is hornbook law that"; "this author has carefully considered the facts and concludes that . . ."

6. Hate Legalese. Use simple and common words that readers understand. Legalese is the antithesis of plain English. All legalisms can be eliminated. The only loss will be the legalese, and the gain will be fewer words and greater understanding. *Incorrect:* "Enclosed herewith is my brief." *Correct:* "Enclosed is my brief." *Incorrect:* "The defendant has a prior conviction." *Correct:* "The defendant has a conviction." Eliminate these words: "aforementioned," "aforesaid," "foregoing," "forthwith," "hereinafter," "henceforth," "herein," "hereinabove," "hereinbefore," "per" (and "as per"), "said," "same," "such," "therein," "thereby," "thenceforth," "thereafter," "to wit," "whatsoever," "whereas," "wherein," and "whereby." Legal writing is planned, formal speech. If you wouldn't say it, don't write it. Write "earlier" or "before," not "prior to." Write "after" or "later," not "sub-

"end" or "finish." "Component" becomes "part." "Conceal" becomes "hide." "Demonstrate" becomes "show." "Donate" becomes "give." "Effectuate" becomes "bring about." "Elucidate" becomes "explain." "Implement" becomes "carry out" or "do." "In case" or "in the event that" becomes "if." "Incumbent upon" becomes "must" or "should." "Is able to" becomes "can." "Necessitate" becomes "require." "Per annum" becomes "a year." "Possess" becomes "own" or "have." "Proceed" becomes "go." "Procure" becomes "get." "Relate" becomes "tell." "Retain" becomes "keep." "Sufficient" becomes "enough." "Terminate" becomes "end," "fire," or "finish." "Utilize" becomes "use."

Pomposity arises when writers go out of their way to sound intelligent but then err. For example, you'll sound foolish if you try to use "whom" and then use it incorrectly. *Incorrect:* "Jane is the person who defendant shot." *Better:* "Jane is the person whom defendant shot." *Best:* "Jane is the person defendant shot." *Incorrect:* "Whom shall I say is calling?" The answer is, "He [or she] is calling." *Better:* "Who shall I say is calling?" *Best:* "Who's calling?"

You'll also sound pompous if you misuse reflexive and intensive pro-

abbreviation formed from the first letter of each word of a title. Define terms and nouns you'll frequently use in your legal document: Department of Housing Preservation and Development (DHPD); New York Stock Exchange (NYSE). Don't use quotation marks or "hereinafter referred to as" to set out the acronym: Judge Me Not Corporation ("JMNC") becomes Judge Me Not Corporation (JMNC). Common legal acronyms need not be defined: CPLR, not Civil Practice Law & Rules (CPLR). If you use acronyms, use articles that modify the acronym, not the word. *Example:* "An NYPD officer," not "A NYPD officer." A person's name or title need not be defined. *Incorrect:* "John Smith (Smith)" or "John Smith, the architect (the Architect)."

9. Hate Mystery and History. Legal documents aren't mystery novels. Don't wait to surprise your readers until the end. Don't bury essential issues in the middle, either, or give your readers clues along the way, hoping they'll catch them on time. Few will try to decipher what you have to say. Also, don't inundate your readers with the history of the case law or statute. Readers don't want a history lesson.

Stay away from IQ or SAT words.

They want current law and how it applies.

10. Hate Inconsistency. Be consistent in tone: Don't be formal in one place and informal in another. Be consistent in point of view: Don't use your point of view in one place and the reader's in another. *Example:* "Writers must not shift your point of view." Be consistent in reference: Don't write "my client" in one place, "this writer" in another, and "plaintiff" in a third. Be consistent in voice: Don't write "you" in one place and "I" in another. Be consistent in style. *Examples:* If you use serial commas in one place, use them everywhere. If you write "3d Dep't" in one citation, don't write "3rd Dept." in another.

11. Hate Nominalizations. A nominalization is a verb turned into a noun. Nominalizations are wordy. They hide. They're abstract. *Example:* "The defendant committed a violation of the law." *Becomes:* "The defendant violated the law." Don't bury your verbs. Most buried verbs end with these suffixes: "-tion," "-sion," "-ment," "-ence," "-ance," and "-ity." Use strong verbs: "Allegation" becomes "allege." "Approval" becomes "approve." "Assistance" becomes "assist." "Complaint" becomes "complain." "Conclusion" becomes "conclude." "Conformity" becomes "conform." "Consideration" becomes "consider." "Decision" becomes "decide." "Description" becomes "describe." "Dissatisfaction" becomes "dissatisfied." "Documentation" becomes "documents." "Enforcement" becomes "enforce." "Evaluation" becomes "evaluate." "Examination" becomes "examine." "Finding" becomes "found." "Holding" becomes "held" or "holds." "Identification" becomes "identify." "Indemnification" becomes "indemnify." "Knowledge" becomes "know." "Litigation" becomes "litigate." "Motion" becomes "moved." "Notation" becomes "noted." "Obligation" becomes "obligate" or "oblige." "Opposition" becomes "oppose." "Performance"

becomes "perform." "Preference" becomes "prefer." "Reference" becomes "refer." "Registration" becomes "register." "Reliance" becomes "rely." "Review" becomes "reviewed." "Ruling" becomes "rule." "Settlement" becomes "settle." "Similarity" becomes "similar." "Statement" becomes "state." "Technicality" becomes "technical."

12. Hate Negatives. Watch out for negative words: "barely," "except," "hardly," "neither," "not," "never," "nor," "provided that," and "unless." *Example:* "Good lawyers don't write in the negative." *Becomes:* "Good lawyers write in the positive." Eliminate negative combinations: "never unless," "none unless," "not ever," and "rarely ever." Don't use "but," "hardly," or "scarcely" with "not." Use "but" instead of "but however," "but nevertheless," "but that," "but yet," and "not but." Eliminate negative prefixes and suffixes: "dis-," "ex-," "il-," "im-," "ir-," "less," "mis-," "non-," "out-," and "un-." Use negatives only for negative emphasis: A: "How are you?" B: "Not bad."

13. Hate Attacks or Rudeness. Condescending language, personal attacks, and sarcasm have no place in legal writing. Attacking others won't advance your reasoning. This behav-

ior, possibly sanctionable, distracts readers and leaves them wondering whether your substantive arguments are weak. Wounding your adversary, your adversary's client, or the judge is ineffective. Instead, be courteous and professional. Never be petty. But if you must attack, aim to kill, metaphorically speaking.

In the next column, the Legal Writer will continue with the next baker's dozen of don'ts. Following that column will be three columns on grammar errors, punctuation issues, and legal-writing controversies. Together with the two preceding columns on legal writing's do's, this series represents legal writing's do's, don'ts, and maybes. ■

1. Ecclesiastes 3:1.
2. William Shakespeare, *As You Like It*, act 2, scene 7, available at http://www.shakespeare-literature.com/As_You_Like_It/10.html (last visited Feb. 22, 2007).
3. My Favourite Puns: Stan Kegel, available at http://workinghumor.com/puns/stan_kegel.shtml (last visited Feb. 22, 2007).
4. Pun ny Oneliners, available at <http://workinghumor.com/puns/oneliners.shtml> (last visited Feb. 22, 2007) (attributed to Theresa Corrigan).
5. *Id.* (attributed to Geoff Tibballs).
6. *Id.* (attributed to Phylbert).