

WRITING GUIDELINES: GENERAL PRINCIPLES & RULES¹

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There is nothing more important in the practice of law than your ability to put together quality written work. I'm happy to help you work on your writing, but be forewarned: Writing is difficult, for everyone – at least, everyone I know (or know of) who does it well. If you think you can produce top-quality written work without pain and hard work you are either (a) incredibly gifted or (b) mistaken.

When asked whether she enjoyed writing, Dorothy Parker replied “No – I enjoy having written.”

When asked whether he found writing difficult, Red Smith replied: “Not at all – you just sit down at the typewriter and open a vein.”

Please read these Guidelines through carefully. They are divided into “General Principles” and “Rules.” The former are for you to contemplate and consider; the latter are for you to obey, blindly if necessary. I have very strong views about the process of writing, and I demand a very serious commitment on your part. Please ask yourself, after you have read through the following, whether you are prepared to do what I'm asking you to do. If not, feel free to reconsider working with me; I will *not* be offended, and we will both be spared considerable future unhappiness.

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I. GENERAL PRINCIPLES

“Good prose is like a windowpane” [George Orwell, “Why I Write”]

The point of legal writing is not to make the simple complicated – for example, by using lots of impenetrable phrases, interminable sentences within interminable paragraphs, and big words, or by constantly reminding the reader that “it is not entirely clear, but, . . .” or that “courts have left this area very uncertain . . .” or the like. The point of legal writing is to make the complicated simple. Do not be afraid of simplicity. Though we have all been taught that simplicity is a sign of stupidity, it is not. You *want* your reader to say, after having read your brief or your memo or your article, something like: “Well, *that* was simple.”

Good prose is like a windowpane in that, like a windowpane, it is transparent, allowing the viewer to see, clearly, whatever is on “the other side.” In legal writing, “the other side” comprises the ideas, arguments, and opinions that you hold in your head. Good prose allows the reader to see those, clearly.

This presents a problem. If your prose is like a windowpane, then, as Orwell so nicely put it, “when you make a stupid remark its stupidity will be obvious, even to yourself.” Often, when putting together written work, you will think to yourself: “My ideas and thoughts are a jumbled-up mess. I don’t *have* any sort of ‘argument’ about why so-and-so exposes you to liability for such-and-such . . . I don’t *want* my prose to be like a windowpane, because then the reader will see just how confused I am.”

This is an understandable reaction, but it is to be avoided at all costs. You have to *want* to write clearly if you are going to learn how to do it. Being confused about the law is no sin; the law is very, very confusing, certainly when you are first learning it and even after you’ve been at it for many years. The law is full of simple questions –

“Would I be liable for copyright infringement if I were to download a photograph of President Obama from the Philly.com website and display it on the screens in my classroom?”

- that are actually quite complex, requiring an understanding of complicated statutory provisions, caselaw that may be conflicting or contradictory and that in any event never seems to quite answer the precise question being asked, etc. Whenever you are analyzing hard legal questions, your initial thoughts and ideas are likely to be something of a jumbled mess; it is to be expected, and it happens to all of us. At the start of your project, you won't have anything resembling a clear argument in your head, or even much of an idea of what such a thing would look like. *That's not the problem.* We all start there; it is an inevitable part of the process of trying to master very complicated material. The problem arises if you allow that to dissuade you from writing as clearly as you possibly can. Exposing the disorder in one's mind can be pretty painful, but one of the functions of writing is to help you see what it is that you don't understand, so that you can go out and do some the thinking/reading/research necessary to understand it. If you are confused, explain your confusion to the reader as clearly as you possibly can – that will help you figure out where the confusion lies, and will help you figure out how to eliminate it.

Impersonate your reader

There is one writing skill that is critical and on which all others, in a sense, depend: *the ability to read your own work as it appears to a reader.* The process of writing well consists of (a) writing something, (b) reading what you have written *from your reader's perspective*, and (c) revising what you have written so that it is clear to your reader. Over and over again.

To do that, you must, first of all, know (or decide) *who your reader is*, because the question “Is what I have written clear?” implies the question: “Clear to whom?” Your explanation of why section 512(c) of the Copyright Act covers dissemination of decryption software, or why business method patents do not serve the purposes underlying the Patent Act, or why the Copyright Royalty Tribunal is unconstitutional under the doctrine of separation of powers, etc., will be very different, depending upon whether you are explaining that to (a) a judge on the Federal Circuit, (b) the Chief Systems Engineer at Comcast, (c) a reader of the Philadelphia Inquirer, (d) a high school student, (e) a partner at your law firm who specializes in international tax law, (f) a partner at your law firm who specializes in patent prosecution, etc.

For example, consider this sentence that might appear in your paper:

“Like much of the DMCA, sec. 512(c) provides ISPs with a safe harbor against copyright infringement claims for monetary damages.”

That sentence is either perfectly clear, or complete gibberish; I can't tell which unless I know who the reader is, because whether or not it is clear depends on what the reader has in her head at the moment she encounters the sentence. What's the DMCA? Who/what are “ISPs”? What's a “safe harbor”? What's copyright infringement? What are “claims for monetary damages”? Either (A) the reader had some idea what these things meant *before* starting your paper, (B) you have explained earlier in your paper what they mean, or (C) the sentence is a failure and needs to be revised because the reader does not know what it means. *Writing well means satisfying yourself that either (A) or (B) is true, for every sentence in your paper.*

Reading your own work from your reader's perspective means learning how to *clear your head of everything you have learned about the subject matter from having worked on the paper*, because your reader often will know nothing, or next-to-nothing, about the subject matter; at the very least, he knows a great deal less than you do. Your reader does not know what you know, has not read what you have read, has not been surrounded by articles about this subject matter for weeks or months the way you have, etc. If you keep all of that stuff in your head as you read over what you have written, you may conclude that your writing makes sense and is reasonably clear (to you) when it is actually very confusing to your reader (who does not have any of that in his head). You have to ask of your own work what the reader will ask: Does what I am reading make sense (to someone who knows next-to-nothing about the subject matter at hand)? What exactly is the author (*i.e.*, you) trying to say here? Why is the author suddenly talking about X when I thought she was talking about Y? Am I learning something as I read?

Developing an ability to edit your own work in this way may be the most important thing you will get out of your writing project. You are the one editor who will always be at your own disposal throughout your career as a lawyer, the one person who will always be available to read your work and to comment upon it, to help you see which arguments are strong and which are weak, which sections make sense and which do not.

To put it differently: When you begin your project, I want you to be focused on *my* editorial comments; by the time you're finished, I want you to be focused on your own.

“Your language becomes clear and strong not when you can no longer add, but when you can no longer take away.” [Isaac Babel]

Less is more. Say what you need to say. Eliminate unnecessary words. Get to the point.

Here's an excerpt from a student paper:

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the district court ruled that the defendant was subject to the personal jurisdiction of the court. In so ruling, the court found that both prongs of the personal jurisdiction test had been met. First, the court found that the defendant fell under the District of Columbia's long arm statute, D.C. Code § 13-423, and was therefore subject to the jurisdiction of the court. Second, the court found that the defendant possessed the minimum contacts with the District of Columbia necessary for the exercise of personal jurisdiction to be constitutional.

It's not bad, but here's my edited version:

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the district court ruled that the defendant was subject to the court's personal jurisdiction. The defendant satisfied both prongs of the personal jurisdiction test: he fell within the District of Columbia's long arm statute, D.C. Code § 13-423, and possessed the “minimum contacts” with the District of Columbia required for the constitutional exercise of personal jurisdiction.

These are the changes I made in going from the first to the second version:

In Blumenthal v. Drudge, 992 F. Supp. 44 (D.D.C. 1998), the district court ruled that the defendant was subject to the court's personal jurisdiction ~~of the court. In so ruling, the court found that. The defendant satisfied~~ both prongs of the personal jurisdiction test ~~had been met. First, the court found that the defendant: he~~ fell underwithin the District of Columbia's long arm statute, D.C. Code § 13-423, and ~~was therefore subject to the jurisdiction of the court. Second, the court found that the defendant~~ possessed the “minimum contacts” with the District of Columbia necessaryrequired for the constitutional exercise of personal jurisdiction ~~to be Constitutional.~~

The original passage has 99 words; the revised version has 66 – exactly 33% fewer. Not coincidentally, the revised version is also a lot better – more direct, clearer, easier to follow.

Read the cases. Read more of them. Read the ones you have read over again. Repeat.

Students hardly ever do the amount of case law research that is required for a good paper. The cases, however, are where the law is – not in the law review articles, not in the treatises, not in the trade publication, not in the ALR annotations, but in the cases and other primary material (statutes, treaties, constitutions). Secondary sources can be enormously helpful – they can point you to the cases that you need to read, and sometimes they can help you to understand the cases you have read. But they should *never* be used as substitutes for the primary material on which they're based.

Learning how to read the cases *critically* – identifying *their* strengths and *their* weaknesses – will help you become a better writer, because it will help you learn how to read your own work critically. As you read the cases, always ask yourself: What question (or series of questions) is the court answering? How does it get to the answer? What *is* the answer? Are you persuaded that it got the right answer – that it properly interpreted the statute/regulation/precedents it was dealing with? Did you learn something about whatever it is the court is talking about? Why, or why not?

Reading judicial opinions is also valuable because it helps you soak up a way of talking and writing about legal questions – customary phrasings, ways of talking about and using precedent and legal doctrine, and the like. If you have read lots of opinions, you are much less likely to write a sentence like the one I'm looking at right now, from a student paper:

“Personal jurisdiction can no longer be missing ‘because the defendant did not physically enter the forum state’. *Burger-King Corp. v. Rudzewicz*. . . .”

I have never encountered *any* judicial opinion (or any other document, for that matter) that referred to whether or not personal jurisdiction was “missing.” It's simply not a word that is used this way – ever, as far as I can tell – in connection with personal jurisdiction. What the author of this sentence has therefore conveyed to me is that she has either (a) not read very many judicial opinions dealing with the question of personal jurisdiction, or (b) has not been paying much attention to those she has read.

You will not learn to write well by talking – to me, or to anyone else – about writing; you will learn to write well by writing.

Talking about writing is like talking about carpentry, or about playing the piano, or about riding a bicycle – the conversation might be interesting, but it will be of little help in actually learning how to *do* any of these things. To learn how to do them, you have to do them, over and over and over. It’s called “practicing.” It’s the same with writing; actually practicing the skill you are trying to master is almost always more useful than talking about it. If you’re trying to learn how to write well, write more – more outlines, more case summaries, more issue statements, more drafts of papers, more . . . Write (more) just for yourself, and write (more) for others.

I’m always happy – really – to talk to you about your project. But talking to me is *much* less valuable than you (and most students) think it is. If you have questions about your writing project, by all means come in and see me; but before you come in to talk, write down what you want to talk about. A sentence, or a paragraph, or an outline, describing your thoughts, or the question(s) you have, will help a great deal. That will not only give you valuable practice in the art of writing, but I guarantee you that it will make our subsequent conversation *much* more productive.

[See Rule 3]

Good legal writing is *persuasive* writing. A good paper or article provides an answer to a question (or series of related questions), and persuades the reader that the answer(s) are the best ones available. It is not a “book report.”

A good paper contains (a) a specific question (or set of questions), (b) an answer to the question(s), and (c) an argument in support of that answer.

1. The question

The absence of a good question is far and away the most common flaw in student writing – and it is generally fatal. A good question provides a paper with structure and purpose; it lets you make the decision “what do I leave in and what do I leave out?” [Answer: you leave in everything the reader needs to understand the question and your answer to it, and you leave out everything else.] “How much ‘background’ do I need to include?” [Answer: As much as the reader requires to understand the question and your answer to it.] “Of the zillions of cases out there, which ones should I read?” [Answer: Those that bear on the specific question you’re trying to answer.] Etc.

The following sentence appears (in some form) in much student writing, usually near the beginning of the paper, and it is a tip-off that the paper will not be a success:

In this paper, I will discuss the current law regarding joinder of defendants in cases involving Internet file-sharing; I will analyze several important recent cases and examine the constitutional implications of current doctrine.

The verbs are all wrong. I do not want you to “discuss,” or “analyze,” or “examine,” or “summarize,” or the like – that’s what I call a “book report.” I want you to answer a question or series of questions.

In this paper, I will show that a number of recent cases have improperly applied the rules regarding joinder of defendants in cases involving Internet file-sharing, and I will argue that the current tests for assessing joinder in such cases violate constitutional limitations.

Coming up with a good question is not a simple task, to be sure; but if you fail to do so, you will not have a good paper. Here are some randomly-chosen good ones:

Whether § 512(c) of the Copyright Act shields a website owner from liability for the dissemination of decryption software.

Whether software patents are invalid under the *Bilski* test for patentable subject matter.

Whether (and under what circumstances) foreign website owners are subject to personal jurisdiction in U.S. courts.

Whether (and under what circumstances) foreign website owners can raise the First Amendment as a defense to prosecution under the Online Gambling Enforcement Act.

Whether “browsewrap” licenses are enforceable under the Uniform Commercial Code and/or the Uniform Electronic Transactions Act.

Whether §230(c) of the Communications Decency Act shields social networking sites from liability for invasions of privacy.

Whether the use of a competitor’s trademarked name in a website “meta-tag” constitutes a sufficient “use in commerce” to subject the user to liability under the Lanham Act.

And here are some *bad* questions:

What effect will the enforcement provisions of the new Anti-Counterfeiting Treaty have on illegal file-sharing?

Should international patent law make it easier for developing countries to distribute patented medicines?

Is “cyber-bullying” a serious social problem, and, if so, what should be done about it?

What makes the good questions good? First, *you can answer them using the tools of legal analysis and legal argumentation*. I don’t know the answer to any of them, but I can tell, just by looking at them, that they can be answered by pulling together the statutes and cases and administrative regulations and the like in order to construct an argument that *e.g.*, §230(c) of the Communications Decency Act does (or doesn’t) shield social networking sites from liability for invasions of privacy. There will be a great deal of additional explaining to do, of course – what does §230(c) say? What kinds of liability for invasions of privacy could a social networking site face? How is “social networking site” defined? Etc. But those are all questions of a sort that we, as lawyers, should be able to answer.

The bad questions don’t have this feature. Whether cyber-bullying is a serious social problem is an interesting and important question, but the standard tools of legal analysis and legal argumentation will not help you (or me) to answer it; for that, you would need the tools of a sociologist, or a psychologist, or perhaps a philosopher, and I’m not teaching you any of those tools.

Second, the good questions are good because they are “descriptive,” rather than “normative” – that is, they focus on what the law *is*, not on what the law *should* be. I am not, frankly, all that interested in your opinion about whether § 512(c) of the Copyright Act should shield website owners from liability for dissemination of decryption software, or whether international patent law should make it easier for developing countries to distribute patented medicines, whether cyber-bullying should be curbed, or whether browsewrap licenses should be enforceable, or whether social networking sites should be immunized from liability for privacy invasions, etc. – at least, I’m not interested until you first explain to me, and show me that you understand, what the law *is*.

Third, they’re good questions because they are all rich and complicated, with a deep ocean of relevant statutory material and caselaw and commentary out of which you can construct a good argument *on either side of the question*. It may not be self-evident to you that the questions on the “good questions” list meet this criterion – but I can tell that they do, because of my familiarity with the subject matter involved. That’s one of the most important roles I (or other faculty advisors) play in this whole process: *we can help you decide whether you’ve got a good question or not*.

How do you find a good question? There's no simple answer to that. Start with some general topic you find interesting and engaging – privacy on social networking sites, enforcement of international arbitration awards in US courts, copyright liability for web hosting services, etc. One way to find good questions within a general topic is to try to find the legal issues that people are actually fighting about. Find a few recent articles on the topic and read them over, looking for areas of disagreement and argument and conflict among the commentators *and* for citations to recent cases. Then, read the cases that seem to be the focus of the commentaries, asking yourself: What questions are the courts answering? What questions are they leaving for later, or ignoring, or missing? Are their arguments persuasive? Look for dissenting opinions – what are the judges disagreeing with one another about, and why? Another idea: Find a good reporter service (*e.g.*, US Law Week, or BNA's "Electronic Commerce Law Report," or any of the other specialized reporters that has good summaries of recent cases – talk to the folks in the Library if you're not familiar with any of these), looking for issues that have arisen in the cases recently (and on which there might be a difference of opinion among different courts) and/or issues that have been left open in the decided cases.

2. The answer. Now that you have your question, you might think that your job is the find "the answer" to the question. Not so! Or, at least, not exactly. As noted above, having a "good" question means having a question on which there are differences of opinion as to what "the answer" is. "Does section 512(c) of the Copyright Act covers the dissemination of decryption software?" You can argue that it does, and you can argue that it doesn't – *remember, that's what makes it a good question*. There's no "answer" hiding somewhere out there that you're trying to find; there are *multiple, mutually contradictory* answers to the question, and what you're trying to construct an answer, putting together the arguments for one of them (and against the others) in a coherent and persuasive manner.

Most legal writing is like this: briefs, judicial opinions, memoranda of law, etc. They are designed to *persuade* the reader of something by the force of argument(s). If you try to "find the answer" to the question, you'll inevitably end up producing something along the lines of: "It's very complicated, and messy, with arguments for and against, and I really don't know what 'the answer' is." That's not very useful for the reader. I don't need to read your paper to know that the law surrounding section 512 and decryption software is complicated and messy. I need for you to help me make sense of that mess, and *the best way you can do that is not to "summarize" the law but to argue for a position in regard to the law*.

So: *Once you have your question(s), take a position on it – your "thesis statement(s)." Then, your task is persuade me – your reader – that your position is the correct one*. Marshal the relevant legal arguments – from the statutes, the cases, the commentary (normally, in that order) – that make your case.

Choose one side or the other – it doesn't really matter which. Make the argument that section 512(c) *does* cover the dissemination of decryption software. If, as you go forward, you find the opposing arguments too strong to overcome, you can change the answer. This is a luxury you have when writing research papers that you don't have when working for clients. You never want to say to your client (unless you have to): "Well, I've finished my research and, lo and behold, I have discovered that the stronger argument is that you are, after all, liable under section 10(b) of the Securities Act!" But with a research paper, you may start out with some thesis – *e.g.*, that browsewrap licenses are enforceable under the UETA – but then conclude, after doing research on the question, that much stronger arguments exist for the opposite proposition. That's fine – you're free to turn around and write that paper instead.

3. The argument. So now you have your question, and your answer to the question/thesis statement: "Section 512(c) of the Copyright Act does not shield a website owner from liability for the dissemination of decryption software." All that's left is for you to persuade me.

One of the errors that beginning writers make frequently is that they begin actually writing (as opposed to "doing research") *much too late* in the process. (A related error is that when they do begin writing, they begin with the "Introduction"; *see Rule 5*) Remember: you're not trying to figure out "the answer," you're trying to marshal the best arguments you can in support of your thesis. Don't wait until you've got it "all figured out" to begin writing – indeed, if you wait until you've got it all figured out, you'll never even begin to write, because *you'll never have it all figured out*. That's the nature of legal problems.

You can't construct your argument in your head and then spill it out onto the page. It doesn't work like that; unless the question you've posed is a *very* simple one, you are not going to be able to construct an answer without putting your argument down on paper and reading it through to see if it holds water. Start by trying to state the propositions that will make your argument:

Thesis: Section 512(c) of the Copyright Act does not shield a website owner from liability for the dissemination of decryption software.

1. Section 512(c) only shields website owners from liability for dissemination of third-party "speech."
2. Decryption software is not speech.
3. Therefore, Section 512(c) of the Copyright Act does not shield a website owner from liability for the dissemination of decryption software.

Now, all you have to do is persuade the reader that #1 and #2 are correct. Go do that; put that argument together, using the statutory language, caselaw, and secondary sources as necessary.

[If you do that, you'll find out that it's not that simple; you'll need to break #1 and #2 down into smaller pieces if you are to persuade me: what does 512(c) actually say? Where does it contain a limitation in regard to "speech"? What is "decryption software"? Why is it not "speech"? Etc. But that's the point of the process.]

Give yourself time to revise, and to revise again

Writing well is always difficult and time-consuming. It will always take longer — usually a *lot* longer — than you think (or than you'd like) to get an outline or a decent draft together, let alone your final product. You must commit to spend however much time it takes to produce a quality product. You need to revise your work *as necessary* so that it makes sense to that reader. You don't get to stop when you have completed the draft that you're supposed to hand in on Tuesday morning; you get to stop when you have something that is clear to your reader (or at least as clear as you can make it at this point in your project). However long it takes you to produce that, that's how long you need to spend on it.

There is, unfortunately, no such thing as an "A for Effort" when it comes to written work

You don't get any prizes for the number of revisions you've done, the amount of sweat you poured on the page, or the difficulties you overcame to produce your paper; you get prizes for expressing yourself clearly. The reader doesn't know, and the reader doesn't care, about *anything* other than what you have put onto the page. "I would have added in the additional cases and fixed the mess in Section III, but my car broke down on Monday and my uncle's family has been staying in our house this week, and . . ." won't cut it, I'm sorry to say.

Use parallel structure. Suppose you are writing about general and specific personal jurisdiction, and you introduce the subject with a sentence like this one:

"Courts analyze personal jurisdiction under two different headings: specific and general."

Because you have introduced them in that order (specific and general), you should discuss them in that order. The next sentence should be about specific personal jurisdiction: "For a court to exercise specific jurisdiction, the defendant must have . . ." When you come to the description of general jurisdiction, use parallel language: "For a court to exercise general jurisdiction, the defendant must have . . ." It makes it much, much easier for the reader if you do that.

Similarly, if you write

"The Copyright Act imposes three requirements for copyright protection."

the reader is expecting you, next, to tell him/her what they are.

“The Copyright Act imposes three requirements for copyright protection. There must be a ‘work of authorship,’ [cite] it must be ‘original,’ [cite] and it must be ‘fixed in [a] tangible medium of expression,’ [cite].”

When you continue the discussion – perhaps in a single paragraph summarizing each of them – *do so in the same order in which you have presented them*. By presenting them in the order you chose, you have set up a structure, or an expectation, in the reader’s mind. If you begin the next paragraph with a discussion of the ‘originality’ requirement, the reader thinks: What happened to ‘work of authorship’? Is the author going to tell me anything more about it, or not? It’s a tiny bit of noise in the reader’s head, keeping him/her from focusing on what you’ve written. It’s not a big deal – but those tiny bits of noise add up over the course of a long document and can become a thunderous roar of confusion that, eventually, prevents the reader from absorbing anything you’ve written.

Remember: You want your reader to say “Well, that was pretty simple” after reading your work. Make it easy on your reader; don’t make him/her do more work than necessary.

If you’re saying the same thing, or referring to the same thing, use the same words.

You may have been taught otherwise, and encouraged to use diverse phrasing so as to give your writing variety and color. But in legal prose, that is a trap, and often a serious one. Do *not* look for lots of different ways to say the same thing; when you’re saying the same thing, say it the same way.

For instance, if you write:

“Section 512 of the Copyright Act was added in 1998 to protect Internet service providers from certain copyright infringement claims.”

when you later refer to “the copyright liability of online service providers,” or “infringement claims against Internet access providers,” or “telecommunications providers,” . . . I will assume that you’re talking about different kinds of entities. If you weren’t, why would you give them different labels?

This is of supreme importance in legal writing, because of the tendency in the law to attribute very complex meanings to specific terms, sometimes very simple and familiar terms. You have already seen this; for example, as you may recall from Torts, to commit some act “intentionally” is *not* the same as committing it “willfully,” or “knowingly,” or “purposefully.” Using those terms interchangeably when referring to a defendant’s state of mind will be hopelessly confusing to the reader.

This is a very, very widespread phenomenon in the law – words or phrases (“terms of art”) that have, within any particular domain of legal knowledge, complex (and sometimes contested and controversial) meanings. It leads to a problem: When you are just beginning to learn about the law in any particular area, you will often not know *which* words or phrases have such a history

of interpretation and construction. In an ordinary discussion with a friend, you might speak interchangeably about “publishing,” or “distributing,” or “selling” a book. But those terms mean *very* different things in copyright law, and if you switch randomly from one to another to describe the same action your readers will be confused. The best way to avoid that is to avoid the temptation to insert artificial variety into your writing by means of lots of synonyms for commonly-used terms. Keep it simple.

Readers read from left to right, and from front to back

Use “as explained below” and “as explained above” very sparingly, if at all. Generally, these are signals that your work is not yet properly organized. What is a reader supposed to do when he/she encounters the phrase “as explained below” in a paper? Stop reading and go “below” to wherever you explain what needs to be explained? If something needs to be explained now, explain it now. If it doesn’t, don’t. Readers read from front to back, and from left to right; do not make the reader’s understanding of something depend on something that you say later.

Everything you put on the page matters

This is, I suppose, the über-rule: Everything – every word, every bit of punctuation, every decision to begin a paragraph with one sentence rather than another, every decision whether to use “shall” or “should” or “may” or “might,” or whether to use “asserted” or “stated” or “argued” or “noted” or “said” – matters. That may or not be true in other fields, but it is true in ours.

This is less an objective fact than an attitude, an attitude that may or may not come naturally to you but which I urge you to start cultivating. I have never met a really top-flight lawyer who didn’t have it. Care about the words you put down on the page. Give a damn about them. They reflect who you are as a lawyer, and they are often the *only* reflection of who you are as a lawyer that your professional colleagues will ever get to see. If you don’t care whether they reflect well on you, they won’t.

When Robert Frost’s *Collected Poems* was originally published, it contained these familiar lines (in “Stopping by Woods on a Snowy Evening”):

The woods are lovely, dark, and deep
But I have promises to keep
And miles to go before I sleep
And miles to go before I sleep.

In fact, what Frost had *actually* written was:

The woods are lovely, dark and deep
But I have promises to keep
And miles to go before I sleep
And miles to go before I sleep.

Adding that comma after “dark” changes – subtly, but critically – the meaning of that stanza.

We are not poets, and the texts we read and write as lawyers are, heaven knows, not poetry. But consider the following: The Copyright Act of 1874 granted copyright protection to “any engraving, cut, [or] print.” It also provided that . . .

“. . . in the construction of [this] Act, the words ‘engraving,’ ‘cut,’ and ‘print’ shall be applied only to pictorial illustrations or works connected to the fine arts.”

Question: Can a pictorial illustration that is *not* “connected to the fine arts” be an “engraving.”?

The answer depends on whether “connected to the fine arts” modifies both “pictorial illustrations” *and* “works,” or “works” alone. See *Bleistein v. Donaldson Lithographic Co.*, 188 U.S. 239 (1903) (*per* Holmes, J.).

Note how the meaning of this phrase would change if there were a comma after “pictorial illustrations”:

“. . . in the construction of [this] Act, the words ‘engraving,’ ‘cut,’ and ‘print’ shall be applied only to pictorial illustrations, or works connected to the fine arts.”

And note how the meaning would change if there were commas after *both* the words “pictorial illustrations” and “works”:

“. . . in the construction of [this] Act, the words ‘engraving,’ ‘cut,’ and ‘print’ shall be applied only to pictorial illustrations, or works, connected to the fine arts.”.

The 1874 Copyright Act is much less beautiful than “Stopping by Woods on a Snowy Evening.” (And section 512(e) of the 1976 Copyright Act is even less beautiful than the 1874 Act – see the [Appendix](#)). The moral of the story, however, is that in legal prose, as in poetry, everything you put on the page matters. *If you don’t start cultivating that attitude towards your own writing, you will never learn to write well.*

II. RULES

The following are not here just to be admired or appreciated – they are here to be *obeyed*. If you would like to know more about my rationale for including any particular rule, or if you disagree with one or more of them, I would be delighted to talk about them – but that does not excuse you from your obligation of obedience.

1. Before you submit anything to me – an outline, a draft, whatever – read it over, from start to finish, in one sitting, as if you were the person for whom it is being written. Satisfy yourself that your reader will not be confused by what you have written (or revise as necessary).

2. Proofread your work with care, or find someone who will do that for you. If you are not a good proofreader, *find someone who is* and ask him/her for help. The details matter – not only because they can affect the meaning of what you have written, but also because of what they communicate to your reader about your attitude towards your work.

Take typographical errors, for instance. They matter – not only on the rare occasions when they affect the meaning of what you have written, but even when they do not. It is easy enough for the reader to realize you meant “ideas” when you wrote “ideax,” or that you meant “the Copyright Act” when you wrote “the Copyrihgt Act,” or that you meant “the First Amendment” when you wrote “the First Amednment,” etc. The meaning is clear, notwithstanding the errors.

But the errors communicate a lack of attention to your own writing; surely, if you had *seen* the words “ideax” or “Copyrihgt,” or “Amednment,” you would have corrected them – so the fact that you didn’t suggests very strongly to the reader that you didn’t read your work over yourself. *And if you didn’t read it, why should I?*

3. When you come to speak to me about your project, bring something in writing (and, if at all possible, email it to me in advance). I’m always happy to talk to you about your project. To enter my office, however, you need a ticket – which consists of *something* in writing that will serve as the basis for our discussion. This can be anything from a one sentence description of the question you’d like to ask me, to a short paragraph describing your confusion in researching a particular question, to an outline, or a full draft – but it must be *in writing*.

4. Read your work aloud. “Writing,” Lawrence Sterne wrote (in *Tristram Shandy*), “is conversation.” He was correct. If your paper, or outline, or memo, or letter, or brief, or . . . does not make sense to a *listener*, it will almost certainly not make sense to a *reader*, and *vice versa*. Read your work aloud – to yourself if need be, or to someone else if possible. Many of your work’s shortcomings will become evident when you do that – that’s the good news. Learning how to write well is learning how to identify those shortcomings, and then how to fix them. You can’t fix them if you can’t even find them.

5. Write your Introduction LAST. Your paper will, usually, consist of four basic parts: an Introduction, Background, the Argument, and a Conclusion – in that order. The function of the Introduction is to tell the reader what’s coming – a little bit about the question(s) you’ll be answering, and the basic structure of your argument that will lead to your conclusion. In the early stages of your project, you don’t know what’s coming, *i.e.*, what shape the argument is going to take, so you can’t possibly write your Introduction. Once you know exactly what your argument looks like (*i.e.*, at the end of the project), it is very easy to write an Introduction; *before* you know what your argument is going to be, it is very difficult – almost impossible – to do so.

6. Quote first; explain later. The actual words used in the statutes or the opinions under discussion *always* matter. Do not tell your reader what you *think* a statutory section means until you have given him the actual language in the statute; don’t venture to say what you think a court *meant* until you first address what it actually *said*. If the statutory language (or the court’s opinion) is clear, then it’s clear, and nothing more need be said. If it needs explanation and interpretation (as it almost always does), explain and interpret – *after* you tell me what the words are that you are explaining and interpreting. I don’t want to know your opinion about the statute or the case – I want to know (a) what it says, and (b) what it means.

7. Use topic sentences to organize your paragraphs. Each paragraph in your paper should cover one point, which you should place in a declarative sentence at the start of the paragraph. Two tips: First, develop the habit, when reading over your own work, of satisfying yourself that all sentences in any particular paragraph explain, or modify, or clarify, or somehow deal with, that paragraph’s topic sentence. Second, *read your paper over ignoring everything except the first sentences in each paragraph*, from start to finish. It should make sense (to someone who knows little or nothing about the subject). If it doesn’t, you’re not finished.

8. A checklist of things to eliminate from everything you write (or, at least, to be very careful about):

The Passive Voice

Always write so that the reader can tell *who* is performing the action described in each of your sentences.

Do *not* say “As the Internet grew, new uses for domain names were found . . .” Tell your reader who found them (*e.g.*, “As the Internet grew, users found new uses for domain names . . .”).

No: “The 5-step test for determining likelihood of confusion under the Lanham Act was crafted . . .”

Yes: “The Eighth Circuit crafted the 5-step test for determining likelihood of confusion under the Lanham Act . . .”

No: “Where there is no general jurisdiction, the possibility of specific jurisdiction must be examined.”

Yes: “Where there is no general jurisdiction, the court must examine the possibility of specific jurisdiction.”

No: “The arbitrators’ decisions are enforced by the imposition of monetary penalties on wrongdoers.”

Yes: “The SEC enforces the arbitrators’ decisions by the imposition of monetary penalties on wrongdoers.”

No: “The modern framework for analyzing a question of personal jurisdiction was developed in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).”

Yes: “The Supreme Court developed the modern framework for analyzing questions of personal jurisdiction in *International Shoe Co. v. Washington*, 326 U.S. 310 (1945).”

No: “ASCAP was authorized to demand payment for the broadcast of copyrighted works.”

Yes: “Congress [or “the FCC,” or “the Communications Act,” or whomever it was] authorized ASCAP to demand payment for the broadcast of copyrighted works.”

No: “In this paper, theories of intellectual property protection are discussed.”

Yes: “In this paper, I discuss theories of intellectual property protection.”³

Sometimes, when you try to implement this rule, you will say to yourself: “But *I don’t know* who enforces the arbitrators’ decisions [or authorized ASCAP to demand payment, or crafted the 5-step test, or . . .]. *Bingo! Go figure it out (or get rid of the sentence)*. That’s a good example of how you can use the writing process to help you learn what you need to learn about the subject; if you find yourself using the passive voice and can’t correct the problem, you need to learn more about the subject.

Thumping on the table. Eliminate the phrases “it is clear that,” “it is obvious that,” and all similar phrases, along with the words “clearly,” “obviously,” and “undoubtedly,” and their close cousins (see “Unnecessary Adverbs,” below), from your vocabulary. If something is obvious, *show* me how obvious it is; just *telling* me that it is obvious (to you) doesn’t get me anywhere. If it is so obvious, it should be easy for you to get the reader see it for herself. If it is *not* obvious, saying that it is will not make it so.

Ninety-nine times out of 100, the words “clearly” and “obviously” are crutches, obscuring the fact that you have *not* made something clear or obvious when you should have, and you are hoping that using the words “obviously” or “clearly” will make up for the deficiency. They won’t. They do just the opposite – they make the reader angry: “The author thinks this is clear/obvious – but hasn’t shown me why or how, and is asking me just to take her word for it.” [Insert sound of gnashing of teeth]

³ All of these examples, as you might have guessed, come from actual student papers.
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Unnecessary adverbs. “The road to Hell,” author Stephen King (correctly) observed, “is paved with adverbs.” Adverbs (words that modify verbs or adjectives, using ending in –ly) are rarely your friend. Like the passive voice, they are signals that the author is aware that he is not expressing himself clearly or getting his point across, but doesn’t quite know how to do so.

“The facts of this case are incredibly similar to those in *Smith v. Jones*.”
“Defendant’s unauthorized transmissions blatantly infringed plaintiff’s copyright.”

As a reader, what do you take away from those sentences? Apparently, the author thinks the facts of the two cases under discussion are very similar, and that the defendant’s conduct was particularly egregious – *but she’s not actually giving you the information necessary for you to understand that, she’s just telling you.*

Show me how similar they are, and you won’t need the “incredibly.” Show me how outrageous the defendant’s conduct was, and you won’t need the “blatantly.”

Adverbs sometimes are useful – but if you use *any* in work that you hand in to me, be prepared to defend each one as necessary and important. [Probably easier to just leave them all out, eh?]

The word “essentially” is particularly⁴ egregious. Do not ever use it.

“The court essentially held that the Copyright Act of 1976 prohibited the importation of ‘gray market’ goods . . .

“Essentially, the defendant’s argument was that the ‘must-carry’ provisions of the Telecommunications Act of 1986 were invalid under the doctrine of ‘compelled speech.’”

“There was, essentially, no material difference between the defendant’s conduct in the two cases involved in . . .”

The word “essentially” adds nothing other than ambiguity to these sentences. Did the court hold that the Copyright Act of 1976 prohibited the importation of ‘gray market’ goods, or didn’t it? Did the defendant make that argument, or not? Was there a material difference between the defendant’s conduct in the two cases, or not? Using the word “essentially” just signals to the reader that the situation is a little more complicated than you’re making it out to be, *without explaining how it is more complicated*, so the reader is left angry and confused.

⁴ Those of you reading closely will notice that I am violating the no-adverb rule here. I can defend that use. If I took out the adverb, the sentence would read as follows:

“The word ‘essentially’ is egregious.”

That would imply that the uses I have just been discussing are *not* egregious, and I do not mean that. The word “particularly” does useful work for me here – it tells you that I think all adverb use is egregious, but that use of ‘essentially’ stands out as being more egregious than the others.

Unnecessary introductory and transition words. Do not say “It should be noted that . . .” or “It is important to note that . . .” or the like. Even “Moreover, . . .” or “Additionally, . . .” or “Furthermore, . . .” should be avoided. They are almost always inserted when the logical transition between your sentences or paragraphs makes no sense, and they reflect your desperate hope that by saying “It is important to note . . .” or “Moreover” or “Furthermore” you will cover up that unfortunate failure of organization. If something is important to note, show me how and why it is important – just telling me “this is important” is not helpful. If you have two sentences that do not belong together, throwing in an “In addition, . . .” at the beginning of the second sentence will *not* help. Use these devices *very* sparingly, if at all.

And again – when you find yourself using phrases like this, don’t just cross them out and move on. Think: “Why did I use that phrase? *Why* do I think this point is so “important to note”? Where, within the structure of what I’m writing, does this point belong? Where should it go so that the reader will see just how important it is without my having to say “This is important”? What other point(s) does it clarify, or contradict, or modify that make it so important?”

Then, move it to wherever it should go.

Do not use “since” when you mean “because.” When I come across a sentence in a paper that begins like this:

“Since enactment of the Copyright Act in 1976 . . .”

I expect what follows to look something like this:

“. . . music reproduction technology has greatly altered the landscape of the music business,” or

“. . . there have been many attempts to revise the statutory ‘work for hire’ provisions,” or

“. . . copyright law has become a more significant component of legal practice.”

What I do *not* expect is something that looks like this:

“Since enactment of the Copyright Act in 1976 was part of an effort to balance the incentives to create and to disseminate copyrighted works, it is important to keep the interests of authors and publishers in mind when considering statutory provisions.”

I get a little jolt of dissonance when I reach the words “was part of an effort . . .” It’s the wrong part of speech, and I have to return to the beginning of the sentence to make sense of what’s written. That’s just a little bit of extra work I have to do as a reader, and it violates a cardinal rule: *Never make your reader work hard – harder than absolutely necessary – to understand what you are saying.*

Get your pronouns to agree with one another. This is a distressingly common problem in a great deal of modern writing. The following sentences should make the hairs on the back of your neck stand up:

Each customer is responsible for payment of the taxes due on their purchases . . .

Any citizen subject to the court’s jurisdiction can assert their claims in a special proceeding . . .

Acme, Inc. is estopped from asserting that their overseas operations qualify for the credit because . . .

Under the ‘work for hire’ doctrine, the employer, as defined with reference to the common law of agency, owns the copyright in all works created by their employees. . . .

These can be tricky to fix (at least in English) because of the Gender Problem. We are (and should be) no longer comfortable about using the pronoun “his” as the catch-all form of the singular possessive (even though it will produce grammatically correct sentences):

Each customer is responsible for payment of the taxes due on his purchases . . .

Any citizen subject to the court’s jurisdiction can assert his claims in a special proceeding . . .

English does not have a gender-neutral form for the singular possessive.⁵ The plural possessive “their” is nicely gender-neutral, so we tend to slip into it even when (as above) it is grammatically incorrect.

The solutions to this problem are:

(a) Use “his/her” (or “his and her”) and “its”:

Each customer is responsible for payment of the taxes due on his or her purchases . . .

⁵ The campaign to introduce ‘hesh’ for this purpose has my wholehearted support, but I recognize that it is not yet gained enough traction to have become an accepted part of the vocabulary. But hope springs eternal . . .

Any citizen subject to the court’s jurisdiction can assert his/her claims in a special proceeding . . .

Acme, Inc. is estopped from asserting that its⁶ overseas operations qualify for the credit because . . .

Under the ‘work for hire’ doctrine, the employer, as defined in the common law of agency, owns the copyright in all works created by its employees.

(b) Alternate “his” and “her”:

Each customer is responsible for payment of the taxes due on his purchases . . .

Any citizen subject to the court’s jurisdiction can assert her claims in a special proceeding . . .

(c) Change the sentence to refer to a plural noun.

Customers are responsible for payment of the taxes due on their purchases . . .

All citizens subject to the court’s jurisdiction can assert their claims in a special proceeding . . .

Corporate taxpayers are estopped from asserting that their overseas operations qualify for the credit because . . .

Under the ‘work for hire’ doctrine, employers, as defined in the common law of agency, owns the copyright in all works created by their employees.

It’s “the Internet,” not “the internet.” Because many of you will be submitting written work to me discussing, or at least mentioning, the global network known as “the Internet,” I am including this on my list of Rules – but I’m putting it last because in truth it is more of an idiosyncrasy, or a pet peeve, than a true Rule. There are many millions of internets; there is only one Internet. That initial capital “I” carries the important meaning that you are speaking about *that one*. Please use it.

⁶ **Please note:** The word “its,” when used as a pronoun (“its taxes,” or “its overseas operations”) *does not have an apostrophe*. “It’s” is a contraction of the words “it is”: “It’s a beautiful day in the neighborhood.”

“A man may take to drink because he feels himself to be a failure, and then fail all the more completely because he drinks. It is rather the same thing that is happening to the English language. It becomes ugly and inaccurate because our thoughts are foolish, but the slovenliness of our language makes it easier for us to have foolish thoughts. The point is that the process is reversible.”

George Orwell, “Politics and the English Language”

Orwell’s Six Rules (from “Politics and the English Language”):

1. Never use a metaphor, simile or other figure of speech which you are used to seeing in print.
2. Never use a long word where a short one will do.
3. If it is possible to cut a word out, always cut it out.
4. Never use the passive where you can use the active.
5. Never use a foreign phrase, a scientific word, or a jargon word if you can think of an everyday English equivalent.
6. Break any of these rules sooner than say anything outright barbarous.

Appendix

Here's another, much more complicated, statutory illustration of the significance of a single comma. Section 512(e) of the Copyright Act provides:

“(e) When a public or other *nonprofit institution of higher education is a service provider*, and when a *faculty member* or graduate student who is an employee of such institution *is performing a teaching or research function*, for the purposes of subsections (a) and (b) of this section such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution, if--

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution *provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.*”

Read it again, carefully. Here's a little problem of statutory interpretation. Assume that:

- (a) Temple University is a “nonprofit institution of higher education” that is a “service provider” within the meaning of subsection (e);
- (b) A faculty member – call him “Professor Post” – is an employee of Temple University and is “performing a teaching or research function” within the meaning of subsection (e);
- (c) Temple University does *not* provide “informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright” to all users of its system, *i.e.*, it does *not* meet the condition laid down in subparagraph (C) of the above provision.

The question: Is Professor Post “a person other than the institution” for “the purposes of subsections (a) and (b) of this section” (whatever subsections (a) and (b) might be)?

The answer is “No.” Why? Because “for the purposes of subsections (a) and (b) of this section” Prof. Post “shall be considered to be a person other than the institution” only if the

conditions in sub-paragraphs (A), (B), and (C) are satisfied. Because the condition in sub-paragraph (C) is not satisfied, Prof. Post shall not be considered to be a person other than the institution. [If you don't see that, re-read the section over until you do].

Note what happens if we omit the comma before the word "if" at the end of the first paragraph. The section now reads as follows:

“(e) When a public or other nonprofit institution of higher education is a service provider, and when a faculty member or graduate student who is an employee of such institution is performing a teaching or research function, for the purposes of subsections (a) and (b) of this section such faculty member or graduate student shall be considered to be a person other than the institution, and for the purposes of subsections (c) and (d) such faculty member's or graduate student's knowledge or awareness of his or her infringing activities shall not be attributed to the institution if --

(A) such faculty member's or graduate student's infringing activities do not involve the provision of online access to instructional materials that are or were required or recommended, within the preceding 3-year period, for a course taught at the institution by such faculty member or graduate student;

(B) the institution has not, within the preceding 3-year period, received more than two notifications described in subsection (c)(3) of claimed infringement by such faculty member or graduate student, and such notifications of claimed infringement were not actionable under subsection (f); and

(C) the institution provides to all users of its system or network informational materials that accurately describe, and promote compliance with, the laws of the United States relating to copyright.”

The answer to the question presented is now “Yes.” Removing the comma has completely changed the meaning of the subsection. Now, for “the purposes of subsections (a) and (b) of this section” Prof. Post “shall be considered a person other than the institution” – full stop. The conditions in sub-paragraphs (A), (B), and (C) apply *only* to determining whether the faculty member will be considered to be a person other than the institution *for purposes of subparagraphs (c) and (d)*. (If you don't see that, read the section over again – aloud if necessary – until you do).