

Writing Sentences That Work

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Essentials for Law Students

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Contents

Preface About This Book	ix
To the Student The Importance of Effective Sentences (and What I Mean by “Effective”)	xiii
Why this book?	xiv
The missing essentials	xv
The nature of modern legal readers, and the challenge it poses	xvi
There is some good news	xvii
The unintended misleading of law school	xviii
The crucial task	xix
Orientation A Few Necessary Concepts	3
0.1 Words, “parts of speech.”	3
0.2 Word order, syntax.	5
Typical (default) word order.	5
Proximity.	6
Summary.	8
Exercises	9

Problem 1 Misplaced Modifiers and Other Faulty Syntax	13
1.1 Dangling modifiers.	14
1.2 Proximity to maintain sense.	16
Exercise	19
Problem 2 Mishandled Clauses	21
2.1 Clauses.	21
2.2 Clause structure effect on punctuation—comma or no comma?	23
2.3 Subordinate clauses—wrongly omitted <i>that</i> .	24
Exercises	28
Problem 3 Neglect or Misuse of Verbs/Verbals	31
3.1 Neglected perfect tenses.	33
3.2 Verb-derived words: verbals, including nominalizations.	35
3.3 Verb selection.	38
3.3.1 Tribunal action.	41
3.4 Passive voice.	42
Exercises	43
Problem 4 Inexact Word Choice	47
4.1 Tailoring language to audience.	48
4.2 Jargon and technical language.	49
4.3 Word selection for optimal communication.	51
4.4 Finding the right word.	54
Exercises	56

Contents	vii
Problem 5 Misuse or Non-Use of Pronouns	59
5.1 Gender and number.	59
5.2 Personal pronoun problems.	60
5.2.1 The me hang-up.	62
5.2.2 Noun-pronoun number mismatch; sexist language.	63
5.3 Other pronouns; faulty use of <i>As such</i> .	67
5.4 Pronoun avoidance.	69
Exercises	70
Problem 6 Punctuation	75
6.1 Apostrophe.	75
6.2 Ellipsis.	76
6.3 Colon and semicolon.	77
6.4 Dash.	77
6.5 Comma.	78
6.5.1 Oxford comma.	78
6.5.2 Clarifying causation.	79
6.5.3 Commas as “police.”	80
6.6 Quotation marks.	81
6.7 Punctuation generally.	82
Exercises	82
Problem 7 Incorrect or Ineffective Sentence Structure	85
7.1 Emphasis through structure.	85
7.2 Hierarchical allocation of ideas.	89
7.3 Interpolations.	92

7.4 Linked sentences.	95
7.4.1 A reflection on However , vs. But .	96
Exercises	99
Problem 8 Often-Confused Word/Phrase Pairs	103
8.1 <i>Affect, effect.</i>	103
8.2 <i>Begs the question/Invites the question.</i>	104
8.3 <i>Bring, take.</i>	105
8.4 <i>Comprised, composed.</i>	105
8.5 <i>Couple, couple of.</i>	106
8.6 <i>Crescendo, climax</i>	106
8.7 <i>Imply, infer.</i>	107
8.8 <i>Its, it's.</i>	107
8.9 <i>Lay, lie.</i>	107
8.10 <i>Lead, lead, led.</i>	108
8.11 <i>Less, fewer.</i>	109
8.12 <i>Like, as.</i>	109
8.13 <i>That, which.</i>	110
8.14 <i>Who, whom.</i>	110
8.15 Resources	112
Exercise	113
Glossary	117
Answers to Exercises	121
Index	139

Preface

About This Book

Lawyers must write effectively. It is the means by which we accomplish the vast majority of what we do for our clients. Yes, there is the telephone, texting, e-mail, and person-to-person conversation, but texting and e-mail are just electronic means of transmitting writing, and phone or in-person conversations will often be reduced to writing to preserve them. Legal matters are too important, and memory is too unreliable, to entrust solely to unrecorded communications.

As important as it is that we write, it is equally important *how* we write. Long gone are the days when clients, judges, and other lawyers would tolerate rambling arguments or stilted legalese. The people lawyers deal with nowadays are hurried and harried, and they need clear, concise writing from the lawyers they encounter.

Anyone who teaches in a law school today knows that many students arrive less well prepared than they ultimately need to be for the writing they will have to do in their careers. Legal writing programs guide students to the ways in which lawyers express themselves in their professional writing. But those courses cannot fully address the practical deficiencies that many incoming students have.

Current education of American students in English focuses on literature and creative writing. This fact may be a residual of the “whole language” approach to reading instruction that in the 1980s and 1990s favored holistic clues rather than component-by-component analysis; for whatever reasons, the educational system no longer emphasizes, and seldom even teaches, how English works functionally, that is, how the components of the language operate and work together to convey meaning.¹ (Students of foreign languages get better exposure to these concepts.) Unfortunately, this knowledge of the functional operation of English is precisely what law students need in order to discern when they have writing deficiencies, to understand what those deficiencies are, and to figure out how to resolve them. And yes, I’m hinting at that fearsome word “grammar.” People tend to think of grammar as a bunch of arbitrary rules about what you can and can’t say, but it is better understood as a system of mutual understandings between speakers and listeners, and between writers and readers, about what the sounds and symbols used in language convey.

It is not acceptable for law students to lack basic competency in writing. When lawyers write, they do so with the purpose of being understood, or at least they should. They need to know, therefore, how to make themselves understood. That means knowing how the mechanism of written language works so it can be operated effectively.

All of the law schools I am aware of now have in place fairly rigorous legal writing programs. But these programs cannot concentrate on writing mechanics, as they have much else to cover: how to analyze cases and statutes, how to do legal research, predictive

1. A web site addressed to those who might aspire to be English teachers, for example, says: “If you’re thinking of becoming an English teacher, you’ll find opportunities to teach all kinds of literary genres, including classic literary texts, creative nonfiction, contemporary fiction, film and web-based media.” No mention of grammar. <https://www.alleducationschools.com/teaching-careers/english-teacher/>. (Visited 6/3/2021.)

vs. persuasive writing, citation form, etc. Those of us who teach in these programs know that we can only do so much to remediate deficiencies: a year or a year and a half of legal writing instruction and occasional editing of student work cannot substitute for a thorough education in how our language works and how it can be used effectively.

Admittedly, the brief program set out in this book likewise cannot compensate for educational deficiencies of this sort; the discussion and exercises contained in this program do not begin to cover the broad range of language issues that can challenge legal writers. But this book addresses eight topics derived from my observation, over more than 17 years of teaching legal writing and years mentoring younger lawyers in law firms, that particular issues frequently recur. Each class of students entering law school presents many of the same areas of confusion, commits many of the same errors in usage, and struggles in many of the same ways to understand why their writing is deficient—or similarly fails to perceive that it *is* deficient. This book is organized around those frequent and common issues. It focuses on constructing good sentences, since they are the heart of any writing. The book is intended to supplement the instruction and practice that students receive in their legal writing courses and to relieve those courses of the need to address these common problems or spend a lot of instructor time on them.

As to each sort of problem addressed, I provide explanations of why the problem *is* a problem and how to fix it. This necessarily involves explaining the principles of proper written English. These brief explanations of English grammar, syntax, and punctuation are essential to understanding the solutions I discuss in this book, but they should also equip students to address problems beyond those discussed here. At the end of each section are practice exercises that address each sort of problem; answers are at the end of the book. I also include a glossary of many of the grammatical and other terms used in the text, to save students the trouble of finding where they were discussed. I hope that addressing these

most common problems, along with the explanations of language structure and function, will inspire students to take greater care in their writing and to feel more confident that they can (1) discern when they have a problem and (2) know how to fix it.

No program, of course, can accomplish improvement without the writer's full engagement and dedication to getting better. But, for a writer who does care about improvement or is encouraged to care by concerned professors, this program should prove helpful.

David Boelzner

Tulsa, Oklahoma

2022

To the Student

The Importance of Effective Sentences (and What I Mean by “Effective”)

For the novelist, written language is a creative medium to convey story and character; for the poet, it is a means of expressing nuance and feeling. But for the lawyer, written language is a practical tool of our profession. Indeed, it is our primary tool. Other skills are useful, even essential, to successful law practice: analytical ability, oratory, negotiating talent, business savvy, political insight, diplomacy, passion. But nothing is as crucial, at least for the younger lawyer, as being able to write effectively in the way lawyers need to write. If you eventually become the senior lawyer in a practice, the rainmaker who draws in the business, or the supervising attorney in a government law office, you could perhaps foist the writing chores onto more junior lawyers, but until you reach that lofty perch, you will be practicing law in the trenches, and in the trenches the work gets done through writing. (And, of course, even as a senior partner who does more schmoozing than writing, you should still want to be able to identify good and not-so-good writing by your subordinates.)

Writing in the law is about conveying ideas, sometimes rather complex ones, as *clearly* and *efficiently* as possible. That statement

may have made you think of instances of legal writing you've seen where these two aims were not accomplished, so let me admit that quite a bit of legal writing is not as it should be. No profession is perfect; just as there is careless driving, lousy fast food, even substandard health care, there is bad writing by lawyers. But no one wishing to succeed will measure his or her abilities against the mediocre or the poorest examples in the field. No one *wants* to deal with careless drivers, or eat lousy food, or suffer at the hands of an incompetent doctor. No law student should aspire to be less than highly competent at one of the essential jobs a lawyer must do.

The key to successful writing in the law is being able to construct sentences that do what you want them to do: say what you mean to say in a way that is immediately comprehensible by another person. That is what I mean by an “effective” sentence. The sentence is the heart of prose. The larger organizational divisions of a piece of legal writing, whether a contract provision, an argument in a brief, a regulation, a statute, or a letter, will be dictated by the particular context and aims of the writing. But every piece of legal writing contains sentences, and indeed doesn't just contain them but is composed of them—they do the work of writing.

This book is intended to help you craft effective sentences. It is organized around the most common problems I've had to correct in law student writing over many years of teaching and practicing law, so it is tailored specifically for the sorts of challenges law students and young lawyers frequently face in becoming competent legal writers.

Why this book?

Why is it worth it for you to work through this book, to work through the issues I've raised and learn how to deal with them? There are two reasons. One is that writing effectively in the legal profession, while it has always been challenging, is even more challenging today than it was, say, 25 or 30 years ago. Modern legal

readers have very specific needs, and lawyers must address them if they are to be successful in their legal writing. Legal writing must be both clear and concise, and to achieve these aims requires much skill and diligence as well as some basic knowledge of how the language operates.

The second reason for this book is that students coming to law school, despite being highly capable intellectually and well-educated in various ways, often have deficiencies in their understanding of how the language works in a functional way, even if they have been successful creative writers in their earlier education. By “functional way” I mean how the components of the language—the words, phrases, and clauses—work together to convey meaning. Language as an engine for communication is essentially a machine, and it is a machine all lawyers must use. Many of us do not understand how our automobiles work, and when they break down we have to take them to a mechanic to fix. But in legal writing we are the mechanics who must diagnose and repair what is wrong. Understanding the functional operation of the language is essential to being able to discern writing problems and how to correct them.

Any deficiencies in understanding this aspect of writing are likely not the result of student laziness but rather are the result of choices in teaching focus in secondary and undergraduate schools. Each of these reasons is discussed briefly below.

The missing essentials

A few decades ago, American language education shifted from tutoring in the fundamentals of how the language works—those unappealing subjects of grammar and syntax—to a less functional approach to language teaching. I am not a linguist or an English teacher, and I am willing to concede that there may be educational advantages in approaching language in this way for certain reasons. But I *am* a lawyer, and I can say with certainty that failing to understand how the language functions is a significant impediment to recognizing and correcting problems in legal writing. Whatever

may be the value of a focus on literature or on creative writing, it does not meet the needs of writers who must understand how each component of the language functions to serve meaning so that they can employ language as an effective and efficient tool. Lawyers are such writers.

You can't know what you've never been taught, and American education nowadays no longer includes much instruction about how the language works. Some fortunate people develop, primarily through reading, a reliable sense of how good sentences work; they absorb via a sort of osmosis a "feel" for when a sentence is working and when it is not. But the rest of us need some guidance. We need to be alerted to the weaknesses in our sentences and understand what the problems are. Only then can we make our sentences do the work they must do. This book aims to supply that guidance.

*The nature of modern legal readers,
and the challenge it poses*

Various people read what lawyers write: clients, judges, clerks, government bureaucrats, other lawyers. Whatever may be their varied reasons for reading what we write, our readers share some common features, some of which may surprise you and all of which add to the challenge of effective legal writing. They may be summarized in the following two facts of life in the law:

Everyone we write for is busy and to some degree reluctant to read our writing.

To the extent readers do read our writing, they want to understand quickly what we are saying so they can move on to something else.

I highlight these statements because I cannot overemphasize this reality of modern law practice. Although as a law student you may be resistant to the notions expressed in these statements, they simply reflect the cold, hard truth, which I entreat you to accept

based on my 35-plus years in the profession. Our readers are hurried and impatient, and they do not want to devote a single moment more than they must to understand our writing.

This has profound significance for how we must write. If you have a vegan friend coming over for dinner and decide to grill up a nice steak, you will not be providing what your friend needs even if it is a superb steak. If we are to have any hope of engaging and retaining our readers' interest long enough to accomplish our objectives, we must give them what they need. We must present our ideas in such a way as to be absolutely clear on first reading, and we must avoid anything that would distract or mislead hurried and impatient readers. Failure in either of these respects is fatal because our readers will abandon us. There is nothing to prevent them from doing so, no bad consequence (as they perceive it) if they do. And if our writing is ignored, we may as well not have troubled to create it. This is why it is so vitally important to gain command of the language machinery and learn to make it hum.

There is some good news

Fortunately for us, the difficulty of writing is balanced by its value to what we do as lawyers. Partly I'm thinking of the positive reaction people have to good writing. But beyond that, the process of writing a legal analysis works in symbiosis with formulating the analysis itself. Nothing reveals weaknesses or gaps in an analysis like trying to present it in writing to someone else. The work of writing—thinking through exactly what you mean to say, finding the words to say it, reading and re-reading to make sure you have said it—these tasks all contribute not only to making the writing clear but also to making the analysis sounder. Think of the sweating blacksmith who repeatedly thrusts a strip of metal into a forge and hammers it against an anvil, torturing the impurities out of it until a fine samurai sword has been created. It is hard work, to be sure, but the value created is worth the effort. It is a mistake to

regard the written presentation of an analysis as mere packaging for it; writing is an essential part of *creating* the analysis. It is the equivalent of the forging and hammering of a sword. So, the good news is that the hard work of writing effectively—call it an ordeal, if you like—achieves two very valuable aims: it helps you refine and strengthen an analysis, and it creates a clean, concise vehicle for its presentation.

The unintended misleading of law school

A frustrating irony of law school is that students will spend three years reading three sorts of writing, *none of which is aimed at the audiences that practicing lawyers must write for*. Predominantly you will read the decisions and opinions of judges in appellate cases; you'll also read statutes and regulations, and occasionally law review articles and treatises on the law. The authors of each of these types of writing know that their audiences, however limited they may be, are dedicated to understanding what is being said and are willing to work fairly hard at understanding it. That is, readers of case decisions, enacted law, and law commentary have sufficient vital interest in understanding what is intended that they will usually persevere to the end no matter how challenging it is to read. People concerned with complying with a statute or regulation, for example, will study the text carefully and try hard to fathom its meaning, because it has great importance to the issue they are researching. The parties to a case, and other lawyers seeking guidance on a legal point, are strongly motivated to discern the court's reasoning, so they will stick with a judicial writer for a long time. Researchers of scholarly commentary likewise have a strong interest in understanding what is being said, even if only to challenge it in some way.

But here is the irony: none of these dedicated readers resembles in any relevant way the sorts of people who read most of what we write as practicing lawyers. Practicing lawyers do not write for

a captive audience like the judge's or the legislature's, nor do we write for scholars deeply interested in what we have to say. On the contrary, we write for clients who are often reluctant to hear what we have to say, for other lawyers or parties who are downright hostile to what we have to say, or for judges and bureaucrats who are interested in what we have to say only insofar as it helps them do their jobs. Moreover, the lawyers and judges are busy, the bureaucrats are busy and often heedless, and even the clients are often busy and intimidated at the prospect of wading through a lawyer's communication. In sum, the readers that practicing lawyers address are not at all like those who read what law students spend three years reading.

This is why this and other books on writing urge you to avoid absorbing and adopting the verbiage and mannerisms of the writing you read in law school. Some of it comes from earlier eras when the pace of life was slower and people were not bombarded round the clock with electronic messages, and so readers were willing to invest more time in reading than they are now. Even more current writing by judges, legislators, and scholars presumes more patient readers than practicing lawyers can expect.

The crucial task

Because writing for the legal audience of most practitioners is so very challenging, it is crucial to learn to construct sentences that are like sharpened tools, optimally suited to doing their jobs. Because many students lack a thorough grounding in the mechanics of the language sufficient to be able to spot problems in this respect and know how to resolve them, it is difficult for them to construct such sentences, or even to appreciate when they have failed to do so. This book seeks to help with this crucial effort.

