Bad Words

Bad Words

A Legal Writer's Guide to What Not to Say

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About the Author

United States Magistrate Judge David L. Horan took the bench in the Dallas Division of the United States District Court for the Northern District of Texas in November 2012. Prior to his swearing-in, Judge Horan was a partner in the Dallas office of Jones Day, where he led the firm's Issues and Appeals Practice Group in its Texas offices. Before joining Jones Day in 2004, Judge Horan was an associate with Hughes & Luce, LLP, in Dallas.

Judge Horan received a bachelor of arts degree in government and philosophy, *summa cum laude*, from the University of Notre Dame in 1996 and, after transferring following his first year at the University of Chicago Law School, a juris doctor degree from Yale Law School in 2000. After graduating from law school, he served as law clerk to United States District Judge Janet C. Hall in Bridgeport, Connecticut, from 2000 to 2001, and as law clerk to United States Circuit Judge Patrick E. Higginbotham in Dallas, Texas, from 2001 to 2002.

Introduction

This is not a book on how to write the first draft of a legal brief or motion. This is a book for editing the second or third draft, when you should cut out material in your first pass that, on reflection, you have decided should not be put in front of a judge.

This is a handbook to check anything about which, you wonder, is it a good idea to say that—or to say that in that way?

This book offers a guide to words, phrases, rhetorical devices, and at least one punctuation mark that you should not use or should at least think twice, or even three times (not "thrice"), before using—or overusing—in formal legal writing.

Most of the words—almost all adjectives and adverbs—aren't bad in every context. Many are not bad in every legal writing context. But they're all bad in at least some ways that legal writers use them.

Avoid adjectives and adverbs for better legal writing

My principal advice is to use adjectives and adverbs—as well as legalese and other five-cent words and phrases—as rarely as possible.

That's easier said than done.

Here's an example that looks a lot like what I have read and, at some point, written. Consider the first sentence:

> Plaintiff has utterly failed to establish even a single genuine fact issue and, in his wholly deficient submissions, has clearly offered absolutely no evidence to support his entirely meritless claims.

And the second:

> Plaintiff has not established a genuine fact issue and has offered no evidence to support his claims.

From a court's perspective, nothing is lost between the first and second sentence other than some length and 13 words that the judge did not need to read, as this marked-up version of the first sentence illustrates:

> Plaintiff has ~~utterly failed to~~ not established ~~even~~ a ~~single~~ genuine fact issue and~~, in his wholly deficient submissions,~~ has ~~clearly~~ offered ~~absolutely~~ no evidence to support his ~~entirely meritless~~ claims.

The second sentence with those edits is more, not less, forceful, because it conveys confidence in the point that the writer is making.

Almost any sentence will carry the same meaning if most adjectives and adverbs are deleted. And these words often are red flags that the writer is overstating her position. Understatement is almost always better.

I practiced law with Glen Nager, who had a personal rule banning all footnotes in his briefs unless there was a strong reason to use one. (A great rule.) Legal writers should consider imposing on themselves the same standard for using adjectives, adverbs, and legalese.

How this book will help you achieve better legal writing

What follows is a guide full of adjectives, adverbs, and other words and phrases that you should use less often, rarely, or not at all.

This is a book of advice on improving legal writing. And the advice as to each word, phrase, or rhetorical device (which are listed in alphabetical order in a dictionary's style) provides some food for thought on if, when, and how often you may want to use any of these words or phrases.

Legal writing is a specialized subset of formal writing. Many observations in this book apply to other types or genres of writing because good legal writing shouldn't be alien even to a reader untrained in or unfamiliar with the law.

Why better legal writing matters

I love legal writing, admire any good writing, and have no doubt used many of these words, phrases, and rhetorical devices myself while in practice as well as in orders and opinions since taking the bench.

And I know that the practice of law is challenging and difficult, that it is harder to write a short brief than a long brief, and that it takes more time to write something that is short and respectful but persuasive.

But it is important to strive for that standard and to avoid the temptation of writing something that you would never consider saying to an opponent's face or in a courtroom.

It is important—that is, good legal writing matters—because you are trying to persuade your audience to accept your client's position. And successful advocacy requires effective communication and avoiding things that may cause a judge to lose confidence in you or become distracted or confused or annoyed.

Effective communication in legal writing entails submitting shorter documents that include shorter sections with shorter paragraphs and shorter sentences and shorter words. Shorter, that is, than much of what you have read in legal writing in your career so far.

Legal writers should write shorter because judges are busy and need to get through briefing efficiently. And that means filing shorter motions and briefs and not taxing judges' and their staffs' time or attention wading through SAT words or, worse, checking a dictionary.

You have probably heard this advice before. It is hard to carry out.

But the easiest way to make progress on this goal may be to use shorter, plainer words with few, if any, adjectives and adverbs.

That is the positive case for following this book's general advice.

Here is the negative case: Writing with lots of adjectives and adverbs amounts to telling, not showing. And showing (not telling) is far more persuasive.

If you believe a defendant is a thieving crook, provide the court with a dispassionate account of the facts of how and what he stole and swindled, rather than a string of inflammatory descriptors.

If you believe an attorney is dishonest and breaks his word, lay out in your brief or motion a detailed chronology of the instances in which the attorney failed to abide by his agreements and promises, and let the court determine that the attorney has acted in ways that the court finds to be untrustworthy and unethical. Better to have the court write up that finding in an order or opinion based on a factual record than for you to use colorful language and angry words to try to make that case.

Writing with lots of adjectives and adverbs facilitates uncivil (and ineffective) advocacy that distracts from telling the judge

your position on the matters that the court must decide. Judges don't welcome lawyers' "prov[ing] the adage that the substance of a motion is inversely proportional to the amount of hyperbole and rhetoric it contains." *Knepper v. Equifax Info. Servs., LLC*, Case No. 2:17-cv-02368-KJD-CWH, 2017 WL 4369473, at *2 n.1 (D. Nev. Oct. 2, 2017).

If you don't believe me about all of this, you can look to the advice of the author of some of the clearest and most concise opinions on the federal bench, United States Circuit Judge Frank H. Easterbrook.

In a 2012 speech honoring and recounting what he learned from former Deputy Solicitor General (later United States Circuit Judge) Daniel M. Friedman, Judge Easterbrook explained that

> Dan Friedman insisted on plain talk using simple words. That's a vital rule. Any private practitioner can and should do the same—though pulling it off requires careful editing with the goal of simplifying and shortening briefs. That was Dan Friedman's goal in reviewing.
>
> His style was bone dry. He went through a brief and deleted almost every adjective and adverb. "Very" and "massive" vanished. No instance of "clearly" or "plainly" or "simply" escaped his red pencil. Good thing too. "Clearly" signifies that some question has just been begged. If you must say that something is clear, it usually isn't.
>
> Adjectives and adverbs designed to intensify a point actually weaken it. Instead of shouting at judges through intensifiers or exaggeration, use the space for a better line of thought.

Frank H. Easterbrook, "Friedman Lecture in Appellate Advocacy," *Federal Circuit Bar Journal* 23, no. 1 (October 2013): 9. There's a lot more. You should read all of the guidance that Judge Easterbrook offers in that published speech.

And the judge follows his own counsel. A review of 80 published opinions that Judge Easterbrook authored and that were issued

between March 1, 2020, and May 16, 2022, shows that, in those opinions, Judge Easterbrook did not use "plainly" or "massive" or "obviously" or, with one exception (other than when using the terms of art "clearly erroneous" or "clearly established"), "clearly."

I know that most of us cannot write like Judge Easterbrook. I cannot write like Judge Easterbrook.

But all legal writing would benefit from all legal writers trying nevertheless. And hopefully this book can help with that effort.

How to use this book to improve your legal writing

While my advice so far should sound familiar, this book goes one step further, laying out one-by-one—starting with a "Top 50 to Avoid" list—words, phrases, and rhetorical devices that writers should use less or not at all in legal writing and explaining why a word, phrase, or rhetorical device should be avoided as much as possible or altogether.

Concerns about wordiness, obscurity, overstatement, ambiguity, weasel words, and incivility—and the idea that language ought to be pleasing to the ear—underlie much of the counsel throughout.

Unlike a dictionary, I intend for legal writers to read this book straight through.

But, like a dictionary, the book also serves as a desk reference in which legal writers can, after or instead of reading the book from cover to cover, look up words as they're drafting and editing. I've included at the end of the book the cleverly titled Alphabetical Table: Where to Find the Entry for Each Word, Phrase, Rhetorical Device, and Punctuation Mark in this Book to assist legal writers in checking if a word is included and, if so, where to find it within the book's three sections.

Writing will always be more an art than a science. No one can offer a mathematical formula for landing on the best word choice or selecting an appropriate tone.

But I hope that the advice offered here may go some way to helping legal writers avoid using fourteen words when four will do—and do better.

If this book helps even a few lawyers perform regularly in their writing as their best selves, it has been worth the effort to advance the cause of making all legal writing more effective and at least a bit more civil.

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