

Effective writing is efficient writing

By Matthew Salzwedel

Writing to British civil servants in the 1940s, Sir Ernest Gowers explained in “The Complete Plain Words” that effective writing is efficient writing: “To be clear is to be efficient; to be obscure is to be inefficient. Your style ... is to be judged not by literary conventions or grammatical niceties but by whether it carries out efficiently the job you are paid to do.”

Lawyers could learn a lot from Sir Ernest. Judging by their sprawling briefs and ponderous, verbose contracts, many lawyers care little about word economy. How can lawyers write more efficiently? They can start by targeting two main enemies of efficient legal writing: buried verbs (aka nominalizations) and unnecessary prepositions.

Be concrete by exhuming buried verbs

Inefficient legal writers bury verbs in abstract nouns. For example, instead of writing “Plaintiffs *allege* that defendant breached the contract,” or “The judge found that defendant *violated* the statute,” lawyers will bury the verbs *allege* and *violated* in abstract-noun phrases: “Plaintiffs *make the allegation* that defendant breached the contract,” and “The judge found that defendant was *in violation of* the statute.”

In “Garner on Language and Writing,” Bryan Garner explains why buried verbs make legal writing inefficient: (a) Abstract nouns are longer than base verbs; (b) Writers often wedge buried verbs in long prepositional phrases and passive constructions; (c) Abstract nouns confuse readers because they don’t directly say who is doing what; and (d) Buried verbs make writing stagnant and dull.

If you learn how to spot buried verbs, however, it’s easy to correct them. Richard Wydick points out in “Plain



English for Lawyers” that base verbs are often buried in words ending with the suffixes *-al*, *-ment*, *-ant*, *-ence*, *-ion*, *-ent*, *-ancy*, *-ency*, *-ance*, and *-ity*. By searching for these suffixes, you’ll catch most buried verbs. You can also identify buried verbs by searching for the preposition *of*. *Of* attaches to abstract nouns like suckerfishes attach to sharks.

After this initial scrub, ask whether you’ve written each sentence actively and concretely. If you do that, it’s easy to eliminate the buried verbs in sentences such as this one: “After the prosecutor *conducted an investigation*, she *reached the conclusion* that defendant *was in violation of* the law” (18 words). The rewrite saves eight words: “After *investigating*, the prosecutor *concluded* that defendant *violated* the law” (10 words).

Tighten by cutting prepositions

Efficient legal writers also cut unnecessary simple prepositions such as *at*, *of*, *in*, *into*, *for*, *on*, *to*, and *with*. As Garner notes in “The Winning Brief,” unnecessary prepositions beget flabby writing, and writers usually don’t lose substance by nixing them. Consider this sentence, which sports four avoidable

ofs: “The lawyer *of* the company filed the brief *of* the company with the office *of* the clerk *of* the district court” (21 words). Cutting the prepositions saves nine words: “The company’s lawyer filed its brief with the district-court clerk’s office” (12 words).

Compound prepositions also hamper efficient prose. As Richard Wydick writes in “Plain English for Lawyers,” compound prepositions “suck the vital juices from your writing” by adding extra words and sometimes creating ambiguity.

Here are some juice-sucking compound prepositions, followed by simpler substitutes: *am in receipt of* [*have*], *as to* [*about*], *at this point in time* [*now*], *despite of the fact that* [*although*], *during such time as* [*while*], *for the purpose of* [*to*], *in addition to* [*besides*], *in accordance with* [*under, according to*], *in connection with* [*about, for*], *in furtherance of* [*to advance*], *in light of the fact that* [*because*], *in order to* [*to*], *in the course of* [*while*], *in the event that* [*if*], *in the instant case* [*here*], *prior/previous to* [*before*], *subsequent to* [*after*], *until such time as* [*until*], and *with regard to* [*regarding, with*].

Besides adding surplus words and ambiguity, compound prepositions don’t jibe with plain English. Can you recall the last time a colleague stopped by your office to say: “I am in receipt of the memorandum drafted by you for the purpose of preparing me for the hearing. As regards to the cases cited therein, in light of the fact that the hearing is tomorrow, I will undertake an effort to read them tonight in furtherance of my preparation. I will make contact with you subsequent to my preparation if I have any questions at that point in time.”

If you say that nobody talks like this, why then do some lawyers consider this nonsense acceptable in their writing?

Efficiency is courtesy

In the “Golden Book on Writing,” David Lambuth says that the “object of any piece of writing is to make your reader understand exactly what you have to say — and understand it as quickly and as effectively as possible.” Doubtless his advice applies to the producers and consumers of legal writing.

It doesn’t matter whether it’s a judge who’s forced to read hundreds of briefs a year, a busy senior partner juggling multiple writing projects, or clients who would rather tend to their businesses or households, legal-writing consumers pay for — and expect — the courtesy of efficient legal writing. So the next time you file a brief or send a document to a client, be honest about whether you’ve exhumed the buried verbs and cut unnecessary prepositions. If you do that, your clients will appreciate your efficiency and the courtesy that comes with it. ✍

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Ethics

ABA addresses foreign outsourcing of legal work

By Cassie Hanson

Lawyers sometimes outsource legal work to another lawyer or law firm on a temporary or project basis. This phenomenon is known as legal outsourcing. Lawyers may also outsource to foreign lawyers who are not admitted to practice in any jurisdiction in the United States or to nonlawyers outside the United States to perform legal work for U.S. clients.

India is a major hub for foreign outsourcing due to an abundance of affordable English-speaking lawyers and similarities in India’s legal system, which is based on English common law.

Since the U.S. federal courts adopted e-filing in 2006, a growing number of foreign outsourcing providers have emerged to offer law firms the services of foreign lawyers to handle the most labor-intensive aspects of legal matters. Foreign outsourcing providers are increasingly sophisticated and offer a broad range of services that include legal research, litigation support, discovery services, and contract and patent drafting, all at a fraction of the U.S. cost.

Legal services may also be coupled with other consumer services that make the foreign outsourcing provider an even more attractive option to U.S. law firms. Foreign outsourcing is expected to continue to grow as the costs of discovery rise and as sophisticated clients

seek a vehicle to keep legal costs down. Despite the prevalent acceptance of legal outsourcing within the U.S., foreign outsourcing continues to remain controversial.

The American Bar Association waded into the debate by issuing Formal Ethics Opinion 08-451 in August 2008. The ABA found outsourcing, including to foreign lawyers, ethically permissible so long as the lawyer handling the outsourcing takes steps to ensure the protection of confidential information, that foreign lawyers are suitably trained and competent, and that bills for outsourced work be reasonable.

The ABA noted that legal outsourcing “affords the lawyers the ability to reduce their costs and often the cost to the client to the extent that the individuals or entities providing outsourced services can do so at lower rates than the lawyers’ own staff.” Despite the ABA allowing

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legal outsourcing, many lawyers and clients remain wary of foreign outsourcing providers’ ability to maintain confidentiality, quality control, and how to provide adequate supervision.

Last August, the ABA adopted revised Comments [6] and [7] to Model Rule 1.1 (competency) to specifically address some of the ethical concerns with legal outsourcing.

New Comment [6] reaffirms the position of Opinion 08-451 that a lawyer must take reasonable steps to ensure that outsourced legal services are performed competently and in compliance with the lawyer’s ethical obligations. Comment [6] goes further by stating that a lawyer should obtain the client’s informed consent prior to retaining a nonfirm lawyer and that the reasonableness to outsource legal work is dependent upon various factors, including the education and experience of the nonfirm lawyer, the nature of the services assigned to the nonfirm lawyer, and “legal protections, professional conduct rules, and ethical environments of the jurisdictions in which the services will be performed, particularly relating to confidential information.” This last sentence in Comment [6] appears to directly address foreign outsourcing.

New Comment [7] addresses when lawyers from more than one law firm are providing legal services to a client on the same matter. Comment [7] emphasizes

that multiple firms working together should consult with the client and each other about the scope of their work and the allocation of responsibility between the firms. Although Minnesota Rule 1.1 is identical to ABA Model Rule 1.1, Minnesota does not have the equivalent of Comments [6] or [7]. Currently, the MSBA is evaluating the August 2012 ABA Model Rule amendments.

While it does not yet appear that foreign outsourcing is commonplace in Minnesota, lawyers considering utilizing a foreign outsourcing provider should be aware of their ethical obligations under not only Rule 1.1 (competency) but also correlating ethical obligations under Rules 1.2 (allocation of authority), 1.4 (communication), 1.5(e) (fee sharing), 1.6 (confidentiality), 5.1 (supervision), 5.3 (supervision of nonlawyer staff), and 5.5(a) (UPL), Minnesota Rules of Professional Conduct.

In a market-driven economy, whether the law proves less amenable to outsourcing than other businesses, which have set up call centers and technical support abroad, will depend on whether the difficulties of supervision, confidentiality concerns and quality control outweighs the economic benefit. ✍

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