The Journey to Excellence in Legal Writing

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DEDICATION


—P.N.

To my mother, Mary S. Peterkin, and my father, Rocky E. Peterkin. Thank you for insisting that my life reflect a continuous journey to excellence, with no excuses. You are my constant motivation.

—T.J.P.
ACKNOWLEDGMENTS

Thank you to NCCU Legal Writing Director, Brenda Gibson, and Assistant Dean Wendy Scott, for their support. Thanks to Mary Wright, my mentor, for her invaluable help on this project. And my thanks to my coauthor, Timothy J. Peterkin, for his undying enthusiasm.

—P.N.

Thanks to my legal writing students for challenging and inspiring me. Thanks to my research assistants, Kevin Brockenbrough, Jordan Ford, Alvin Hudson, and Jamie Wilkerson. Thank you for being available to answer last-minute research questions and for providing countless hours of assistance. Thanks to the NCCU Legal Writing Program, the best in the country! Thank you to my coauthor, Pamela Newell, who always kept me focused and on track to meet deadlines.

—T.J.P.
FOREWORD

Law students across the country bemoan having to take Legal Research and Writing. I know this from my own first-hand experience as a student, a legal research and writing instructor, a professor of first-year students, and an academic dean. As Professors Newell and Peterkin suggest, new law students assume they can easily master legal writing. Those who are good writers assume that their research and writing skills are up to par, while not realizing the unique nature of legal research and writing. Other students have managed to mask fundamental writing problems, only to have them revealed in law school. The Journey to Excellence in Legal Writing addresses both the advanced and the challenged student writer.

Professors Newell and Peterkin deal thoroughly with fundamental grammar skills often overlooked in legal writing textbooks. The subsequent chapters cover everything that students should learn in legal writing, from spotting issues, finding and interpreting the law, to writing either an objective or persuasive document for their client or the court. Each chapter provides exhaustive treatment of the topic. The text also provides useful examples and exercises for the reader to test his or her understanding of the topic.

The Journey to Excellence in Legal Writing not only contains a thorough explication of legal writing for first-year law students. Upper-level students, practitioners, and judges will benefit from the instruction contained in these pages. I know that all readers will appreciate the organization, research, and writing in this book as much as I do. I plan to use the book myself, because a good writer never stops learning.

Wendy Scott
Associate Dean for Academic Affairs
NCCU School of Law
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Legal writing is the foundation of our profession, which rests on statutory and case law. Our statutes are carefully crafted by the legislature. Every word is there for a reason. When the courts determine that a statute is ambiguous, they proclaim it to be ambiguous and the legislature hastens to pass a clearer law. When our appellate courts, which provide case precedence, are the authors of incomprehensible opinions, they may be overruled by higher courts. Consequently, there is a need for excellence in legal writing. During and after law school, you should be able to show exemplary writing to the professor looking for scholarship, the judge reading your motion, the justice reading your brief, and the overworked senior partner reading your writing sample with appreciation.

Many students make the mistake of treating their first-year writing as a simple course, not worthy of the attention they give to doctrinal courses. Some hope that legal writing will be their “easy class.” There are no easy classes in law school. Likewise, there are no unnecessary classes in law school. Every class is required or offered for a reason. There is a purpose for legal writing being a two- or three-semester course (or longer at some schools). You cannot fully understand law unless you can explain it. You learn to explain it in writing. If you have poor writing skills, you will have poor grades in every class that requires an essay exam or a term paper. Poor writing skills may follow your legal career by precluding you from unique jobs and opportunities. You are much less likely to obtain a clerkship for a judge or agency, you will make a poor associate, you cannot draft bills in the legislature, and a career in academia is highly unlikely. You will also fail to qualify for financial aid for scholarships requiring essays. Your legal correspondence will not effectively convey your
skills as an attorney. Poor writing skills can also be costly in that you may be required to hire personnel to assist you in preparing your legal documents.

Thus, this text is dedicated to demonstrating perfect grammar, excellent citation and attribution characteristics, good legal writing habits, and interesting examples to illustrate the lessons. You will learn the differences between primary and secondary law, the doctrine of *stare decisis*, and the distinction between statutory law and case law. You will also become skilled at outlining rules in order to identify issues and craft issue statements properly. Additionally, you will gather knowledge to interpret statutes and apply case law to different factual scenarios. You will use synthesis to compare court holdings and reasoning in fashioning a general legal principle.

You will be taught how to develop organizational skills and use grammatical rules appropriately. In addition, you will be able to apply effective techniques in writing memoranda. You will study the importance of ethics in correspondence to a client. You will comprehend the power behind mediation and negotiations. You will study the best ways to answer examination questions.

The only way to improve your legal writing is by writing. Digest the chapters presented in this book and cultivate your writing skills. It is a valuable advantage in this profession. In fact, it is *a must*!
Many students are so eager to begin the process of legal writing that they bypass the rules of grammar. They believe that the legal analysis is the “meat and potatoes” of legal writing. While this is mostly true, the proper presentation of a document may be the difference between the meat and potatoes being served on a silver platter or a paper plate. Even for English and journalism majors, a grammar refresher is necessary. Think about how long it has been since you had a class on grammar. It has probably been a while, and you probably do not remember the rules precisely, as grammar is a precise subject. Do not make the mistake of believing the content of your writing will compensate for poor grammar. On the contrary, the poor grammar will, in all likelihood, lead the reader to disregard the substance of your writing. Do not allow your ideas to be dismissed so easily. After you have taken great strides to understand the legal analysis process, it would be unfortunate for the reader to lose confidence in your argument because of poor grammar. Using language accurately will make your writing easier to read and will focus the reader on your issue. You are responsible for knowing the rules of grammar. Thus, it is to your benefit to honestly assess the strength of your grammar and invest the necessary time to address any areas that need improvement.

For the time being, a short refresher is set below. Since most legal texts do not have a comprehensive grammar review, you should acquire a book that focuses solely on grammar.
1. MAKE SURE YOU DO NOT CONFUSE SIMILAR WORDS. FOR EXAMPLE:

   a. **Effect** or **affect**

      The word “effect” is a noun, meaning something that is produced by a cause. It is a result or consequence. For example: Exposure to the sun had the effect of toughening his skin. “Effect” also means the power to produce results or validity: His protest had no effect. “Effect” can be the state of being effective or operative: He anticipates bringing a plan into effect. “Effect” can also be defined as a mental or emotional impression produced, as by a painting or a speech.

      On the contrary, “affect” is usually used as a verb. It means “to act on; produce an effect or change in something.” Example: Cold weather affected the crops. “Affect” can also mean to impress the mind or move the feelings of: The music affected him deeply.

   b. **Lie** or **lay**

      Both words are verbs. However, the similarity ends there. To lie and to lay have very different meanings. “To lie” means to rest or assume or be situated in a horizontal position. “To lay” means to put or to place. Thus, the essential difference between these two verbs is that “to lie” describes an action undertaken by a subject, but it will never have a direct object, meaning the verb “to lie” does not express the kind of action that can be done to anything. See these sentence examples: (1) I like to lie in my hammock; (2) Yesterday, I lay there; and (3) I am lying on the sofa. “To lay” is never used to describe the act of reclining.

      “To lay” is a transitive verb, needing a direct object because it describes an action that is done to something else. For example, something or someone has to be receiving the action of the verb “to lay.” In other words, “to lay” is to place or to put. Examples: (1) I lay out my clothes for tomorrow the night before; (2) I will lay my books on the kitchen table tonight; and (3) I laid my blanket on the floor before I sat on it.

      Frequently, students use “lay” when they should use lie, as in the sentence “I am going to lay down and rest.” Instead, they should say “I am going to lie down and rest.” Students also use “laid” when they should use “lay,” as in the sentence “Fred laid in a hammock all afternoon watching the clouds.” Instead, they should say “Fred lay in a hammock all afternoon.” Tips to keep lie and lay straight: The verb that means “to recline” is to lie, not to lay. Thus, if we are talking about the act of reclining, we must use to lie, not to lay: “When I get a headache, I need to lie down and close my eyes.” On the other hand, the verb “laid” will always have a direct object; for us to use the word “laid” correctly in a sentence, something or someone in the sentence must be getting “put” or “placed,” as in the sentence: “I laid my car keys on the counter when I came home.”
c. Sit or set

“To sit” is an intransitive verb, describing an action undertaken by the subject of a clause. However, it cannot take a direct object: the verb “to sit” does not express the kind of action that can be DONE TO anything. Just as with “to lie,” think of “to sit” as meaning “to recline.” Never use the words “sit” or “sat” to describe the act of putting or placing something or someone.

“To set” is a transitive verb, describing an action. It needs a direct object because it describes the kind of action that is DONE TO something. In other words, something or someone in the sentence has to be receiving the action expressed by the verb. Similar to the phrase “to lay,” think of “to set” as meaning “to place or to put.” Never use the word “set” to describe the act of reclining.

d. Which or that

Both words can be used in other constructions; however, they are easily confused when they are being used as pronouns to introduce clauses. Remember that a clause is simply a group of words containing a subject and a verb. Read the following sentences:

A. My car (that has a flat tire) needs servicing.
B. My car, (which has a flat tire), needs servicing.
C. The houses (that were renovated over the summer) are lovely.
D. The houses, (which were renovated over the summer), are lovely.

In all four sentences, the clause tells us something about either the car or the houses, but the choice of using “which” or “that” changes the way we should read each sentence. In Sentence A, the use of “that” suggests that the writer owns more than one car and therefore must explain to you which car she is referencing—the one with the flat tire. Consequently, the adjective clause is essential to your understanding of the sentence.

Sentence B tells the reader that she owns only one car and she is simply telling you that it happens to have a flat tire. That information is not necessary for the understanding of the sentence. In other words, without the adjective clause, the sentence would still make sense.

Sentence C provides that only SOME of the houses were renovated over the summer. If we omitted the clause “that were renovated over the summer,” we would be left with “The houses are lovely.” This statement would not be accurate because it implies that ALL the houses are lovely. Therefore, the adjective clause is essential to the meaning of the sentence. The writer is telling us that she is referencing ONLY the houses that were renovated over the summer—not the others.

In Sentence D, the clause is not essential because the sentence intends to tell us that ALL the houses were renovated. Further, the sentence would be clear even if the clause
were omitted. To summarize, “which” clauses are nonessential. “That” clauses are essential. Nonessential clauses and phrases are set off from the rest of a sentence by a pair of commas.

e. Who or whom

“Who” and “whoever” are subjective pronouns. “Whom” and “whomever” are in the objective case. As simple and important as that distinction is, many people have difficulty regarding the proper usage of “who” and “whom.” To keep them straight, remember that if you are able to substitute with “he” or “she,” use “who.” If “him” or “her” would be correct, use “whom.”

Remember that every verb with a tense in a sentence must have a subject. That word is always in the nominative case, so you should use “who.” Consider this sentence as an example: I decided to vote for whoever called me first. Here, “I” is the subject of “decided” and “he” is the subject of the verb “called.” Consider another sentence: Give it to whoever deserves it: ([You] give it to whoever deserves it.) Here, “he” is the subject of the verb “deserves.”

2. PUNCTUATION

a. Commas

Basic rules for comma usage: Use commas to separate independent clauses when they are joined by any of these seven coordinating conjunctions: and, but, for, or, nor, so, yet. Use commas after (a) introductory clauses; (b) phrases; or (c) words that come before the main clause. Use a pair of commas in the middle of a sentence to set off clauses, phrases, and words that are not essential to the meaning of the sentence. Use one comma before to indicate the beginning of the pause and one at the end to indicate the end of the pause.

Examples:

a. David did not complete his homework, nor did he finish his chores.
b. Even though the sky was cloudy, the meteorologist said that it would not rain.
c. I looked fierce in my leather boots, which I got on sale, and my matching leather coat.
d. Before the holidays, I need to shop for gifts, groceries, cards, and stockings.
e. Donna was a happy, healthy baby.
f. For my birthday, I rented a club, contacted a caterer, and signed an agreement with a deejay.
Use commas to separate three or more words, phrases, or clauses written in a series. Use commas to separate two or more coordinate adjectives that describe the same noun. Be sure never to add an extra comma between the final adjective and the noun itself or to use commas with non-coordinate adjectives. Use a comma near the end of a sentence to separate contrasted coordinate elements or to indicate a distinct pause or shift. Use commas to set off phrases at the end of the sentence that refer to the beginning or middle of the sentence. Such phrases are free modifiers that can be placed anywhere in the sentence without causing confusion. Use commas to set off all geographical names, items in dates (except the month and day), addresses (except the street number and name), and titles in names. Use commas to separate three or more words, phrases, or clauses written in a series.

Do not use commas to set off essential elements of the sentence, such as clauses beginning with “that.” “That” clauses after nouns are always essential. “That” clauses following a verb expressing mental action are always essential. Do not use a comma to separate the subject from the verb. Do not put a comma between the two verbs or verb phrases in a compound predicate. Do not put a comma between the two nouns, noun phrases, or noun clauses in a compound subject or compound object. Do not put a comma after the main clause when a dependent (subordinate) clause follows it (except for cases of extreme contrast).

b. Semicolons

Students often attempt to write complex sentences. While shorter, simpler sentences are preferred, complex sentences are acceptable as long as they are punctuated correctly and the meaning is clear to the reader.

If you have two independent clauses in one sentence, you must separate them with a semicolon.

Example: Michelle threw the ball at Jon; however, the ball struck Jon’s dog first.
Example: The issue is whether Michelle will be found liable for Jon’s dog’s injuries when Michelle threw the ball; the ball hit the dog; and the dog cannot recover on its own.

3. SUBJECT-VERB AGREEMENT

When the subject of a sentence is composed of two or more nouns or pronouns connected by “and,” use a plural verb. When two or more singular nouns or pronouns are connected by “or” or “nor,” use a singular verb. When a compound subject contains both a singular and a plural noun or pronoun joined by “or” or “nor,” the verb should agree with the part of the subject that is nearer the verb.

“Doesn’t” is a contraction of “does not” and should be used only with a singular subject. “Don’t” is a contraction of “do not” and should be used only with a plural subject. The exception to this rule appears in the case of the first person and second person pronouns
“I” and “you.” With these pronouns, the contraction “don’t” should be used. Please note that contractions are rarely proper in legal writing.

Do not be misled by a phrase that comes between the subject and the verb. The verb agrees with the subject, not with a noun or pronoun in the phrase. For example: “One of the boxes is open.” The words “each,” “each one,” “either,” “neither,” “everyone,” “everybody,” “anybody,” “anyone,” “nobody,” “somebody,” “someone,” and “no one” are singular and require a singular verb. For example: “Either is correct.”

Nouns such as civics, mathematics, dollars, measles, and news require singular verbs. Nonetheless, when discussing money you need to use a singular verb, but when referring to the dollars themselves, a plural verb is required. Nouns such as scissors, tweezers, trousers, and shears require plural verbs because there are two parts to these items. In sentences beginning with “there is” or “there are,” the subject follows the verb. Since “there” is not the subject, the verb agrees with what follows. For example: (1) There are many questions; and (2) There is a question.

Collective nouns are words that imply more than one person but are considered singular and take a singular verb, such as: group, team, committee, class, and family. Expressions such as “with,” “together with,” “including,” “accompanied by,” “in addition to,” or “as well” do not change the number of the subject. Remember, if the subject is singular, the verb is also.

4. PLURALS, POSSESSIVES, AND POSSESSIVE PLURALS

Usually a writer can show possession by using an apostrophe. However, students become confused when making plural nouns or nouns ending in “s” possessive. When showing the possessive of a pluralized family name, you must pluralize it first and then simply make the name possessive with the use of an apostrophe. For example, “You might ride in the Smiths’ car when we visit the Joneses at the Joneses’ home.”

For expressions of time and measurement, the possessive is shown with an apostrophe “s.” For example, see: “one dollar’s worth,” “two dollars’ worth,” “a hard day’s night,” “two years’ experience,” “an evening’s entertainment,” and “two weeks’ notice.” With nouns whose plurals are irregular, add an apostrophe followed by an “s” to create the possessive form. For example: (1) She plans on opening a women’s clothing boutique; (2) Children’s programming is not a high priority; and (3) The geese’s food supply was endangered.

5. TRANSITIONS

Good transitions can connect paragraphs and turn disconnected writing into a unified whole, by helping readers understand how paragraphs work together, reference one another, and build to a larger point. The key to producing good transitions is highlighting connec-
tions between corresponding paragraphs. By referencing in one paragraph the relevant material from previous ones; writers can develop important points for their readers.

It is a good idea to continue one paragraph where another ends. Picking up key phrases from the previous paragraph and highlighting them in the next can create an obvious progression for readers. Many times, it only takes a few words to draw these connections. Instead of writing transitions that could connect any paragraph to any other paragraph, write a transition that could only connect one specific paragraph to another specific paragraph.

a. **Add**: and, again, and then, besides, equally important, finally, further, furthermore, nor, too, next, finally, what’s more, moreover, in addition, first (second, etc.)

b. **Compare**: whereas, but, yet, on the other hand, however, nevertheless, on the contrary, by comparison, where, compared to, up against, balanced against, vis à vis, but, although, conversely, meanwhile, after all, in contrast, although this may be true

c. **Prove**: because, for, since, for the same reason, evidently, furthermore, moreover, besides, indeed, in fact, in addition, in any case, that is

d. **Show Exception**: yet, still, however, nevertheless, in spite of, despite, of course, once in a while, sometimes, occasionally

e. **Show Time**: immediately, thereafter, soon, after a few hours, finally, then, later, previously, formerly, first (second, etc.), next, and then

f. **Repeat**: in brief, as has been noted

g. **Emphasize**: definitely, extremely, in fact, indeed, in any case, absolutely, positively, naturally, surprisingly, always, forever, perennially, eternally, never, emphatically, unquestionably, without a doubt, certainly, undeniably, without reservation

h. **Show Sequence**: first, second, third, and so forth. A, B, C, and so forth, next, then, following this, at this time, now, at this point, after, afterward, subsequently, finally, consequently, previously, before this, simultaneously, concurrently, thus, therefore, hence, next, and then, soon

I. **Give an Example**: for example, for instance, in this case, in another case, on this occasion, in this situation, take the case of, to demonstrate, to illustrate, as an illustration, to illustrate

J. **Summarize or Conclude**: in brief, on the whole, summing up, to conclude, in conclusion, hence, therefore, accordingly, thus, as a result, consequently, on the whole

6. NOUN-PRONOUN AGREEMENT

    When using a singular pronoun, you must also use a singular noun. While this sounds simple, often students err because they are actually seeking to remain gender-neutral.
Incorrect: When a parent is acting inconsistently with their constitutionally protected status as a parent, third parties may gain custody rights.

Correct: When parents are acting inconsistently with their constitutionally protected status as a parent, third parties may gain custody rights.

Correct: When a parent is acting inconsistently with his or her constitutionally protected status as a parent, third parties may gain custody rights.

Frequently, students realize it is politically incorrect to refer to a gender-neutral noun with a specific pronoun. Although this is true, it remains inappropriate to refer to the singular pronoun with a plural noun.

Additional grammar tips are located in the Appendix.