

THE MORE THINGS CHANGE:

The State of Legal Writing in 2017

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What's new(ish) in the world of legal writing?

- The **evolution of e-mail** into a primary mode of communication.
- The **advent of some new vocabulary**.
- The growing **emphasis on document design**.

E-MAIL COMMUNICATION

- There are many articles and blogs about "best practices" for e-mail communication in general.
 - <http://www.businessinsider.com/email-etiquette-rules-everyone-should-know-2014-9#now-check-out-these-general-workplace-etiquette-tips-12>.
 - <http://learning.colostate.edu/guides/guide.cfm?guideid=4>.
 - <http://writingcenter.unc.edu/handouts/effectiv-e-e-mail-communication/>.

E-MAIL COMMUNICATION

- And there are many articles and blogs about privacy protection and the mechanics of e-mail retention in law practice.
 - http://www.americanbar.org/groups/departments/offices/legal_technology_resources.html.
 - <http://www.lexisnexis.com/law-firms/pdf/practice-management-email-managemet.pdf>.

Conveying Legal Analysis via E-mail

- The very nature of an e-mail itself
 - places a greater premium than ever on **clarity and conciseness**.
 - requires greater attention than ever to **tone**.

Achieving Clarity

- Graham's Top Three:
 - Use simple sentence structure.
 - Keep sentences and paragraphs to a manageable length.
 - Use lists (tabulations) to present complex information clearly.

Clarity Through Sentence Structure

- Use the expected sentence structure most of the time—**subject, verb, object.**
 - The judge dismissed the case.
 - NOT: The case was dismissed by the judge. [passive voice]
- Keep **subjects and verbs close together.**
 - After she criticized the lawyers for poor courtroom demeanor, the judge dismissed the case.
 - NOT: The judge, after criticizing the lawyers for poor courtroom demeanor, dismissed the case.
- Avoid **run-on sentences.**
 - Please ask the paralegal to review the complaint; it must be filed today.
 - NOT: Please ask the paralegal to review the complaint, it must be filed today. [comma splice]

Clarity Through Sentence and Paragraph Length

- Generally, sentences that exceed three lines are too long.
- Vary sentence length to avoid a string of very long sentences or a string of very short sentences.
- Paragraph breaks are important, because they allow the reader to pause and refocus.
- A paragraph should relate to one distinct idea, and it should begin with a good topic sentence.
- A paragraph should be as long as it needs to be—forget the “5-sentence rule” and the “no 1-sentence paragraph” rule.
- Most readers have trouble getting through a paragraph that’s more than a half page long.

Clarity Through Lists (Tabulations)

- Lists work well for
 - elements of a cause of action;
 - components of a definition; and
 - groupings of facts.
- They create “visual drama” and interest, and they enable readers to comprehend complex information quickly.
- Compare:
 - The elements of a cause of action for breach of contract are an agreement, a breach of that agreement by one party, and damages caused by the breaching party.
 - The elements of a cause of action for breach of contract are as follows:
 - an agreement;
 - a breach of that agreement by one party; and
 - damages caused by the breaching party.

Achieving Conciseness

- **Graham's Top Four:**
 - Eliminate "throat-clearing phrases."
 - Don't use four or five words when one or two will do.
 - Use the passive voice sparingly.
 - Avoid "nouncing verbs" (nominalizing).

ELIMINATE THROAT-CLEARING PHRASES

- A "throat clearing phrase" is an introductory phrase that is a "mere prelude" for the main idea to follow.
 - *The fact of the matter is that* the company is bankrupt.
 - *It is important to note that* this proposed legislation will be difficult to implement.
 - *To be honest,* I do not see how we can come to an agreement here.
 - *Clearly* your client has violated the terms of the contract.

ELIMINATE EXCESS WORDS AND REDUNDANT PHRASES

- The plaintiff was awarded damages *in the amount of* \$75,000.
- We will vote *at the conclusion of* the meeting.
- *In the event that* you do not respond within 15 days, we will pursue legal action.
- We decline to answer that question *at the present time*.
- We will hold a meeting *for the purpose of* electing new officers.
- In my *personal opinion,* that judge was biased.
- What is the *current status of* the proposal?
- If *past history is any* indication, ...
- We request a *full and complete* investigation.

AVOID THE PASSIVE VOICE

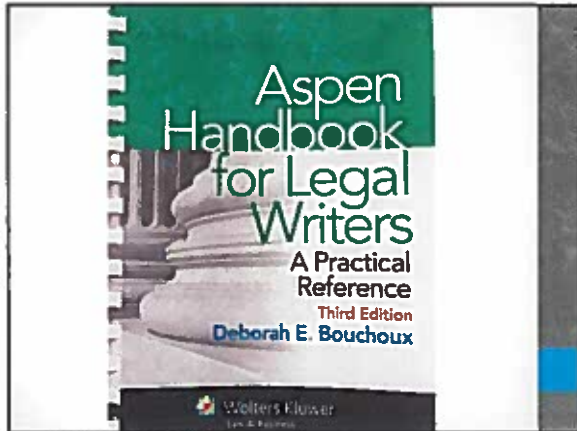
- The active voice focuses the reader on the subject of the sentence—the cause of the action—and is a more powerful construction.
- The passive voice puts the subject—the actor—in a subordinate position, is a weaker construction, and is wordier.
- Consider the difference:
 - I have a dream.
 - A dream was had by me.
- Consider the difference:
 - A proposal to the buyer to make a counter-offer was issued by the seller.
 - The seller proposed that the buyer make a counter-offer.

AVOID NOMINALIZATIONS

- A nominalization is a “nouned verb.” In other words, you take a perfectly good verb and make a noun out of it, resulting in a longer, less powerful sentence.
- Compare:
 - The judge *provided an explanation of* his ruling.
 - The judge *explained* his ruling.
- Compare:
 - We will *give full consideration to* your proposal.
 - We will *fully consider* your proposal.
- Compare:
 - We can *make an argument* that the law is unconstitutional.
 - We can *argue* that the law is unconstitutional.

CLARITY & CONCISENESS RESOURCES

- <http://grammar.ccc.commnet.edu/grammar/passive.htm>.
- <https://owl.english.purdue.edu/owl/resource/572/01/>.
- Deborah E. Bouchoux, *The Aspen Handbook for Legal Writers: A Practical Reference* (3d ed. 2013). This book has excellent lists of wordy phrases and legal redundancies.



Striking the Proper Tone

- **Graham's Top Three:**
 - Don't attempt to be humorous.
 - Don't be too casual.
 - Don't send an e-mail while you are overly emotional.

Hey there,

I'm not sure if you said anything about this (my head is in the middle of nowhere right now haha) but I was wondering if I could meet with you this week to talk about these cases/this memo -- I am kind of lost, feeling like I can't narrow down my argument/arguments in an orderly, definite fashion. I think just talking about some issues I've been having with some of these cases would help ...

Should I just stop by any time, or is there specific times that would work best for you?

Thanks a million.

To: Science Woman
(science.woman@mystery.edu)
From: sillyname@yahoo.com
Subject: Hey
can u tell me how to do number 4 on the problem set. i no u went over it in class but i have had a VERY LONG week lol tests ha ha ha and i lost my notes. pleeese help
Stu

Good morning

Please explain you comment so I can explain David what's going on, and manage the situation. The way it works is, if you have information about the Smith's that I do not have or know, how can I help, you must keep me informed. Do not push me, give me the information.

This is between attorney's at this point, you both know that.

Let's talk.

MORE E-MAIL RESOURCES

- Laura Graham, "Before You Click 'Send': E-Mail Best Practices for Lawyers," 16 *The Young Lawyer* (ABA Young Lawyers Division Dec. 2011) (reprinted in manuscript).
- Christine Coughlin, Joan Malmud Rocklin, & Sandy Patrick, "Professional E-Mails," in *A Lawyer Writes* (2d ed. 2013) (reprinted in manuscript with permission).
- <http://chrisblattman.com/2010/11/08/students-how-to-email-to-your-professor-employer-and-professional-peers/>.

Some New Vocabulary

- Thanks perhaps to the 24/7 “news” media (and to some extent, social media), we have been introduced to some new vocabulary that is creeping into formal legal writing.
 - gender-neutral terms
 - “made-up” words
 - phrases that have no meaning in the legal writing context

Achieving gender-neutrality

- The problem:
 - A nurse should always keep her thermometer handy.
 - A judge should always exercise control over his courtroom.
- Some poor solutions:
 - Making up new words.
 - *ze*, for example, instead of *he* or *she*
 - Using a pronoun that doesn't agree with the noun.
 - A judge should always keep control of *their* courtroom.

Achieving gender-neutrality

- Some better solutions:
 - Use *his* or *her*, but sparingly and only in short documents.
 - Use the plural to eliminate the need for the singular pronoun.
 - Nurses should always keep their thermometers handy.
 - Revise the sentence to eliminate the need for the pronoun.
 - A nurse should always keep a thermometer handy.
- Do not
 - Alternate between *he* and *she* or *his* and *her* in the same document.
 - Use *s/he*, *he/she*, *his/her* (the slashes are distracting).
- See my *NC Lawyer* column at <https://www.ncbar.org/media/224539/august2013.pdf> (included in manuscript).

Avoiding "made-up" words

- The exhibit was *impactful*.
- We need to *incentivize* our employees to be on time.
- We *efforted* the project.
- I'd like to *gift* you with this commemorative plaque.
- Let's *concretize* our plans for tomorrow.
- I suggest the parties *conversate* about solving this problem.
- The administration seems locked into one *modality*.
- We need to *double down* and play better.
- I'm impressed by his *physicality* and *stick-to-it-iveness*.
- That idea is simply a *non-starter*.

Eliminating meaningless phrases

- Basically, . . .
- It is worth noting that . . .
- At the end of the day, . . .
- Let me begin by saying . . .
- With all due respect, . . .
- If I may, . . .

The new emphasis on document design

- Legal writing experts are paying more attention than ever to document design.
 - font style
 - font size
 - white space
 - use of all caps, boldface, etc.

Using an effective font style and size

- Always check the local rules of court for formal legal documents (pleadings, discovery, motions, briefs, etc.).
- When no font style or size is specified:
 - Use a serif font.
 - Century, Georgia, Times New Roman, Cambria.
 - Do not use a font smaller than 12-point.
 - Do not use "cute" or "unusual" fonts.
 - We demand an answer today.
 - We demand an answer today.
 - We demand an answer today.

Eliminating visual "distractors"

- Minimize "white space" in your document.
- DO NOT USE ALL CAPS.
- Use **boldface** and *italics* sparingly.
- Be consistent in how you set your margins and tabs, how you format your page numbers, etc.
 - Margins should be at least one inch on all sides.
 - Do not right-justify your text; this makes your document hard to read, because it can create lots of empty space between words.

DOCUMENT DESIGN RESOURCES

- Ruth Ann Robbins, *Painting with Print*, available at [http://www.ca7.uscourts.gov/Rules/Painting with Print.pdf](http://www.ca7.uscourts.gov/Rules/Painting%20with%20Print.pdf).
- Matthew Butterick, *Typography for Lawyers: Essential Tools for Polished and Persuasive Documents* (2010).
- Mary Beth Beazley, *Writing (and Reading) Appellate Briefs in the Digital Age*, 15 J. App. Prac. & Process 47 (2014), available at <http://lawrepository.uair.edu/cgi/viewcontent.cgi?article=1356&context=appellatepracticeprocess>.

What hasn't changed in the world of legal writing?

- **Correct grammar, punctuation, and spelling** are still musts.
- **Citations** are still required.
- **Consistency** still counts!

GPS: The Importance of Correct Grammar, Punctuation, and Spelling

- **Incorrect GPS**
 - makes your writing harder to read;
 - annoys your readers; and
 - damages your credibility.

Common Grammar Errors

- **Subject-verb disagreement.**
 - See excerpt from *The Aspen Handbook* (included in manuscript).
- **Incorrect pronoun usage.**
 - See excerpt from *The Aspen Handbook* (included in manuscript).
- **Incorrect use of the word *myself*.**
 - I will take care of this myself. [correct]
 - Call Robert or myself. [wrong]
 - Call Robert or me. [correct]
 - Martha and myself will take care of this. [wrong]
 - Martha and I will take care of this. [correct]





Common Punctuation Errors

- The comma is a huge culprit.
 - The rules are too many to include in this presentation.
 - See my column in *The NC Lawyer*, "Don't Eschew the Comma," from 2012 (included in manuscript).
 - Also see *The Aspen Handbook*, pages 34-42.
- The apostrophe is a close second.
 - Learn the difference between
 - "your" and "you're"
 - "its" and "it's"
 - "who's" and "whose"

GRAMMAR AND PUNCTUATION RESOURCES

- www.grammarbook.com
(Select "Punctuation and Capitalization")
- Purdue's Online Writing Lab (OWL).
- <https://www.gpo.gov/fdsys/search/pageDetails.action?granuleId=&packageId=GPO-STYLEMANUAL-2009>
- <http://grammar.ccc.commnet.edu/grammar>
- www.kentlaw.edu/academics/lrw/grinker/LWTA.htm

Let's eat grandma!



Let's eat, grandma!

**PUNCTUATION
SAVES LIVES!**

EDITING AND PROOFING RESOURCES

- Purdue University's Online Writing Lab (OWL), at <http://owl.english.edu/owl/resource/561/01>.
- The Writing Center at UNC, at <http://writingcenter.unc.edu/handouts/editing-and-proofreading>.
- *Top Ten Proofreading Tips*, at <http://grammar.about.com/od/improveyourwriting/a/tipsproofreading.htm>.

EDITING AND PROOFING RESOURCES

- Grammar Check (in Word)
 - Open your document.
 - Select File.
 - Select Options.
 - Select Proofing.
 - Customize, being sure to check Readability Statistics.
 - Click OK.

Avoiding Spelling Errors

- Remember that Spellcheck is not foolproof.
 - Seen in a student paper: Mr. Metcalf's speech was a matter of public concern.
 - See *An Ode Too Spellcheck* (reprinted in manuscript).
- So use Spellcheck, but then proofread relentlessly!
 - If time permits, print your document and proof it using a hard copy.
- The search function can be a great tool.
 - Develop a "hit list" of words you tend to frequently misspell, and search your document for them.
 - Examples:
 - "trail" instead of "trial"
 - "principle" instead of "principal"
 - "untied" instead of "united"
 - "statue" instead of "statute"

SPELLING RESOURCES

- www.dictionary.com
- <http://dictionary.law.com>
- www.grammarbook.com (select "Spelling")
- Purdue's Online Writing Lab (OWL) (select "Spelling")
- And (of course) *The Aspen Handbook*—it has an excellent list of frequently misspelled and misused words.

Best Practices for Citing to Authority

- Follow the current edition of the *Bluebook* unless your jurisdiction has adopted another citation system.
- Do not put a citation in the middle of a sentence.
- Do not put citations in footnotes.
- Always include pincites.
- Avoid string citations ("sleeping pills on paper").

CITATION RESOURCES

- Deborah Bouchoux, *Aspen Handbook for Legal Writers: A Practical Reference* (3d ed. 2013). An excerpt from the *Aspen Handbook* is reprinted in the manuscript.
- Peter W. Martin, *Introduction to Basic Legal Citation*, <https://www.law.cornell.edu/citation/>.
- My columns in *The North Carolina Lawyer: A Citation Refresher*, Parts I and II (included in manuscript).
- Linda J. Barris, *Understanding and Mastering the Bluebook* (3d ed. 2015).

CONSISTENCY COUNTS

- In capitalization
 - Common "problem words"
 - *Court* or *court*?
 - *Judge* or *judge*?
 - *Plaintiff* or *plaintiff*?
- See my May 2015 column in *The North Carolina Lawyer*, *Capitalization for Practitioners: Consistency Counts* (included in manuscript).

CONSISTENCY COUNTS

- In how you refer to parties and people
 - The plaintiff in your case is Mary Jones. After you refer to her once by her full name, choose a short form and stick with it.
 - Don't use "Mary" then "Ms. Jones" then "the Plaintiff" then "Jones"—be consistent!
 - You are writing to someone in the legal department of the Dalton Corporation, Inc. After you name the corporation in full once, choose a short form and stick with it.
 - Don't use "Dalton" then "your company" then "Dalton Corp."—be consistent!

CONSISTENCY COUNTS

- In how you format certain information
 - Dates
 - Dec. 22, 2015
 - 22 December 2105
 - 12-22-15
 - Numbers
 - Spell it out if it begins a sentence.
 - Spell out numbers up to 99.

Three "action items"

- Get a copy of *The Aspen Handbook* ASAP!
- Be an avid reader of good writing.
- Contact me at grahamlp@wfu.edu if I can ever assist you with a writing issue.

Before You Click "Send"

E-MAIL BEST PRACTICES FOR LAWYERS

By Laura Graham

For most attorneys, e-mail is a staple of law practice. In fact, in a recent survey of lawyers conducted by the ABA, 97 percent of attorneys said they used e-mail for routine correspondence, and over 70 percent said they used it for case status reports, memoranda, and briefs. Do these attorneys always take care to craft effective, error-free, and professional e-mails before they click "send"? Or do their e-mails sometimes reflect a rush to meet a deadline, a perception that e-mail isn't "real writing," or even instances of unprofessionalism, all of which can negatively impact them and their clients?

Attorneys can't afford to view e-mail as an informal form of communication that warrants less time and attention than other legal documents. The recipients of your e-mails are evaluating your credibility, as well as your employer's credibility, based on the quality and tone of your e-mails. This is true whether the e-mail contains a summary of a complex legal analysis or a three-line answer to a straightforward question.



The quality and tone of our e-mails also tell our readers how we think of *them*; we can't risk sending the message that we don't respect them by writing e-mails that are too casual or too sloppy.

Here are several suggestions for writing e-mails that will reflect well upon you and your employer while meeting the needs and expectations of your readers.

- **Make the subject line appropriate and specific.** "Smith discussion" is too casual and isn't helpful; "Discussion of Bill Smith's potential defamation claim" has a more appropriate level of formality and is more informative to the reader.
- **Carefully consider the salutation.** Use a salutation at the beginning of each e-mail exchange. If a particular exchange continues over a period of time, you can usually drop the salutation. Whether you use the recipient's last name ("Dear Ms. Miller") or first name ("Dear Mary") depends on the closeness of your professional relationship with the recipient.
- **Keep e-mails short.** Common wisdom is that an e-mail longer than one screen contains more information than the reader is likely to absorb. So an e-mail might work fine for an analysis that can be communicated in two or three short paragraphs; anything longer should probably be included in an attachment to the e-mail.
- **State your bottom line at the outset of the e-mail.** Even if you decide to put the formal analysis in a separate document attached to the e-mail, you should summarize its contents immediately and efficiently in the e-mail itself.
- **Don't send an e-mail when you're upset or emotional.** A good rule of thumb is to ask yourself whether you

E-mail Reminders

■ continued from page 2

would say what you wrote in the e-mail to the recipient's face. An e-mail should not be a forum for venting, especially because it can be forwarded to an unlimited number of persons whom you never intended to read it.

- **Always review an e-mail to make sure it will be received by the reader in the way you intend.** The reader can't rely on your facial expressions, body language, or intonation to interpret the content of the e-mail. For example, an e-mail that is very short and abrupt ("Don't know.") may seem efficient to the writer, but the reader may find it rude and dismissive.
- **DON'T TYPE IN ALL CAPS.** Readers often view all caps as "electronic shouting."
- **Don't use cute initialisms, and don't use emoticons.**

Initialisms (often referred to as acronyms) such as "FWIW" and "TTYL" may be fine for texting your teenage daughter or your "BFF," and the little smiley-face is cute, but you wouldn't use them in a client letter, office memo, or settlement proposal, so don't use them in your e-mails.

- **Draft every e-mail with an eye toward confidentiality (your own and your clients').** Generally, employers can monitor their employees' e-mail if they've notified the employees that monitoring may occur. And e-mails containing content that's not protected by attorney-client privilege are now discoverable in litigation. So be zealous about guarding your own privacy and your clients' confidentiality at all times.

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Professional E-mails

- I. **Correspond Professionally**
 - II. **Consider the Three Integral Parts of Correspondence: Content, Tone, and Format**
 - A. **Keep the Content Short, Clear, and Readable**
 - B. **Keep the Tone Polite and Professional**
 - C. **Keep the Style Formal**
 - III. **Stop and Think Before You Send**
-

Using e-mail is critical to practicing law effectively. As a new attorney, you will be communicating with your clients, other attorneys, and filing documents with the court electronically. As much as eighty percent of your business correspondence may be through e-mail. The benefits of e-mail are numerous: E-mail allows users to communicate ideas quickly, easily, efficiently, and without regard to schedule or geography.

As an attorney, you can take advantage of these benefits if you know how to compose a professionally-appropriate e-mail. A professionally-appropriate e-mail will (1) be easy for your reader to manage and absorb and (2) maintain the formality that is appropriate in a business setting. This chapter provides guidelines to achieve those goals.

I. **Correspond Professionally**

E-mail has become a preferred mode of communication, and most people use it daily. With personal correspondence to friends or family, a casual style is often acceptable, and the reader will easily forgive the occasional typographical error, misspelled word, or improper punctuation. In a law practice, however, these errors take on new significance.

- **Professional e-mails should convey professionalism**

As an attorney, your credibility will be constantly evaluated with every piece of work you complete—whether that work is a complex memorandum or a three-line e-mail. In other words, the work makes a loud statement about your credibility. Sending an e-mail to a colleague or

client that is too casual is like wearing a bathing suit to the office. It reflects poor judgment. In addition, your correspondence tells people how you view *them*. Correspondence that is too casual can send a message to the reader that you do not value or respect them. Most importantly, your work reflects on your employer and your client. As you draft any piece of correspondence, make sure it reflects well on you, your law office, and your client.

- Take the same care with an e-mail that you use with a paper letter

In every e-mail, you should evaluate the content, tone, and format. For each e-mail, take the same care as you would in a paper letter sent out over your signature. Read each e-mail before you send it. For very important e-mails, print them and read them just as you would a draft of a letter. Remember that while a paper letter may potentially be seen by a few people, e-mails can potentially be seen by millions of people around the world.

II. Consider the Three Integral Parts of Correspondence: Content, Tone, and Format

Every piece of correspondence has three components: the substantive content you want to convey, the tone (or the voice your reader will hear when reading the correspondence), and the format (the way the correspondence looks). Because each component can either add to or detract from the reader's perception of your credibility and competency, draft your e-mail with each component in mind.

Consider the following suggestions on how to make the substance, tone, and format of your correspondence more effective.

A. Keep the Content Short, Clear, and Readable

Your first priority in sending an e-mail is to convey information. In a law practice, attorneys communicate important substance about their client's cases in the text of e-mails. Just as with a legal memorandum, you will want that substance to be accurate and clearly explained. You will also want to keep sensitive information confidential and protect any privileges that can attach to the information.

- Create an appropriate and specific subject line

The subject line provides context and tells the reader what to expect. More importantly, an appropriate subject line makes it easier for your colleague to find your e-mail again. "Research re: Court's duty to determine jurisdiction" is appropriate and specific. "Research" is not.

- **Make the e-mail and its information easy to manage and absorb**

As with any other communication, you should draft e-mail with your reader in mind. Information in an e-mail must be easy for your reader to absorb, and the e-mail itself must be easy to store and then retrieve later. Make sure every word of the e-mail is necessary. Make sure every line of the e-mail clearly conveys the meaning you intend.

- **Keep e-mails short**

The optimal length for an e-mail is one screen. When a reader has to scroll through more and more screens, the information becomes more difficult to absorb. Unlike a page that ends and needs to be turned, a scrolling screen has no landmarks that allow the eye to rest or register the end of a unit. As a result, a lengthy e-mail can quickly become an overwhelming mass of information.

If your e-mail does become an overwhelming mass, your message will likely be lost. Readers tend to read thick slabs of text too quickly or skip them completely. So, your message will be easier to absorb if it is kept to one screen length.

As a result, when you want to send a legal analysis by e-mail, you will have to consider whether your complete analysis can be conveyed within approximately one screen length. If it can, you can send your analysis in the body of an e-mail. A short legal analysis appropriately conveyed in the body of an e-mail might look like Example 18-A.

Example 18-A • A short legal analysis in an e-mail

From: Gail Mosse [gmosse@zalassociates.com]
Sent: Friday, September 5, 2013
To: Dina Wong [dwong@zalassociates.com]
Subject: Oursine Living Will

Dina -

You asked whether Tom and Kitty Oursine's living will would be enforceable in Oregon. The answer is that it will not be enforceable.

← Description of the issue that the memorandum addresses and the bottom-line conclusion are stated up front

The Oursines drafted their living will on their computer and signed it themselves without any witnesses. Under Oregon Revised Statutes § 127.531 living wills "must be the same as the form set forth in this section to be valid." That section also requires that two witnesses sign the form. *Id.*

← A detailed — but short — supporting analysis is provided in the body of the e-mail.

As a result, the Oursines will need to re-draft their living will. The Oursines can access the correct form at http://egov.oregon.gov/DCBS/SHIBAadvanced_directives.shtml.

Please let me know if you have any further questions.

Gail

- **Attach complex analyses in a separate document**

When an analysis is longer than one screen, consider drafting the text in a document and attaching the document to an e-mail. Although an analysis in an attached document requires extra key-strokes to reach, an attached analysis can take advantage of the formatting features of a word processing program. Formatting, such as indented and bolded headings, paragraph breaks, and pagination all help the reader organize the information on the page. Importantly, those formatting features will be retained even when an attached document is forwarded to another person.

Moreover, a document conveys an air of formality and deliberateness. After spending the time and effort to effectively analyze a legal question, you should provide your analysis with the dignity it deserves.

- **State your bottom line up front**

Attorneys want to know the bottom line quickly. As a result, whether your analysis is short and can be included in the body of an e-mail or your analysis is long and needs to be attached, include in your e-mail a quick summary of your bottom-line. Remind your colleague or client of the issue that the e-mail is addressing and state your conclusion at the outset. Then provide any additional explanation necessary to support your conclusion.

If your analysis will fit within the body of the e-mail, your e-mail might look like the previous example, 18-A, or like the next example, 18-B.

Example 18-B • Another short legal analysis by e-mail

From: Mary Blake [mblake@zalassociates.com]
Sent: Friday, October 24, 2013
To: John Arden [jarden@zalassociates.com]
Subject: Research re: Court's duty to determine jurisdiction

Attachments: Steel v. Citizens.doc

John:

Description of the issue that
the memorandum addresses

→ You asked that I find a case that states that a federal court must determine that it has jurisdiction over a case even if neither party raises the issue.

Quick summary of the
bottom-line answer

→ The U.S. Supreme Court in *Steel Co. v. Citizens for a Better Environment*, 523 U.S. 83, 94 (1998), addresses the issue and states that "the first and fundamental question is that of jurisdiction. . . . This question the court is bound to ask and answer for itself, even when not otherwise suggested, and without respect to the relation of the parties to it."

A copy of the case is attached, and the relevant portion is highlighted. Please let me know if you need further research regarding this issue.

Mary

If your analysis is longer and attached in a separate document, stating the bottom line might look like Example 18-C.

Example 18-C • An e-mail attaching the legal analysis in a separate memorandum

From: Gail Mosse [gmosse@zalassociates.com]
Sent: Friday, September 5, 2013
To: Dina Wong [dwong@zalassociates.com]
Subject: Bar Application Question re: Expunged Convictions

Attachments: Expunged Convictions Memo.doc

Dina -

You asked that I research whether it's permissible for our state bar to ask an applicant for information regarding convictions that were set aside or expunged under state law.

The answer is that such a question appears to be permissible. I have attached a memo discussing the relevant law and considering how an applicant might respond to the question.

If you have any additional questions, please let me know.

Gail

- **Title attached documents appropriately**

Your reader will likely need to download and save any attachment. You will make her work easier if you name the document in a way that is easy to save and find again later. For example, "Smith Affidavit.doc" is a better name than "Affidavit.doc."

- **Use the same confidentiality warning on e-mail that you would use for any legal document¹**

Confidential or sensitive information about a client's case is too often distributed either to the wrong people or distributed when it should not be distributed at all. Make sure that privileged information, which includes your attorney work product, is protected. Include a confidentiality warning on each piece of e-mail you send just in case it is erroneously distributed to the wrong recipients. The best advice, though, is to stop and think before you send an e-mail, making sure its information can be communicated and that you are distributing it to the correct recipients.

1. Wayne Schiess, *Writing for the Legal Audience* 41-43 (Carolina Acad. Press 2003).

B. Keep the Tone Polite and Professional

Every piece of writing conveys a certain tone—that is, a general mood or feeling. As explained before, correspondence not only tells readers about your attitudes and credibility, but it also tells readers what you think about them. Your tone may convey as much information as the substance of the e-mail, so always think about the tone you would like to convey and the tone the e-mail is actually sending.

Tone is particularly tricky because readers can perceive it so differently. For instance, a sentence meant to be taken as funny, may be perceived as cruel or offensive by the reader. Be particularly aware of this component when you receive an emotionally charged e-mail or when you are tempted to send one.

Tone is most often conveyed through word choice and sentence construction. Make deliberate choices about the words you choose and about how you phrase your sentences. Your goal is to convey the substance politely and professionally.

- Review every e-mail to consider how it will be received by the reader

E-mail communications can be easily misinterpreted even if they are neutral because of the lack of nonverbal expressions in the message. Think about it: When you communicate in person, you rely on facial expressions, body language, and tone to express your intent. On the telephone, the pace and tone of a phone conversation provides context. Consider the e-mail exchange between two associates in Example 18-D.

Example 18-D • Consider an e-mail's tone

From: Abigail Manzanita [amanzan@zalassociates.com]
Sent: Friday, September 5, 2013
To: Adam Donaldson [adonaldso@zalassociates.com]
Subject: Re: Smith Discovery

Sorry. Can't.

On 9/5/13, Adam Donaldson wrote:

Abby –

I need some help making my way through the *Smith* discovery documents. Would you have some time to help me out?

Adam

In writing the e-mail, Abigail may have assumed that Adam knows how busy she is, and she just wanted to send a reply quickly. Adam, however,

may be offended that Abigail gave his request such short shrift. Before you send any e-mail, take a moment to consider how it will be received. A little more time and explanation may smooth some rough edges.

- **Determine an appropriate salutation**

Each new e-mail exchange should begin with a salutation: “Dear Bob” or “Dear Ms. Zal.” Take a moment to consider whether you know the person well enough to address that person by her first name.

A salutation, however, is not necessary once you have exchanged several e-mails about the same topic. An e-mail exchange is like a conversation, and in a conversation you do not say hello each time it is your turn to speak.

- **Do not send e-mail while emotional**

If neutral e-mails are easily misinterpreted, you can imagine how much harm can occur when you vent anger or frustration in an e-mail. Never reply emotionally, even when you get an e-mail that is emotionally charged. When you are tempted to send an emotional reply, consider:

- Would I say this to this person’s face?
- How would I feel if I received this e-mail message?

Usually, after considering the above questions you will be calm enough to write your message differently and more professionally. Consider the difference between the e-mail messages in Table 18-E.

Table 18-E • Send emotionally appropriate e-mails

Inappropriate message	Appropriate message
If you don’t get this memo done, I will report you to the managing partner TOMORROW!!!! I am sick and tired of your incompetence.	I am growing increasingly concerned about the timing of this memo. Can we set up a time to talk about this more?

While it is tempting to fire off a quick and equally nasty response to a rude e-mail, do not let someone else’s unprofessional behavior pull you down to that level. When it appears that an electronic dialogue has turned into a conflict, it is best to suggest a time to speak or meet in person.

Remember that e-mails can be forwarded to multiple recipients virtually instantaneously. A final question you might ask yourself is this:

- How would I feel if this message appeared on the front page of the *New York Times* with my name attached to it?

If you would feel comfortable with your e-mail being seen by the rest of the world, go ahead and press send.

C. Keep the Style Formal

In the professional setting of a law practice, writing should be more formal. In an e-mail, use the same grammar, syntax, punctuation, writing style and, if possible, formatting that you would use in a memorandum, paper letter, or other professional document.

- **Do not type in ALL CAPS**

Writing in ALL CAPS is perceived as yelling.

- **Use proper capitalization, punctuation, and grammar**

You are not e.e. cummings. Failing to adhere to traditional writing norms will come across as flippant and unprofessional—even to members of your own office or people who know you well.

- **Edit and spell check**

Miss steaks can detract from your professional image, especially if they are pervasive.

- **Do not use internet acronyms**

Although you and most of your friends may know what IMHO² or FWIW³ means, a more senior colleague may not. Do not risk confusing and frustrating that colleague as she tries to figure it out.

- **Do not use emoticons**

Emoticons include smiley faces, winks, and other graphics created from type. They are typically used to convey tone; however, since you wouldn't draw a smiley face in a client letter or office memorandum, don't do it in a professional e-mail. If the e-mail text by itself does not convey the tone you are seeking, re-draft. In many cases, you should simply omit the questionable text.

- **Review the "To," "CC," and "BCC" lines**

When you receive an e-mail, be aware that the "To," "CC," and "BCC" members can change the meaning of the message as it pertains to you.

The "To" line indicates the recipient to whom the sender is speaking. "CC" stands for "carbon copy." It's a phrase that comes from the days when secretaries used typewriters and put a sheet of carbon paper between two blank pieces of paper to create copies as they typed. Today you may hear the phrase referred to as a "courtesy copy." A sender will

2. In my humble opinion.

3. For what it's worth.

“CC” other recipients if the sender wants the CC’d recipients to be aware of the e-mail message. Recipients in the “To” line and in the “CC” line can see that the e-mail has been sent to each other.

“BCC” stands for blind carbon copy. A sender puts a recipient in the BCC line if the sender wants the recipient to be aware of the e-mail but does not want others to know that the e-mail has been sent to that person. Recipients in the “To” and “CC” lines will not know that the e-mail has been sent to someone who is in the BCC line.

You have to be particularly careful if you receive an e-mail and you are a BCC recipient. Others will not know that you have received that e-mail, and so if you reply, you should reply only to the sender, and you should probably not refer to the e-mail publicly since the e-mail was sent to you confidentially.

You should review the “To,” “CC,” and “BCC” line not only when you receive the e-mail, but also before you send an e-mail. You must verify that all of the recipients are intended recipients. Make sure to know the difference between “forward,” “reply,” and “reply to all” and to double-check that you are striking the right key when you send an e-mail.

As an attorney, you are expected to adhere to the highest standards of discretion and confidentiality. Clearly, then, you do not want to send an e-mail with confidential matters to unintended recipients. And even if an e-mail does not happen to contain confidential information, when it is inadvertently sent to the wrong recipients the fact that you misfired your e-mail undermines confidence in your ability to be discreet and keep a confidence.

III. Stop and Think Before You Send

Before you send, read your e-mail.⁴ For each e-mail, take the same care that you would with any other professional document distributed over your signature. For very important e-mails, print and read them just as you would a draft of a memorandum or letter.

As you read, pause and reflect to make sure the content is accurate and supported, the tone will not be misread, the grammar and punctuation are correct, and the formatting is appropriate. In addition, before sending, determine whether the e-mail contains any sensitive or confidential information and whether that information can be disclosed to each recipient. Never send an e-mail without pausing to think about these things first.

Remember: It takes twenty years to build your reputation in a legal community, but only a minute to taint it.

4. For an expanded discussion about thinking before you send, see Schiess, *supra* note 1, at 34-36.

Practice Points



- E-mail communications allow attorneys to communicate information quickly, easily, and efficiently. Because the medium is fast-paced, take extra care to maintain a proper level of formality and professionalism.
- Every e-mail should have a polite and professional tone. Use a formal style that follows traditional rules of grammar, syntax, and punctuation.
- The substance of every e-mail should be accurate, succinct, and clearly explained.
- Use the same confidentiality warning on e-mails that you would use on any legal document.
- Because every e-mail has the potential to be seen by the entire world, stop, think about it, and review the e-mail before you send.

EET? HERIM? HISERT?

A Bridge Too Far In Search Of Gender-Inclusive Language?



Laura Graham

Recently, while sorting through my emails, I came across an article forwarded to me by a fellow legal writing professor. The title intrigued me: *What is "Eet"? A Proposal to Add a Series of Referent-Inclusive Third Person Singular Pronouns and Possessive Adjectives to the English Language for Use in Legal Drafting*¹ (Who but a writing professor would find that title intriguing?) So I paused in my email sorting and started reading the article.

The author began by identifying a problem that all writers encounter fairly often: "The English language does not include third person singular pronouns, possessive pronouns, and pronominal possessive adjectives that refer in the alternative to antecedents of the male gender, the female gender, or the neuter." In other words, what word do you use when you need to refer back to a general noun that could refer to either a male or female? Example: "A judge must maintain control over ____ courtroom at all times."

Should you follow the venerable but now much-criticized "masculine rule," which views the third person masculine as both a male and an indefinite referent, and write "*his* courtroom"? The author dismisses this possibility, calling the masculine rule "indefensible." He acknowledges that the masculine rule "continues to survive as a rule of statutory construction" but calls it "unabashedly sexist," "discriminatory in its gender bias," and "unfair," not to mention "imprecise."

Should you boldly flaunt the masculine rule and write "*her* courtroom"? Should you cover all of the bases and write the thorough but inelegant "*his or her* courtroom"? Should you ignore the fact that "judge" is a singular noun and make the problem go away by writing "*their* courtroom"? (This last suggestion is not a viable solution, in my opinion; isn't it like hearing nails on a chalkboard to read, "A judge must maintain control over *their* courtroom.>")

Recognizing the inadequacy of these and other possible "fixes" for the lack of gender-neutral pronouns and possessive adjectives, the author then moves forward to present his interesting and somewhat strange solution: the addition to the English language of some brand new words that would be used primarily in legal drafting.² The author writes, "All of the pronouns proposed . . . meet several criteria. They are inclusive in referring to antecedents that might be masculine or feminine,

or to antecedents that might be . . . non-human. They do not have any double meanings. They are egalitarian in their composition, being composed of letters taken from existing male, female, and neuter pronouns. They are brief, being composed of as few letters as possible. And they should be easily comprehensible to the reader or addressee."

For example, *ee* would be used to refer to a person of unspecified sex (eliminating the need for the *he/she* construction): "A witness may testify to matters of which *ee* has personal knowledge." *Herim* would be used to refer to a direct object that could be either masculine or feminine: "If the witness refuses to answer, the judge may hold *herim* in contempt." *Hiserts* would be used as a possessive adjectival modifier when the referent could be masculine, feminine, or non-human: "A contract that does not satisfy the requirement of subsection (a)(1) but is in all other respects valid is enforceable if the party against whom enforcement is sought admits in *hiserts* pleading or testimony that a contract for sale was made." You get the idea.

With all due respect to the author, I must confess that when I finished reading the article, I wondered if it was meant to be tongue-in-cheek—a clever response to the very vocal leaders of the gender-neutrality movement. But other than its radical propounding of these odd new words, nothing about the article screamed "Satire!" So I was thus left to consider the merits of the author's proposal.

Of course, the English language does continually evolve; many words that once seemed strange and perhaps even ridiculous are now widely used and accepted. For example, just this year, the Oxford English Dictionary added more than 100 new words, including *bestie*, *do-over*, and *wackadoodle*.³ But formally recognizing words that are already in common usage is quite different than deliberately introducing a whole series of new and unusual words into the language and expecting them to be used widely and consistently. Thus, while I recognize the problem the article identifies, I question whether its proposed solution would actually improve the quality and readability of legal documents.

For now, you should probably stick to the following tried-and-true methods of addressing the gender-inclusivity problem in your writing.

Revise the sentence to make the terms plural: "Judges must maintain control over their courtrooms at all times."

Revise the sentence to eliminate the need for any pronoun at all. For example, instead of, "A good judge takes his or her job very seriously," write, "A good judge takes *judging* very seriously."⁴

Use the pronoun *one*, as in "*One* must always tell the truth in

one's testimony." But avoid overusing *one*; otherwise your writing may sound stuffy and vague.

Where the above methods do not work well, and your document is relatively short, use the phrases *he or she* and *his or her* throughout.

In a transactional document such as contract or a lease, follow the masculine rule, and include a statement at the end that the use of the masculine gender is deemed to include the feminine.

Avoid using *he/she*, *his/her*, and *s/he*; the slashes are distracting to the legal reader.

Avoid alternating between *he* and *she* in a single document; this "solution" to the gender-inclusivity problem is awkward and disrupts the flow of the document. **AVZ**

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1 The author is C. Marshall Thatcher, a professor at the University of South Dakota School of Law, and the article is published at 59 S.D. L. Rev. 79 (2014).

2 As precedent for his proposal, the author points out that in Sweden, a new pronoun, *hen*, was recently added to the official National Encyclopedia of Sweden, to replace the masculine pronoun *han* and the feminine pronoun *hon*.

3 You can see the full list at <http://public.oed.com/the-oed-today/recent-updates-to-the-oed/march-2014-update/new-words-list-march-2014/>.

4 This example was taken from an article on gender neutral language that appears at http://www.kentlaw.edu/academics/lrw/grinker/Lw%20Gender_Neutral_Language.htm.

D. Subject-Verb Agreement

A verb must agree with its subject. Singular subjects correspond with singular verbs (as in *The plaintiff is testifying*) and plural subjects must correspond with plural verbs (as in *The plaintiffs are testifying*).

Most problems in subject-verb agreement occur when:

- A subject has more than one word;
- The subject is an indefinite pronoun (such as *everyone*);
- The subject is a collective noun (such as *committee*); or
- Words or phrases intervene between the subject and the verb.

1. Multiple-Word Subjects

- Rule One: Singular subjects joined by *and* usually take a plural verb.**

Incorrect

The judge and the jury was unpersuaded by the witness's testimony.

Correct

The judge and jury were unpersuaded by the witness's testimony.



Try mentally replacing multiple-word subjects with the word *they* to determine the correct verb, as in *They were unpersuaded by the witness's testimony*.

Exception to Rule One: When the parts of the subject describe a singular idea or are thought of as a unit, they are singular and take a singular verb, as in *Macaroni and cheese is my favorite lunch* or *The corporation's president and secretary is Eve Stanley*.

- Rule Two: Singular subjects joined by *or* or *nor* take a singular verb.**

Incorrect

Neither the defendant nor his attorney were prepared.

Correct

Neither the defendant *nor* his attorney was prepared.

- Rule Three: Plural subjects joined by *or* or *nor* take a plural verb.**

Incorrect

Either the records or the receipts is missing.

Correct

Either the records or the receipts *are* missing.

- Rule Four: When the subject is composed of a singular word and a plural word, and they are joined by *or* or *nor*, the verb should agree with the nearer word.**

Correct

Neither the jurors nor the judge *has* left.

Note, however, that sentences such as these “sound” better with plural verbs; thus, try to place the plural subject nearer to the verb.

Better

Neither the judge nor the jurors have left.

- Rule Five:** When a compound subject (a subject with more than one word) is preceded by the words *each* or *every*, the verb is usually singular.

Correct

Each plaintiff, defendant, and witness was present in the courtroom.

2. Indefinite Pronouns

Indefinite pronouns are pronouns that do not refer to a specific person or thing. Many of them end in *-one* or *-body*.

Indefinite pronouns can be singular or plural. Singular indefinite pronouns take singular verbs, and plural indefinite pronouns take plural verbs. Some indefinite pronouns (such as *all*, *any*, *none*, or *some*) may be singular or plural, depending on the noun to which they refer. If one of these pronouns refers to a singular noun, use a singular verb; if the pronoun refers to a plural noun, use a plural verb. Thus, both of the following are correct: *None of the documents were delivered* and *None of the document was reviewed*.

Following are some common indefinite pronouns:

Singular Indefinite Pronouns

anybody
anyone
each
either
every
everybody
everyone
neither
nobody
no one
nothing
one
somebody
someone
something

Plural Indefinite Pronouns

both
few
many
others
several

Singular or Plural Indefinite Pronouns

all
any
more
most
none
some

Correct Examples

- *Each of the complaints alleges malpractice.*
- *Everyone in the courtroom was seated.*

- ❑ *No one* was absent from the board meeting.
- ❑ *Many of the documents* were missing from the file.
- ❑ *Both contracts* contain errors.
- ❑ *Neither of the plaintiffs* lives in the county.

Caution: Remember that a few indefinite pronouns (*all, any, more, most, none, and some*) can be singular or plural depending on the word to which they refer.

Correct Examples

- ❑ *All the board members* were present for the meeting.
- ❑ *All the money* is counted.
- ❑ *Some of the documents* were missing.
- ❑ *Some of the document* was edited.

3. Collective Nouns and Company Names

Collective nouns are nouns that stand for a group of people or things, such as *committee, corporation, crowd, evidence, jury, staff, and team*. These collective nouns are usually singular because they refer to the group as a unit and they thus take singular verbs. The word *court* is also viewed as a collective noun (even when there is only one trial judge), and it is always treated as a singular word. Similarly, organizational names (General Electric Company or Starbucks Corporation) are usually treated as singular.

Incorrect

The jury have adjourned to deliberate.

The evidence show probable cause.

The court have decided the case.

The board of directors have passed a resolution.

Starbucks are holding their annual meeting today.

Correct

The jury has adjourned to deliberate.

The evidence shows probable cause.

The court has decided the case.

The board of directors has passed a resolution.

Starbucks is holding its annual meeting today.

If you wish to discuss the individuals that compose the unit, use the following forms:

Correct

The jurors have adjourned to deliberate.

The members of the court have decided the case.

The members of the board of directors have passed a resolution.

Note, however, that in British usage, collective nouns are usually treated as plurals, and thus it would be common to read *The team are playing at home today.*

Tips



On Singular Nouns

- Always use a plural verb with the pronoun *you* even when *you* is singular, as in *You alone are prepared.* Use a singular verb after the phrase *one of*, as in *One of my laptops is missing.*
- Expressions of time and money are usually singular, as in *Three hours is enough time to edit the brief* and *One hundred thousand dollars is the settlement offer.*
- Geographic names such as *the United States* are usually treated as singular nouns, as in *The United States has pledged foreign aid.*

4. Intervening Words

Subject-verb agreement problems often occur when words or phrases (often prepositional phrases) intervene between a subject and its verb. These intervening expressions often confuse writers, who may be tempted to match the verb with the noun in the intervening phrase rather than with the subject of the sentence. To be correct, identify the subject of the sentence, and ignore intervening words.

Incorrect

The discrepancy between the books and the accounting records have been resolved.

The remainder of the goods to be distributed are in storage.

One of the best experts are available.

Correct

The *discrepancy* between the books and the accounting records *has* been resolved.

The *remainder* of the goods to be distributed *is* in storage.

One of the best experts *is* available.

Caution: Phrases or words such as *together with*, *including*, *as well as*, or *in addition to* do not change the number of the verb. If the subject is singular, select a singular verb; if the subject is plural, select a plural verb.

Correct Examples

- ▣ The attorney, together with the paralegals, has reviewed the contract.
- ▣ The exhibits, as well as the report, show a pattern of traffic congestion.

5. Inverted Sentence Order

In most sentences, the subject is placed before the verb, as in *Two copies of the contract are enclosed.* When this standard sentence structure is inverted and a verb precedes its subject, make sure they agree.

Correct Examples

Enclosed are two *copies* of the contract.

In the written proposals for settlement, there *is* a suggestion for compromise.

Caution: Be careful with sentences or phrases beginning with *there is* and *there are*. These expressions signal that the sentence is inverted. In these sentences, the subject follows the verb. Be sure to use *is* for singular subjects and *are* for plural subjects.

Correct Examples

- ▣ There *is* an exhibit in the folder.
- ▣ There *are* many options to consider.

Challenge**Subject-Verb Agreement**

Select the correct word.

1. Although both attorneys were delayed, neither was/were apologetic.
2. Either the printer or the editors has/have misplaced the files.
3. Neither the defendants nor the plaintiff are/is present.
4. Each of the firm's offices have/has its own ethics policies.
5. Several of the firm's offices have/has their own ethics policies.
6. Everybody was asked to silence their/his or her cell phone.
7. More than one exhibit is/are missing.
8. More than five exhibits is/are missing.
9. The committee meet/meets on Monday.
10. No one in their/his or her wildest dreams could have predicted an acquittal.
11. General Electric has/have decided to cancel its/their lease.
12. The agreement, as well as the exhibits, display/displays careful drafting.

E. Modifiers

Modifiers are words that modify other words by describing, limiting, or qualifying those other words. An adjective such as *big* is a modifier because it describes another word. Adverbs (such as *slowly*) are also modifiers. Modifiers should be placed as close as possible to the words they modify.

Tips



The Old Rules

Because legal writing is more formal than other styles of writing and because legal readers are notorious perfectionists, err on the side of caution so readers will not be jarred by your usage. Thus, whenever possible, comply with the "old" rules of writing in legal documents unless awkwardness would result:

- Avoid splitting an infinitive;
- Avoid starting a sentence with a conjunction such as *and* or *but*; and
- Avoid ending a sentence with a preposition.

In most instances, there is a quick fix for violations of these old rules. For example, to remedy the split infinitive *to promptly investigate*, reword as *to investigate promptly*.

Ending a sentence with a preposition is something up with which I will not put.

Attributed to Sir Winston Churchill

G. Pronouns

Pronouns are words that replace nouns. Thus, consider the sentences *John filed the complaint* and *He filed the complaint*. In the second sentence the word *he* is a pronoun because it replaces the proper noun *John*. There are many different kinds of pronouns, including personal pronouns, indefinite pronouns, and reflexive pronouns, but all pronouns must always agree with their *antecedents* (the word or phrase the pronoun refers to or replaces).

1. Personal Pronouns

Personal pronouns (*I/me, you, he/him, she/her, we/us, they/them*) change form depending on whether they function as the subject of the sentence or the object of the sentence. Most problems occur when there is more than one subject or object. For example, writers seldom have difficulty with a sentence such as *Give the document to me* (and would never write *Give the document to I*); however, when another party is added to the pronoun, as in *Give the document to John and me*, confusion often results.

- Rule One:** When a pronoun functions as or replaces the subject of a sentence, use *I, he, she, we, or they*.

Incorrect

It was me who prepared the contract.

James and her drafted the brief.

Her and I will attend the meeting.

Either him or me will do the cite-checking.

Us on the jury voted to convict the defendant.

It was them who informed the police.

Correct

It was I who prepared the contract.

James and she drafted the brief.

She and I will attend the meeting.

Either he or I will do the cite-checking.

We on the jury voted to convict the defendant.

It was they who informed the police.

- Rule Two:** When a pronoun functions as or replaces the object of a sentence, use *me, him, her, us, or them*.

Incorrect

You must give John and I directions.

We urge you to release Susan and he from their employment contracts.

She has provided the committee and we with the budget analysis.

Between you and I, the defendant is guilty.

Correct

You must give John and me directions.

We urge you to release Susan and him from their employment contracts.

She has provided the committee and us with the budget analysis.

Between you and me, the defendant is guilty.

**For Pronoun Use**

As an aid to determining which form of pronoun to use, omit or cover up the noun and the word *and* accompanying the pronoun. This will provide a clue as to which pronoun to use.

Example: You must give Ted and me the police report.

Omit or cover up the words *Ted and* so that the sentence reads,

You must give _____ the police report.

This reading makes it clear that the correct pronoun is *me*.

It is customary to place the pronouns *I* or *me* after other pronouns or subjects. Thus, write *Deliver the records to Jack and me* rather than *Deliver the records to me and Jack*. Similarly, write *She and I attended the meeting* rather than *I and she attended the meeting*. There is nothing grammatically incorrect with the second presentations, but custom (and perhaps modesty) dictates that we refer to ourselves after we refer to others.

2. Pronoun Agreement

A pronoun must agree in number with its antecedent (the word the pronoun stands for or refers to). Singular antecedents take singular pronouns and plural antecedents take plural pronouns.

In most instances, writers instinctively choose the right pronoun based on what “sounds” right. Thus, writers seldom have difficulty with a sentence such as *The jurors brought their notes into the jury deliberation room.*

There are a few instances, however, that tend to cause problems for most writers: the use of indefinite pronouns, collective nouns, generic nouns, or when a prepositional phrase or several words intervene between the subject and the verb.

a. Indefinite Pronouns

- Rule:** Use a singular pronoun when the antecedent is a singular indefinite pronoun.

Some antecedents are indefinite, meaning that they do not refer to any specific person or thing. The most common indefinite pronouns that take a singular form are as follows (note that many end with *-body*, *-one*, or *-thing*):

Singular Indefinite Pronouns

anybody, anyone, anything
 each
 either
 every
 everybody, everyone, everything
 much
 neither
 nobody, no one, nothing
 one
 somebody, someone, something

When these indefinite words serve as antecedents of pronouns, select a singular pronoun.

Incorrect

Somebody forgot to file their papers.

Does everyone have their contract?

Each fraternity member had their cap.

Correct

Somebody forgot to file *his or her* papers.

Does *everyone* have *his or her* contract?

Each *fraternity member* had *his* cap.

Although these correct examples show proper usage, you may wish to avoid the expression *his or her* if it strikes you as wordy or stuffy. As discussed later in subsection 7, there are several ways to remedy such constructions. For example, the first example could be rewritten as *Somebody forgot to file the papers.*

- **Rule:** Use a plural pronoun when the antecedent is a plural indefinite pronoun.

Plural Indefinite Pronouns

both
few
many
several

Correct

Several of the defendants have called their attorneys.

Remember that some indefinite pronouns (such as *all*, *any*, *none*, or *some*) may be singular or plural, depending on the noun to which they refer. If the pronoun refers to a singular noun, use a singular verb. If the pronoun refers to a plural noun, use a plural verb.

Correct

All of the contract was reviewed.
All of the contracts were reviewed.

b. Collective Nouns

As discussed in Section D.3, collective nouns (nouns that stand for a group of people or items) such as *committee*, *corporation*, *crowd*, *court*, and *jury*, are usually singular and take a singular pronoun.

Incorrect

The corporation is holding their annual meeting next week.

Correct

The corporation is holding its annual meeting next week.

If you wish to discuss the individuals composing the unit, for clarity use the following form:

Correct

The corporation's shareholders are holding their annual meeting next week.

c. Generic Nouns

A generic noun is one that could refer to either men or women, such as *athlete*, *attorney*, *defendant*, *juror*, or *plaintiff*. These generic nouns usually take a singular

pronoun, as in *An attorney must present his or her argument* or *A juror will be compensated for his or her time on the jury*. As previously discussed, many sentences with the phrase *his or her* can be reworded to eliminate awkwardness, as in *The attorneys must present their arguments* or *Jurors will be compensated for their time on the jury*.

d. Intervening Phrases

When a phrase or word intervenes between the subject and verb of a sentence, ignore it, and match the verb to the pronoun, as in *Every one of the doctors was credible*. Remember that some indefinite pronouns (such as *all*, *any*, *most*, *none*, or *some*) can be singular or plural. When using these indefinite pronouns, look at the noun in the *of* phrase and match the verb to this noun.

Correct

Most of the brief was cite-checked.
Most of the briefs were cite-checked.

3. Pronoun Reference

A pronoun must relate clearly and specifically to its antecedent (the noun to which the pronoun refers).

a. Ambiguous References

A pronoun is ambiguous when it could refer to two possible antecedents. Thus, make sure that any pronoun used in a sentence refers clearly to one antecedent. This ambiguity often occurs when writers substitute pronouns for names. For example, consider the following sentence: *The document Ellen drafted for Teresa was given to her for review*. It is unclear whether *her* refers to Ellen or Teresa.

There are two ways to remedy such an ambiguity:

1. Replace the pronoun with the appropriate noun, as in *The document Ellen drafted for Teresa was given to Ellen for her review*.
2. Revise the sentence if you do not wish to repeat a noun, as in *Ellen, who drafted the document for Teresa, was later given the document for review*.

Ambiguous

Dan told Bill that he needed to draft the contract.

Revised

Dan told Bill that Dan needed to draft the contract.

or

Dan told Bill that Bill needed to draft the contract.

b. Implied References

Pronouns must refer to a specific stated noun in the same sentence or the previous sentence, not to a word that is implied in the sentence.

Incorrect Implied Reference

After the verdict was rendered, the attorney thanked *them*.

Correct Specific Reference

After the *jurors* rendered a verdict, the attorney thanked *them*.

c. Vague References

The pronouns *it*, *this*, *that*, and *which* are often used in a vague manner. These pronouns must refer to one specific noun.

Confusing

If you put your hand on the banister, it will get wet.

The expert witness always arrives on time and is well dressed. This is important.

Steve took out his pen and signed the will. He then put it back in his briefcase.

Revised

If you put your hand on the banister, *your hand* [or *the banister*] will get wet.

The expert witness always arrives on time and is well dressed. *Punctuality* [or *dressing well*] is important.

Steve took out his pen and signed the will. He then put *the pen* [or *the will*] back in his briefcase.

d. Indefinite Use of *It* and *They*

When using *it* or *they*, make sure that a definite noun has first been used.

Incorrect

In the case *Allen v. Burns*, it describes the doctrine of equivalents.

Correct

The case *Allen v. Burns* describes the doctrine of equivalents. It holds that . . .

4. Use of *Who* and *Whom*

Who and *whom* are used either in questions, as in *Who wrote the book?* or in subordinate clauses, as in *I am unsure who will represent the plaintiff.*

- In questions, use *who* for a subject and *whom* for an object. Use *who* whenever *I*, *he*, *she*, *we*, or *they* could be substituted for *who*, and use *whom* whenever *me*, *him*, *her*, *us*, or *them* could be substituted for *whom*.

Correct Examples:

Who will be going to the trial?

Explanation: In this question, *who* acts as the subject of the sentence.

Whom does the indictment name?

Explanation: In this question, the object of the sentence is *whom* and the subject is *indictment*.

- In subordinate clauses, use *who* and *whoever* for all subjects and use *whom* and *whomever* for all objects.

Correct Examples:

Give the document to whoever needs it.

Explanation: In this sentence, *whoever* is the subject of the subordinate clause *whoever needs it*.

It was Judge Allen whom I saw.

Explanation: In this sentence, *whom* is the object of the subordinate clause *whom I saw*.



Who versus Whom: Remember "m" for Whom

In every use of *who* or *whom*, rephrase the question or subordinate clause and determine whether you would use *he* or *him* in its place. If *he* would be used, use *who*. If *him* would be used, use *whom*. Remember that the "m" in him matches up with the "m" in whom.

Example: Who is calling?

Test: Rewrite as *He is calling*. Replace *he* with *who*.

Example: This is the man whom I mentioned earlier.

Test: Rewrite as *I mentioned him earlier*. Replace *him* with *whom*.

5. Use of *That* and *Which*

That is used to introduce a restrictive clause (one that is necessary to the meaning of a sentence) and is not preceded by a comma. *Which* is nearly always used to introduce a nonrestrictive clause (a clause that is not necessary to the meaning of the sentence and that can be omitted without changing the meaning of the sentence). A *which* clause is usually preceded by a comma. Use *who* to refer to people, and use *that* or *which* to refer to groups and things.

The use of *that* or *which* depends on the writer's intent. If the writer wishes to convey essential information, *that* should be used to introduce the information; if the writer intends to define, add to, or limit information, *which* should be used to introduce the information.

- Example:** *The corporation that was formed in Delaware has no assets.*
Explanation: The word *that* tells us which particular corporation has no assets. There may be several corporations that have no assets, but the writer is describing which particular corporation, namely, the one formed in Delaware (rather than others formed elsewhere), has no assets. Use *that*.
- Example:** *The contract that was modified was admitted into evidence.*
Explanation: The word *that* tells us essential information about which particular contract was admitted into evidence (namely, the one that was modified).
- Example:** *The car that was damaged in the collision was my car.*
Explanation: Elimination of the *that* clause causes the sentence to lose meaning. Use *that*.
- Example:** *The corporation, which was formed in Delaware, has no assets.*
Explanation: The phrase *which was formed in Delaware* provides additional information about the corporation, but it is not essential to the meaning of the sentence. The *which* clause is set off by commas because it acts as a parenthetical expression; it adds a fact about the only corporation being discussed. Use *which*.
- Example:** *The contract, which was modified, was admitted into evidence.*
Explanation: The phrase *which was modified* tells us a nonessential fact about the only contract being discussed.
- Example:** *My car, which was brand new, was damaged in the collision.*
Explanation: The *which* clause adds information, but it can be dropped and the sentence will still make sense. Use *which*.
- Examples:** *We may wish that the argument were true, but it is not, and that which we cannot deny, we should not deny.*
His summation sets the standard by which all others should be judged.
Explanation: These two sentences are examples of the fact that the word *which* is not always preceded by a comma and *that which* is sometimes used to introduce a restrictive clause. The expressions *that which, in which, by which, of which*, and so forth are not preceded by commas.

Many writers are confused about the use of *that* and *which*, and you will likely see incorrect uses. Recognizing this confusion, many writing texts have relaxed the rules about the distinction between *that* and *which*. Nevertheless, because legal writing is so specific, try to remember to use *that* when you introduce essential information and *which* when you introduce nonessential information. See Chapter 2, Section C for additional information.

Tips



That or Which?

To determine whether to start a clause with *that* or *which* consider these tips:

- If you can drop the clause and still retain the meaning of the sentence, use *which*. If you can't, use *that*.
- A clause beginning with *which* is usually set off by commas because it includes nonessential information.
- A clause beginning with *that* is not set off by commas. *That* introduces essential information; *which* seldom does.

6. Reflexive Pronouns

The reflexive pronouns are the *self* pronouns, namely, *myself*, *yourself*, *himself*, *herself*, *itself*, *ourselves*, *yourselves*, and *themselves*. Reflexive pronouns reflect back on a subject, as in *She injured herself* or *He satisfied himself that the defendant was guilty* or are used to show emphasis, as in *I myself made the decision*. Do not substitute a *self* pronoun for a personal pronoun (*I*, *me*, *he*, *him*, and so forth).

Incorrect

He won't give Lyndsey or myself his phone number.

The accident was witnessed by Mrs. Hendrix and himself.

He issued a statement on behalf of his wife and him.

Correct

He won't give Lyndsey or me his phone number.

The accident was witnessed by Mrs. Hendrix and *him*.

He issued a statement on behalf of his wife and *himself*.

DON'T ESCHEW THE COMMA!

“No wonder feelings run high about the comma. When it comes to improving the clarity of a sentence, you can nearly always argue that one should go in; you can nearly always argue that one should come out.”

--Lynne Truss, *Eats, Shoots & Leaves*

I often find myself wishing that my students' feelings about the comma *did* run high! Instead, I find that many of my students give little thought to comma usage in their writing. And the sad fact is that many of them have never been formally taught even the most basic rules of comma usage. This has been the case for several years now; thus, I have to assume that there are more than a few practitioners who could use a refresher on the subject.

Lynne Truss, the author of the humorous best-seller on punctuation, *Eats, Shoots and Leaves*, writes that “lawyers eschew the comma as far as possible, regarding it as a troublemaker; and readers grow so accustomed to the dwindling incidence of commas in public places that when signs go up saying “No dogs please”, only one person in a thousand bothers to point out that actually, as a statement, “no dogs please” is an indefensible generalization, since many dogs *do* please, as a matter of fact; they rather make a point of it.”

As practicing lawyers, we should not “eschew the comma,” and we should not assume that our readers are comfortable with our sometimes undisciplined use of it. Fortunately, by observing just five key rules of comma usage, we can eliminate most of the comma errors in our writing, thus making our writing noticeably more readable. Here are those five key rules:

1. **Use a comma after a sentence introduction of three or more words.** If the introduction is fewer than three words, it is still fine to use a comma after it, if doing so will improve the clarity of the sentence. Thus:
 - Although the witness was nervous, her testimony was very convincing.
 - After the hearing, the judge dismissed the case.
 - According to the complaint, the accident occurred more than three years ago.
 - First, the judge considered the claim that the court lacked personal jurisdiction.
 - Fortunately, the trial date was postponed.
2. **Use a comma between each item in a list of three or more items.** The “serial comma” (affectionately known as “the Oxford comma”) has generated much debate over the years, but the better practice is to include a comma after every item in a list, including the item preceding the “and” or “or.” Thus:
 - The American flag is red, white, and blue.
 - The elements of a negligence claim are duty, breach, proximate cause, and damages.
 - Will you be arriving on Wednesday, Thursday, or Friday?
 - For lunch, I had a small apple, a sandwich with ham and cheese, and yogurt.

Note the result if the “serial comma” is omitted in the last example; did the writer really put yogurt on the sandwich along with the ham and cheese?

3. Use a comma on both sides of a phrase that interrupts a sentence. Such interruptions can take the form of transitional words, phrases of contrast, and appositives (phrases that explain the nouns they follow). Whatever the form of the interruption, the commas on either side assist the reader by “containing” the interrupting words. Thus:

- The second question, however, is not as easy to answer.
- The plaintiff, not the defendant, has the burden of persuasion in this case.
- The opinion’s author, a long-standing member of the Court, was quite vocal in his disagreement with the appellant’s argument.

4. Use a comma to separate two independent clauses. An independent clause has a subject and a verb and can stand on its own. Always use a comma to separate independent clauses that are joined by a coordinating conjunction (*and, or, but, for, nor, so, yet*). Never use a comma to separate an independent clause from a dependent clause (one that cannot stand on its own). Thus:

- I budgeted my time wisely, so I was able to finish the trial brief well before the deadline.
- My client was laid off from his job of twenty years and has been unable to find a comparable job.

An incorrect construction, but one that I’m seeing more frequently, is two independent clauses joined by a comma but without the coordinating conjunction: “My client was laid off from his job of twenty years, he has been unable to find a comparable job.” This erroneous construction can be corrected either by adding the conjunction “and” before the word “he” or by omitting the comma, adding the conjunction “and,” and omitting the word “he” (the second example above).

5. Use a comma before and after most quotations. The comma after the quotation should be placed inside the quotation marks. Thus:

- “Have the brief on my desk by noon,” Judge Jones said.
- Judge Jones said, “Have the brief on my desk by noon.”
- “Have the brief on my desk by noon,” Judge Jones said, “or I will cite you for contempt.”

Of course, as with almost all rules, the rules of comma usage have some exceptions; I can’t cover all of the exceptions here, any more than I can cover all of the rules. If you’ve read my previous columns, you know that I am a big fan of legal style manuals. *The Aspen Handbook for Legal Writers*, my current “go-to” legal style manual, has an excellent section on comma usage; I find myself consulting it quite often, sometimes on my students’ behalf and often for my own benefit. For most of us, some rules of correct comma usage are well-ingrained, and others we may have

to look up repeatedly. Whatever the case, we should avoid “eschewing the comma” and take a disciplined approach to our comma usage, for the sake of our legal readers.

AN ODE TOO SPELLCHECK
(sores unknown)

Eye have a spelling checker
It came with my pea sea
It plainly marks four my revue
Miss steaks eye kin knot sea.

Eye strike a key and type a word
And weight four it two say
Weather I am wrong or write
It shows me strait a weigh.

As soon as a mist ache is maid
It nose bee fore two long
And eye can put the era rite
Its rare lea ever wrong.

Eye have run this poem threw it
Eye am shore your please two no
Its letter perfect awl the weigh
My checker tolled me sew.

- Full case names are not italicized in law review footnotes whereas they are always underscored or italicized by practitioners.

ALWD does not differentiate between citation form for law review footnotes and for practitioners; it endorses ordinary type and does not use any form of LARGE AND SMALL CAPITALS.

D. Using This Appendix

This appendix is intended to provide a quick reference only to citation form and thus the focus is on the most commonly encountered types of citations and their examples rather than on explanations of the underlying rules for citation form. Consult *The Bluebook* and *ALWD* for explanation of the rules. Most examples in this section are fictitious.

E. Quick Reference for Citations (Bluebook and ALWD Forms)

Note that references to the Bluepages in *The Bluebook* are shown as "B."

Type of Citation and Bluebook and ALWD Rule	Bluebook Law Review Footnote Form	Bluebook Practitioner Form (Note that underscoring may be substituted for italics in any example.)	ALWD Form (Note that underscoring may be substituted for italics in any example.)
State Cases (if court rules require parallel citations) (Bluebook B4.1.3, Rule 10.3, and Table T.1.3; ALWD Rule 12.4)	Not applicable	<i>Allen v. Carr</i> , 201 N.C. 118, 429 S.E.2d 16 (1984); <i>Harris v. Lee</i> , 101 N.C. App. 12, 409 S.E.2d 90 (1982)	<i>Allen v. Carr</i> , 201 N.C. 118, 429 S.E.2d 16 (1984); <i>Harris v. Lee</i> , 101 N.C. App. 12, 409 S.E.2d 90 (1982)
State Cases (in all other instances) (Bluebook B4.1.3, Rule 10.3, and Table T.1.3; ALWD Rule 12.4)	<i>Allen v. Carr</i> , 429 S.E.2d 118 (N.C. 1984); <i>Harris v. Lee</i> , 409 S.E.2d 90 (N.C. Ct. App. 1982)	<i>Allen v. Carr</i> , 429 S.E.2d 16 (N.C. 1984); <i>Harris v. Lee</i> , 409 S.E.2d 90 (N.C. Ct. App. 1982)	<i>Allen v. Carr</i> , 429 S.E.2d 16 (N.C. 1984); <i>Harris v. Lee</i> , 409 S.E.2d 90 (N.C. App. 1982)

Type of Citation and Bluebook and ALWD Rule	Bluebook Law Review Footnote Form	Bluebook Practitioner Form (Note that underscoring may be substituted for italics in any example.)	ALWD Form (Note that underscoring may be substituted for italics in any example.)
U.S. Supreme Court Cases (Bluebook B4.1.3, Rule 10.4, and Table T.1.1; ALWD Rule 12.6)	Daley v. Fisk, 520 U.S. 103 (1998)	<i>Daley v. Fisk</i> , 520 U.S. 103 (1998)	<i>Daley v. Fisk</i> , 520 U.S. 103 (1998) (ALWD permits but does not prefer parallel citations)
U.S. Courts of Appeal Cases (Bluebook B4.1.3, Rule 10.4, and Table T.1.1; ALWD Rule 12.6)	Lawrence v. Mather, 103 F.3d 114 (8th Cir. 1999)	<i>Lawrence v. Mather</i> , 103 F.3d 114 (8th Cir. 1999)	<i>Lawrence v. Mather</i> , 103 F.3d 114 (8th Cir. 1999)
U.S. District Court Cases (Bluebook B4.1.3, Rule 10.4, and Table T.1.1; ALWD Rule 12.6)	Blakely v. Yost, 742 F. Supp. 2d 942 (C.D. Cal. 2000)	<i>Blakely v. Yost</i> , 742 F. Supp. 2d 942 (C.D. Cal. 2000)	<i>Blakely v. Yost</i> , 742 F. Supp. 2d 942 (C.D. Cal. 2000)
U.S. Constitution (Bluebook B6, Rule 11; ALWD Rule 13)	U.S. CONST. amend. IV	U.S. Const. amend. IV	U.S. Const. amend. IV
State Constitution (Bluebook B6, Rule 11; ALWD Rule 13)	CAL. CONST. art. XX, § 4	Cal. Const. art. XX, § 4	Cal. Const. art. XX, § 4
Federal Statutes (Bluebook B5, Rule 12, and Table T.1.1; ALWD Rule 14)	17 U.S.C. § 101 (2006); 17 U.S.C.A. § 101 (West 1998); 17 U.S.C.S. § 101 (LexisNexis 1996)	17 U.S.C. § 101 (2006); 17 U.S.C.A. § 101 (West 1998); 17 U.S.C.S. § 101 (LexisNexis 1996)	17 U.S.C. § 101 (2006); 17 U.S.C.A. § 101 (West 1998); 17 U.S.C.S. § 101 (Lexis 1996)
State Statutes (Bluebook B5, Rule 12, and Table T.1.3; ALWD Rule 14 and App. 1)	ARIZ. REV. STAT. ANN. § 10-401 (1992); CAL. EVID. CODE § 521 (West 1998)	Ariz. Rev. Stat. Ann. § 10-401 (1992); Cal. Evid. Code § 521 (West 1998)	Ariz. Rev. Stat. Ann. § 10-401 (West 1992); Cal. Evid. Code Ann. § 521 (West 1998)

Type of Citation and Bluebook and ALWD Rule	Bluebook Law Review Footnote Form	Bluebook Practitioner Form (Note that underscoring may be substituted for italics in any example.)	ALWD Form (Note that underscoring may be substituted for italics in any example.)
Federal Rules (Bluebook B5, and Rule 12.9.3; ALWD Rule 17.1)	Fed. R. Civ. P. 12(b)(6)	Fed. R. Civ. P. 12(b)(6)	Fed. R. Civ. P. 12(b)(6)
Federal Regulations (Bluebook B5 and Rule 14.2; ALWD Rule 19.1)	Cheese Import Regulations, 42 C.F.R. § 131 (2012); or 29 C.F.R. § 605.89 (2010) (include title if helpful)	Cheese Import Regulations, 42 C.F.R. § 131 (2012); or 29 C.F.R. § 605.89 (2010) (include title if helpful)	42 C.F.R. § 131 (2012); or 29 G.F.R. § 605.89 (2010) (include title if helpful)
Federal Register (Bluebook Rule 14.2; ALWD Rule 19.3)	Standard Industrial Codes, 64 Fed. Reg. 27812 (Dec. 6, 2012)	Standard Industrial Codes, 64 Fed. Reg. 27812 (Dec. 6, 2012)	64 Fed. Reg. 27812 (Dec. 6, 2012) (title is optional)
Administrative Decisions (Bluebook Rule 14.3 and T.1.2; ALWD Rule 19.5)	Network Solutions, Inc., 18 F.C.C.2d 909 (2000); Stevens Textile Co., 403 N.L.R.B. 120 (1985)	Network Solutions, Inc., 18 F.C.C.2d 909 (2000); Stevens Textile Co., 403 N.L.R.B. 120 (1985)	Network Solutions, Inc., 18 F.C.C.2d 909 (U.S. Fed. Commun. Commn. 2000); Stevens Textile Co., 403 N.L.R.B. 120 (U.S. Natl. Lab. Rel. Bd. 1985)
Looseleaf Services (Bluebook Rule 19 and Table T.15; ALWD Rule 28.1)	<i>In re Walmart Stores, Inc.</i> , 5 Bus. Franchise Guide (CCH) ¶ 42,201 (D.N.J. Aug. 12, 1995)	<i>In re Walmart Stores, Inc.</i> , 5 Bus. Franchise Guide (CCH) ¶ 42,201 (D.N.J. Aug. 12, 1995)	<i>In re Walmart Stores, Inc.</i> , 5 Bus. Fran. Guide (CCH) ¶ 42,201 (D.N.J. Aug. 12, 1995)
Attorneys General Opinions (Bluebook T.1.2; ALWD Rule 19.7, 20.7)	Recess Appointments, 23 Op. O.L.C. 4 (2010); Forefeiture of Pension Benefits, Op. Ill. Att’y Gen. 11-003 (2011)	Recess Appointments, 23 Op. O.L.C. 4 (2010); Forefeiture of Pension Benefits, Op. Ill. Att’y Gen. 11-003 (2011)	23 Op. Ofc. Leg. Counsel 4 (2010); Ill. Atty. Gen. Op. 11-003 (2011)

Type of Citation and Bluebook and ALWD Rule	Bluebook Law Review Footnote Form	Bluebook Practitioner Form (Note that underscoring may be substituted for italics in any example.)	ALWD Form (Note that underscoring may be substituted for italics in any example.)
Books (Bluebook B8 and Rule 15; ALWD Rule 22.1)	2 J. THOMAS MCCARTHY, MCCARTHY ON TRADEMARKS AND UNFAIR COMPETITION § 4:13 (4th ed. 1998); 7 SAMUEL WILLISTON, TREATISE ON THE LAW OF CONTRACTS § 901 (Walter H. Jaeger ed., 3d ed. 1964)	2 J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition § 4:13 (4th ed. 1998); 7 Samuel Williston, Treatise on the Law of Contracts § 901 (Walter H. Jaeger ed., 3d ed. 1964)	J. Thomas McCarthy, McCarthy on Trademarks and Unfair Competition vol. 2, § 4:13 (4th ed., West 1998); Samuel Williston, Treatise on the Law of Contracts vol. 7, § 901 (Walter H. Jaeger ed., 3d ed., West 1964)
Periodical Materials and Law Reviews (Bluebook B9 and Rule 16 and Table T.13; ALWD Rule 23.1)	David J. Hayes, Jr., <i>Due Process</i> , 41 EMORY L.J. 164 (1997); Janet R. Sanders, <i>Corporate Takeovers</i> , 12 J. Bus. L.18 (2001)	David B. Hayes, Jr., <i>Due Process</i> , 41 Emory L.J. 164 (1997); Janet R. Sanders, <i>Corporate Takeovers</i> , 12 J. Bus. L. 18 (2001)	David B. Hayes, Jr., <i>Due Process</i> , 41 Emory L.J. 164 (1997); Janet R. Sanders, <i>Corporate Takeovers</i> , 12 J. Bus. L. 18 (2001)
Dictionaries (Bluebook B8 and Rule 15.8; ALWD Rule 25.1)	BLACK'S LAW DICTIONARY 791 (9th ed. 2009)	Black's Law Dictionary 791 (9th ed. 2009)	Black's Law Dictionary 791 (Bryan A. Garner ed., 9th ed., West 2009)
Legal Encyclopedias (Bluebook B8 and Rule 15.8; ALWD Rule 26.1)	76 AM. JUR. 2D Trademarks § 13 (1986); 95 C.J.S. Trial § 32 (1988) 14 CAL. JUR. 3D Contracts §§ 14-18 (1994)	76 Am. Jur. 2d Trademarks § 13 (1986); 95 C.J.S. Trial § 32 (1988); 14 Cal. Jur. 3d Contracts §§ 14-18 (1994)	76 Am. Jur. 2d Trademarks § 13 (1986); 95 C.J.S. Trial § 32 (1988); 14 Cal. Jur. 3d Contracts §§ 14-18 (1994)
Restatements (Bluebook B5 and Rule 12.9.5; ALWD Rule 27.1)	RESTATEMENT (SECOND) OF TORTS § 13 (1986)	Restatement (Second) of Torts § 13 (1986)	Restatement (Second) of Torts § 13 (1986)

Type of Citation and Bluebook and ALWD Rule	Bluebook Law Review Footnote Form	Bluebook Practitioner Form (Note that underscoring may be substituted for italics in any example.)	ALWD Form (Note that underscoring may be substituted for italics in any example.)
A.L.R. Annotations (Bluebook Rule 16.7.6; ALWD Rule 24.1)	James W. Gray, Annotation, <i>Nuisance Theory</i> , 56 A.L.R.4TH 145 (1990)	James W. Gray, Annotation, <i>Nuisance Theory</i> , 56 A.L.R.4th 145 (1990)	James W. Gray, <i>Nuisance Theory</i> , 56 A.L.R.4th 145 (1990)
Electronic Databases (Bluebook B4 and Rule 18; ALWD Rule 12.12)	<i>Bowes v. Capital Inc.</i> , No. 94-1765, 1995 U.S. App. LEXIS 1202, at *2 (4th Cir. Oct. 8, 1995)	<i>Bowes v. Capital Inc.</i> , No. 94-1765, 1995 U.S. App. LEXIS 1202, at *2 (4th Cir. Oct. 8, 1995)	<i>Bowes v. Capital Inc.</i> , 1995 U.S. App. LEXIS 1202 at *2 (4th Cir. Oct. 8, 1995)
	<i>Green v. Taylor</i> , No. 97-CAS-120, 1998 WL 44102, at *1 (D.N.J. Feb. 10, 1998)	<i>Green v. Taylor</i> , No. 97-CAS-120, 1998 WL 44102, at *1 (D.N.J. Feb. 10, 1998)	<i>Green v. Taylor</i> , 1998 WL 44102 at *1 (D.N.J. Feb. 10, 1998)
Internet Source (article available solely on Internet) (Bluebook Rule 18; ALWD Rule 40.1)	Mike Scarcella, <i>DOJ Fights over Privacy</i> , LAW.COM (July 30, 2012), http://www.LAW.COM/jsp/nlj/PubArticleNLJ.jsp	Mike Scarcella, <i>DOJ Fights over Privacy</i> , Law.Com (July 30, 2012), http://www.law.com/jsp/nlj/PubArticleNLJ.jsp	Mike Scarcella, <i>DOJ Fights over Privacy</i> , http://www.law.com/jsp/nlj/PubArticleNLJ.jsp (July 30, 2012)

F. Special Bluebook and ALWD Citation Issues

1. General Comments

- Practitioners never use LARGE AND SMALL CAPITALS in citations in their court documents or legal memoranda. They always use ordinary Roman type. LARGE AND SMALL CAPITALS are used only for law review footnotes in *The Bluebook* system and other similar academic writings. ALWD does not recognize LARGE AND SMALL CAPITALS as appropriate for any citation.
- Practitioners may underscore or italicize case names, book titles, names of articles in journals, and so forth. Select one method and be consistent. Use this same method for signals (such as *see* and *id.*). Italics are far more common in law practice than underscoring.

A Citation Refresher: Back to the Basics



Laura Graham

Let's face it: When you were in law school, there were few things more excruciating than sitting through a class on citation. It's been twenty-plus years since I was introduced to the joys of the *Bluebook* as a 1L, and to this day I haven't found a great way to make learning citation interesting or fun for my students.

Nonetheless, citation is an integral part of good legal writing. Without it, your reader is left to wonder

whether or not the statements you've made are supported by authority. And when your citation is incomplete, your reader can't always determine the strength of the authorities you've cited. So it's worth spending a little time every few years to refresh your memory about citation basics. Here are some FAQs about citation and the answers to them, as simply as I can explain them.

Do readers really pay any attention to the citations?

If they're careful readers, yes. A citation gives the reader several important pieces of information about the proposition it follows: what authority supports the proposition, where the reader can find that authority, and how much weight the reader should give that authority when evaluating the analysis or argument in which the proposition appears. If you omit citations that you should include, the reader will likely infer that no authority exists to support your analysis or argument. I recall an opinion issued by the North Carolina Court of Appeals in a case I worked on in which the court chided opposing counsel for making a "one-page, citation free argument" on a particular point. Not surprisingly, the court flatly rejected that argument. The bottom line is that legal readers need and expect you to include citations as often as appropriate, and they need and expect them to be in correct citation form.

Do I really have to use the dreaded Bluebook to figure out how to cite correctly?

When writing documents for submission to North Carolina courts, yes. Appendix B of the North Carolina Rules of Appellate Procedure states, "Citations should be made according to the most recent edition of A Uniform System of Citation."¹ "A Uniform System of Citation" is the subtitle of—yes, you guessed it—the *Bluebook*.²

The *Bluebook* is published by the editors of the law reviews at Columbia, Harvard, Yale, and Penn. It is updated every few years, apparently whenever the urge strikes. The current edition is the Nineteenth, published in 2010.

The subtitle "A Uniform System of Citation" is something of a misnomer; in fact, the *Bluebook* sets out two different systems, one for practitioners and one for scholarly writing. This dual sys-

tem has been a source of endless frustration for law students and practitioners for generations.³ However, in the last two editions, the editors of the *Bluebook* have thrown practitioners a bone by including a section called the Bluepages (so named because the pages are, in fact, blue).

The editors describe the Bluepages as "a how-to guide for basic citation" that is simpler than the remainder of the *Bluebook* (which is "at a level of complexity commensurate with the needs of the law journal publication process").⁴ The Bluepages "provide easy-to-comprehend guidance for the everyday citation needs of first-year law students, summer associates, law clerks, practicing lawyers, and other legal professionals."⁵ While "easy-to-comprehend" is perhaps a bit of a stretch, it is true that the Bluepages help make sense of some of the complex material in the white pages, thus making life simpler for practitioners. So if you are using an old edition of the *Bluebook*, it might be worth investing in the Nineteenth Edition.

How often do I have to cite? Reasonable minds differ in this regard; just a few weeks ago, there was a lengthy thread on this very subject on the Legal Writing Institute's LISTSERV. However, there are some generally accepted rules of thumb.

- Place a citation "after each sentence, or part of a sentence, that contains a statement of a legal principle, a reference to or a description of a legal authority, an idea, a thought, or an expression borrowed from another source."⁶
- If, in a single paragraph of your document, you refer to material from the *same* page, section, or other subdivision of the *same* source, you have two options:
 - You may place one citation at the end of the material.
 - You may place a citation after every sentence, although this sometimes results in a string of *Id.* citations that adversely affects the paragraph's readability.

In general, when in doubt, err on the side of including a citation.

Do I have to parallel cite?

In documents to be submitted to North Carolina courts, yes. Appendix B of the North Carolina Rules of Appellate Procedure states, "Citations to regional reporters shall include parallel citations to official state reporters."⁷ In other words, when you cite a North Carolina case, you must cite to both the North Carolina official reporter in which the case appears (N.C. or N.C. App.) and the West unofficial regional reporter (for North Carolina cases, the South Eastern Reporter, now in its second series, known as S.E.2d).

This requirement may seem outdated in the age of electronic research, when a case can be pulled up on Lexis or Westlaw using

either citation; but until the Rules of Appellate Procedure change in this regard, parallel citation is necessary. A detailed discussion of the ins and outs of parallel citation is beyond the scope of this column (and would probably lull you to sleep as you read it); consult Bluebook Rule 10.3 (or better yet, Bluepages Rule B4.1.3) for explanations and examples.

What are pinpoint cites, and do I have to use them?

A pinpoint cite (or pincite for short) is a citation to the specific page in the source on which the material you've referenced is located. And yes, the Bluebook requires them.⁸ A pincite allows your reader to turn straight to the cited material once he or she locates the source. Thus, when pincites are omitted or incorrect, your reader may become very frustrated by having to work harder than he or she should have to in order to find the specific material you've cited.

In an infamous opinion which he later withdrew, former Texas judge Samuel Kent chastised the plaintiff's attorney for his sloppy citation:

Plaintiff's citation, however, points to a nonexistent Volume "1886" of the Federal Reporter Third Edition and neglects to provide a pinpoint citation for what, after being located, turned out to be a forty-page decision. . . . The Court cannot even begin to comprehend why this case was selected for reference. It is almost as if Plaintiff's counsel chose the opinion by throwing long range darts at the Federal Reporter (remarkably enough hitting a nonexistent volume!).⁹

Ouch! How would you like to be that lawyer, whose name of course appears in bold print at the outset of the opinion?

Citing correctly is not one of the more enjoyable aspects of good legal writing, but it is an indispensable one. In the next couple of columns, I will cover some of the more troublesome aspects of citation in more detail. As always, I welcome your suggestions as to particular citation issues you would like me to address.

Happy citing! *.wcz.*

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¹ N.C. R. App. P. app. B.

² *The Bluebook: A Uniform System of Citation* (19th ed. 2010).

³ I would be remiss if I did not mention that there is another citation manual that uses a single system for all authorities, the *ALWD Manual*. Published by a group of legal writing professors, the *ALWD Manual* is easier to use than *The Bluebook*, but it is not officially endorsed by the North Carolina courts. See ALWD & Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation* (4th ed. 2010).

⁴ *Bluebook*, *supra* note 2, at 1.

⁵ *Id.*

⁶ *ALWD*, *supra* note 3, at 366.

⁷ N.C. R. App. P. app. B.

⁸ See Rule 3.2 and Bluepages Rules B4.1.2 and B4.1.3.

⁹ *Bradshaw v. Unity Marine Corp., Inc.*, 147 F. Supp. 2d 668, 671 (S.D. Tex. 2001). This case is worth a read for its pure entertainment value!

IT'S TIME TO MAKE YOUR VOICE HEARD PRIOR TO JUDICIAL ELECTIONS

Take a few minutes and respond to the JPE Survey by November 15!

The NCBA's Judicial Performance Evaluation Committee wants to ensure that our voices as attorneys are heard and have launched the 2013 JPE Survey—Phase I. The survey has been emailed by BDO USA to attorneys and sent by the U.S. Postal Service to judges and government attorneys.

People are listening to your opinions. You can help make a real difference in the quality of our judiciary by participating in this survey.

This survey includes Special Superior Court judges and all trial judges slated to appear on the ballot in 2014, except our newest judges. The JPE Survey—Phase II to be released in March 2014 will give lawyers an opportunity to evaluate the newest judges and the non-incumbent candidates vying for seats in the 2014 election.

Judges are given an overall rating for performance and are graded on legal ability, integrity and impartiality, professionalism, communication and administrative skills.

The NCBA wants to provide comprehensive information provided by those who know these judges best — you, the practicing attorneys!

If you think your opinion doesn't matter, think again.

The JPE survey's website, www.ElectNCJudges.org registered more than 20,000 unique visitors and over 100,000 page views its first year in production. Results for this most recent survey will be made available to the public through this same website.

"This survey is here to stay due to its remarkable success. With the help once again of lawyers, voters in 2014 will have essential information on judicial candidates." — NCBA Past-President Mike Wells Sr.

Questions? Contact dbohm@ncbar.org • 919.657.1553

CITATION REFRESHER, PART 2



Laura Graham

I'm sure you have been waiting with bated breath since November for my follow-up column on citation. Maybe Santa even left the 19th Edition of the Bluebook in your stocking this year! For those of you who have resolved to be better citers in 2014 (and who hasn't?), here are a few more citation tips that will help you keep your resolution!

1. Use string citations carefully in briefs and court documents. A string citation is just what the term suggests: an often lengthy string of citations to authorities that all support a single proposition. Nothing in the Bluebook prohibits the use of string citations, but you should use them sparingly. A colleague of mine often refers to them as “sleeping pills on paper.” And most legal readers would readily admit that they rarely read string citations.

In an effective string citation, each authority is there for a reason. The reader does not benefit from a string citation that serves only to “bulk up” the memo or brief. “Judges and practitioners who read court documents and legal memoranda typically want to see only those authorities that provide the best and strongest support for the stated proposition.”¹ For example, string citing several cases from different jurisdictions is useful to the reader when the citations illustrate a trend among the circuits; but when the proposition you need to support is well-settled in your jurisdiction, one citation to a case from the highest court will likely suffice.

2. Use explanatory parentheticals following your citations if they will help the reader understand the significance of the cited authorities. An explanatory parenthetical is a device that briefly explains the relationship between a particular authority and the proposition it follows. For example, to support a synthesized rule, you must cite two or more cases; this results in a string citation. Inserting an explanatory parenthetical after each citation in the string allows you to show the relevance of each case briefly, without delving into facts and holdings. Here is a good example from the *ALWD Citation Manual*:

A qualifying expense under the Illinois Family Expense Act includes both household goods and services. *E.g. Carter v. Romano*, 662 N.E.2d 883, 884 (Ill. 2007) (doctor and hospital bills); *Armani v. Gucci*, 893 N.E.2d 99, 101 (Ill. App. 1st Dist. 2009) (clothing); *Crocker v. Hines*, 645 N.E.2d 583, 587 (Ill. App. 1st Dist. 1998) (food); *Broyhill v. Lane*, 559 N.E.2d 32, 33 (Ill. App. 1st Dist. 1992) (furniture).²

The same caution that applies to string citations applies to explanatory parentheticals: don't overuse them. Professor

Richard K. Neumann puts it this way:

If the material is complicated and important to the issue, explain it in the text. Use an explanatory parenthetical only for information that is simple and not an important part of your discussion or argument. And resist the temptation to use explanatory parentheticals to avoid the hard work of explaining complicated and important authority.³

For a fairly straightforward discussion of the practitioner rules governing explanatory parentheticals, see Bluepages B11 in the 19th edition of the *Bluebook*.

3. Avoid citation clauses and embedded cites if possible. A citation clause results when a citation supports only part of a sentence and thus is located within the textual sentence. The Bluebook permits citation clauses; in fact, it seems to require them in sentences that contain two propositions that are supported by different authorities. Here is an example from the *ALWD Manual*:

Although the Fourth Amendment prohibits unreasonable searches, *Elkins v. U.S.*, 364 U.S. 206, 222 (1960), each case must be decided on its own facts and circumstances, *Harris v. U.S.*, 331 U.S. 145, 150 (1947).⁴

An embedded citation is also located within the textual sentence and is used to provide the remainder of the citation when the authority itself is named in the textual sentence. The *ALWD Manual* provides this example:

In *International Shoe Co. v. Washington*, 326 U.S. 310, 316 (1945), the Court held that if the defendant was not present in the forum, due process required that he have minimum contacts with the forum.⁵

The trouble with citation clauses and embedded cites is twofold. First, they hinder the readability of your sentences and paragraphs by producing unwieldy sentences—sentences that are too long, too choppy, or both. Second, they interrupt the reader's train of thought as he or she tries to understand and absorb the propositions in your sentences. You can almost always avoid citation clauses if you follow the general rule of including only one proposition per sentence—a rule that usually enhances both readability and comprehension. An embedded citation should only be used when the authority itself is part and parcel of the proposition.

I initially planned to include a fourth tip regarding placement of citations in footnotes; a few readers have asked for guidance on when this is appropriate. But as I explored that subject, I realized that there is more to say than can fit into this column. So to those readers, I'll just say, “Stay tuned!” To all of you, I wish you a Happy 2014! *WFL*

Capitalization For Practitioners: Consistency Counts!

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Capitalization For Practitioners: Consistency Counts!

As a legal writing professor, one of my goals is to inspire my students to strive for excellence in their work. But this month, as I thought about what to say in this column, it was my students who inspired me. In late February, they turned in their rough drafts of their final assignment, and as I was reading, I noticed that their capitalization of certain words was wildly inconsistent, not only from draft to draft, but even from one page of a draft to the next.

In my students' defense, we hadn't spent much class time on capitalization, because in the big scheme of things, it is not as critical to good legal writing as content, structure, and readability. And at the draft stage, I wasn't expecting perfection, and I wasn't "grading" their capitalization. I'm sure that in the final briefs, which sit in a huge pile on my side table at home, most of the capitalization inconsistencies have been corrected.

However, "small things" like capitalization do affect our readers' overall impression of our work. To a perfectionist (which many of our legal readers are), inconsistent capitalization may suggest at best that we are careless and at worst that we are not knowledgeable about capitalization rules. That, in turn, may suggest carelessness or lack of knowledge in our analysis, which affects the reader's view of our credibility.

It seemed likely that if my students need some help with the rules of capitalization in legal documents, my colleagues who read this column might also need some help. Fortunately, my go-to source for legal writing style, the Aspen Handbook for Legal Writers, has a great summary of capitalization rules for some of the most common words used by legal writers.[i] I've "summarized the summary" below, drawing some examples from the Handbook and adding a few of my own.

Act

- Capitalize when referring to a specific act.
 - The Sarbanes-Oxley Act was passed in 2002. Since then, the Act has been amended numerous times.

Code

- Capitalize when referring to a specific code.
 - the Code of Federal Regulations
 - Do not capitalize when referring to codes generically.
 - The inspector cited the landlord for numerous code violations.

Constitution

- Capitalize when referring to the U.S. Constitution.
 - The Constitution has often been called a "living document."
 - Capitalize when referring to parts of the U.S. Constitution in textual sentences.
 - The Fourth Amendment prohibits unreasonable searches and seizures.

Court

- Capitalize when referring to the United States Supreme Court or a state supreme court.
 - The Court's decision in *Brown v. Board of Education* changed the civil rights landscape.
 - Capitalize when naming any court in full.
 - The Court of Appeals for the Seventh Circuit granted certiorari.

- Capitalize when referring to the court to which you are submitting the document.
 - For the reasons stated in this brief, the Court should grant Defendant's Motion for Summary Judgment.

Federal

- Capitalize when the word it modifies is capitalized.
 - He was appointed to the Federal Commission on Safe Schools.
 - Do not capitalize when it is used as a common adjective.
 - The defendant was transported immediately to federal prison.
 - Many ideas have been advanced as to how Congress can balance the federal budget.

Judge or Justice

- Capitalize when referring to a specific individual.
 - Our guest speaker this evening is Judge Worthy, a highly-respected member of our local bar.
 - Capitalize when referring to any Justice of the United States Supreme Court.
 - The Justices issued a 5-4 decision.

Party designations (Plaintiff, Defendant, etc.)

- Capitalize when referring to the parties in the matter that is the subject of the document.
 - The Court should allow Plaintiff to amend her Complaint in this matter.
 - Do not capitalize when referring to parties generically.
 - In Jones, the court held that the plaintiff had shown a likelihood of success of the merits.

State or Commonwealth

- Capitalize when it is part of the full name of a state.
 - The State of Texas
 - The Commonwealth of Virginia
 - Capitalize when it is used as an adjective modifying a proper noun.
 - The State Inspector General
 - Capitalize when the state is a party to the matter before the court.
 - The State has not proved guilt beyond a reasonable doubt.

Titles of court documents

- Capitalize when referring to documents filed in the action before the court.
 - Plaintiff's Complaint fails to state a claim for negligent infliction of emotional distress.
 - Do not capitalize when referring to documents in a generic manner.
 - A defendant has thirty days after service of the complaint to file a responsive pleading.

Fortunately for my students, and for you as practitioners, these capitalization rules are fairly intuitive, and once you begin to focus on them in your drafting, you can learn them quickly. So it's an easy way to improve the overall effectiveness of your writing.

Happy capitalizing!

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