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# THE LEGAL READER: AN EXPOSÉ

Michael J. Higdon\*

“*[T]he success of your communication depends on the reader’s response, not your desires.*”<sup>1</sup>

## I. INTRODUCTION

In the film *Gosford Park*, Director Robert Altman takes us back to the year 1932, where a group of aristocrats and their respective servants gather for a weekend at an English country home, the name of which is Gosford Park.<sup>2</sup> Critics praised the movie, which received seven Academy Award nominations. Owen Gleiberman of *Entertainment Weekly*, for instance, described it as “a succulent and devious drawing-room mystery that, in its panoramic way, takes a puckish pleasure in scrambling and reshuffling the worlds of upstairs and downstairs.”<sup>3</sup> Indeed, the movie is very much about the sometimes independent and yet often overlapping worlds of those who live upstairs (the aristocrats) and those who reside downstairs (their servants).<sup>4</sup> One who takes her quarters in the lower chambers of Gosford Park is Mrs. Wilson, the housekeeper and head servant, played by Dame Helen Mirren. At one point in the film, Mrs. Wilson, when talking about her career and the pride she takes in her work, says:

What gift do you think a good servant has that separates them from the others? It’s the gift of anticipation. And I’m a good servant. I’m better than good. I’m the best. I’m the perfect servant. I know when they’ll be hungry and the food is ready. I know when

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\* Associate Professor and Director of Legal Writing, University of Tennessee College of Law. My own understanding of the legal reader is something that has taken years to develop, and I would like to thank those who helped me along the way: Terrill Pollman, Carol Parker, Rebecca Scharf, Ruth Anne Robbins, Don Leatherman, Laurel Oates, Anne Enquist, and every legal writing student I have had the privilege of teaching—without any of them, this article would not be possible.

1. PAUL V. ANDERSON, *TECHNICAL COMMUNICATION: A READER-CENTERED APPROACH* 69 (7th ed. 2011).

2. *GOSFORD PARK* (USA Films 2001).

3. OWEN GLEIBERMAN, *Review: Gosford Park*, *ENT. WKLY.*, Jan. 10, 2002, at 25.

4. *GOSFORD PARK*, *supra* note 2.

they'll be tired and the bed is turned down. I know it before they know it themselves.<sup>5</sup>

As someone who teaches legal writing, I have always found special meaning in this quote. What, you may ask, does it have to do with legal writing? Well, it demonstrates the importance of understanding one's audience. Mrs. Wilson understands her audience better than they understand themselves, thus allowing her to excel at her job. Likewise, to be successful as a legal writer, one must understand the nature of the person to whom he is writing.<sup>6</sup> In fact, I have often thought the biggest challenge facing novice legal writers is their inability to fully grasp the complexity of their audience. Many legal writers make the mistake of merely writing for themselves. This is a very easy mistake to make given that, as one scholar explains: "We cannot rely on our eyes and ears to keep the image of our audience before us, we must rely on our imagination instead. The picture is not clear and constant, and often we find that we are writing to ourselves rather than to the real reader."<sup>7</sup> To avoid this temptation to engage in a dialogue with one's self, it is critical that the writer ask himself at the outset: who is the audience and what key characteristics does it possess?<sup>8</sup>

Of course, identifying one's audience is not always easy. John Steinbeck once said, "Your audience is one single reader. I have found that sometimes it helps to pick out the person—a real person you know, or an imagined person—and write to that one."<sup>9</sup> For legal writers, however, this advice is somewhat difficult to follow, as their documents are likely to be read by many different kinds of audience members.<sup>10</sup> In this article, however, I mean to focus specifically on one particular kind of reader: the legally trained reader or, more simply, the legal reader. After all, the majority of lawyers will find themselves communicating most

5. *Id.*

6. So as to avoid confusing pronouns, I will refer throughout this article to the legal writer as "he"; the legal reader, "she."

7. LINDA H. EDWARDS, *LEGAL WRITING: PROCESS, ANALYSIS, AND ORGANIZATION* 162 (3d ed. 2002).

8. See GRETCHEN HARGIS ET AL., *DEVELOPING QUALITY TECHNICAL INFORMATION: A HANDBOOK FOR WRITERS AND EDITORS* 19 (2d ed. 2004) ("Before you start writing, be sure that you have a clear understanding of your audience."); KAMELA BRIDGES & WAYNE SCHIESS, *WRITING FOR LITIGATION 2* (2011) ("An author should always consider the audience and purpose for each document.").

9. JOSIP NOVAKOVICH, *Fiction Writer's Workshop* 102 (1998).

10. For instance, attorneys typically write to their clients, whether those clients are individuals or businesses. They also write to non-clients on behalf of clients, contacting other individuals, businesses, or perhaps governmental agencies. See VEDA R. CHARROW ET AL., *CLEAR AND EFFECTIVE LEGAL WRITING* 101–02 (3d ed. 2001).

often with legal readers, whether those readers are other lawyers, judges, or even legislators.<sup>11</sup> For this reason, it is legal readers to whom most first-year law students are trained to direct their writings—be it an interoffice memorandum written to a “senior partner” or a trial/appellate brief written to a hypothetical judge or opposing attorney. Indeed, legal writing professors are constantly reminding their students that they are writing for “the legal reader.”<sup>12</sup>

But who is this legal reader? And, further, what is it about this person that makes her different from an ordinary reader? After all, by modifying the word “reader” with “legal,” we are necessarily conceding that the legal reader is somehow different. Various books and articles on legal writing have alluded to the legal reader, and some have even identified some of the key characteristics such a reader is likely to possess.<sup>13</sup> In this article, however, I want to go further. Specifically, it is my goal not only to synthesize the various descriptions that others have used when describing the legal reader, but also to add to those descriptions to create a single manageable definition, one that is based on and that identifies the pertinent traits of the average legal reader. I then illustrate the way in which these traits manifest themselves in the expectations of the legal reader. After all, it is these expectations the legal writer must understand if he hopes to communicate with the legal reader most effectively.

Along the way, I rely heavily on examples from pop culture given that, first of all, I think that doing so makes for a more entertaining read (and let’s be honest, an article on legal writing probably needs all the help it can get in that department). Second, and most importantly, pedagogy scholars have increasingly come to classify pop culture as being “indispensable in education.”<sup>14</sup> In fact, even “[l]egal scholars are starting to recognize the positive impact of using popular-culture references as a

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11. BRIDGES & SHIERS, *supra* note 8, at 2 (“The audience members for memos and briefs are typically lawyers (some of whom dress in black robes).”).

12. *See, e.g.*, Jessica E. Price, *Imagining the Law-Trained Reader: The Faulty Description of the Audience in Legal Writing Textbooks*, 16 WIDENER L.J. 983, 984 (2007) (“In law schools today, first-year legal writing courses play a crucial role in preparing law students to communicate with the “law-trained reader.””).

13. *See, e.g., Id.*; EDWARDS, *supra* note 7, at 161 (devoting an entire chapter to “The Office Memo and the Law-Trained Reader”); BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 49 (2001) (“To the legal reader, few things are more pleasing than the sense that a writer is talking directly to you—one intelligent being to another.”); MICHAEL D. MURRAY & CHRISTY H. DESANCTIS, LEGAL WRITING AND ANALYSIS 185 (2009) (referencing the “law-trained reader”). *See generally* Patricia Grande Montana, *Better Revision: Encouraging Student Writers to See Through the Eyes of the Reader*, 14 J. LEGAL WRITING INST. 291 (2008).

14. KELVIN SHAWN SEALEY, FILM, POLITICS, AND EDUCATION 46 (2008).

mechanism of communication in legal discourse.”<sup>15</sup> Thus, because I hope this article might (at least in part) serve as a teaching tool, I have intentionally included the various pop culture references contained herein to provide us all with some common ground. After all, when it comes to legal education, “students” (whether talking about law students in particular or lifelong students of the law in general) are able to “better understand, explore, apply, and synthesize new legal concepts when the concepts are linked or related to their preexisting knowledge and experiences.”<sup>16</sup>

## II. LEGAL WRITING IS TECHNICAL WRITING

In order to fully understand the legal reader, one needs to first understand that legal writing is very much a form of technical writing. While some think of technical writing as merely encompassing such things as “[s]ales catalogs, business letters, financial reports, standard operating procedures, medical research studies, [and] lab reports,”<sup>17</sup> the term need not be so narrowly defined. Instead, technical writing includes any communication concerning a specialized area that is directed at a particular audience for a discrete purpose.<sup>18</sup> More simply, technical writing is that which “is engineered to display information effectively on the page in order to get results, or in other words, to inform and to persuade.”<sup>19</sup>

So what distinguishes technical writing from other writing? In essence, there are ten attributes that make technical writing a distinct category:

- It pertains to a technical subject.
- It has a purpose.
- It has an objective.
- It conveys information/facts/data.

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15. Victoria S. Salzmann, *Here's Hulu: How Popular Culture Helps Teach the New Generation of Lawyers*, 42 McGEORGE L. REV. 297, 301 (2011).

16. Craig Anthony Arnold, *How Do Law Students Really Learn? Problem-Solving, Modern Pragmatism, and Property Law*, 22 SEATTLE U. L. REV. 891, 895 (1999) (citation omitted).

17. DARLENE SMITH-WORTHINGTON & SUE JEFFERSON, TECHNICAL WRITING FOR SUCCESS 8 (3d ed. 2010). And this form of writing is anything but uncommon: “You have probably used technical writing if you have given someone directions, written a recipe, explained closing procedures at work, or done many other everyday activities.” *Id.* at 17.

18. See HARGIS ET AL., *supra* note 8, at 1 (“Technical information is information about a technical subject, usually for a particular audience and for a stated purpose.”).

19. BRIAN R. HOLLOWAY, FUNDAMENTAL WRITING BASICS: A GUIDE TO STYLE AND FORM 1 (4th ed. 2008).

- It is impersonal.
- It is concise.
- It is directed.
- It is performed with a particular style and in a particular format.
- It is archival.
- It cites contributions of others.<sup>20</sup>

In short, “[a]s opposed to fiction, technical communication does not seek to entertain or amuse the audience but to inform or document them as objectively and efficiently as possible.”<sup>21</sup> Using these definitions and guiding principles, there can be little doubt that—as an article in the *ABA Journal* once put it—“legal writing is inherently a form of technical writing.”<sup>22</sup> After all, legal writing is built upon the law, citing and conveying (ideally in a concise manner) various legal authorities with a very specific purpose and objective, which is generally to inform, persuade, or both.<sup>23</sup> Further, there are particular styles and conventions that govern legal writing, and legal communications are frequently archived to benefit future readers who may hold similar questions as the audience for whom the communication was originally created.

The reason it is important to see legal writing as a form of technical writing is that, in the field of technical communication, understanding one’s audience is crucial. Unlike famed American novelist Leon Uris, who once said, “I do not write for an audience,”<sup>24</sup> a technical writer cannot be so cavalier. In fact, “[k]nowing the audience is key to any successful technical communication . . . If the audience cannot use, apply, or understand the information presented, then the author has failed to meet his or her objective.”<sup>25</sup> Another text on technical writing illustrates the

20. KENNETH G. BUDINSKI, *ENGINEERS’ GUIDE TO TECHNICAL WRITING* 4 (2001).

21. CARMEN BOMBARDO SOLES, MARTA AGUILAR PEREZ, & CLADIA BARAHONA FUENTES, *TECHNICAL WRITING: A GUIDE FOR EFFECTIVE COMMUNICATION* 19 (2009); see also GARY BLAKE & ROBERT W. BLY, *THE ELEMENTS OF TECHNICAL WRITING* 4 (1993) (“The primary goal of any technical communication is to *transmit technical information accurately*. In this regard, technical writing differs from popular nonfiction, in which the writing is meant to entertain, or from advertising copywriting, which is intended to sell.”).

22. Jeffrey H. Mills, *Write On*, 76 A.B.A. J. 92 (1990).

23. DEBORAH A. SCHMEDEMANN & CHRISTINA L. KUNZ, *SYNTHESIS: LEGAL READING, REASONING AND WRITING* 104 (1999) (“The aim of legal writing is to communicate the writer’s legal analysis of a situation to the reader.”).

24. Leon Uris Quotes, BRAINYQUOTE, [http://www.brainyquote.com/quotes/authors/l/leon\\_uris.html](http://www.brainyquote.com/quotes/authors/l/leon_uris.html) (last visited Aug. 6, 2012).

25. DIANE MARTINEZ ET AL., *KAPLAN TECHNICAL WRITING* 7 (2008); see also GERALD J. ALRED ET AL., *HANDBOOK OF TECHNICAL WRITING* 42 (9th ed. 2009) (“Considering the needs of your audience is crucial to achieving your purpose.”).

need for audience awareness using the following analogy: “The real estate agent’s mantra is ‘Location, location, location’; your mantra should be ‘Audience, audience, audience.’”<sup>26</sup>

Of course, realizing the important role that the audience plays in technical communication is one thing; figuring out the relevant commonalities of those who comprise that audience is much more difficult. Nonetheless, for the legal writer, it is essential that he understand the person to whom he is writing. Frequently that person is the “generic and faceless”<sup>27</sup> individual whom we like to refer to as “the legal reader.”

### III. INSIDE THE MIND OF THE LEGAL READER

In her book *Legal Writing: Process, Analysis and Organization*, Professor Linda Edwards offers a glimmer of hope to those who attempt to better understand the relatively nondescript legal reader. Specifically, she notes that that “you can still write with a fairly accurate focus on this unfamiliar reader because readers, particularly law-trained readers, tend to share certain characteristics.”<sup>28</sup> But before I move into what those characteristics are, let me first dispel some misconceptions about the legal reader. First, the legal writer cannot assume that the legal reader is any particular gender, race, age, or even nationality.<sup>29</sup> Not that those qualities would make much (if any) difference, but remember the attorney is not writing to himself;<sup>30</sup> likewise, he should not assume that his reader shares the same demographic information as himself. Can we assume that the legal reader is intelligent? Sadly, no; however, most legal readers do meet this criterion, and thus, the legal writer who makes such an assumption will generally be OK.

What a writer should not assume, however, is that the reader is particularly well versed in any particular area of law. Indeed, “[a]ttorneys sometimes misperceive the expectations of the courts or other lawyers when they write, assuming that all lawyers speak the same language and

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26. ALAN S. PRINGLE & SARAH S. O’KEEFE, *TECHNICAL WRITING* 101, at 76 (2d ed. 2003).

27. ELIZABETH FAJANS ET AL., *WRITING FOR LAW PRACTICE* 314 (2d ed. 2010).

28. EDWARDS, *supra* note 7, at 162.

29. See J. Christopher Rideout & Jill J. Ramsfield, *Legal Writing: A Revised View*, 69 WASH. L. REV. 35, 61 (1994) (“[Law students and lawyers] are situated in several social settings at once. They are working within the law office and law school communities, whose members are making various and changing demands on the writer. They are usually also working within the larger legal community, whose members have set ethical and practice standards. And they come from different gender, race, and ethnic communities that may generate different learning styles and perspectives.”).

30. See EDWARDS, *supra* note 7.



are familiar with the same subject matter.”<sup>31</sup> Instead, “[m]odern law is complex, and a lawyer who specializes in one area of the law may be unfamiliar with the nuances of other areas.”<sup>32</sup> One who lacks the relevant background knowledge will have a very difficult time “understanding the new information in a legal text.”<sup>33</sup>

In the end, there are really only two qualities the legal writer can safely assume that all legal readers possess. Specifically, the legal reader is impatient and the legal reader is hypercritical. I say “safely” assume, because even if a particular legal reader does not possess either or both of these two attributes, writing to her as though she did will still greatly benefit the writer. However, laboring under other assumptions—such as assuming the reader has specialized knowledge, holds a particular bias, or is hoping to find (and is willing to look for) the next great American novel buried in the mass of legal materials she has to read on any given day—could be quite costly.

#### A. *The Legal Reader is Impatient*

“By all means, move at a glacial pace—you know how that thrills me!”  
 – Miranda Priestly (played by Meryl Streep) in *The Devil Wears Prada*<sup>34</sup>

Imagine you have just purchased the latest top-of-the-line technological device, one capable of doing the most amazing things. Currently, however, you are not quite sure yet how to make it do anything. Thus, out comes the owner’s manual, which you eagerly start reading, hoping to soon be in the position to start playing with your new goodie. Now, at this point, how long do you think you would want to spend reading the manual? You would probably want to finish reading it as quickly as possible with the hope that you never have to read it again. As you continue reading, keep the owner’s manual scenario in mind; I will return to it in a bit.

Although legal writers might labor under the impression that their work product will ultimately rival *Pride and Prejudice* as something to be slowly savored and frequently reread,<sup>35</sup> sadly this will rarely (if ever) be

31. CHARROW ET AL., *supra* note 10, at 102.

32. *Id.*

33. Leah M. Christenson, *Legal Reading and Success in Law School: An Empirical Survey*, 30 SEATTLE U. L. REV. 603, 607 (2007) (As Christenson points out, “the factor most affecting reading comprehension is the ‘real world’ knowledge that the reader brings to the legal text.”).

34. *THE DEVIL WEARS PRADA* (20th Century Fox 2006).

35. Or, as one commentator put it when describing the enduring legacy of Don Quixote, “perceptive readers could ‘unpeel’ the petals of this rose of literature, and savoring each, revel in its scent of genius and see the masterwork of its author.”

the case.<sup>36</sup> After all, most legal readers routinely find themselves staring at a pile of paperwork filled with numerous tasks that require the legal reader's immediate attention. This situation is particularly true of judges. As Diane Pratt notes, "[y]our case is important to you and your client, but it is only one of many cases that require the judge's attention that day or week."<sup>37</sup> Or, as the authors of the textbook *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* describe, "Flooded with paperwork, judges are unlikely to relish reading a pile of briefs any more than a student looks forward to studying numerous law review articles or an attorney enjoys reading advance sheets."<sup>38</sup> Even when your legal reader is not a judge, she is still likely to be impatient simply as a result of the heavy workloads most attorneys carry. For example, a senior partner is likely to "ha[ve] many other obligations" and is thus "extraordinarily busy."<sup>39</sup>

Accordingly, the legal reader will see the legal writer's work product as being something very much akin to the owner's manual that I mentioned earlier—something that she would rather not have to read at all, but because she does, something she wants to move through quickly and with the ardent hope that she will only have to read it once. Further, once she has fully digested the document, she is apt to regard it as no better

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MICHAEL A. LACOMBE & DAVID J. ELPERN, *OSLER'S BEDSIDE LIBRARY: GREAT WRITERS WHO INSPIRED A GREAT PHYSICIAN* 89 (2009).

36. See, e.g., JOHN C. DERNBACH ET AL., *A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD* 188 (2d ed. 2009) ("People do not usually read legal writing for fun, so make the reader's job as easy as you can."); Megan McAlpin, *Silencing the Novelist Within*, OR. ST. B. BULL. (Or. St. Bar) Oct. 2008, at 11, available at <http://www.osbar.org/publications/bulletin/08oct/legalwriter.html> ("Unraveling the author's thought process . . . can be the most enjoyable part of reading a novel; it will never be the most enjoyable part of reading a memo or a brief or a contract.").

37. DIANA V. PRATT, *LEGAL WRITING: A SYSTEMATIC APPROACH* 257 (4th ed. 2004); see also WILLIAM P. STATSKY & R. JOHN WERNET, JR., *CASE ANALYSIS AND FUNDAMENTALS OF LEGAL WRITING* 158 (1994) ("Judges, for example, are extremely busy. They may have numerous cases before them. Many judges complain about the overwhelming amount of reading they must do.").

38. MICHAEL R. FONTHAM ET AL., *PERSUASIVE WRITTEN AND ORAL ADVOCACY IN TRIAL AND APPELLATE COURTS* 18 (2002); see also RICHARD K. NEUMANN JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 54 (5th ed. 2005) (noting that "lawyers and judges are busy people who do not have time to wade through poor writing.").

39. EDWARDS, *supra* note 7, at 163; see also NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *LEGAL WRITING AND OTHER LAWYERING SKILLS* 119 (2004) ("The reader is most often a very busy person who does not have the time or patience to ferret out what you are trying to say.").

than—as C.S. Lewis once put it—“a burnt-out match, an old railway ticket, or yesterday’s paper.”<sup>40</sup>

More specifically, it is safe to assume that the busy legal reader will approach each legal document with four distinct desires: (1) She wants the document to fully answer her questions; (2) She only wants to have to read the document once to get those answers; (3) She wants those answers upfront and not at the end of the document; and (4) Along the way, she does not want to read material that is either irrelevant or redundant.

### 1. The Legal Reader Wants Your *One* Document to Answer *All* Her Questions

In the *Harry Potter* series by J.K. Rowling,<sup>41</sup> Harry Potter eventually learns that, in order to defeat Voldemort (aka “Thomas Riddle,” the “Dark Lord,” “You Know Who,” and “He-Who-Must-Not-Be-Named”), he must track down and destroy a series of items called horcruxes (i.e., magical objects that contain a portion of Voldemort’s soul). One of these horcruxes is Salazar Slytherin’s Locket, and, boy, does Harry have a hard time tracking that one down! Harry first pursued the locket in an enchanted seaside cave near the end of book six, *Harry Potter and the Half-Blood Prince*,<sup>42</sup> only to find that someone had already taken the actual locket, leaving a fake in its place. Continuing this quest in book seven, *Harry Potter and the Deathly Hallows*,<sup>43</sup> Harry subsequently remembers a locket he discovered earlier (in book five, *Harry Potter and the Order of the Phoenix*,<sup>44</sup> to be precise) in the home that he had inherited from his godfather, Sirius Black. When he returns home to look for the locket, however, Harry learns that it has been stolen by an individual named

40. C.S. LEWIS, AN EXPERIMENT IN CRITICISM 2 (7th prtg. 2003) (“It was for them dead.”).

41. A series I am proud to see getting quite a bit of attention in legal scholarship. Indeed, legal scholars in a variety of subject matters are making use of Harry Potter’s world as an means of shedding light on various legal issues. See, e.g., Scott Hershovitz, *Harry Potter and the Trouble with Tort Theory*, 63 STAN. L. REV. 67 (2010–2011); Christopher B. Gilbert, *Harry Potter and the Curse of the First Amendment: Schools, Esoteric Religions, and the Christian Backlash*, 198 ED. LAW REP. 399 (2005); Andrea Kayne Kaufman, *What Would Harry Potter Say About Bong Hits 4 Jesus?*, 32 OKLA. CITY U. L. REV. 461 (2007).

42. J.K. ROWLING, HARRY POTTER AND THE HALF-BLOOD PRINCE (2005). Just getting to the cave was itself a challenge: “No Muggle could reach this rock unless they were uncommonly good mountaineers, and boats cannot approach the cliffs, the water around them are too dangerous.” *Id.* at 556.

43. J.K. ROWLING, HARRY POTTER AND THE DEATHLY HALLOWS (2007).

44. J.K. ROWLING, HARRY POTTER AND THE ORDER OF THE PHOENIX 116 (2003) (described as “a heavy locket that none of them could open”).

Mundungus Fletcher. Harry finally locates Mundungus only to learn that, after stealing the locket, Mundungus then passed it on to Dolores Umbridge, an evil witch (literally) who works at the Ministry of Magic. Disguised (and likely exhausted by this point), Harry Potter infiltrates the Ministry of Magic and eventually recovers the locket. Thus, to find the locket, Harry had to spend quite a bit more time than he anticipated and visit many more different locations that he would have hoped. Nonetheless, although he would likely have preferred the quest to be a bit simpler, in the end Harry would probably say that it was all worth it given that procuring the locket was a necessary step in defeating Voldemort.

Unfortunately, when it comes to legal writing, one cannot assume that the legal reader is going to be quite as industrious and committed as Harry Potter.<sup>45</sup> Quite the opposite is true, in fact, as legal readers want the document at hand to serve as one-stop shopping for all their legal needs.<sup>46</sup> Because “their attention is finite,”<sup>47</sup> legal readers do not want to find themselves in a position of having to go various places just to track down the discrete information they need. Thus, when writing to the legal reader, the analysis must be, first and foremost, complete. As noted in the text *Writing for Law Practice*, “the ‘unwritten’ (appearing as omissions, gaps, and loopholes) is a notable source of confusion in drafting since a legal instrument cannot be smoothly and fairly administered if it is not complete.”<sup>48</sup> Such warnings are consistent with the advice given by those who write in the more general field of technical writing: “Readers can’t use what isn’t there. Consequently, your first job when planning for usability is to ensure that your communication will be complete, that it will include all the information your readers need in order to perform their tasks.”<sup>49</sup> Of course, the legal writer must also keep in mind that “[i]ncluding a topic doesn’t necessarily mean that you have covered it adequately.”<sup>50</sup>

A legal writer has violated this principle of completion whenever the legal reader finds herself in a position where she feels compelled to

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45. See PRATT, *supra* note 37, at 257 (“An associate or partner may take the extra time to try and figure out the analysis you present in a memo, or she may ask you to rewrite the memo. You do not have this luxury when writing to a trial judge. If you fail to explain the analysis precisely, your client may lose.”).

46. See, e.g., Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 SCRIBES J. LEGAL WRITING 1, 2 (1994–95) (“Any piece of persuasive or analytical writing must deliver three things: the question, the answer, and the reasons for that answer.”).

47. EDWARDS, *supra* note 7, at 263.

48. FAJANS ET AL., *supra* note 27, at 397.

49. ANDERSON, *supra* note 1, at 101.

50. HARGIS ET AL., *supra* note 8, at 79.

track down a document, a legal source, or the writer himself to find out exactly what the writer was trying to say.<sup>51</sup> For instance, if a legal writer were to say something like, “In light of the *Applejohn* case, the Defendant’s expert witness submitted a report, the contents of which prove the Defendant was at fault. Moving on . . .” Notice how the writer here has assumed that the reader is intimately aware of the contents of the expert’s report, the facts/holding/rationale of *Applejohn*, and how exactly the writer was comparing *Applejohn* to the contents of the report. Assuming the writer does not at some point explain himself, to fully comprehend the writer’s meaning, the reader is likely to make three demands: (1) Get me the report; (2) Get me a copy of *Applejohn*; and (3) Track down the writer and ask him what in the world these two things have to do with one another! In fact, even if the legal reader can ultimately figure out on her own what the legal writer intended, she still does not want to have to stop and ponder such a question. Instead, the answer should be in front of her, clearly laid out in the document. As Dernbach and Singleton advise, “It is not enough that you state a particular result will occur; you must identify the analytical steps leading to that result.”<sup>52</sup>

To aid in doing so, the legal writer must—quite simply—include all relevant information. As simple as that may sound, where many legal writers go astray is in their use of word choices and sentence constructions that are either vague, ambiguous or both.<sup>53</sup> As the authors of one of the leading texts on legal writing point out, “Successful normative prose requires a kind of ultimate clarity we call precision. Precision is achieved only when we exercise maximum control . . . over word choice (semantic control) and over sentence structure (syntactic control).”<sup>54</sup> As an example

51. Taken to its extreme, lawyers can be disciplined for violating this principle. See, e.g., *In re Shepperson*, 674 A.2d 1273, 1274 (Vt. 1996) (suspending attorney after he, among other things, “repeatedly submitted legal briefs to this Court that were generally incomprehensible”); *Ky. Bar Ass’n v. Brown*, 14 S.W.3d 916, 917 (Ky. 2000) (dismissing attorney’s appeal and instituting a disciplinary proceeding after the attorney filed a “virtually incomprehensible” brief).

52. JOHN C. DERNBACH & RICHARD V. SINGLETON II, *A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD* 9697 (1981).

53. To illustrate, consider the problems posed by the ambiguities contained in the U.S. Constitution: “The Second Amendment is one example. What exactly does ‘the right to keep and bear Arms’ mean? . . . Of course, the writers of the Constitution could not have anticipated every possibility that could arise in the future. However, ambiguities in their writing continue to generate questions and debates years later.” AMANDA MARTINSEK, *LEGAL WRITING: HOW TO WRITE LEGAL BRIEFS, MEMOS, AND OTHER LEGAL DOCUMENTS IN A CLEAR AND CONCISE STYLE* 78 (2009).

54. FAJANS ET AL., *supra* note 27, at 395–96; see also, TERRI LECLECRQ, *EXPERT LEGAL WRITING* 89 (1995) (“Precision always has to outweigh conciseness.”).

of ambiguous word choice, the “naked this” is a popular offender.<sup>55</sup> When a legal writer says something like “This is problematic,” the legal reader is then forced to go back in the document (usually the preceding sentence) and try to figure out what exactly “this” is. Not only is being forced to reread portions of a document annoying to the reader, as it requires extra work, but the writer runs the risk that the reader, while rereading, will pick something other than what the writer actually intended as the referent to “this.”<sup>56</sup> Likewise, general language can produce similar problems. For instance, the sentence “a prenuptial agreement may be invalid if the bride does not learn of its existence until the wedding is close at hand.” What the writer meant by “close at hand” is entirely unclear—24 hours? A week? Six months? Notice how instead of answering questions, the legal writer is merely prompting additional ones.

On the topic of word choice, legal writers should also avoid selecting words that force the legal reader to consult a dictionary, whether it be a legal dictionary to look up the meaning of a legal term that the writer fails to define or a regular dictionary to look up the meaning of some obscure word that would ordinarily be found only on the verbal portion of the SAT.<sup>57</sup> Although some writers seem to think “that fancy words sound more official or make them sound more knowledgeable,”<sup>58</sup> using such words has the potential to confuse and possibly even alienate the legal reader.<sup>59</sup> After all, when we use such words, “we are being just a bit pompous by unconsciously sacrificing clarity of expression for a boastful little demonstration of just how smart we are.”<sup>60</sup>

55. See BRYAN J. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 259 (2001) (“A pointing word such as *this* or *these* should always have an identifiable referent.”).

56. For instance, try and discern what the “this” in the second sentence is referring to: “My mother called me last night to tell me that my brother had taken a job at Arby’s. This made me angry.”

57. See JOHN K. WILSON, HOW THE LEFT CAN WIN ARGUMENTS AND INFLUENCE PEOPLE: A TACTICAL MANUAL FOR PRAGMATIC PROGRESSIVES 178 (2000) (criticizing the SAT on the basis that it “bears no relationship to how the world actually works. Real writers don’t use obscure words or odd analogies”).

58. ANDERSON, *supra* note 1, at 279.

59. As one self-professed collector of words puts it: “Contrary to what many self-help books would have you believe, adding a great number of obscure words to your vocabulary will not help you advance in the world.” AMMON SHEA, READING THE OED: ONE MAN, ONE YEAR, 21,730 PAGES, at sec. xi (2008). Instead, he notes that “[a]t best you might bore your friends and employers, and at worst you will alienate them, or leave them thinking that there is something a little bit wrong with you.” *Id.*

60. CELIA ELWELL & ROBERT SMITH, PRACTICAL LEGAL WRITING FOR LEGAL ASSISTANTS 28 (1996).

Beyond the use of individual words, sentence structure is another way in which a legal writer often creates ambiguity.<sup>61</sup> The most frequent example arises through the use of passive voice. Legal writing professors have been teaching the ills of passive voice for many years,<sup>62</sup> a caution echoed in the literature on technical writing. As Paul Anderson instructs, “use the active voice rather than the passive voice” because “the active voice eliminates the vagueness and ambiguity that often characterize the passive voice.”<sup>63</sup> In fact, research on human cognition has even demonstrated that readers can digest active voice sentences more quickly than those written in the passive voice.<sup>64</sup> Consider, for example, the following two sentences: “In the *Turner* case, the Defendant picked up the baby. It was held . . .” If you had to guess, could you predict what comes after “held”? Probably not, the “was held” could refer to the Defendant’s act of holding the baby or the court’s act of issuing a holding in the case. Now, it could be that the remainder of second sentence ultimately clarifies the identity of the subject. Regardless, the legal reader would not want to waste any of her precious time trying to figure out who/what “it” is. Simply saying “The Defendant held . . .” or “The Court held . . .” would immediately solve that problem.

In sum, regardless of the discrete nature of document he is creating, a legal writer must keep in mind that the impatient legal reader expects that document to make her life easier by resolving all her questions at one time, and not merely tease her with the promise of answers only to ultimately require that she go somewhere else to find that which she is seeking.

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61. To illustrate, consider the famous example: “Put the block in the box on the table.” The ambiguity arises because it is uncertain “whether ‘in the box’ modifies ‘block’ or not.” LEXICAL AMBIGUITY RESOLUTION: PERSPECTIVES FROM PSYCHOLINGUISTICS, NEUROPSYCHOLOGY AND ARTIFICIAL INTELLIGENCE 4 (Steven L. Small et al. eds., 1988).

62. See generally Michael J. Higdon, *Passive Voice: An Old-Friend Revisited*, DICTA, Aug. 2011, at 11 (“Many attorneys cringe at the mention of ‘passive voice,’ which is hardly surprising given the dire warnings most attorneys received while in law school about the evils inherent in this form of sentence construction.”).

63. ANDERSON, *supra* note 1, at 272.

64. See, e.g., Pamela Layton & Adrian J. Simpson, *Surface and Deep Structure in Sentence Comprehension*, 14 J. VERBAL LEARNING & VERBAL BEHAV. 658 (1975); see also Lawrence A. Hosman, *Language and Persuasion*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 371, 373 (James Price Dillard & Michael Pfau eds., 2002) (describing study that “found that readers more favorably evaluated advertisements with active rather than passive sentence construction”).

## 2. The Legal Reader Wants to Have All Her Questions Answered in a Single Reading

If you have ever visited Disneyland (or even Disney World), you have likely encountered the “It’s a Small World” ride, in which visitors enjoy a leisurely boat ride while treated to a collection of animatronic dolls, representing children from different countries all over the world.<sup>65</sup> Adding to the overall “cute factor” is the fact that all the dolls are singing the song “It’s a Small World” in their native tongue. The ride is quite popular—so much that you would not be surprised to hear someone exiting the ride say, “Let’s do it again!”<sup>66</sup> However, if you have ever taken the ride, one thing you know is that, although taking the ride again may be fun, you need not ride it more than once to understand what the ride is about. After all, the boat in which you are riding moves at a steady but somewhat slow pace, allowing you take in everything going on around you. Further, the dolls are organized in different rooms by continent and then further broken down by the countries that comprise each continent.

For instance, when the boat is heading through Europe, you will see a set of dolls dancing the Can-Can, representing the children of France. Imagine if dancing alongside the Can-Can girls was a Hawaiian girl, wearing a grass skirt and dancing the Hula. That would be confusing, right? You may be tempted to yell out, “Hey! Stop the boat so I can figure out what the heck is going on!” You might even wish to go back and start the ride over again to look for some clue that would make the presence of the Hawaiian in France more understandable. At any rate, you would continue on the ride, but now perhaps you would be distracted by thoughts such as “I still don’t get what the Hawaiian girl was doing next to the Can-Can girls . . .” But, of course, there are no such confusing elements in the ride; the creators obviously put forth a lot of effort to make the ride one that people could fully and easily comprehend in just one trip. After all, if the line for the ride is too long, one trip may be all that most are willing to take during a visit to the park. In short, people are unlikely to find the ride confusing.

The lesson, then, that legal writers should take from “It’s a Small World” is the need for organization and consistency. After all, this ride,

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65. See Michael J. Higdon, *It’s a Small World: Using the Classic Disney Ride to Teach Document Coherence*, 17 PERSP.: TEACHING LEGAL RES. & WRITING 111 (Winter 2009).

66. Children at least seem to enjoy it. As Frommer’s puts it, “it’s a bit favorite of younger kids.” LAURA LEA MILLER, FROMMER’S WALT DISNEY WORLD AND ORLANDO WITH KIDS 189 (2010). Frommer’s also says “[a]nd as much as some adults pooh-pooh it, I’d take bets they come out smiling and singing right along with the kids.” *Id.* I’m not so sure that’s a wise bet . . . .



like all the rides in the Disney theme parks, did not simply spring into existence. Instead, it resulted from careful planning. Likewise, legal writers need to plan out their documents in advance to enable the legal reader to glean the necessary information with one read.<sup>67</sup> In so doing, legal writers must keep in mind that the document need not mirror the path the writer took in understanding the information, regardless of how revelatory the writer found that path to be. As one text aptly describes, “[y]our analytical process may have been circuitous, backtracking and refining as you reached for a thorough understanding of the problem.”<sup>68</sup> Indeed, such is the path that legal writers typically take, and the early drafts of the legal document are apt to simply memorialize that crooked journey. Thus, even if when the legal writer creates a document that is substantively complete,<sup>69</sup> he must then translate his *writer-based* document into a *reader-based* document,<sup>70</sup> one that the legal reader can more efficiently process. Typically there are two broad ways in which the legal writer performs this translation: (1) logical organization and (2) transitions.

In technical writing, organization is essential: “If the reader believes the content has some importance to him, he can plow through a report even if it is dull or has lengthy sentences and big words. But if it is poorly organized, forget it.”<sup>71</sup> For this reason, legal writers are frequently admonished on the absolute need for effective organization:

Good organization is fundamental to effective legal writing. No matter how well you have stated the question and the significant

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67. See, e.g., DERNBACH ET AL., *supra* note 36, at 107 (“Good organization is fundamental to effective legal writing . . . Good organization begins with advance planning, and some writers find that advance planning requires a detailed outline.”). Even texts aimed at paralegals preach the need for planning. See, e.g., HOPE VINER SAMBORN & ANDREA B. YELIN, *BASIC LEGAL WRITING FOR PARALEGALS* 33 (3d ed. 2007) (“Writing involves planning—the more planning, the more effective the written document.”).

68. PRATT, *supra* note 37, at 167; see also CHRISTINE COUGHLIN ET AL., *A LAWYER WRITES: A PRACTICAL GUIDE TO LEGAL ANALYSIS* 13 (“Legal writing is really about committing to paper something much more complex—legal thinking. That legal thinking is the end result of a recursive process that repeatedly looks back on itself and asks whether previous decisions still stand.”).

69. See *supra* Part III.A.1.

70. See, e.g., Montana, *supra* note 13, at 310 (“the ability to effectively revise one’s own work turns on the law student’s ability to set aside his or her perspective as a writer, and review the draft from the reader’s standpoint”).

71. BLAKE & BLY, *supra* note 21, at 17; see also BUDINSKI, *supra* note 20, at 93 (“The method of presenting information in a technical document is equally important as technical content.”).

facts, how thoughtfully you have analyzed the problem, or how skillfully you have used language, your work will be wasted unless it is organized intelligently. As a lawyer, you will be lucky if you are simply asked to rewrite poorly organized documents. If you are not lucky, you will be ignored or misunderstood.<sup>72</sup>

To organize effectively, the legal writer must organize the material in a logical manner, such that the reader is never surprised or distracted by what comes next.<sup>73</sup> It is this guiding principle that produced IRAC, the basic organizational paradigm used in legal writing. With IRAC, students are taught to state the issue (“I”), then the rule (“R”), then the analysis (“A”) and then the conclusion (“C”).<sup>74</sup> The reason students are taught this paradigm is not simply that a group of professors got together and said, “Well, heck, we need *something*—let’s just try this!” Instead, this organizational tool reflects how the human brain goes about solving problems. After all, whenever you are confronted with any dilemma, you must first start by identifying the question (i.e., the “issue”); you cannot solve a problem until you have first identified its very existence. Second, you would ask yourself, “Well, what information is available to me about this kind of problem?” (i.e., the “rule”). Only after identifying the question and the information you already possess about that question can you hope to solve the dilemma (i.e., reach the “conclusion”). Before you can do that, of course, you must apply the rule to the question (i.e., the “analysis”).<sup>75</sup>

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72. DERNBACH & SINGLETON, *supra* note 52, at 76; *see also* CECIL C. KUHNE, *CONVINCING THE JUDGE: PRACTICAL ADVICE FOR LITIGATORS* 169 (2008) (“Good organization is like a road map for the judges that enables them to follow from the beginning to the end without getting lost. A poorly-organized brief often misunderstands the starting point, misreads the destination, and then obscures the road in between.”).

73. *See* BUDINSKI, *supra* note 20, at 93 (“The most important aspect of a technical document is a logical structure for the reader.”). In fact, I often tell students that, if *It’s a Small World* represents a well-organized document, then a haunted house would have to represent a poorly-organized document. Specifically, I am referring to those “haunted houses” that pop-up in strip malls around Halloween. The ones where, upon entering, you find yourself in pitch blackness with no idea where you are or where you are to go next. Thus, you fumble around in the dark, seeking a path that will lead you to the exit. Along the way, spooky things emerge at random from the darkness to scare you. You continue on wondering “What in the world was that? And, more importantly, is it coming back?” Once you think you’ve found the exit, typically someone with a chainsaw will then chase you out of the house—you run away as quickly as possible, thinking “Thank goodness I’m done with that!”

74. *See* SAMBORN & YELIN, *supra* note 67, at 147.

75. Thus, in many respects, IRAC mirrors the steps of the Scientific Method: Observation, Measurement and Experimentation. *See, e.g.*, ANNE MYERS & CHRISTINE

Thus, whether or not we realize it, we essentially follow IRAC any time we make a decision. For example, assume that I have agreed to have dinner with a friend one evening. As we are driving down the road, looking for a restaurant, he spots Arby's and asks if I would like to eat there. Thus, the issue then is "Do I want to eat at Arby's?" I scour my brain for what I already know about Arby's, discovering that I long ago decided it was a disgusting place to eat.<sup>76</sup> Applying, then, this "rule" to the "issue," I come to the following analysis: "I don't want to eat at places I find disgusting." Accordingly, my conclusion then becomes "Let's keep driving." Now, I would reach this decision in less than a second, but if you break down the process that took place in my mind, it would follow the IRAC I have detailed here.

Another way in which good organization replicates the way human beings process information is that we always begin with general concepts before moving on to more specific sub-points. Returning to the "It's a Small World" ride, Walt Disney used this exact means of organization, beginning the ride with the overall theme of the children of *Earth*, then leading us to a room in which we find the children of *Europe*, and then leading us still to a display involving the children of *France*. For these same reasons, a legal writer discussing a federal constitutional challenge to a state statute on the basis of gender discrimination would need to first identify the Fourteenth Amendment before isolating the Equal Protection Clause contained in that Amendment. Again, this method of organization is hardly arbitrary, but is instead based on how people process information. Our brains more comfortably accommodate information when it is presented in the order of general to the specific.<sup>77</sup> Imagine, for example, that you somehow got "beamed" to the other side of the Universe, where you stumbled upon an indigenous alien who miraculously just happens to speak English. If he were to say, "Where are you from?" You would respond—after, of course, politely pointing out to him that it

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H. HANSEN, *EXPERIMENTAL PSYCHOLOGY* 18 (2011) ("We gather information objectively and systematically, and we base our conclusion on the evidence we obtain—not on our preconceived notions.").

76. For the record, I actually enjoy Arby's. Someone over at the Simpsons, however, apparently does not. Indeed, the food chain is regularly (and quite humorously) insulted in the animated series. Some of my favorites are: "I'm so hungry, I could eat at Arby's!" *The Simpsons: Das Bus* (Fox television broadcast Feb. 15, 1998); "Lisa, people do lots of crazy things in commercials . . . like eat at Arby's!" *The Simpsons: Old Yeller Belly* (Fox television broadcast May 4, 2003); and "If I can keep down Arby's, I can keep down you!" *The Simpsons: Treehouse of Horror XVII* (Nov. 5, 2006).

77. Likewise from the familiar to the unfamiliar and the simple to the complex.

is bad form to end a sentence with a preposition<sup>78</sup>—with something like: “I am from a galaxy called the Milky Way, in which there is a particular solar system with a sun and eight planets. I am on the third planet from the sun, called Earth.” Notice how you needed to start generally and get more specific to best help your new friend understand your answer. Imagine how perplexed he would be if you were to simply respond with “I live on Delancy Street.”

Of course, sometimes in legal writing, the nature of the document or the nature of the things the legal writer is using to support his document requires him to do things that might not be immediately apparent or seemingly logical to the legal reader. When that is the case, the thoughtful legal writer needs to provide some help to the legal reader such that she can still make it through the document rather seamlessly. This help frequently comes in the form of transitions.<sup>79</sup> As English essayist Thomas de Quincey once said, “Transition and connection [is] the art by which one step in an evolution of thought is made to arise out of another: all fluent and effective composition depends on the connections.”<sup>80</sup> In legal writing, the use of transitions is especially important given that “[a]lthough you may know the analysis so well that it is obvious to you how you moved from one point to the next, the reader does not intuitively know how the pieces fit together.”<sup>81</sup>

Assume, for example, the legal writer is applying a statute that has four elements. Yet, because two of the elements are not in dispute, the writer only discusses the remaining two. Imagine what would happen if the writer laid out the statute, noting the four requirements, and then proceeded to discuss only two of the elements without ever acknowledging the omission of the other two. The legal reader would likely be confused at the end of the document, and she may even be tempted to go back and reread to see if she missed something. Just as Disney designed

78. A rule that, when applied too rigidly, can produce absurd results as Winston Churchill once eloquently illustrated when he said, “This is the kind of thing up with which I don’t intend to put.” ED SHEWAN, *MASTERING COMMUNICATION SKILLS* 58 (2007).

79. “A transition is a word or phrase that helps a document to flow smoothly by emphasizing the connections between one idea and the next.” MARTINSEK, *supra* note 53, at 90.

80. See TERESA J. REID RAMBO & LEANNE J. PFLAUM, *LEGAL WRITING BY DESIGN: A GUIDE TO GREAT BRIEFS AND MEMOS* 219 (2001).

81. PRATT, *supra* note 37, at 188; see also LECLERCO, *supra* note 54, at 104 (“Thus, a *carefully chosen transition* highlights the writer’s abstract structural concept, that is, the way the writer believes the ideas connect. A *missing transition* forces the reader to intuit the relationship between the parts, which is both frustrating and time consuming.”).

“It’s a Small World” so that confusion would never lead riders to demand a U-turn, so too would the legal writer want to design his document to avoid the same temptation. Thus, in this example, writers would include what legal writing professors often call a roadmap, which is also a form of transition, like, “Here, given that the facts of the case only implicate Element 1 and Element 3, the remainder of this memorandum will only discuss those two elements.”<sup>82</sup>

Some transitions are much more discrete. In some instances, perhaps a short clause, or even a single word,<sup>83</sup> is all that is needed to keep the reader’s eyes moving at a steady pace. For instance, consider the following two sentences:

Congress intended Rule 106 of the Federal Rules of Evidence to codify the common law doctrine of completeness. Rule 106 does not permit the use of evidence that is otherwise inadmissible under the other evidentiary rules unlike the common law doctrine.

Notice how, reading those two sentences, the legal reader would not understand the exact relationship between the two until she got to the word “unlike” in the second sentence. At that point, realizing that all she had read so far in the second sentence was a difference between the evidentiary rule and the common law doctrine, she would be tempted—perhaps even required—to go back and reread that portion again. Indeed, without a transition between the two, she could have very well launched into the second sentence thinking that the relationship was, instead, *because* Rule 106 was based on the common law doctrine, it does not permit otherwise inadmissible evidence. Note how reordering the second sentence to begin with “Unlike the common law doctrine,” or simply adding a transition word like “however” after “Rule 106” would cure this problem.

In reading these examples, it becomes clear that in order to craft a document that a legal reader would only need to read once in order to grasp its full meaning, the legal writer must actively plan ahead before constructing the document.<sup>84</sup> After all, “poor organization stems from

82. Of course, if it is not immediately apparent to the legal reader why the other two elements are not in dispute, the legal writer would need to briefly explain.

83. Many single-word transitions are also known as conjunctive adverbs. See *THE AMERICAN HERITAGE GUIDE TO CONTEMPORARY USAGE AND STYLE* 111 (2005) (“Conjunctive adverbs include words like *accordingly*, *besides*, *furthermore*, *however*, *likewise*, *moreover*, *nevertheless*, *therefore*.”).

84. JILL J. RAMSFIELD, *THE LAW AS ARCHITECTURE: BUILDING LEGAL DOCUMENTS* xvii (2000) (“For us, organization is not a simple deductive approach, but a complex synthesis of law, message, and purpose; of audience, scope, and the ultimate use our readers will make of the document.”).

poor planning.”<sup>85</sup> Such an outline need not be elaborate, simply a document that takes into account the most logical way to arrange the information based on the reader’s expectation and how to link, using transitions, the various components—be it between sections, paragraphs, or even sentences. In this regard, the legal writer would be wise to think of himself as an architect, keeping in mind that “[f]ew write the way an architect builds, who first sketches out his plan and designs every detail. Rather, most people write only as though they were playing dominoes, where the pieces are arranged half by design, half by chance; and so it is with the sequence and connection of their sentences.”<sup>86</sup>

### 3. The Legal Reader Does Not Want to Read a Mystery Novel

To the great annoyance of those who must live with them, legal readers often have difficulty turning off their impatience—even when they find themselves outside the legal setting.<sup>87</sup> For instance, a few years back I noticed that everyone was buzzing about this new television show called *True Blood*.<sup>88</sup> Hearing that it was about vampires who struggle to assimilate into modern-day American life, I was intrigued and decided to check it out. By that point, however, I had missed the first season on television. But, lucky for me, it had just come out on DVD. So I bought the entire season, popped in disc number one, and watched the first episode. I immediately saw what all the fuss was about, and I agree that it is a great show! Now, by the end of the first episode, we learn that somebody (or something) is killing female inhabitants in Bon Temps, the city in which the series takes place. As I looked at the stack of DVDs spread out before me, I knew that by the time I got the last episode on the last disc, the identity of the killer would be revealed. “Screw that!” I thought. Out came the laptop, up came “Wikipedia,” and within a few minutes I knew the identity of the murderer (which I will not reproduce here for the benefit of those who have not yet seen the show). Did I still go back and watch all the episodes? Of course! However, now I could do so while feeling a bit more relaxed, because now I could just sit back and take in

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85. BLAKE AND BLY, *supra* note 21, at 17; *see also* ROBERT BARRASS, SCIENTISTS MUST WRITE: A GUIDE TO BETTER WRITING FOR SCIENTISTS, ENGINEERS AND STUDENTS 87 (2002) (“Poor writing may result from distraction, from not knowing what to say, from not considering how to present information, from insufficient care the choice and use of words, or from not allocating sufficient time to thinking, to planning, to writing, and to checking and if necessary to revising the work.”).

86. BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS 28 (2004).

87. Luckily there is help out there. *See, e.g.*, FRANCES M. WEINER ET AL., LIVING WITH LAWYERS: INSIGHTS INTO UNDERSTANDING THE LAWYER IN YOUR LIFE (2011).

88. TRUE BLOOD (Home Box Office 2008).

what was happening without being distracted by obsessive thoughts of “who done it.”

My experience with *True Blood* is a perfect example of my legal reader brain at work. And if I am that impatient while relaxing at home watching a television show, you can imagine the level of impatience I experience for the bottom line while in the workplace. Some may argue, “Well Professor Higdon, that’s just your own private form of crazy . . .” The truth is, however, legal readers *in general* want to know immediately where the writer is going. Consider, for example, what Diana Pratt says in her book *Legal Writing: A Systematic Approach*: “As the reader has neither the time nor the patience to try and figure out the conclusion, it should appear at the beginning.”<sup>89</sup> Doing so is a great help to the reader given that “[r]eaders usually read most efficiently when the writer announces his or her main point at the beginning of a communication.”<sup>90</sup>

One of the reasons legal readers benefit from having the bottom line up front (a reason that also implicates the hypercritical aspect of the legal reader) is that “[t]he reader wants to know the overall thesis or conclusion at the beginning, so she can test the analysis against this conclusion throughout the memo.”<sup>91</sup> In other words, as long as the reader is unsure where the writer is headed, she will read a bit more slowly given that she is actively trying to guess the bottom line. Announcing it upfront frees her of this burden, allowing her brain to process the analysis much more quickly. Consider, for example, how much longer a car trip seems when taking a brand-new route. Subsequent trips on that route will almost always seem shorter because on those trips, the driver has a better grasp on such things as how long the trip takes, the scenery along the way, what turn to take, etc.

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89. PRATT, *supra* note 37, at 178; see also NANCY L. SCHULTZ & LOUIS J. SIRICO, JR., *PERSUASIVE WRITING FOR LAWYERS AND THE LEGAL PROFESSION* 119 (2nd ed. 2001) (“If you do not get to the point immediately, you will lose your reader at the outset.”).

90. ANDERSON, *supra* note 1, at 545; see also Denise Riebe, *Readers' Expectations, Discourse Communities and Effective Bar Exam Answers*, 41 GONZ. L. REV. 481, 490–91 (2005–2006) (“By stating a conclusion at the beginning of a unit of writing, writers provide readers context. Readers have a pressing need for contextualizing information before they have to deal with new information, and context helps readers understand all that follows. In addition, establishing context makes readers receptive to the arrival of subsequent information.”).

91. PRATT, *supra* note 37, at 178; see also RICHARD K. NEUMANN, *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 95 (2009) (“State your conclusion first because a practical and busy reader needs to know what you are trying to support before you start supporting it.”).

Thus, the legal writer must make his writing fully conform to this expectation of the reader, and chief among the ways in which he does that is by beginning the document with his overall conclusion. As one judge has advised those who appear before him: “Start in the very first sentence with the problem in this case. Put it right up front. Start early. Don’t bury it under a lot of verbiage and preliminaries.”<sup>92</sup> In fact, many legal writing texts encourage legal writers to move from IRAC to CRAC,<sup>93</sup> CREAC,<sup>94</sup> or even CRuPAC.<sup>95</sup> The difference between these last three forms of legal organization are not necessarily important here; instead, all that really matters is that each directs the writer to start his communication with “C,” i.e., the “Conclusion.”

Of course, being direct is not only important at the beginning of the document, but also the beginning of paragraphs, where legal writers are frequently directed to lead with a thesis sentence.<sup>96</sup> Beginning a paragraph in this way forces the legal writer to announce, in the very first sentence, the entire point of the paragraph that follows. Doing so benefits the legal reader, making the paragraph one that is easier to digest not only for the reasons given above, but also because the legal reader can now easily skim the document in question without missing relevant data.<sup>97</sup> After all, if the first sentence of each paragraph encapsulates the entire point of the ensuing paragraph, then reading only the first sentence of those paragraphs (which is typically how we skim) should give her a fairly complete idea of the document’s overall message.

Further, beyond benefitting the legal reader, thesis sentences also provide at least two benefits to the legal writer as well. First, by beginning

92. Bryan A. Garner, *Judges of Effective Writing: The Importance of Plain Language*, 73 MICH. B.J. 326, 326 (1994) (quoting Nathan Hecht).

93. See FONTHAM ET AL., *supra* note 38, at 5 (“[W]e advocate using CRAC (Conclusion, Rule, Analysis, and Conclusion) as a method of organizing individual point arguments.”).

94. See DAVID S. ROMANTZ & KATHLEEN ELLIOT VINSON, *LEGAL ANALYSIS: THE FUNDAMENTAL SKILL* 120 (2009) (“Each letter in CREAC represents a specific component part of the written expression of legal analysis: Conclusion, Rule, Explanation of the law, Application of the Law, and Conclusion.”).

95. NEUMANN, *supra* note 91, at 94 (“Conclusion, Rule, Proof of Rule, Application, and Conclusion”).

96. PRATT, *supra* note 37, at 179 (“The discussion of each issue begins with a thesis sentence.”); see also Michael J. Higdon, *The Legal Reader, The Legal Writer, and the All-Important Thesis Sentence*, NEV. LAW. (Sept. 2007).

97. See Debra Moss Curtis & Judith R. Karp, *In a Case, on the Screen, Do they Remember What They’ve Seen? Critical Electronic Reading in the Law Classroom*, 30 HAMLINE L. REV. 247, 280 (2007) (“When a reader scans, the reader looks for specific words and phrases, searching to see if the document can answer a specific question. In a paper document, the reader seeks this answer in visually accessible places . . .”).



each paragraph with the point of that paragraph, the legal writer forces himself to think more critically about why he is including that paragraph and how that paragraph advances his argument. As a result, thesis sentences are particularly helpful in paragraphs that describe case law relating to a discrete issue. By forcing himself to draft a thesis sentence for the paragraph, the legal writer is less likely to devote a paragraph to a redundant case.

Second, by using thesis sentences, the legal writer has an easy method to test the overall organization of his paper. If each paragraph begins with a sentence that truly encapsulates the point of that paragraph, the legal writer should be able to skim his paper, looking only at the first sentence of each paragraph, and quickly realize if he has remained on topic. For example, if the legal writer finds a thesis sentence that centers around the statute of frauds in a section of the paper dealing with the parol evidence rule, the legal writer would immediately be on notice that the paragraph may be out of place. Furthermore, if the legal writer were to find two thesis sentences that essentially say the same thing in different sections of the paper, then the legal writer would know that perhaps there is an organizational problem that is causing him to be redundant.<sup>98</sup>

A good example of an effective thesis sentence would be: “The Supreme Court has already ruled that, even if an employer acted negligently, an injured worker’s recovery is nonetheless limited to worker’s compensation.” Notice how that sentence fully communicates the essential point that the writer puts forth in the paragraph that follows. Now, the reader can read on if she wants to learn more, such as how the legal writer came to this conclusion or what authority produced this general proposition of law; however, she does not *have* to continue reading to figure out the bottom line.<sup>99</sup> For that reason, to work properly, a thesis sentence cannot leave the legal reader with unanswered questions. Consider, for instance, this example of a less-than-effective thesis sentence: “The Sixth Circuit has already considered the issue of whether diabetes can qualify as a disability of the American’s with Disabilities Act.” Saying that the court has considered the issue communicates nothing about what the court ultimately ruled or, indeed, *if* the court ultimately ruled.<sup>100</sup> For

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98. See *infra* note 99 and accompanying text.

99. For this reason, however, the legal writer must be sure that the thesis sentence is indeed a complete encapsulation of the paragraph that follows. For instance, if the paragraph includes some other tangential point and the legal reader, in relying solely on the thesis sentence, opted not to read the entire paragraph, she would miss that other point.

100. The court could have technically “considered” the issue, yet then decided the case on some other grounds.

these reasons, such a sentence would fail to adequately benefit the reader.

Finally, the conclusion-up-front principle also applies to sentence structure. Consider the following example:

Because the Defendant has failed to show a history and continuing practice of program expansion that is demonstrably responsive to the developing interest and abilities of female students; and has failed to demonstrate that the interests and abilities of those students have been fully and effectively accommodated by the present program, the Plaintiff's motion for summary judgment should be granted.<sup>101</sup>

Note how much stronger that sentence would be and how much easier it would be for the legal reader to fully digest its meaning in one read if the phrase “the Plaintiff's motion for summary judgment should be granted” were simply moved to the very beginning of the sentence.<sup>102</sup>

In sum, one of the essential components of mystery novels is the way in which the author “withhold[s] from the reader for as long as possible the complete solution to the mystery.”<sup>103</sup> When writing to the legal reader, however, one must do the exact opposite if he wishes to please this impatient reader, who again is likely reading the legal document because she absolutely has to and not for personal enjoyment—as she would do if reading a mystery novel.

#### 4. The Legal Reader Does Not Want to Read Material That Is Either Irrelevant or Repetitious

Like many people, I loved the movie *Win Win*. The film is about an attorney struggling to keep his law practice afloat and the lessons he learns from coaching a high-school wrestling team.<sup>104</sup> One thing about the film, however, has always bothered me. Namely, early on in the movie,

101. Taken from a sample student brief applying Title IX's Cohen test. *See* *Cohen v. Brown Univ.*, 991 F.2d 888, 897–98 (1st Cir. 1993).

102. Those who helped influence the development of the Spanish language obviously understood this point as, in Spanish, writers learn to “use an upside down question mark or exclamation mark at the beginning of a question or exclamation,” and not merely at the end of the sentence as we do in English. ALAN STEPHENSON ET AL., *BROADCAST ANNOUNCING WORKTEXT: A MEDIA PERFORMANCE GUIDE* 87 (3d ed. 2009).

103. CHARLES J. RZEPKA, *DETECTIVE FICTION* 11 (2005). Thus, [c]oncealment is a necessary condition of any mystery, and is frequently effected by the device of retardation—i.e., the deliberate withholding of information necessary to the puzzle's solution.” NADYA AISENBERG, *A COMMON SPRING: CRIME NOVEL & CLASSIC* 98 (1980).

104. *WIN WIN* (Fox Searchlight Pictures 2011).

we learn that Mike Flaherty, the film's protagonist, is having problems with the boiler in his law office.<sup>105</sup> And, throughout the film, there are numerous references to the malfunctioning boiler and the fear that it could soon "blow."<sup>106</sup> Not only is the boiler constantly generating an ominous clanking sound, but those in the office are routinely making comments like:

- "[The plumber] took one look at it and said we should replace it before it blows."
- "That clanking is driving me nuts. Can't you hear it down in your office?"
- "Am I still hung over or is that noise getting louder?"
- "Well I was thinking we could leave [the boiler] for now and just cover the file cabinets in plastic to be safe."
- "And I'm not hung over today. That noise *is* getting louder!"<sup>107</sup>

Understanding the way in which movies use foreshadowing,<sup>108</sup> I just knew that the boiler would explode at some point. I was wrong. Not only did the boiler remain intact but, at some point, all references to it completely dried up. I found this lack of resolution a bit distracting, wondering "Did I miss something?" My reaction is not surprising given that the makers of the movie violated a principle known as Chekhov's Gun.

"Chekhov's Gun" is the name of a literary technique, named after the famous playwright Anton Chekhov. It states: "If you have a gun going off in the third act of a play, it had better sit on the mantelpiece during the first two acts. Conversely, if a gun is clearly visible on the mantelpiece for two acts, it had better go off during the third."<sup>109</sup> Instead, if the gun has no purpose, then it should not be there in the first place.<sup>110</sup> The reason behind this maxim is that "critical plot developments and critical characters must be clearly foreshadowed, not dragged in from left

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105. *Id.*

106. *Id.*

107. *Id.*

108. As I have explored in a previous article, foreshadowing is a literary device that, beyond, not film and fiction, can be quite powerful in legal writing as well. See Michael J. Higdon, *Something Judicious This Way Comes . . . The Use of Foreshadowing as a Persuasive Device in Judicial Narrative*, 44 U. RICH. L. REV. 1213 (2010).

109. NANCY KRESS, *DYNAMIC CHARACTERS* 250 (2004); Ashish Pandey, *Dictionary of Fiction* 40 (2005) ("If you put a gun onstage in Act I, Chekhov once wrote, you must use it by Act III.").

110. LISA SELVIDGE, *WRITING FICTION WORKBOOK* 78 (2007); see also MARION ROACH SMITH, *THE MEMOIR PROJECT: A THOROUGHLY NON-STANDARDIZED TEXT FOR WRITING & LIFE* 86 (2011) ("In other words, every detail needs a reason for being there.").

field at the end of your novel.”<sup>111</sup> Failure to adhere to this principle violates the reader’s expectations in that if a writer makes the conscious choice to “spend time and verbiage on something early on, [readers] reasonably expect that thing to figure in the climax or denouement.”<sup>112</sup> Or, as another author describes this phenomenon, “[a]mazing creatures, readers, possessing remarkable memories, they collect each detail like foreign coins but expect to cash in every one of them by the end of the journey.”<sup>113</sup>

Chekhov’s Gun is equally applicable in legal writing,<sup>114</sup> and there are three ways in which legal writers typically run afoul of this rule. First, while laying out the existing law, some writers will introduce a legal source (say, a statute or the facts of a precedent case) and then never apply that source to the topic at hand. When the legal reader first encounters that source, she is likely to think there is a reason the writer is bringing it up and thus will be waiting to discover that reason. After all, why else would the writer have included it? If, however, the writer fails to ever apply this source, the reader will think perhaps she missed something, forcing her to go back and reread the entire analysis. Upon discovering that she did not, in fact, miss anything, the impatient legal reader is likely to be, at the very least, annoyed.<sup>115</sup>

111. KRESS, *supra* note 109, at 250.

112. *Id.*

113. SMITH, *supra* note 110, at 86.

114. As are a whole host of literary devices. Indeed, as Jerome Bruner points out, “So if literary fiction treats the familiar with reverence in order to achieve verisimilitude, law stories need to honor the devices of great fiction if they are to get their full measure from judge and jury.” JEROME BRUNER, MAKING STORIES: LAW, LITERATURE, LIFE 13 (2002).

115. Consider, for example, the case of *Romer v. Evans*, where the Supreme Court struck down an amendment to the Colorado Constitution that prevented any state antidiscrimination laws from protecting homosexuals. 517 U.S. 620 (1996). At the time the Court decided the case, *Bowers v. Hardwick*, a U.S. Supreme Court case which upheld the constitutionality of state sodomy laws, was still good law. It would seem then that the existence of *Bowers* would have presented somewhat of an obstacle for the Court in *Romer*. Indeed, as Justice Scalia noted in his dissent, “[i]f it is constitutionally permissible for a State to make homosexual conduct criminal, surely it is constitutionally permissible for a State to enact other laws merely disfavoring homosexual conduct.” *Id.* at 636 (Scalia, J., dissenting) (citing *Bowers v. Hardwick*, 478 U.S. 186 (1986)). How then did the majority get around the argument that perhaps, under *Bowers*, the Colorado amendment in *Romer* was constitutional? Unfortunately, we can only guess, because the majority opinion never even mentions *Bowers*. This omission is somewhat surprising to the reader, especially given that the majority would surely have read Scalia’s dissent prior to publication. This silence comes at a heavy price. As Professor Nan Hunter points out, the failure of the majority opinion in *Romer* to even mention *Bowers* “does weaken the persuasive power of the deci-

A different, but somewhat related, way in which the legal writer can annoy the legal reader with irrelevant detail is by spending time answering a question that was never asked. As Margaret Johns put it: “your reader does not want an esoteric, lyrical musing on the philosophical underpinnings of economic theory in civil litigation, as fascinating as that might be. Your reader wants an answer—or the closet thing to an answer that honesty allows.”<sup>116</sup> For similar reasons, the legal writer should also avoid providing information of which the legal reader is already well aware. Instead, “[t]he goal should be to include enough detail for users to do their tasks, but no more detail than they need.”<sup>117</sup> This is so because “[u]nnecessary detail slows down the user, making needed information more difficult to find and use.”<sup>118</sup> As the book *Technical Communication* reminds us, providing basic background information to an already knowledgeable reader can cause that person to ask, “Why is this writer making me read about things I already know?”<sup>119</sup> For instance, imagine including the following in a brief to the United States Supreme Court:

The Sixth Circuit recently decided a case called *Smith v. Jones*. It is published in the Federal Reporter, because that is where cases issued by the Federal Courts of Appeals are published. Were it a federal district court case, it would be published in the Federal Supplement. Regardless, because *Smith v. Jones* was issued by a lower court, its holding is not binding on this Court. In fact, this Court is free to disregard it should it so choose. Now, moving on I would like to bring to the Court’s attention this document called “The U.S. Constitution.” Believe it or not, it has been amended a few times . . .

I am fairly confident that the justices on the Supreme Court are well aware of all these facts and might be a bit miffed that they were forced to waste time reading such tripe. Admittedly, my example is a bit extreme. More common examples are “In order to predict how our case might be decided, we need to look at how the highest court in our jurisdiction has decided similar cases,” or “Having explained the law as it relates to child

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sion.” Nan D. Hunter, *Proportional Equality: Readings of Romer*, 89 KY. L.J. 885, 897 (2001).

116. MARGARET Z. JOHNS, *PROFESSIONAL WRITING FOR LAWYERS: SKILLS AND RESPONSIBILITIES* 18 (1998).

117. HARGIS ET AL., *supra* note 8, at 79.

118. *Id.* at 84; see also GARY PROVOST, *100 WAYS TO IMPROVE YOUR WRITING* 152 (1985) (“You don’t want unnecessary parts in your car. They do no good, and they slow you down. So you certainly don’t want unnecessary words in your writing. They do no good, and they slow you and your reader down.”).

119. ANDERSON, *supra* note 1, at 78.

support in Tennessee, I will now to apply that law to our case.” Remember, the legal reader went to law school too—so she is already intimately aware of such basic components of legal analysis. The key then becomes to understand the common knowledge shared by legal readers.

The risk of stating the obvious is not simply that the legal reader may be put out by having to read irrelevant material. Indeed, anytime the writer tells the reader something she already knows, the writer is wasting the reader’s time and, what’s more, irrelevant detail encourages the reader to stop reading and skim to something more informative within the document.<sup>120</sup> Any time the reader starts skimming, there is the very real danger that she will skim too far and miss something important.<sup>121</sup>

Similarly, apart from irrelevant content, legal writers want to avoid even using irrelevant words. After all, “[t]o someone faced with the prospect of reading a stack of legal documents, nothing is more frustrating than a long-winded, undirected argument.”<sup>122</sup> For instance, between the following two sentences, consider which most readers would prefer.

Sentence 1: It is an axiomatic principle of federal law that, if a plaintiff wishes to bring a claim in federal court for employment discrimination, it is critical that a plaintiff first file a complaint with the EEOC before she can file her claim in the federal court.

Sentence 2: A plaintiff must first file a complaint with the EEOC if she wishes to pursue an employment discrimination claim in federal court.

Is there really any contest?<sup>123</sup> Perhaps Strunk and White put it best when they advised that “[a] sentence should contain no unnecessary words, a

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120. See Mary Massaron Ross, *Handling a Box Case on Appeal: Large Record, Large Judgments, and Complex Issues*, 50 DEFENSE RES. INSTITUTE 23 (2008) (“Don’t repeat yourself. I have heard appellate advocates argue that repetition is important in a box case because the judges will skim the brief. This is bad advice because the more repetition the judges find in a brief, the faster they will skim it.”).

121. *Id.* (“And the faster they skim, the more likely they are to miss essential points.”); see also CHARLES HUBBARD JUDD & GUY THOMAS BUSWELL, *SILENT READING: A STUDY OF THE VARIOUS TYPES* 152 (2010) (“There is no more practical ability than that of going rapidly over a page, omitting most of it in order to catch the small items which suit one’s immediate purpose. Nor is there any more dangerous habit to acquire than that of skimming.”).

122. FONTHAM ET AL, *supra* note 38, at 20.

123. Care for another example? Check out *Dockery v. Sprecher*, 68 A.D.3d 1043, 891 N.Y.S.2d 465 (2d Dep’t 2009). The opening sentence in the opinion is 303 words long; the second, 343 words. Enjoy!

paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines and a machine no unnecessary parts.”<sup>124</sup>

Finally, legal writers would be wise to keep in mind that repetition can be the death of relevance. I say “can,” because sometimes repetition is beneficial, such as “when it appropriately emphasizes and reinforces important points or enables users to avoid an unnecessary branch to another topic or page.”<sup>125</sup> Legal writers, for example, may wish to repeat key information in different portions of a legal communication given that legal readers often do not read the whole document at one time.<sup>126</sup> However, needless repetition can be quite damaging given that “extraneous details waste reading time and might give a wrong impression about what is important.”<sup>127</sup>

Thus, when it comes to writing for the legal reader—who, again, has a limited attention span—legal writers should only include or repeat information when they have a compelling reason for doing so.

### B. The Legal Reader is Hypercritical

“Don’t pee on my leg and tell me it’s raining . . . ” – Judge Judy<sup>128</sup>

When I was in grade school, I was taught that, in the event of a nuclear attack, I could successfully protect myself by crawling under my desk and holding a book over my head.<sup>129</sup> When I was in junior high school, I was told that if I simply abstained from “impure thoughts,” my acne would clear up all by itself.<sup>130</sup> Finally, when I was in law school, I was told that I would never get a job as a law professor given that I failed to

124. WILLIAM STRUNK & E.B. WHITE, *THE ELEMENTS OF STYLE ILLUSTRATED* 39 (2007) (“This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.”).

125. HARGIS ET AL., *supra* note 8, at 96.

126. In addition—and for similar reasons—attorneys are also frequently advised to repeat key information during oral argument. See DAVID C. FREDERICK, *THE ART OF ORAL ADVOCACY* 84 (describing the “mantra” as “a phrase or sentence to repeat several times so that it becomes the theme of the argument”).

127. HARGIS ET AL., *supra* note 8, at 96.

128. JUDGE JUDY SHEINDLIN, *DON’T PEE ON MY LEG AND TELL ME IT’S RAINING: AMERICA’S TOUGHEST FAMILY COURT JUDGE SPEAKS OUT* (1996).

129. I was not alone. See MARTY JEZER, *THE DARK AGES, LIFE IN THE UNITED STATES 1945–1960*, at 97 (1999) (In response to fears stemming from the Cold War, “[c]hildren also learned to crawl under their desks as protection against nuclear attack.”).

130. Unfortunately, other teens have apparently been given similar bad advice. See JULIE WILLET, *THE AMERICAN BEAUTY INDUSTRY ENCYCLOPEDIA* 1 (2010) (“[I]n the early 20th century, popular belief held that acne was a sign of some internal spiritual struggle or sexual immorality.”).

attend a top-twenty institution.<sup>131</sup> Each of these three “lessons” brought me to the same realization: By and large, people often do not know what the heck they are talking about. Indeed, most of us, through the course of our lives, arrive at the same conclusion. Thus, in devoting the early part of 2012 to writing this article you are now reading, I am counting on the fact that those who tell me the world will end on December 21 of this year are, in fact, mistaken.<sup>132</sup>

This is all a very long-winded way of saying that life has taught me to be critical of what others do and say. Legal readers are no different. In fact, if anything, they are *hypercritical*. As one author succinctly puts it, “they read in bad faith.”<sup>133</sup> They do so for a variety of reasons. For one, when talking about a legal dispute, the stakes are usually quite high for all involved. Accordingly, there is a need to be more careful. As Professor Jill Ramsfield describes, “No one will give you the benefit of the doubt because the stakes are too high, the results too concrete.”<sup>134</sup> Also, the very nature of the law requires a skeptical approach. As first-year law students quickly learn, the law is rarely black and white; if anything, it is permeated with gray.<sup>135</sup> It takes an extremely critical eye to search for that ever-elusive concept of “truth.”<sup>136</sup> For this reason, the legal reader “will not be a passive recipient of information, dutifully taking in whatever you have put on the page and doing nothing more with it.”<sup>137</sup>

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131. To their credit, it can be quite difficult to get a job in legal education without a J.D. from an “elite” law school. See Brad Wendel, *The Big Rock Candy Mountain: How to Get a Job in Law Teaching*, CORNELL UNIV. L. SCH., <http://ww3.lawschool.cornell.edu/faculty-pages/wendel/teaching.htm> (last visited April 16, 2012) (“Getting a teaching position with a J.D. from a school significantly farther down the food chain would be akin to walking on water, unless you are #1 in your class, have a graduate degree in law or some other discipline, and have a record of good publications.”).

132. See JAMES ALFRED OHO, *SOCIOLOGICAL TRESPASSES: INTERROGATING SIN AND FLESH* 2–3 (2011) (“Some, citing the ancient Mayan calendar, forecast that the world will cease at exactly 11:11 a.m. (Greenwich Time) December 12, 2012.”).

133. RAMSFIELD, *supra* note 84, at 24; see also NEUMANN, *supra* note 38, at 52 (“The reader is aggressively skeptical and will search for any gap or weakness in your analysis.”).

134. *Id.* As Richard Neumann points out, legal readers read in bad faith “not because lawyers are particularly nasty people, skepticism simply causes better decisions.” NEUMANN, *supra* note 91, at 48.

135. Or, as the Supreme Court once stated: “The greys are dominant and even among them the shades are innumerable.” *Estin v. Estin*, 334 U.S. 541 (1948).

136. Indeed, what we even mean by “truth,” is itself a question that is open to much debate. See, e.g., DENNIS PATTERSON, *LAW AND TRUTH* 3 (1999) (addressing the question of “What does it mean to say that a proposition of law is true?”).

137. MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 146 (2006).



Instead, “[a] law trained reader reads skeptically, constantly assessing the strength and accuracy of the analysis.”<sup>138</sup>

So how does this critical eye manifest itself, and how can the legal writer craft his communication in response? What follows are four discrete principles that the legal writer should observe when dealing with the hypercritical legal reader. Failure to follow any one of them can provoke a number of negative reactions in the legal reader.

1. The Legal Reader Wants to Know “Why?” and, In Response, Is Looking For Something a Little More Robust Than “Because I Said So”

Children are notorious for repeatedly asking one very simple question—“why?” Stand-up comedian Louis C.K. talks about this phenomenon in one of his routines:

You see a parent in McDonalds with the kid . . . , and the kid asks a question like “Momma, why is the sky blue?” And she’s like “Just shut up and eat your French fries.” And you think, “What a terrible mother! Why doesn’t she answer her child? When I have a child, I will answer *all* of their questions and open their minds to the wonders of the world.” Well guess what? You don’t know what the @#% you’re talking about. You can’t answer a kid’s question! They don’t accept *any* answer! A kid never goes: “Oh, thanks, I get it.” . . . They just keep coming—more questions: why, why, why?<sup>139</sup>

Of course, such persistent questioning would be extremely annoying. Unfortunately for the legal writer, however, he must become accustomed to such behavior given that legal readers do just that. Specifically, legal readers want to know why and how the legal writer arrived at each and every one of the conclusions and factual assertions contained in his communication. In fact, legal readers are worse than children in at least one respect. Namely, the legal writer cannot simply respond with “because I said so” to shut them up! Instead, legal readers expect legal support<sup>140</sup> for every proposition contained in the document, and the failure to do so can

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138. EDWARDS, *supra* note 7, at 162. Those adverse to the legal writer’s position (e.g., “the opposing counsel who would like to distort an ambiguous phrase into something the writer never meant, the unsympathetic judge looking for a misstatement on which to base and adverse ruling) may read even more harshly. NEUMANN, *supra* note 91, at 48.

139. *Louis C.K.: One Night Stand* (Home Box Office 2006).

140. In legal writing, we refer to these as “citations,” and as one of the leading books on judicial writing defines that term: “A citation in a legal writing may be defined as a reference to an authority that will support the particular statement or

be quite costly given that “if you have failed to identify a significant legal authority or an important legal, ethical, or policy argument, you should presume that no one else will dig it up either.”<sup>141</sup> In addition, for whatever sources the legal writer does provide, the legal reader will be actively critiquing them, asking herself whether that source is particularly reliable and appropriate in the context in which the legal writer uses it.

Earlier, when talking about the busy legal reader, I noted how that reader expects the document at hand to answer all her questions.<sup>142</sup> At that time, I was focusing more on making the document a form of one-stop shopping so that the legal reader can obtain all the information she needs without the assistance of any supporting materials. To satisfy the hypercritical legal reader, however, the answers contained in the legal document must nonetheless be backed up by supporting authority—just in the case the reader *wants* to learn more about the sources or to double check the writer’s representations. As Charles Calleros puts it, “you must lead your reader through each of your arguments and *support your assertions of law with supporting authority*.”<sup>143</sup> Or, in other words, “[d]ocument your contentions so they have more than air to support them.”<sup>144</sup> Again, this requirement stems directly from the fact that legal readers “are a skeptical lot” who “will not accept your conclusions on faith.”<sup>145</sup>

Including support, however, is only a small part of pleasing the legal reader. In addition, the support must be compelling. Technical writers, for instance, are instructed that “[b]y showing that an idea was expressed by a respected person or in a respected publication, you are arguing that the idea merits acceptance.”<sup>146</sup> Thus, citing to Wikipedia, for instance, is not likely to impress the legal reader (at least, not favorably).<sup>147</sup> Nor would it be advisable to cite a case for a proposition of law when the case was later

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proposition expressed.” JOYCE J. GEORGE, *JUDICIAL OPINION WRITING HANDBOOK* 30 (2007).

141. BEAZLEY, *supra* note 137, at 4. As Beazley notes, “[l]egal writing is referenced writing, and readers expect frequent citation.” *Id.* at 98.

142. *See infra* Part III.A.1.

143. CHARLES R. CALLEROS, *LEGAL METHOD AND WRITING* 362 (6th ed. 2011).

144. FONTHAM ET AL., *supra* note 38, at 19.

145. DERNBACK ET AL., *supra* note 36, at 152.

146. ANDERSON, *supra* note 1, at 676.

147. “Given the fact that this source is open to virtually anonymous editing by the general public, the expertise of its editors is always in question, and its reliability is indeterminable. Accordingly, we do not find that it constitutes persuasive authority.” *English Mountain Spring Water Co. v. Chumley*, 196 S.W.3d 144, 149 (Tenn. Ct. App. 2005). *But see* Jason C. Miller & Hannah B. Murray, *Wikipedia in Court: When and How Citing Wikipedia and Other Consensus Websites Is Appropriate*, 84 ST. JOHN’S L. REV. 633 (2010)

overturned on that exact issue. Such warnings are nothing new to the legal writer, who learned early on in law school the difference between primary and second authority and when that authority is mandatory and when it is merely persuasive. The bottom line is that, when selecting sources, legal writers must examine each source, taking note of a number of variables, including where the source originated, how favorable or unfavorable it has subsequently become, its relevance to the question at hand, and how it compares to the other legal sources the writer has located.<sup>148</sup>

Although there are numerous, excellent books discussing legal research and the role that weight of authority plays in that research,<sup>149</sup> here I would yet again like to take a page from pop culture to illustrate the way in which some authorities are inherently stronger than others. Specifically, consider the glowing quotes that movie studios, in an effort to persuade consumers to buy or rent a movie, emblazon on the covers of DVD packages. These quotes are generally taken from favorable reviews by movie critics and tend to vary widely in terms of persuasiveness, given the various forms of movie critic that exist today. Consider, for example, the DVD cover for *March of the Penguins*, which contains positive quotes from *Newsweek*, *The New York Times*, and *Ebert and Roeper*.<sup>150</sup> Now compare that to the DVD cover for *Dude, Where's My Car*, which contains only one positive quote—from *The Arizona Daily Star*.<sup>151</sup> Many would guess that the first DVD is likely the better film, not only because of the number of sources, but the reputation of those authorities as experts on cinema, a reputation *The Arizona Daily Star* likely does not possess—at least not among those who live somewhere other than Tucson, Arizona.

DVD covers also illustrate the perils that attach to citing an authority that has been called into question. Take, for example, the DVD cover to *White Chicks*, which includes a quote by Shawn Edwards, describing the film as “The Funniest Comedy of the Year!”<sup>152</sup> Now, you may not have heard of Shawn Edwards, so allow me to tell you a bit more about

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148. See HELENE S. SHAPO ET AL., *WRITING AND ANALYSIS IN THE LAW* 369–70 (5th ed. 2008).

149. See, e.g., AMY E. SLOAN, *BASIC LEGAL RESEARCH: TOOLS AND STRATEGIES* (4th ed. 2009); ROBERT C. BERRING & ELIZABETH A. EDINGER, *FINDING THE LAW* (12th ed. 2005); WILLIAM H. PUTNAM, *LEGAL RESEARCH* (2009); KENT C. OLSON, *PRINCIPLES OF LEGAL RESEARCH* (2009).

150. See Michael J. Higdon, *Using DVD Covers to Teach Weight of Authority*, 15 *PERSPECTIVES: TEACHING LEGAL RES. & WRITING* 8, 9 (2006).

151. *Id.*

152. *Id.* at 10.

him. First off, Edwards has been described as “possibly the most enthusiastic man in the entire world.”<sup>153</sup> And when you read some more of his reviews, you start to understand why. For instance, describing *The Chronicles of Riddick*, Edwards said: “One of the best sci-fi films ever! Extraordinary! A true classic not to be missed! Vin Diesel is ecstatically superb.”<sup>154</sup> Interestingly, the same year Edwards was applauding the cinematic achievement of *Dude, Where’s My Car*, he also dubbed the movie *Barbershop 2* as “The best comedy of the year!” on February 6, 2004 (i.e., barely a month into the year), followed by his July 9, 2004 naming of *White Chicks* as “The funniest comedy of the year!”<sup>155</sup> Less than a month later, he declared *Little Black Book* to be “The best romantic comedy of the year!”<sup>156</sup> To say that other film critics did not share Mr. Edwards’ positive assessment of these three films would be a gross understatement.<sup>157</sup> Thus, notice how in light of this information, a glowing quote from Shawn Edwards could now very easily have the opposite effect on a knowledgeable consumer.

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153. COURTY TURCZYN, *The Bottom 5: This Week—Movie Critics Who Will Shill for Anything!*, POPCULT (Mar. 28, 2002), [www.popcultmag.com/passingfancies/bottom-five/moviecritics/moviecritics1.html](http://www.popcultmag.com/passingfancies/bottom-five/moviecritics/moviecritics1.html).

154. Higdon, *supra* 62. The New York Times was less enthusiastic when describing Vin Diesel: “Think of Telly Savales as a hip-hop thug, and you’ll get the idea.” NEW YORK TIMES THEATER REVIEWS, THE NEW YORK TIMES FILM REVIEWS 1999–2000, at 243 (2001). Furthermore, Edwards had the following to say about Britney Spears’ 2001 foray into acting: “Britney rocks! She is like a comet. A talent of her magnitude only comes around once in a lifetime and you can’t take your eyes off her when she is on screen in this totally cool and delightfully hip movie.” Ms. Spears did, in fact, win an award for her portrayal in the movie; unfortunately, that award 2002 Golden Raspberry Award (“Razzie”) for worst actress. See JOHN WILSON, THE OFFICIAL RAZZIE MOVIE GUIDE: ENJOYING THE BEST OF HOLLYWOOD’S WORST 358 (2005).

155. TIMOTHY M. GRAY, *Blurbs Provide Best Comedy of the Year*, VARIETY (Jan. 27, 2005, 3:16 PM), [www.variety.com/article/VR1117917018?categoryid=4&cs=1](http://www.variety.com/article/VR1117917018?categoryid=4&cs=1).

156. *Id.*

157. At least as to the latter two films. For instance, regarding *Little Black Book*, Richard Roeper described it as “one of the worst romantic comedies of this or probably any other year.” GERALD POSNER, *Brittany Death Suit*, THE DAILY BEAST (Jan. 27, 2010, 10:39 AM), <http://www.thedailybeast.com/articles/2010/01/27/brittany-death-suit.html>; see also Stephen Hunter, ‘Little Black Book’: Way Too Much Face Time, WASH. POST, Aug. 6, 2004 (“If you think it’s worth it to sit there for 97 minutes for three or possibly four laughs, then you are beyond help.”). Turning to *White Chicks*, Desson Thomson of the Washington Post described it as a “banshee-howlingly awful caper, tiresomelessly drawn from a few dozen other bad cross-dressing films of the forgettable past.” Desson Thomson, ‘White Chicks’: No Wayans, WASH. POST, June 24, 2004, at 36. The film was also nominated for five Golden Raspberry Awards. See WILSON, *supra* note 154.

Similarly, a legal citation is not only essential to the legal reader in order to back up each and every one of the writer's assertions, but those citations themselves communicate something very important to the reader. Just as the source alone of a positive review printed on the cover of DVD package can communicate a tremendous amount of information concerning quality, so too can the source of a legal proposition communicate to the legal reader just how much confidence to place in the legal writer's assertions.

## 2. The Legal Reader Wants You to Anticipate Her Questions and Answer Them

Although I began this article by discussing *Gosford Park*, please note that my taste in movies is not always quite that highbrow. Recently, for instance, I was enjoying the film *Tucker & Dale vs. Evil*.<sup>158</sup> Now, in that film, two harmless country boys (Tucker and Dale) are mistaken for homicidal rednecks (a la *Deliverance*)<sup>159</sup> by a group of college students who go camping near the remote mountain shack where the two men live.<sup>160</sup> Thinking that the two men have kidnapped one of their female friends, the college students attempt to rescue her, only to suffer extremely violent deaths as a result of their own incompetence (for example, one of the students attempts to tackle Tucker but misses, diving head-first into a wood chipper).<sup>161</sup> Although the deaths are all accidental, from the perspective of the remaining college students (whose numbers are rapidly dwindling), it appears to them that Tucker and Dale are murdering their friends.<sup>162</sup> As a result, the survivors ultimately become quite hysterical at the thought that they will become the next victims.<sup>163</sup>

It was at this point in the film that I turned to the friend who was watching with me and said, "If they really think these guys are going to kill them, why don't they just leave?" No sooner had those words left my mouth, when one of the coeds (Naomi) turns to her fellow survivors and initiates the following dialogue:

NAOMI: "We just got to get out of here! I mean, what the hell are we still doing here?"

CHLOE: "How we gonna get out of here? [Chad] over here sent Chuck off with the truck!"

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158. TUCKER & DALE VS. EVIL (Magnolia Pictures 2010).

159. DELIVERANCE (Warner Brothers 1972).

160. *Id.*

161. *Id.*

162. *Id.*

163. *Id.*

NAOMI: “Well then let’s walk!”

CHLOE: “40 miles?!”

NAOMI: “Maybe you should have thought of that before you wore stripper shoes.”<sup>164</sup>

Notice how clever the filmmaker was here. He not only anticipated that the audience may question why the college students would not just turn and run, but he affirmatively raised that question *himself* and provided the answer. Not only that, he raised and answered the question at the *precise* moment the question occurred to me, a member of his audience. Had he not done so, I would have continued to watch the film, but I would have been somewhat distracted by my question. Because he did answer the question, and at just the right time for me, I was able to just sit back distraction-free and enjoy the remainder of the movie.<sup>165</sup>

Anticipating the questions of another can be quite difficult; it is nonetheless a skill that legal writers must master. Indeed, to successfully craft a legal document that is complete, the legal writer must be aware of “the questions your readers will bring to the communication *or* ask while reading it.”<sup>166</sup> For example, assume there is a criminal defense attorney who once represented a defendant who is now deceased. During that representation, the defendant confessed to an unrelated, unsolved crime. After the defendant dies, the police subsequently charge someone else with the crime to which the—now deceased—defendant had confessed. The defense attorney wishes to share this exculpatory information, but the question arises as to whether the attorney-client privilege continues to protect the client even after the client’s death.

The issue is assigned to a first-year associate, and he is directed to draft an interoffice memorandum on this question. He finds that no court has yet permitted such an exception, but courts have recognized other

164. *Id.*

165. If you want a more “high-brow” example, check out episode one of the PBS series *Downton Abbey*, another “upstairs/downstairs” variety English drama set in 1914. In the first episode, one of the footmen is seen ironing the newspaper prior to giving it to the Earl. I wondered why he was doing that and, at about that time, one of the maids asked, “Why are the papers ironed?” Another maid quickly responded: “To dry the ink, silly—you wouldn’t want your Lordship’s hands to be as black as yours!” Ah! There’s my answer. See *DOWNTON ABBEY* (2010).

166. ANDERSON, *supra* note 1, at 101; see also SUN TECHNICAL PUBLICATIONS, *READ ME FIRST! A STYLE GUIDE FOR THE COMPUTER INDUSTRY* 72 (2d ed. 2003) (“One of the most important contributions a writer makes is to anticipate the reader’s questions and provide appropriate answers.”); BETH LUEY, *EXPANDING THE AMERICAN MIND: BOOKS AND THE POPULARIZATION OF KNOWLEDGE* 122 (2010) (noting how an engineer “must anticipate the questions his reader will ask of the work, and to accomplish its end is to answer beforehand those questions”).

exceptions to the attorney-client privilege.<sup>167</sup> All of this information (i.e., that no exception on this basis has been found even though other exceptions exist) would certainly be helpful to the assigning attorney but, at the same time, this information would likely provoke a number of additional questions—questions the associate should anticipate and address in advance. For instance, what is the nature of the other exceptions to the privilege? How are they different from the one being contemplated here? If the courts have recognized other exceptions, would the court in this case have the authority to craft a new exception even if other courts have declined to do so? Thus, a basic explanation of the underlying law can itself prompt further questions that a legal writer should foresee.

Other aspects of a legal document can also suggest future questions that the legal writer should anticipate. The underlying facts, for instance, are a fertile source of such questions. To illustrate, imagine there is a plaintiff alleging that she and the defendant effectuated a common-law marriage in 1980. The facts, however, state that the plaintiff and the defendant held a civil wedding ceremony two years later. Reading these facts, most legal readers would naturally wonder why the plaintiff would have married someone in 1982 if she thought she had already married him in 1980.<sup>168</sup> The legal writer should anticipate and address that question—even if the “answer” is that the record is unclear as to why she would do that. Indeed, even when there is no great answer to questions that may arise in the reader’s mind, often it is sufficient that the legal reader merely demonstrate that he took that question into account, answering it as best he could.

Likewise, the procedural posture of a case also can give rise to additional questions, as in the case of an attorney who files a motion for summary judgment prior to the close of discovery. It is entirely foreseeable that a judge in that instance would be distracted by thoughts of: “Maybe this is premature, and I should first let the other side complete discovery. Would that solve the problem?” Again, the moving attorney should himself raise the question and provide the answer. Similarly, when writing an appellate brief about an alleged error that the lower court made, it is entirely foreseeable that the court will question—if not immediately apparent based on the issues—the standard of review to be applied in such

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167. An interesting issue to be sure—and one that has gotten quite a bit of attention from legal scholars. See, e.g., Jessica Berg, *Grave Secrets: Legal & Ethical Analysis of Postmortem Confidentiality*, 34 *CONN. L. REV.* 81, 83 (2001); Jason Greenberg, Comment, *Swidler & Berlin v. United States . . . And Justice for All?*, 80 *B.U. L. REV.* 939, 946 (2000).

168. Such situations do arise. See, e.g., *Staudenmayer v. Staudenmayer*, 552 Pa. 253, 714 A.2d 1016 (1998).

an appeal. Thus, the legal writer, even if not required to do so by court rules, should provide that information up front.<sup>169</sup>

Finally, even the nature of the authorities used in a legal document can prompt questions that attorneys should recognize and address up front. For instance, relying on the Advisory Committee Notes to advance a particular interpretation of one of the Federal Rules of Evidence would prompt many legal readers to ask: “What weight can I give these notes? Don’t I have to rely exclusively on the plain language of the rule?” Not only should the legal writer answer that question, but he should do soon after (or perhaps even before) he cites the Advisory Committee notes in his brief so as to immediately allay any concerns the legal reader may have on this topic. Similarly, citing only persuasive authority<sup>170</sup> in a legal memorandum to a senior partner would naturally raise the question, “Is there no mandatory law on this topic?” If the answer is no, the legal writer should affirmatively acknowledge that absence early enough in the document to prevent the legal reader from being distracted by such questions while she reads.<sup>171</sup>

The reason questions like these frequently arise in the context of legal writing is that, as noted earlier, the purpose is not for the legal writer to have a conversation with himself, but instead to engage in a dialogue with the legal reader, or more specifically, with the “opinionated, skeptical, and talkative”<sup>172</sup> little voice inside the legal reader’s head. And that voice “has been trained to read very critically to ensure the content is complete, the analysis accurate, and the point of view consistent.”<sup>173</sup> When the reader finds an omission in any department, because the writer failed to answer either the original question or any subsequent question that *should* have occurred to the writer, the legal reader will be distracted until this omission is corrected. Thus, legal writers need to anticipate the point at which a question will arise and address it at that precise moment. Waiting too long or, even worse, ignoring the question altogether will result in an unsatisfactory document, one in which the legal reader will likely place limited (if any) confidence.

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169. In fact, many courts affirmatively require attorneys to provide that information up front in the brief. See Kevin Casey et al., *Standards of Appellate Review in the Federal Circuit: Substance and Semantics*, 11 FED. CIR. B.J. 279, 281 (2001).

170. By “persuasive authority,” I mean legal authority that a court is not bound to follow. Thus, a more apt description would be authority that is, at most, persuasive. See Edwards, *supra* note 7, at 58–60.

171. An example might be: “As this Court has not yet had occasion to address this discrete issue, the remainder of this brief will rely quite heavily on persuasive authority.”

172. EDWARDS, *supra* note 7, at 165.

173. RAMSFIELD, *supra* note 133, at 24.



### 3. The Legal Reader Expects Your Message to be Consistent

In the 2005 movie *Charlie and the Chocolate Factory*<sup>174</sup>—a remake of the 1971 musical *Willy Wonka and the Chocolate Factory*<sup>175</sup>—five children win the opportunity to tour Willy Wonka’s world-famous chocolate factory. The children—by and large—are quite naughty; as a result, each suffers a rather bizarre fate during the tour. At one point in the movie, one of the naughty children, Violet, has just ballooned up into an oversized blueberry after chewing an experimental gum that she was *repeatedly* warned to stay away from. As the other children leave Violet behind, two of them engage in the following conversation with Willy Wonka:

VERUCA SALT: Will Violet always be a blueberry?

WILLY WONKA: No. Maybe. I dunno. But that’s what you get from chewing gum all day. It’s just disgusting!

MIKE TEAVEE: If you hate gum so much, why do you make it?

WILLY WONKA: Once again you really shouldn’t mumble . . . <sup>176</sup>

To be honest, Mike Teavee does have a point. It is a bit hypocritical to manufacture and market gum, yet turn around and criticize someone for actually chewing it! By doing so, Willy Wonka is being very much inconsistent in word and deed. Although Willy Wonka can seemingly get away with such inconsistencies because, well, he is Willy Wonka, legal writers do not possess similar license.

Indeed, although anticipating reader questions and then answering them in advance is crucial when writing to the legal reader,<sup>177</sup> that reader also expects the answers to those questions to be consistent with the overall message.<sup>178</sup> And a legal writer can violate that expectation in a number of ways. As the book *Technical English* advises: “Every element of information design, visuals, and language must be consistent to help the audience read, use, and understand the finished project.”<sup>179</sup> Legal writers typically run afoul of such advice in three areas: substantive consistency, structural consistency, and language consistency.

174. The information and quotes contained in these first two paragraphs all come from the movie *CHARLIE AND THE CHOCOLATE FACTORY* (Warner Brothers 2005).

175. *WILLY WONKA AND THE CHOCOLATE FACTORY* (Warner Brothers 1971).

176. *Id.*

177. *See supra* Part III.B.2.

178. MURRAY & DESANCTIS, *supra* note 13, at 260 (“Proper legal writing is internally consistent. It promotes clarity to use the same name or terms to refer to the same parties, person, and objects throughout your work.”).

179. NELL ANN PICKETT ET AL., *TECHNICAL ENGLISH: WRITING, READING AND SPEAKING* 158 (8th ed. 2001); *see also* ALRED ET AL., *supra* note 25, at 489 (“Make sure that layout and design, visuals and use of language are consistent.”).

Substantive inconsistency is likely the most problematic to the reader, and it occurs whenever the legal writer's message is just patently contradictory. For instance, one semester my legal writing students were working on a brief involving Title IX. Specifically, they were representing a university that had been accused of failing to offer sufficient athletic opportunities for women. Prong 1 of the relevant three-prong test dealt with whether the university had provided athletic opportunities to each gender in close proximity with that gender's enrollment in the overall student body. In other words, if a university had a student body that was 55 percent male and 45 percent female, it would ideally want to show that its student athletes were 55 percent male and 45 percent female. Because most schools would have difficulty meeting and maintaining such an exact percentage match, however, the two percentages need only be "substantially proportional."<sup>180</sup> In laying out the rule for substantial proportionality, most students correctly noted that the courts have never identified a certain percentage disparity that is either automatically satisfactory or automatically fatal.<sup>181</sup> Instead, the cases merely consider the percentage disparity on a case-by-case basis, and what may be OK in one case may not be OK in another.<sup>182</sup>

After laying out all this basic information about the rule, many of the students nonetheless went on to make arguments that looked something like this: "Thus, here our client has a percentage disparity of 6.2 percent; because the Court in *Walker* ruled that 6.5 percent was substantially proportional, our client has likewise satisfied the substantial proportionality requirement." Such an argument, of course, is entirely inconsistent with what they previously said when describing the overall rule. If the percentage in one case is, by itself, irrelevant to whether the percentage in our case is acceptable, then such a comparison is a waste of time. If students wanted to use the *Walker* case, they would have to go behind the percentage and explain why the percentage in that case, apart from the numbers alone, should have some bearing on the present dispute.

A second, albeit less disastrous, consistency violation that legal writers often commit involves structural inconsistency, which relates to the design of the document. As one of the leading books on technical writing explains: "Consistent organization helps users become familiar with the structure of information so that they can find what they need with confi-

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180. See *Cohen v. Brown Univ.*, 101 F.3d 155, 165 (1st Cir. 1996).

181. See *Ollier v. Sweetwater Union High Sch. Dist.*, 604 F. Supp. 2d 1264, 1271–72 (S.D. Cal. 2009) (noting that there is no fixed percentage that constitutes compliance "or that, when not met, results in a disparity or a violation").

182. *Id.*

dence. When you present information consistently, users learn to predict what information they will find and where they will find it.”<sup>183</sup> For instance, when a legal writer announces early on either explicitly (through a roadmap statement) or implicitly (simply the order in which he lays out certain elements that he will later discuss) that he will follow a certain outline yet then fails to do so, he has created a document that is not structurally consistent. Failing to follow IRAC—or some close variation—likewise creates an inconsistent structure simply because it is inconsistent with the structure most legal readers are accustomed to reading.<sup>184</sup>

Finally, another popular form of inconsistency, which legal writers should almost always avoid, involves language inconsistency.<sup>185</sup> Although I am talking here about legal writers, such advice is typical of technical writing in general. Indeed, “be consistent in the word or phrase you use to refer to something,” advises *The Handbook of Technical Writing*.<sup>186</sup> Nonetheless, for legal writers, this advice is particularly crucial. As Professor Jill Ramsfield elaborates:

While elegant variation was the standard advice from our seventh grade teachers, we are not looking for that in most legal writing. In the modern legal interior, precision triumphs. Here, the legal reader attaches significance to things, to specific notions. Changing the word for the sake of doing so may change the meaning of the sentence. Thus *agreement* cannot become *contract* without others mistaking them for two different documents; *plaintiff* cannot become *Mrs. Armstrong* for the same reason.<sup>187</sup>

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183. HARGIS ET AL., *supra* note 8, at 232.

184. *See supra* notes 74–75 and accompanying text.

185. RUPERT HAIGH, *LEGAL ENGLISH* 58 (2009) (“Legal English is full of synonyms. It is therefore all too easy to start writing about something using certain words, and then later on in the document or letter start using other words to describe it. This can lead to lack of clarity or to ambiguity. It is crucial to be consistent in your use of terminology.”).

186. ALRED ET AL., *supra* note 25, at 453; *see also* SHERYL LINDSELL-ROBERTS, *TECHNICAL WRITING FOR DUMMIES* 92 (2001) (“For example, if you make reference to a *user manual*, don’t later call it *reference manual*, *guide*, or *document*. Your readers won’t know whether you’re referring to the same publication or to different ones.”).

187. RAMSFIELD, *supra* note 133, at 443; *see also* LINDSELL-ROBERTS *supra* note 186, at 92 (“Repeating a word is better than compromising the integrity of what you write.”).

#### 4. The Legal Reader Does Not Believe in the Perfect Case

In 1989, Steven Spielberg released the third movie in the *Indiana Jones* franchise, *Indiana Jones and the Last Crusade*.<sup>188</sup> Near the beginning of the film, we find the titular hero—an archeology professor at a fictional college in Connecticut—lecturing his students on the reality of what it means to be an archeologist: “So forget any ideas about lost cities, exotic travel and digging up the world. We do not follow maps to buried treasure, and ‘X’ *never ever* marks the spot.” The quote is highly ironic because, if anyone has seen the previous two films in the franchise, you are well aware that Indiana Jones’s career as an archeologist routinely involves all those glamorous elements. In fact, later in the *Last Crusade*, he will find exactly the treasure he is seeking buried under a huge “X.” For Indiana Jones, then, his life stands as the exception to the rule he puts forth to his students; namely, that the work of the archeologist is messy, and rarely does a perfect solution present itself.

Law professors no doubt offer their students similar advice, but I would dare say one would be hard-pressed to find the legal corollary to Indiana Jones—that is, the lawyer who always finds (and prevails upon a judge to accept!) law *perfectly* suited to answering his case. There just are not that many “slam dunks” when it comes to legal analysis.<sup>189</sup> Again, the law is rarely black and white, thus lending itself at any given time to a number of different interpretations and applications.<sup>190</sup> What’s more, the legal reader is well aware of this general uncertainty. Thus, given the rather large role that reader expectations play in constructing a legal document, a legal writer must openly acknowledge any debate that is relevant to the existence, meaning, or application of the law he is discussing.

When writing an interoffice legal memorandum, for instance, the legal writer is attempting to predict the likely outcome of a case, not yet

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188. The information and quotes contained in this first two paragraph all come from the movie *INDIANA JONES AND THE LAST CRUSADE* (Paramount Pictures 1989).

189. See LAWRENCE M. PROSEN, *THE CURRENT STATE OF GOVERNMENT CONTRACT LITIGATION: A WORLD IN FLUX* (Aspatore 2010) (“Oftentimes, you hear the client’s story and by the end of that meeting, they have tried to convince you that the case is a “slam dunk.” There is no such thing as a “slam dunk,” and certainly not at the start of a case. It is almost never possible to give a definitive pronouncement as to the likelihood of success in a particular case, mostly because you cannot control all the variables.”); William A. Blancato & C. Allen Gibson, Jr., *Controlling Your Own Destiny: You Can With Mediation*, 63 *DISPUTE RESOLUTION J.* 14, 17 (2008) (“In the legal business, there are no slam dunks. Even in basketball, players occasionally miss a dunk. If you or your client think your case is a slam dunk, there is a good chance you have not evaluated the strengths of the adversary’s case and the weaknesses of your own, or erred in your evaluation.”).

190. See CALLEROS, *supra* note 143 and accompanying text.

decided by any court. Even a first-year law student understands that failing to include counterarguments can be costly. As Professor Charles Calleros explains:

To effectively represent the client, the assigning attorney must know both the weaknesses and strengths of the client's claims and defenses. If you present a balanced analysis of the dispute in your office memorandum, you will enable your assigning attorney to focus his attention on his strongest arguments, to anticipate the counterarguments of the opposing party, and to develop an effective strategy.<sup>191</sup>

Failing to present a balanced picture, however, has another consequence. Specifically, the hypercritical legal reader will be even more skeptical of what the legal writer has to say than she normally would, realizing full well that few cases are so one-sided in favor of victory.

The same can be said of the legal writer, who, writing as an advocate, fails to include adverse authority in a legal brief. Now, even assuming the writer can justify this omission under the Model Rules of Professional Conduct,<sup>192</sup> failure to include this less-than-desirable authority is quite damaging. Specifically, the legal writer's opponent is likely to include said authority, leading a judge to believe that the original omission was a product of laziness, incompetence, or outright dishonesty.<sup>193</sup> Once again, though, regardless of whether the writer's opponent fails to bring up the adverse authority, the legal reader is even less likely to respond well to analysis that appears to be a bit too perfect, simply as a result of knowing that the law is often anything but definite. As experts in the field of technical writing remind us, when writing a technical document the legal writer must "[a]lways keep in mind the particular attitudes, experiences, and expectations" of the legal reader.<sup>194</sup> That the legal writer's case is likely not a home run is one of those expectations the legal reader holds quite firmly.

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191. CALLEROS, *supra* note 143, at 208; *see also* STATSKY & WERNET, *supra* note 37, at 179 ("It is extremely important that this memo present the strengths *and weaknesses* of the client's case. The supervisor must make strategy decisions based in part on what you say in the memo. Hence the supervisor must have a realistic picture of what the law is.").

192. *See* MODEL RULES OF PROF'L CONDUCT R. 3.3(a)(2) (2010) ("A lawyer shall not knowingly . . . fail to disclose to the tribunal legal authority in the controlling jurisdiction known to the lawyer to be directly adverse to the position of the client and not disclosed by opposing counsel.").

193. *See generally* Michael J. Higdon, *When the Case Gives You Lemons . . . : Using Negative Authority in Persuasive Legal Writing*, 46 TENN. B.J. Mar. 2010, at 14.

194. ANDERSON, *supra* note 1, at 295.

Further, presenting something as an “open and shut” case can be harmful for another reason. Research has revealed that an “influence agent is more persuasive if the intent to persuade is not obvious.”<sup>195</sup> Likewise, research has also revealed that “a participant’s awareness of the intent to persuade on the part of the influencing agent will result in less message acceptance.”<sup>196</sup> Thus, failure to present a balanced analysis could come across as an attempt to manipulate, which prompts most readers to affirmatively reject the message. Legal readers are especially sensitive to such attempts. As one legal writing scholar describes, “[a] reader who feels pushed will resist. An effective legal argument will not push an unwilling reader down a path. Rather, an effective legal argument will place the reader at a vantage point that allows the *reader* to see and take the best path.”<sup>197</sup>

None of this is to suggest that there are not cases in which the answer is relatively clear under the applicable law—that does happen. However, when communicating that result to the legal reader, the legal writer must affirmatively demonstrate that he considered other conclusions and why those conclusions nonetheless gave way to the one he ultimately reached. Think of it this way: if the legal reader were to accompany Indiana Jones on one of his adventures, she would probably initially ignore any large “X”s she were to find, returning with shovel in hand only after she was satisfied that other potential locations were safely eliminated from consideration.

#### IV. PUTTING IT ALL TOGETHER: WRITING FOR THE LEGAL READER

As you can tell from the foregoing discussion, communicating with the legal reader is a rather tricky enterprise. On the one hand, the writer must craft a document that is internally consistent and extremely thorough. Further, the writer must ensure that every question (including those the reader may not even encounter until she actually reads the document) is answered fully in a way that is not only persuasive, but also realistic and—at least seemingly—objective. At the same time, however,

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195. Frank R. Kardes, *Spontaneous Inference Processes in Advertising: The Effects of Conclusion Omission and Involvement on Persuasion*, 15 J. CONSUMER RESEARCH 225, 225 (1988).

196. Michael Burgoon et al., *Revisiting the Theory of Psychological Reactance: Communicating Threats to Attitudinal Freedom*, in THE PERSUASION HANDBOOK: DEVELOPMENTS IN THEORY AND PRACTICE 213, 224 (James Price Dillard & Michael Pfau eds., 2002).

197. EDWARDS, *supra* note 7, at 264.

this thorough document should ideally be one that the reader can breeze through, having to read it only once to have each and every one of her questions answered and, at the same time, never leaving her in suspense as to where the writer is going and never distracting her with irrelevant material. In simpler terms, the document must be thorough and exhaustive, yet succinct and to the point. Few would argue that this is quite a difficult balance to strike. So how does the legal writer best go about accomplishing this mission?

There are a number of ways one could accomplish this task, and ultimately each writer has to find a writing process that works best for him or her. However, whatever that process is, audience considerations should permeate every step.<sup>198</sup> For instance, when I write, I tend to follow the Flowers Paradigm, developed by English Professor Betty Sue Flowers.<sup>199</sup> Under this paradigm, the writer will act in four different capacities during the writing process: madman, architect, carpenter, and judge. The madman is the stage during which the writer is indiscriminately generating ideas, some of which might make it into the ultimate paper, many of which will not.<sup>200</sup> Once the madman has produced a sufficient number of ideas, he morphs into the architect, who then looks at those ideas and begins to organize them into some form of an outline.<sup>201</sup> Then, once an initial outline is complete, the architect becomes the carpenter, who begins building the document on the basis of the architect's "blueprints."<sup>202</sup> Only when the architect is complete can the writer take on the final role of judge, who then comes in to look around and offer his critique.<sup>203</sup> To illustrate my point that the legal writer must keep the legal reader in mind at every stage of the writing process, consider how the legal writer would do that if following the four stages of the Flowers Paradigm.

First, during the madman stage, the legal writer should begin to brainstorm on a number of foundational topics. These include basic questions like "What do I hope to accomplish with this document?" and "What questions do I need to answer?" After that, the questions would become more specific, with the madman turning his attention to things

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198. See *supra* notes 24–26 and accompanying text.

199. See Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, UNIV. OF TEX. AUSTIN, [https://webpace.utexas.edu/cherwitz/www/ie/b\\_flowers.html](https://webpace.utexas.edu/cherwitz/www/ie/b_flowers.html) (last visited Sept. 2, 2012).

200. *Id.* (describing the madman as one who "is full of ideas, writes crazily and perhaps rather sloppily, gets carried away by enthusiasm or anger, and if really let loose, could turn out ten pages an hour").

201. *Id.*

202. *Id.*

203. *Id.*

like, “What kinds of law do I need to answer my questions?” and “In what sources am I going to look to find that law?” Finally, once he has found some of the relevant law, the questions would likely become more specific still—“What rule(s) can I take from this law that I should include in my paper?” and “What are the component parts of these rule(s)?” Notice how the questions the madman is asking himself are directed at gathering information that ultimately will make the document complete, something legal readers very much expect and depend upon.<sup>204</sup>

With those basic questions answered, the madman can probably take a break. At this point, the legal writer would adopt the role of the architect and start crafting an outline. The outline should be guided by logic, using a conventional legal paradigm (IRAC for example)<sup>205</sup> in which general principles are first introduced before moving to more specific components.<sup>206</sup> Further, the outline should be one that comports with the legal reader’s expectations. For instance, at the most basic level, the outline should answer the questions it is intended to address and, more specifically, it should include all the components necessary to adequately address those questions, including counterarguments. Doing this initial planning helps begin the process of creating a document that will ultimately assist the reader in moving through the document more quickly, free from confusion and distraction.

With an initial outline in place, it is now time for the legal writer to put on his carpenter hat. During this phase, taking each discrete portion of the outline, the legal writer can then use substance to flesh out those issues. This substance should not only be complete, meaning that every question is thoroughly and objectively answered, but every assertion should be based on legal authorities that the legal reader is likely to deem acceptable. As the legal writer drafts, he should take note of things he says or sources he brings up that are likely to provoke further questions in the reader’s mind.<sup>207</sup> At any point in which he anticipates such questions, he needs to answer them *then and there*. He should also labor to actively avoid redundancy and maintain consistency. Finally, throughout the document—be it the overall document, the discrete sections in the document, the paragraphs in those sections, or even the sentences in those paragraphs—he should try to consistently state his conclusion up front, and only then explain how he came to that conclusion.<sup>208</sup>

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204. *See supra* Part III.A.1.

205. *See supra* notes 74–75 and accompanying text.

206. *See supra* note 77 and accompanying text.

207. *See supra* Part III.B.2.

208. *See supra* Part III.A.3.



Finally, when the legal writer is feeling pretty good about the document he has built, he then (and *only* then) can let the judge take a look at the paper and edit what has been done so far. This is perhaps most crucial stage because, despite the fact that the madman, architect and carpenter have all worked with an eye toward satisfying the needs of the legal reader, it is the judge who will affirmatively test how successful they have been. To accomplish his task, the legal writer as judge must, in essence, *become* the legal reader. As Stephen Sondheim once said, “When the audience comes in, it changes the temperature of what you’ve written.”<sup>209</sup> In legal writing, that’s a crucial temperature to take, given that the very purpose of this document is to communicate with that reader—and, more specifically, a legal reader who has never read the document before or likely even encountered the subject matter contained in that document.<sup>210</sup> To say this task is difficult would be a huge understatement. It is nearly impossible for the legal writer to read something he has written without reading not what the document says, but what he *thinks* it says. Nonetheless, for the reason outlined at the beginning of this article, it is essential that the legal writer judge the document through that lens.

During this final stage, the legal writer would be well advised to use the eight principles I outlined above as a checklist to help gauge the likely effect of the document. Specifically, he should ask:

1. If she had to, could the legal reader rely on this one document to answer all her questions?
2. Can she discern those answers by reading the document (including its component parts) only once?
3. At every point in the document, does the legal reader know where the legal writer is headed?
4. Has all irrelevant and repetitious content been eliminated?
5. For every legal proposition in the document, is it supported by legal authority and is relevant, trustworthy and persuasive?
6. Within the document, are there any components that are likely to generate additional questions and, if so, did the legal writer answer those questions at the very moment the questions are likely to arise?
7. Is the document consistent in substance, in structure and in language?
8. Has the legal writer created a document that at least has the appearance of objectivity, meaning that it adequately incorporates other potential considerations, interpretations and conclusions?

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209. *Stephen Sondheim Quotes*, BRAINYQUOTE.COM, [http://www.brainyquote.com/quotes/authors/s/stephen\\_sondheim\\_2.html](http://www.brainyquote.com/quotes/authors/s/stephen_sondheim_2.html) (last visited Sept. 7, 2012).

210. *See supra* notes 31–33 and accompanying text.

If the answer to *any* of those questions is “no,” then there is a problem. At that point, the legal writer needs to shed the judge’s robe and again adopt the role of madman, architect or carpenter—depending on how much work is needed to correct the problem. When complete, the judge can return to conduct another test. Given that writing is a recursive process, a legal writer should expect that he might have to repeat this process a few times.<sup>211</sup> It is important to keep in mind, though, that at no stage in the Flowers Paradigm should the writer be simultaneously playing two roles—in fact, each character can only exist in the absence of the other three. For instance, attempting to edit too heavily (i.e., playing the judge) at the same time the legal writer is trying to complete an initial draft (i.e., playing the architect) can bring the entire process to a standstill. Likewise, trying to organize thoughts (i.e., playing the architect) while the legal writer is still in the process of generating basic ideas (i.e., playing the madman) will likely result in an incomplete outline, one that may need to be substantially revised or even completely disregarded in light of the more complete picture that will emerge only after the madman is permitted to finish his task.<sup>212</sup>

However, when the legal writer goes through each stage—one at a time—in order, repeating that cycle when the circumstances so dictate, he will complete the draft more efficiently. In addition, following that process with an eye toward the guidelines I developed earlier in the article, the document the legal writer creates will be one that is more carefully tailored to and thus likely to be better received by the impatient and hypercritical legal reader.

## V. CONCLUSION

Alfred Hitchcock once advised, “Always make the audience suffer as much as possible.”<sup>213</sup> Trust me, that does not work in legal writing! The audiences for the film *Rear Window* and an appellate brief are just too different—each has an extremely divergent purpose and expectation. Nonetheless, what Hitchcock says is still instructive because it illustrates the absolute necessity of understanding one’s audience. When it comes to

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211. See *supra* note 68 and accompanying text.

212. When it comes to the madman, the presence of the judge can be particularly destructive. As Flowers explains: “He’s been educated and knows a sentence fragment when he sees one. He peers over your shoulder and says, ‘That’s trash!’ with such authority that the madmen loses his crazy confidence and shrivels up.” Flowers, *supra* note 199.

213. JAMES W. ROMAN, *BIGGER THAN BLOCKBUSTERS: MOVIES THAT DEFINED AMERICA* 86 (2009).

the audience of legal readers, we may be prone to think of them as “generic and faceless,”<sup>214</sup> but they still possess some core attributes, knowledge of which can greatly assist the legal writer. Indeed, looking to the field of technical writing for example, there is quite a bit of valuable information the legal writer can use to better understand the legal reader.

One final nugget of wisdom from this field, however, is the point that “when writing to an audience composed of relatively homogenous readers, you might create an image of a composite reader and write for that reader.”<sup>215</sup> So who is the composite legal reader? Well, I cannot really answer that. Like a birthday wish, that’s a personal decision, one guided by what will best assist the individual legal writer. For me, however, the composite legal reader is—someone I quoted earlier in this piece—Judge Judy Scheindlin of the syndicated television program *Judge Judy*. Eric Konigsberg of *New York Magazine* described her perfectly when he wrote: “Wearing a lace collar and the demeanor of someone who perhaps drinks lemon juice by the glass, Judge Judy handles her litigants with skepticism and impatience.”<sup>216</sup> Indeed, Judge Judy wants all her questions answered and answered quickly. When litigants fail in either regard, her displeasure is immediately apparent. Saying things like: “I eat morons like you for breakfast. You’re gonna be crying before this is over,”<sup>217</sup> I picture Judge Judy as my reader, imagining that should I not live up to her expectations for efficient and complete answers, she will yell similar unpleasanties at me on national television.

Other legal writers may envision someone different—perhaps someone less abrasive—when writing. The point, however, is that legal writers absolutely must have some audience member in mind when they craft a legal document. After all, legal writing is technical writing, and as such, its sole purpose is to convey information on a discrete topic, using a discrete medium, and directed at a discrete audience. The success of the document then will depend on how well it communicates that information to the end user—the legal reader. Thus, it must be tailored to her and the special attributes she possesses. Those attributes are impatience and a level of skepticism that can only be described as hypercritical. Failure to take into account these two qualities of the legal reader and the resulting considerations those qualities require will almost always result in a writer-based document—one that is written by the legal writer to the

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214. See *supra* note 27 and accompanying text.

215. ALRED ET AL., *supra* note 25, at 42.

216. Eric Konigsberg, 1999 *New York Awards*, N.Y. MAG., <http://nymag.com/nymetro/news/nyawards/1710/> (last visited Sept. 7, 2012).

217. Memorable Quotes for “Judge Judy,” IMDB, <http://www.imdb.com/title/tt0115227/quotes> (last visited Sept. 7, 2012).

legal writer and one, in all likelihood, that will only ever be completely read by the legal writer. The impatient, hypercritical legal reader will have none of it.

Or as Judge Judy would no doubt respond: “Ridiculous. NEXT!”<sup>218</sup>

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218. *Id.*