WRITTEN ADVOCACY

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Law Students, Beware

Mark Mathewson

In *One L*, that classic account of life during the first year at Harvard Law School, author Scott Turow describes his first assignment, a four-page case for his Legal Methods class. Only four pages? They must be going easy on us, he thought — until he began reading. "It was," he wrote, "something like stirring concrete with my eyelashes."

It may seem ironic that Turow, a writer and teacher of writing before law school, felt so frustrated upon confronting what were, after all, mere words. But that's the irony of legalese: the more you know about words and how to arrange them, the more frustrated you are by a "language" that violates nearly every principle of good writing. For the most part, the substance of the law — the stuff you thought would be difficult — is easy compared to the words, phrases, clauses, sentences, and paragraphs under which it is buried.

Chances are that legalese is burying you, too, especially if you're a first-year law student. Chances are you are spending precious hours each day digging out from under it, hours that you'd rather spend struggling with some challenging legal concept, or pondering the public-policy implications of some legal doctrine, or playing with your kids or your lover.

I empathize. Rest assured that you will learn the language of the law after a fashion, and I hope you learn it quickly. But I also hope you never learn it so well that it ceases to frustrate and anger you. God forbid that it should someday sound elegant to you, as it did to the charming southern gentleman who taught me contracts. (He was an undergraduate English major, speaking of ironies.) I hope that you stay angry and that you channel your anger into a willingness to undertake in your professional lives the hard and thankless — but valuable — labor of translating legalese into standard English.

Let me address some fundamental questions. First, what exactly *is* legalese? If it's an "ese" — a language as I've suggested — it must

have identifiable, recurring characteristics that set it apart. Some distinctive features of legalese include the following:

- Arcane and archaic vocabulary: Lawyers use outmoded words and phrases (*know ye by these presents*) and Latin and French words and phrases (*habeas corpus*), and they give unfamiliar meanings to familiar words and phrases (*complaint, consideration, assault*). Not surprisingly, unfamiliar vocabulary is a barrier to comprehension.

- Overspecificity and redundancy: Legal writing is full of such doublets and triplets as *will and testament, cease and desist*, and *remise, release, and forever discharge* that waste time and space.

- Abstraction and indirectness: Legal language shares these weaknesses with scholarly and bureaucratic prose. Legal writers overuse the passive voice, producing sentences that are longer and less straightforward than they should be — for example, "It can be argued that the property was not owned but was leased by our client," instead of "We argue that our client did not own the property, but leased it." Lawyers also transform direct, vital verbs — the workhorse words of the English language — into long, languid nominal (noun-based) constructions glued together with helping verbs, articles, and prepositions. Thus "Bob determined that" becomes "Bob made the determination that" (or, more likely, "the determination was made by Bob that"). Multiply these transgressions several hundredfold, and you'll see how they can sap your prose's — and your reader's — vitality.

- Grammatical complexity: This heading describes a multitude of sins that together constitute the most serious barrier to comprehension in legal writing. Indeed, other character-

istics of legalese are mere annoyances in comparison. Many examples come to mind, but I'll point to the complex construction I find most frustrating: the long sentence made up of a series of subordinate clauses that appear before the main clause they modify, thus putting the grammatical cart before the horse and suspending the core meaning of the sentence until the end. Here's an example from a set of jury instructions:

> It will be your duty, when the case is submitted to you, to determine from the evidence admitted for your consideration, applying thereto the rules of law contained in the instructions given by the court, whether or not the defendant is guilty of the offense as charged.

Here's a simplified version, and notice how quickly it gets to the point:

> Your duty is to determine whether the defendant is guilty of the offense charged. You must do this by applying the law contained in these instructions to the evidence admitted for your consideration.

- Long sentences: Complex, convoluted constructions go hand in hand with long sentences. When your high-school English teacher told you that each sentence should contain a single thought, he or she was giving sound, if simplistic, advice. You know from mind-numbing experience that 200-word sentences are endemic in legal writing. All are harder to read than need be.

By now you should be getting a fix on the enemy; on the other hand, you may be wondering whether legalese really is the enemy. I mean, isn't legalese a necessary evil? Aren't legal terms of art a shorthand that actually makes it easier for lawyers to communicate

with each other? Surely, our good professors wouldn't make us work these verbal Chinese puzzles if it weren't necessary.

Legalese may indeed be a necessary evil, depending on what you mean by "necessary." If you mean that legalese is necessary because your boss will berate you or your law professor will lower your grade if you refuse to use it, you may be right. In the same sense, bosses and law professors are necessary evils.

But is legalese necessary for purposes other than reinforcing the prejudices, and quieting the fears, of your "superiors"? The answer is yes (rarely) and no (usually). Yes, terms of art are useful under some circumstances. *Res ipsa loquitur* is a time-saving shorthand for the concept it represents, as is *proximate cause*. But terms of art are harmful, not useful, in consumer contracts and other documents designed for public consumption. The lawyer's shorthand is the public's gobbledygook.

More important, terms of art, which are sometimes useful, do less to impede comprehension than the long strings of archaic phrases or tortuous sentences for which there is *no* excuse. Tangled sentences are not a shorthand for anything. They waste time and cause confusion, which in turn causes needless litigation. Antiquated formalisms are similarly useless. To use Professor David Mellinkoff's example, there is no rational justification for writing "in consideration of the agreements herein contained, the parties hereto agree" instead of "we agree."

There are reasons for these affronts to good English, of course. For example, archaic formalisms are frozen into legal prose by the inherent conservatism of the legal process. When a judge upholds the words of a contract, those words become winners. Cautious lawyers will choose them time and again over untested words, even though the "winning" words fell from common usage centuries ago.

As legal drafters, you will have to live with these reasons, just as you must live with bosses and law professors and judges. More than most writers, lawyers must be sensitive to the needs of their varied readers and must learn to write for their audience. I'm simply asking that you put up with as little legalese as you can. If your boss won't

let you draft contracts in standard English, at least don't write client letters in legalese. At least don't permit yourself to write some 300-word boa constrictor of a sentence — and if your boss makes you do *that*, get a new boss. Finally, when *you* become the boss, create an environment in which standard English flourishes. You will be rewarded many times over.

How so? you ask. Why, now that you've gone through or are going through such agony to learn legalese, should you join the crusade to revise it into something that approximates standard English? (Incredibly, legalese does have its defenders.)

There are many reasons for casting arms against bad legal writing, including the hardship that legalese works on laypeople who must interpret it and the damage it does to our profession's already tarnished image. But if you're persuaded by no other reason, consider this: legalese will continue to waste your time and energy even after law school, and your time will be more valuable then, at least in monetary terms. Translating legalese may get easier, but "easier" is a comparative adjective — easier than what? Easier than stirring concrete with your eyelashes, maybe. Maybe. Stay angry. Stay tuned.

Eschew Exaggerations, Disparagements, and Other Intensifiers

Kenneth F. Oettle

An advocate's instinct is to disparage the other side. Motivated by indignation at the perceived insult to our intelligence and to the cause of truth, we say the other side's position is "obviously" or "clearly" wrong, their reading of a statute is "preposterous," and they cite no law "whatsoever." We almost cannot help ourselves.

Such characterizations of the other side's arguments are not effective writing. They are more likely to trigger disbelief than agreement because they are the known refuge of persons whose positions are weak. They are a way of pounding the table when you cannot pound the law or the facts. If you pound the table with *clearly*, *obviously*, and *whatsoever*, the reader may figure that you have nothing substantive to say.

Just as bad, if not worse, are statements disparaging the opposing advocate. In the following examples, the italicized words should be eliminated:

1. Plaintiff's *disingenuous* reading of the rule is inconsistent with the public policy that supports the rule.

2. Defendant *blithely* ignores the fact that he was present when the statements of which he claims ignorance were made.

3. *In an outrageous show of chutzpah,* the plaintiff blames his injury on the defendant rather than on his own inattention.

Words should speak for themselves — you should not have to speak for them. Consider the following intensifier in a brief submitted by a condemnee appealing for the third time from a trial court's refusal to value the condemned property fairly:

> An appalling ten years after the taking, condemnee comes before the Appellate Division for the third time.

The word *appalling* is unnecessary because the egregiousness of the condemnee's having to wait ten years for a shot at justice is evident merely in the recital, without need of editorial gloss. The passage of time speaks for itself, and the point is made just as well without *appalling*:

> Ten years after the taking, condemnee comes before the Appellate Division for the third time.

Some writers vigorously defend the use of "strong language," deeming it a matter of taste and contending that those who shy from the practice are wimps. This view has some merit, but not much. Aggressive writing may intimidate a few adversaries, and more importantly, it may give some clients the sense that you are vigorously advocating their cause. But experienced lawyers are not easily intimidated, and they frequently turn strong language back on the writer, portraying the writer (and, by dint of association, the writer's client) as offensive rather than thoughtful or thorough.

Judges are largely unmoved by intensifiers. If the words are ad hominem attacks on the other side (e.g., contending that an argument is "disingenuous"), the court may deem it unseemly. If they are used to pump up your own argument (e.g., contending that your point is "clear" or that a delay was "appalling"), the court may be insulted because you consider it necessary to point out the obvious (e.g., that a ten-year odyssey in court is appalling). If the

facts don't speak for themselves, they probably aren't good enough facts.

Though you may wish to express indignation if the other side is caustic, don't sink to their level. In the end, the best way to persuade the client that you are a dedicated and effective advocate is to prevail in court, and the best way to prevail in court is to make your point and back it up with authority.

Persons who use intensifiers are often trying to make up for a failure to highlight good facts. Consider the following first sentence in the preliminary statement to our condemnee's brief, where the condemnee argued that the trial court had undervalued the condemned property. Which version would you use, A or B?

> A. Condemnee seeks a redetermination of fair market value based on the value that a hypothetical willing buyer would have paid for the property at the time of the taking.
>
> B. Condemnee seeks a determination that a person buying into the Jersey City waterfront real-estate boom in April 1986 would have seen the potential of this choice parcel and would have paid a premium for it.

The best fact for the condemnee is that its condemned property was situated in the midst of a waterfront real-estate boom, so a willing buyer would have paid a premium for the property. Using version B, the writer integrated the most important fact (waterfront real-estate boom) into the first sentence of the preliminary statement. With version A, the writer would have presented nothing more than a statement of the law. Thus, version B is persuasive, and version A is not. The facts in version B supply the "intensity" for which intensifiers are a poor substitute.

Just as someone always votes for the other side in an election, some writers would use version A anyway, reasoning that (1) they don't want to appear to be too much the advocate too soon or (2) it's important to invoke the key terms — such as *fair market value*, *hypothetical willing buyer*, and *time of the taking* — in the relevant principle of law. These rationales are unimpeachable as general statements, but taken in context, they are outweighed by the more important principle that persuasion begins with good facts.

Tips for Writing Less Like a Lawyer

Mark L. Evans

Upon entering the profession, too many lawyers start imitating the worst writing they saw in law-school casebooks and law journals. This, they imagine, is the kind of dense, dreary prose that lawyers are supposed to write. In working with new lawyers over the past three decades, I've compiled this list of tips and other admonitions — many of them familiar to anyone who cares about legal writing. Their goal is to turn new lawyers around before bad writing becomes habitual.

1. Empathize. Put yourself in the reader's shoes. Sensitivity to the reader animates every other rule of effective writing. Your objective is to lead the reader through the problem, step by step.

2. Make your writing self-contained. The reader should not feel the need to look at the statute or read the cases to understand your analysis. Bare citations are rarely enough. Draw from the statute or case what is significant (and only what is significant). Quote the crucial language. Don't let the reader wonder what the case is about.

3. Draw parallels. As you develop the authorities, draw the parallels explicitly. Don't leave it to the reader to figure out how the case helps or hurts.

4. Face weaknesses openly. Don't ignore the soft spots in your analysis. What adverse authorities will your opponent cite? How can your cases be distinguished? How will your opponent read the statute? Frame your arguments with the anticipated response in mind. If there is bad news, deliver it yourself

and place it in the most favorable context. Don't risk your credibility by letting the other side offer up a surprise.

5. Provide road maps. Transitions should be neither abrupt nor obscure. Tell the reader how one topic follows from the last and leads to the next. The flow should be gradual; the analytical links should be explicit.

6. Use examples. You can breathe life into abstract principles by illustrating your point.

7. Always start with the basics. Spell out the regulatory context, the key statutory phrase, the central legal or practical problem. Even a sophisticated reader will be comforted by your retracing a familiar path.

8. Don't expect too much of the reader. Write with the assumption — which is almost always accurate — that you have thought far more about the problem than your reader has. Your writing will be better even if the assumption is wrong.

9. Rewrite. Be your own toughest critic. You've never written a draft that couldn't be improved.

10. Make your logic explicit. Put down on paper every analytical step you have taken in your head. Be vigilant about this. Take no shortcuts. Leave no gaps.

11. Care about style. Style cannot be divorced from substance. If it can be said better, say it better. It is not enough to have good ideas, not enough to get your good ideas down on paper. You have to express those ideas effectively.

12. Don't skip over the rough spots. You know where they are. Force yourself to rework the bumpy sentence, the awkward paragraph, the loose analysis.

13. Don't write an abstract thesis. Apply the law to the facts at hand. Solve the problem.

14. Don't limit yourself to direct authority. Good advocacy and effective counseling are driven by analogies.

15. Logic is more important than authority. If you have a compelling argument but can't find support for it, make the argument anyway.

16. Pay attention to detail. Don't underestimate the importance of grammar, spelling, citation form, general aesthetics. Sloppy work suggests a disorganized mind. Careless mistakes not only distract and irritate a reader but may undermine her trust in you.

17. Use subheadings liberally. Good subheadings give the reader cues that aid comprehension. They can help make a long brief digestible. They can also assist the writer by exposing organizational weaknesses. If you can't frame a good subheading, you may have jumbled ideas that should be treated separately.

18. Omit superfluous details. Ask yourself whether a reader needs a particular fact or detail to understand the problem or the analysis. Editing out what isn't necessary will strengthen your writing. Be particularly brutal in striking out dates and numbers. Each conveys the impression that it has special significance.

    - If a number is unnecessary, leave it out. If it must be included, use a round number unless a more precise one is crucial. "$37 million" is far easier to absorb than

"$37,000,000" or (even worse) "$37,468,139.27." Don't distract and tire the reader with pointless precision.

- If a date is not pivotal, leave it out. When you tell a story, all that usually matters is the sequence of events. That can be conveyed by the order of the sentences, occasionally supplemented by a cue word such as "then," "subsequently," or "meanwhile." If you must use a date, keep it as general as you can: try "a year later," or "in 1997," or even "in March 1997," any of which is preferable to "on March 14, 1997."

19. Use short paragraphs. Two or three paragraphs per typed page are about right. Don't be afraid to use one-sentence paragraphs where they seem to work. Paragraph breaks are like breaths of air. They make your writing more hospitable to the reader.

20. Use short sentences. The simple, declaratory sentence should be the staple of your writing. Compound and complex sentences should be used for variety.

21. Don't try to jam too many thoughts into one sentence. If you have more than one connecting word — "although," "if," "because," "and," "but" — you should probably break the sentence into two or three shorter ones.

22. Minimize footnotes.

- Footnotes interrupt the flow of your writing and impede communication. They ask the reader not only to drop his eyes to the bottom of the page, but also to absorb information that the writer did not consider important enough to include in the text.

- Use footnotes only for essential material that would be more disruptive in the text than in a footnote.

- Place footnotes at the most obvious break points. The end of a paragraph is the best possible spot; the end of a sentence is second best. If you must place a footnote in the middle of a sentence, put it where there is a natural break — for example, at a comma or a semicolon.

23. Eliminate unnecessary words.

- Avoid adverbs such as "very," "clearly," "plainly," and "extremely." They weaken rather than strengthen. In place of "very strong," just say "strong." Or try substituting a vigorous adjective such as "powerful."

- Don't hide behind weasel words like "fairly," "rather," and "somewhat." You will inspire greater confidence if you omit needless qualifiers.

24. Avoid legal-sounding words and phrases. Good lawyers don't sound like lawyers.

- Stay away from Latin phrases like "inter alia" and "vel non." They communicate little and impress no one.

- Don't let Latin abbreviations infect your writing. In place of "i.e.," "e.g.," and "viz.," substitute "that is," "for example," and "namely."

- Whip yourself if you find "above-mentioned" or its relatives in anything you've written. Administer similar punishment for "hereinafter," "heretofore," and all the other words that lawyers have invented to scare the lay public.

- Don't use a big word when a small one will do. Use "city" instead of "metropolis," "get" instead of "obtain," "have" instead of "possess," and "give" instead of "bequeath.

- In general, use language that a nonlawyer member of your family can understand. Avoid language that would subject you to ridicule if you were to use it in a personal letter.

25. Don't write in law review style. Be practical, not academic. Cryptic citations do not advance the analysis.

26. Be sparing in your use of parentheticals. They disrupt your rhythm and make for hard reading. It is usually better to characterize the case in front of, not behind, the citation.

27. Don't pile on the cases. Pick the one or two most potent authorities and develop them fully and compactly. Adding weaker authorities dilutes rather than strengthens your argument.

28. Don't paraphrase critical language. Tell the reader precisely what the legislature or the court said.

29. Minimize the use of long block quotations.

    - It is rarely necessary to give the reader the entire quotation. You should do the hard work of extracting the key sentences or phrases and weave them into your own text with quotation marks.

    - If you must use a block quotation, tell the reader why she is being asked to wade through it. Otherwise, her eye is likely to skip right over the quotation.

30. Use underscoring or italics conservatively.

    - Typographical emphasis in text is the equivalent of shouting. Use it only where truly necessary to aid comprehension. When you edit your work, take out as much of the underscoring or italics as you can.

    - In quotations, underscoring can sometimes be helpful in drawing the reader's attention to the key language. But ask yourself whether the rest of the quotation is essential. If not, paraphrase it, and draw attention to the important material by making it the only part that is quoted.

31. Avoid computer jargon. "Input" and "interface" have crept into casual discourse. Don't let them infiltrate your legal prose.

32. If you must use technical terms, define them.

33. Avoid unpronounceable acronyms.

    - There are some obvious exceptions: "IRS," "FBI," "FCC," "FOIA," "NAACP."

    - If you need a short handle for "The National Committee for the Protection and Promotion of Free Market Economic Principles," don't use "NCPPFMEP." That is a false economy. Though it takes up less space than the full name, the reader's eye stops at each letter, and the acronym conveys nothing that any normal person can remember. A much better alternative is "the Committee" or "the National Committee" or the "the Free Market Committee." For the "Telecommunications Act of 1996," use "1996 Act" or "Telecom Act," not "TA."

    - Tell the reader what shortened name you will use only when necessary to avoid confusion. There is ordinarily no

need, for example, to say "Federal Communications Commission ('FCC' or 'Commission')." No one will wonder what "FCC" or "Commission" refers to.

34. Use pinpoint citations. Letting the reader know which page to look at not only will save her time but also will inspire confidence in your analysis.

35. Be alert to sexist terminology.

- "He or she" and "his or her" are acceptable alternatives to "he" and "his." "He/she," "his/her," "s/he," and all other similar mutations are out of bounds.

- In some situations, a succession of "he or she" phrases can be cumbersome. Try rewriting the sentence to eliminate the need for a pronoun, or use a plural noun and a plural pronoun. Or try alternating "she" and "he" as I have done here.

- Under no circumstances is it permissible to mix a plural pronoun with a singular noun. Everyone can choose his or her (not their) own solution to the problem, so long as it does no violence to the fundamental rules of grammar.

36. Keep good resources at hand. Read and reread Strunk & White's *The Elements of Style.* For a desktop bible on writing rules, invest in Bryan A. Garner's *A Dictionary of Modern Legal Usage* (2d ed. 1995). For an excellent thesaurus, try Rodale's *Synonym Finder* (Warner Books ed. 1978).

37. Write with flair. Don't be afraid to use colorful, vigorous language. Legal writing doesn't have to be deadly.

Version 1

CAUSE NO. 09CV46548

DON ADAMS, ET. AL *Plaintiffs,*	§	IN THE DISTRICT COURT
VS.	§	HOWARD COUNTY COURT
ALON USA, LP, ET. AL *Defendants.*	§	118TH JUDICIAL DISTRICT

BENCH BRIEF: COLLATERAL ESTOPPEL

ISSUE: Does collateral estoppel apply in this case?

RESPONSE: Collateral estoppel prevents relitigation of particular issues already resolved in prior suit. *Resolution Trust Corp. v. Sunbelt Fed. Sav.*, 837 S.W.2d 627, 628 (Tex. 1992) (citing to *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). Specifically, collateral estoppel precludes relitigation of identical issues of fact or causes of action which were actually litigated and essential to prior judgment. *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714, 721-22 (Tex. 1991) (citing to *Dyke v. Boswell, O'Toole, Davis, & Pickering*, 697 S.W.2d 381, 384 (Tex. 1985)). However, as a general rule, a judgment on the merits in a suit on one cause of action is not conclusive in a subsequent suit in a different action, except as to issues of fact actually litigated and determined in the first suit. *Sunbelt Fed. Sav.*, 837 S.W.2d at 629 (citing to *Griffin v. Holiday Inns of America*, 496 S.W.2d 535, 538 (Tex. 1973)). The policies behind the doctrine reflect the need to bring all litigation to an end, prevent vexatious litigation, maintain stability of court decisions, promote judicial economy, and prevent double recovery. *Sunbelt Fed. Sav.*, 837 S.W.2d at 629.

first sentence doesn't give answer; it is unhelpful

same with sentence

by end of para, provides no help information

In order for collateral estoppel to apply, the party bringing forth the motion must establish: 1) the facts sought to be litigated in the first action were fully and fairly litigated in the prior action; 2) those facts were essential to the judgment in the first action; and 3) the parties were east as adversaries in the first action. *Eagles Properties, Ltd.*, 807 S.W.2d at 721 (citing to *Bonniewell*, 663 S.W.2d at 818). "Due process requires that the rule of collateral estoppel operate *only* against persons who have had their day in court either as a party to the prior suit or as a privy, and, where not so, that, at the least, the presently asserted interest was actually and adequately represented in the prior trial." *Eagle Properties, Ltd.*, 807 S.W.2d at 721; *Benson v. Wanda Petroleum Co.* 468 S.W.2d 361, 363 (Tex. 1971) (finding collateral estoppel did not apply to plaintiff bringing forth a separate lawsuit from another plaintiff where both plaintiffs were involved in a three car collision with defendant – plaintiff bringing forth a separate lawsuit

except for this critical third part- which is buried

was emphasis in orig?

Repetitive and introducing 3 fa this way is poor style; doesn't co context or significance

Overall, the reader is just exhausted reading this long, boring, poorly-formed paragraph.

gained during existence of the first trial is imputed to the second client). Moreover, remaining Plaintiffs' interests were not represented by a party in action nor are the remaining Plaintiffs succesors in interest to the trial Plaintiffs.

one of many examples of unnecessary language

To get a better understanding of the last two elements of privity, Plaintiffs point the Court towards the opinion in *Myrick v. Moody Nat'l Bank of Galvston.* 590 S.W.2d 766 (Civ.App. – Houston [14th Dist.] 1979). In *Myrick,* ~~the issues revolved around a prior lawsuit where~~ defendant's former wife brought suit against the trustee, Moody National Bank of Galveston, for garnishment for child support, which was owed by the benificiary, the defendant. *Id.* at 767. The trial court concluded that the trust account could be and was garnishable. *Id.* In a later lawsuit, Defendant attempted to retry the issue of the trust account being open to garnishment of monies owed. *Id.* at 767-68. Defendant ~~stated he~~ was not party to the first lawsuit; thus, collateral estoppel did not apply. *Id.* at 769. The ~~Appellate~~ Court found ~~otherwise, stating the beneficiary of~~ the trust was in privity with the trustee, ~~the bank,~~ because his interests ~~are~~ were represented by the trustee. *Id.* at 769. Other relationships which would satisfy the second and third elements are: parents/children, decedents/heirs, insurer/insured, and possibly even employer/employee. In this instance, privity does not exist between trial Plaintiffs and the remaining Plaintiffs. In addition, remaining Plaintiffs do not have a propriety or financial interest in the first trial. *Benson,* 468 S.W.2d at 364. Thus, collateral estoppel does not apply to this case.

aarghl no transition; conclusory assertion

A case on point which addresses this issue as a matter of law is *Benson. Benson,* 468 S.W.2d 361. *Benson* is a case that involved a three car collision. *Id.* The defendant was the driver of a tractor and trailer owned by Wanda Petroleum Company, which collided with the plaintiff and a third party. *Id.* at 362. The third party and the plaintiff brought separate suits against the defendant. *Id.* The third party had a trial, and the jury found the defendant to be free of negligence. *Id.* In the suit involving the plaintiff and the defendant, the defendant brought forth the rule of collateral estoppel to estopp the plaintiff's suit because the matter regarding the defendant's negligence was already tried in the prior law suit involving the third party. *Id.* The Texas Supreme Court found that the doctrine of collateral estoppel did not apply because the plaintiff never had her day in court on the critical issues for which her suit was premised upon. *Id.* at 364. She was not a party to the former action. *Id.* She was not in privity with the third party because her rights did not derive from the third party. *Id.* She had no voice (control) in the conduct of the prior suit. *Id.* She had no right to examine the witnesses or to take action to protect her own interests. *Id.* Nor did she have any beneficial interest in the recovery of damages for personal injuries on behalf of the third party. *Id.* As such, collateral estoppal does not apply. That case is exactly like this case.

why not lead with this instead of that crazy discussion of Myrick?

writing is so tilted; and point hat is critical s left for end

The facts in *Benson* regarding the position of the remaining Plaintiffs are identical. *Id.* The remaining Plaintiffs were not parties to the former action; thus, they have yet to have their day in Court. Their rights do not derive from those of the trial Plaintiffs. They had no control in the proceedings or events which took place in the first trial. They did not participate in

CAUSE NO. 09CV46548

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PLAINTIFFS' BENCH BRIEF ON COLLATERAL ESTOPPEL

Issue #1: Does collateral estoppel bar nonparties from relitigating the first jury's determination regarding gross negligence in the trial of *Beverly Smithie, Ronnie Walker and Debra Walker v. Alon USA?*

Answer: Absolutely not. The Texas Supreme Court has consistently held that one who was not a party or in privity with a party in a prior case is never collaterally stopped from relitigating an issue that was determined in the prior case. *See, e.g,. Sysco Food Serv. v. Trapnell*, 890 S.W.2d 796 (Tex. 1994) (observing that for collateral estoppel to apply it is "necessary that the party *against whom* the doctrine is asserted was a party or in privity with a party in the first action") (emphasis in original); *Eagle Properties, Ltd. v. Scharbauer*, 807 S.W.2d 714 (Tex. 1991); *Benson v. Wanda Petroleum Co.*, 468 S.W.2d 361, 363 (Tex. 1971). This is understood to be a basic principle of due process. "Due process requires that the rule of collateral estoppel operate only against persons who have had their day in court either as a party to the prior suit or as a privy. . . ." *Benson*, 468 S.W.2d 361, 363. The U.S. Supreme Court has underlined the point as emphatically: "A person who was not a party to a suit generally has not had a 'full and fair opportunity to litigate' the claims and issues settled in that suit. The application of claim and issue preclusion to nonparties thus runs up against the 'deep-rooted historic tradition that everyone should have his own day in court.'" *Taylor v. Sturgell*, 553, U.S. 880, 892-93 (2008) (internal citations omitted). Simply put, "collateral estoppel cannot be asserted against a party who was not a party or in privity with a party in the prior litigation." *Eagle Properties*, 807 S.W.2d 714, 721-22.

Moreover, this fundamental limitation on issue preclusion law applies in all cases, from the simplest car-wreck suit, *see, e.g., Benson*, 468 S.W.2d 361, to the most complex multi-party litigation. *See, e.g., Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816 (Tex. 1984) (litigation arising out of airplane crash, involving five different actions and multiple parties); *Young v. City of Corpus Christi*, 2006 WL 1360842 (Tex. App.—Corpus Christi, May 18, 2006, no pet.) (mass action against city involving 243 plaintiffs); *Owens Corning Fiberglas Corp. v. Sitz*, 970 S.W.2d

Commented [HL1]: Notice that very first words emphasize the argument to come

Commented [HL2]: A definitive, early answer

Commented [HL3]: Case cite accompanied by paren that describes why case is being cited and includes a key quote from the case

Commented [HL4]: Normally, string cites are overused, but do you see why citing multiple authorities works well here? What does it convey to the reader?

103 (Tex. App.—Eastland 1998, rev. denied) (products liability asbestos exposure). Focusing specifically on the mass tort context, numerous courts and commentators explain that collateral estoppel may only be applied against one who was a party or in privity with a party from the prior suit in which the determination was made. *See, e.g., In re TMI Litigation*, 193 F.3d 613, 724-25 (3d Cir. 1999) ("[T]he District Court's extension of the Trial Plaintiffs' summary judgment decision to the Non-Trial Plaintiffs' claims adversely affected the substantive rights of the Non-Trial Plaintiffs. ... The District Court could not properly extinguish the substantive rights of the 1,990 Non-Trial Plaintiffs merely because all of the cases had been consolidated."); Jack Ratliff, *Offensive Collateral Estoppel and the Option Effect*, 67 TEX. L. REV. 63, 65 (1988) (discussing mass tort litigation and noting that "subsequent plaintiffs are not bound to a finding *against* the first plaintiff. Each subsequent plaintiff has a due process right to a day in court on that question") (emphasis in original); Meiring de Villiers, *Technological Risk and Issue Preclusion: A Legal and Policy Critique*, 9 CORNELL J. L. PUB. POL'Y 523, 543 (2000) ("This privity requirement prevents a defendant who prevailed in an action to collaterally estop a non-party plaintiff. Suppose, for instance, a victim of an automobile accident sues the manufacturer of an automobile alleging a defectively designed gasoline tank. The manufacturer then prevails on the defectiveness issue. This judgment does not preclude a different plaintiff from relitigating the identical issue in a different cause of action.").

There can be no doubt, of course, that as a matter of law the other individual plaintiffs are not in privity with Plaintiffs Beverly Smithie, Ronnie Walker, and Debra Walker. The Texas Supreme Court has underlined time and again that privity connotes those who are so connected with a party to the judgment as to have such an identity of interest that the party to the judgment represented the same legal right. *See, e.g., Amstadt v. U.S. Brass Corp.*, 919, S.W.2d 644, 653 (Tex. 1996). Further, privity is not established by the mere fact that persons may happen to be interested in the same question or in proving the same facts. *Avre v. J.D. Bucky Allshouse, P.C.*, 942 S.W.2d 24, 27 (Tex. App.—Houston [14th Dist.] 1996, writ denied). Instead, parties are only found to be in privity for purposes of collateral estoppel and res judicata when: (1) they control an action even if they are not parties to it; (2) their interests are represented by a party to the action; or (3) they are successors in interest, deriving their claims through a party to the prior action. *HECI Exploration, Co. v. Neel*, 982 S.W.2d 881, 890 (Tex. 1998).

Commented [HL5]: This para anticipates an argument the other side may be making, so it is a clever preemptive approach without looking defensive

Nor can it be argued that the other plaintiffs are in privity with Plaintiffs Beverly Smithie, Ronnie Walker, and Debra Walker because they have the same attorneys. This identical argument has been repeatedly rejected, by state and federal courts in Texas. *See, e.g., Tex. Capital Sec. Mgmt., Inc. v. Sandefer*, 80 S.W.3d 260, 267 (Tex. App.—Texarkana 2002, pet. strkn.); *Pollard v. Cockrell*, 578 F.2d 1002, 1008-09 (5th Cir. 1978). Moreover, as the Fifth Circuit noted in *Pollard*, since privity depends on control, and control of a case fundamentally rests with the *client*, not the *lawyer*, privity can never be established for preclusion purposes based solely on the fact that two parties share a common attorney. *See Pollard*, 578 F.2d 1002, 1009 ("Representation by the same attorneys cannot furnish the requisite alignment of interests in light of the well established ethical rule that, in areas affecting the merits of the cause or substantially affecting the rights of the client, 'the authority to make decisions is exclusively that

Commented [HL6]: ditto

of the client and, if made within the framework of the law, such decisions are binding on his lawyer'. American Bar Association, Code of Professional Responsibility, EC 7-7 (1971)").

Indeed, even when two persons are in virtually the identical factual situation, privity will not be found when none of the formal legal requirements for privity exist. For instance, in *Benson*, there was an automotive collision involving a tractor owned by the defendant. Inside the other car was the driver, his wife and the car's owner. The driver and his wife (the Porters) first brought suit against the tractor owner but lost when the jury found that the tractor owner was not negligent. Thereafter, when the owner of the car (Mrs. Benson) brought suit, the tractor company argued that her claim was collaterally estopped by the jury's finding of no negligence in the first case with the Porters. The Supreme Court fully dismissed the company's argument, underlining that even when the facts are identical, collateral estoppel cannot preclude relitigation of issues against one who was not a party (or in privity with a party) in a prior case:

Commented [HL7]: this sentence introduces the block quote and justifies why it is such a long quote worth reading

> The suit at bar is a separate and distinct action for redress for personal injuries. Mrs. Benson was not a party to the former action instituted by the Porters following her non-suit and they did not represent her in her claims against Wanda, respondent here. It was not shown that Mrs. Benson participated in, or exercised any control over, the trial in the Porter suit, or that she had any right to do so. She was not shown to have any beneficial interest in the recovery of damages for personal injuries on behalf of the Porters. In our view, the requirements of due process compel the conclusion that a privity relationship which will support application of the rules of res judicata does not exist under these circumstances. Accordingly, we hold that the fact findings and judgment in the Porter suit do not bar Mrs. Benson, and that she is entitled to her day in court in prosecuting this action in her own right.

Benson, 468 S.W.2d 361, 364.

In sum, the law is clear: subsequent parties not in privity with any party from a prior case are not collaterally estopped by an issue decided in the prior case when the subsequent parties have not, as the Supreme Court has put it, "had their day in court." *Bonniwell v. Beech Aircraft Corp.*, 663 S.W.2d 816, 818 (Tex. 1984)). Beverly Smithie, Ronnie Walker, and Debra Walker were the only individuals who had their day in Court. No one else has had their claims adjudicated and so no one else is collaterally stopped by the jury's finding regarding gross negligence in the trial of *Plaintiffs Beverly Smithie, Ronnie Walker and Debra Walker v. Alon USA*.

Commented [HL8]: strong clear ending

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RUSSEL WASHINGTON *Plaintiff,* v. LA MARQUE INDEPENDENT SCHOOL DISTRICT, *Defendant.*	§ § § § § § § § § §	Civil Action No. 3:12-cv-00041

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

COMES NOW RUSSEL WASHINGTON, Plaintiff in the above referenced matter, filing Plaintiff's Response to Defendants' Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6)[1] and would respectfully show the Court as follows:

Commented [HL1]: Unnecessary legalese to start
And cookie cutter beginning, squandering opportunity
And repetitive of title of document
And note: we still have no idea what this document is about or what the argument will be

Nature and Stage of Proceedings

This lawsuit arises from the violation of due process given to the Plaintiff Washington ("Plaintiff" and/or "Plaintiff Washington") when Defendant La Marque Independent School District ("Defendant" and/or "Defendant LMISD") terminated Plaintiff's employment as the Chief of Police for the Defendant and Defendant violated the Texas Open Meetings Act ("TOMA") by failing to provide adequate notice to the public of the subject of the possible termination of the Plaintiff.[2]

Commented [HL2]: Is this really necessary to aid reader comprehension?

Commented [HL3]: Too many acronyms is not good. Hard to read.

Commented [HL4]: A good rule: never put anything substantive in a footnote. If it is important enough to say, put it above the line; if not, consider not saying it at all.

[1] This response is co-wrote and co-briefed by Professor Lonny Hoffman of the University of Houston Law Center. Professor Hoffman is a chaired professor and expert in the area of federal civil procedure. Professor Hoffman is a nationally recognized legal expert in all areas relevant to this response.

[2] In Plaintiff's Original Complaint, Plaintiff brought causes of action against La Marque Independent School District ("LMISD") and the La Marque Independent School District Board of Trustees ("LMISDBT"). As Defendant points out in its Motion, Defendants are not separate entities. As such, Plaintiff has corrected this issue in his First

In response to Plaintiff's Original Complaint, Defendant has filed its Motion to Dismiss Pursuant to Federal Rules of Civil Procedure 12(b)(1) and 12(b)(6) ("Motion"). Plaintiff's deadline to respond to Defendant's motion is on April 4, 2012. Oral hearing has not been set at this time pertaining to Defendant's motion.

Commented [HL5]: Why say any of the preceding paragraph?

Statement of the Issues

- Defendant incorrectly claims that Plaintiff has not pled a viable Fourteenth Amendment claim.
- Defendant incorrectly claims that Plaintiff has not pled any of the essential elements of municipal liability to bring forth a viable Fourteenth Amendment claim.
- Defendant incorrectly claims that Plaintiff's pre-termination procedural due process claim is barred by the Parratt/Hudson doctrine.
- Defendant incorrectly claims that since Plaintiff was given a post-termination hearing, that the violation of due process given to the Plaintiff at the pre-termination hearing is not a valid claim.
- Defendant incorrectly claims that Plaintiff does not have a viable procedural due process claim because Plaintiff did not exhaust all administrative appeal procedures available to him.
- Defendant incorrectly claims that Plaintiff has not pled a viable post-termination violation of his procedural due process claim because board member Cynthia Malveaux did not demonstrate actual bias and board member Donna Holcomb's unqualified vote had no affect on the termination of the Plaintiff.
- Defendant incorrectly claims that it provided sufficient notice under TOMA for the meeting where Defendant terminated Plaintiff's when Defendant informed the public that it would only "***consider the recommendation*** to propose the termination of the contract and employment of the LMISD Chief of Police"—not actual termination.

Commented [HL6]: Try to avoid the urge to add emphasis unless absolutely necessary to aid readability (hint: it rarely is)

Commented [HL7]: The instinct of this section is OK (to try to identify multiple issues); but is this really an effective argument technique?

Standard of Review

Commented [HL8]: When offering a section this like, don't just make black letter law summaries that don't advance your argument substantively.

Amended Complaint. *See* Exhibit 8. Thus, in Plaintiff's response to Defendant's Motion, Plaintiff refers to Defendants properly as one entity.

Under Federal Rule of Civil Procedure 8(a)(2), a pleading must contain a "short and plain statement of the claim showing that the pleader is entitled to relief." *Ashcroft v. Iqbal*, 556 U.S. 662, 129 S.Ct. 1937, 1949 (2009) (quoting *Bell Atlantic Corp. v. Twombly*, 550 U.S. 544, 127 S.Ct. 1955 (2007)) (internal quotations omitted). The pleading standard does not require detailed factual allegations, but it demands more than un-adorned accusations. *Iqbal,* 129 S.Ct. at 1949.

To survive a motion to dismiss, a complaint must contain sufficient factual matter, accepted as true, to state a claim to relief that is plausible on its face. *Id.* at 1949. The court is to accept all well-pleaded facts as true when viewing those facts in the light most favorable to the plaintiffs. *Gonzalez v. Kay*, 577 F.3d. 600 (5th Cir. 2009). The claim has facial plausibility when the plaintiff pleads content that allows the court to draw reasonable inference that the defendant is liable for the misconduct that is alleged. *Iqbal,* 129 S.Ct. at 1949. This standard is not a "probability requirement"—the facts in a complaint merely must propose more than a "sheer possibility" that a defendant has acted unlawfully. *Id.* Moreover, the court may not look beyond the pleading in ruling on the motion. *Baker v. Putnal*, 75 F.3d 190 (5th Cir. 1996).

The Supreme Court in *Iqbal* explained that a court must first identify well-pleaded factual allegations because threadbare recitals of elements of a cause of action that are supported by conclusory statements do not suffice. 129 S.Ct. 1937, 1949-50. While legal conclusions can provide a framework of a complaint, they must be supported by factual allegations. *Id.* When well-pleaded facts are contained in a complaint the court ***shall assume*** their veracity and determine the plausibility of an entitlement to relief. *Id.* A well-pleaded complaint may proceed even if it appears "that a recovery is remote and unlikely." *Scheuer v. Rhodes*, 416 U.S. 232, 236, 94 S.Ct. 1827 (1974).

Relevant Facts

Defendant LMISD employed Plaintiff Washington as its Chief of Police under the terms of a two-year written employment contract. Complaint at p.4 ¶ 10; *see* Multi-Year Employment Term Contract, attached hereto as Exhibit 1. During his employment for the Defendant, Plaintiff Washington was wrongfully indicted in September of 2009 for crimes he did not commit. Complaint at p.5 ¶ 11. After the indictment, Plaintiff Washington was placed on administrative leave. Complaint at p.5 ¶ 11.

Commented [HL9]: Must be careful about arguing in a non-argument section of the brief.

In March 2010, Superintendent Burley placed the following item on the agenda for the March 25, 2010 public meeting: "***Consider recommendation*** to propose the termination of the contract and employment of the LMISD Chief of Police." Complaint at p.5 ¶ 12; *see* March 25, 2010 Agenda, attached hereto as Exhibit 2. ***Actual termination was not on the agenda.*** Complaint at p.5 ¶ 12; *see* March 25, 2010 Agenda, attached hereto as Exhibit 2.

At the meeting, Defendant's seven member Board voted four to three to terminate Washington's employment due to the pending indictment even though such action was not on the agenda for the March 25, 2010 meeting. Complaint at pp. 5-6 ¶13, p.7 at n.10. Furthermore, prior to the vote, Plaintiff was not allowed to present his side of the story or introduce contradictory evidence. Complaint at pp. 10-11 ¶ 22. Moreover, two board members, Mrs. Cynthia Bell-Malveaux and Mrs. Donna Holcomb, should have either recused themselves or have not been allowed to vote on the termination of Plaintiff.

Prior to the meeting, Mrs. Malveaux had filed a lawsuit against Plaintiff for defamation. Complaint at p.6 n 7; *see* Cynthia Bell-Malveaux's Original Petition against Russel Washington filed in the 212th Judicial District Court of Galveston County, Cause No. 09 CV 0768, attached hereto as Exhibit 3. Moreover, it was known in the community that Mrs. Malveaux was attempting to get Plaintiff fired and that she was worried that Plaintiff would report a possible

UNITED STATES DISTRICT COURT
SOUTHERN DISTRICT OF TEXAS
GALVESTON DIVISION

RUSSEL WASHINGTON	§	
	§	
Plaintiff,	§	
	§	Civil Action No. 3:12-cv-00041
v.	§	
	§	
LA MARQUE INDEPENDENT SCHOOL DISTRICT,	§	
	§	
	§	
Defendant.	§	

PLAINTIFF'S RESPONSE TO DEFENDANTS' MOTION TO DISMISS PURSUANT TO FEDERAL RULES OF CIVIL PROCEDURE 12(b)(1) AND 12(b)(6)

Right out of the gate, Defendants move to dismiss this case and their argument essentially goes like this: The Court should find that (1) we were unable to provide adequate due process prior to terminating Mr. Washington (their *Parratt/Hudson* argument); or that, in any event, (2) he was provided all the process he was due (their *Gilbert* argument); or, making their final pitch, that (3) our failure to provide adequate procedures both before and after we terminated him is excusable because he didn't appeal to the Texas Education Commissioner before filing suit. It's a sort of three-headed argument that manages to be wrong on the law in three different ways.

Commented [HL1]: A memorable start. Because this is a long response (20 pages in total), it is helpful to have a somewhat more detailed summary at the beginning

Commented [HL2]: A slight jab- meant to wrap up the prior long sentence. Not meant to make argument fully. Just a transition line.

Defendants' first argument undervalues the minimum due process protections that, under *Cleveland Board of Education v. Loudermill*, 470 U.S. 532 (1985), are constitutionally owed to claimants at the pre-termination stage (such as allowing him some opportunity to defend himself before they fired him), protections the state undeniably was able to provide in this case. Defendants' second argument pays no mind to the critical distinction the cases draw between the process that is due when a temporary suspension is contemplated and the even greater process that is owed before a permanent termination is decreed. As to their third and final argument,

deprivation occasioned by the pre-termination hearing on March 25, 2009 truly was not "unauthorized" in the sense that it was not within the officials' delegated authority. It should go without saying that Defendants could have permitted Mr. Washington to testify in his own defense at the pre-termination hearing and to introduce contradictory evidence. It is equally plain that board member Malveaux could have recused herself because of her conflict of interest and/or that the board should have excluded her from the deliberations and voting.

3. Mr. Washington was not provided all the process he was due either at the March pre-termination hearing or the April post-termination appeal hearing.

The second major argument for dismissal Defendants make is that Mr. Washington was, as they put it in their motion, "provided all the process he was due in light of the felony indictment and the prompt post-termination hearing." Motion to Dismiss, at 10. In essence, Defendants are saying: "We didn't need to look at any other facts before we fired him. He was indicted, so he must be guilty. And, we scheduled the post-termination appeal hearing promptly after we fired him, so what's he complaining about?"

A. Defendants miss the basic distinction *Gilbert* draws between temporary suspension and termination.

Defendants rely heavily on *Gilbert v. Homar*, 520 U.S. 924 (1997) in arguing that the mere fact he was indicted meant that the state was free to dispense with providing him adequate procedural due process. Defendants' reliance is misplaced because they fail to attend to the fundamental distinction the Court draws (in *Gilbert* and other cases) between temporary suspension and termination. These cases actually demonstrate that it would be error to dismiss Mr. Washington's procedural due process claims.

In *Gilbert*, a policeman who worked for a university was arrested and charged with a drug felony. He was immediately suspended without pay. Just a couple of days later, the charges

UNITED STATES DISTRICT COURT
MIDDLE DISTRICT OF FLORIDA
TAMPA DIVISION

ZACHARY BELLI, et al.,

Plaintiffs,

v. CASE NO: 8:12-cv-1001-T-23MAP

HEDDEN ENTERPRISES, INC., d/b/a INFINITY TECHNOLOGY SOLUTIONS

Defendant.
_____/

ORDER

On August 3, 2012, the plaintiffs moved (Doc. 22) for leave to submit a motion that exceeds the page limit. The motion states, "The complex factual and legal issues involved[] make it difficult to meet the page limitation of twenty-five [] pages." Two hours later and without leave, the plaintiffs submitted (Doc. 23) a twenty-nine-page motion. Based on the mistaken premise that this FLSA collective action presents atypically complex issues, the motion to exceed the page limit (Doc. 22) is DENIED. The motion for conditional collective status (Doc. 23) is STRICKEN.

A review of the proposed, twenty-nine-page motion's commencement confirms that a modicum of informed editorial revision easily reduces the motion to twenty-five pages without a reduction in substance. Compare this:

~~Plaintiffs, ZACHARY BELLI, BENJAMIN PETERSON, ERIC KINSLEY, and LARRY JOHNSON, (hereinafter referred to as "Plaintiffs"), individually and on behalf of all others similarly situated ("Class members"), by and through the undersigned counsel and pursuant to the Fair Labor Standards Act of 1938, (the "FLSA"), 29 U.S.C. § 216(b) files this motion seeking an order~~ [move] (1) [to] conditionally certify~~ing this case as~~ a collective ~~class~~ action; (2) [to] requir[e]~~ing~~ the Defendant, ~~HIDDEN ENTERPRISES, INC. d/b/a INFINITY TECHNOLOGY SOLUTIONS (hereinafter "Defendant"),~~ to produce ~~and disclose all of the~~ names[,] ~~and last known~~ addresses[,] and telephone numbers of the [each] potential ~~C~~[c]lass ~~M~~[m]embers ~~so that notice may be implemented~~; and (3) [to] authoriz[e]~~ing~~ notice ~~by U.S. First Class mail to all~~ [of this action to each] similarly situated persons employed by Defendant within ~~the past three (3)~~ years[.] ~~to inform them of the pendency of this suit and to inform them of their right to opt-in to this lawsuit. In support of this Motion, Plaintiffs sets forth the following facts and provides this Court with a Memorandum of Law in support of the Motion, and asserts as follows:~~

To this:

> Plaintiffs move (1) to conditionally certify a collective action; (2) to require the Defendant to produce the name, address, and telephone number of each potential class member; and (3) to authorize notice of this action to each similarly situated person employed by Defendant within three years.

Concentrating on the elimination of redundancy, verbosity, and legalism (*see, e.g.*, BRYAN A. GARNER, THE ELEMENTS OF LEGAL STYLE (2d ed. 2002)), the plaintiffs may submit a twenty-five-page motion on or before August 15, 2012.

ORDERED in Tampa, Florida, on August 7, 2012.

STEVEN D. MERRYDAY
UNITED STATES DISTRICT JUDGE

On the Papers

A MICRO-JOURNEY THROUGH A SENTENCE OF HORRORS

GEORGE D. GOPEN

The author is Professor Emeritus of the Practice of Rhetoric at Duke University.

I am going to explore a single sentence. It was written by one of my legal writing students at the Harvard Law School who later produced a book that won the Pulitzer Prize. In other words, he was already a smart and accomplished fellow. He knew what he wanted this sentence to say. If you told him you were having trouble reading it, he could unpack it and repack it in five minutes of discussion, and you would come away understanding his intended meaning. But a sentence is supposed to do all that work without the author being present, and on one reading. Take a look at it.

> Similarly, in *Weaver*, the D.C. Court of Appeals held that the qualifying word "estimate" used in conjunction with the stipulations and conditions that the quantities were "to be used to canvass bids" and "not to be the basis for any payment by the ultimate consumer of the products" and that payments would be made "only for actual quantities of work completed," transformed the contract into a requirements contract.

The underlying structural problem here often oppresses legal readers: The author has separated his grammatical subject ("the qualifying word 'estimate'") from its verb ("transformed") by 47 words. (For a fuller discussion of this problem, see my earlier article in this series, *How to Overburden Your Reader: Separate Your Subject from Your Verb*, LITIGATION, Vol. 39, No. 3 (Summer 2013), at 14.) If we get that subject and its verb together, the rest of the revision process falls easily into place.

The journey through his subject/verb separation, burdensome enough by itself, is rendered almost unendurable by the seemingly harmless presence of two small words: "and" and "that." I have never met anyone who was capable of understanding this sentence on first reading—with the exception of people who already knew so much about this area of the law that they did not need to read it in the first place.

The default value reader expectation: The moment a grammatical subject appears, a reader expects the appropriate verb to follow almost immediately. If it takes some time for that verb to arrive, a substantial part of the reader's interpretive energy will be used to retain the memory of having encountered the subject. Without the subject in mind, the reader will not be able to put the verb to use. I want to explore here, in slow motion and great detail, what happens to a reader during this kind of wait. Please be patient. It is necessarily hard to read why a sentence is hard to read, even if the explanation is itself written clearly.

We begin with the opening word, "Similarly." How do we expect an English sentence will unfold? We expect to find a subject up front, followed immediately by a verb, and then the unfolding of its complement. "Similarly" is not a grammatical subject. But we have experienced initial adverbs many times and know how to store them in mind as we then look for the subject.

But we do not get the subject. Instead, we get "in *Weaver*." Now we *want* our subject. We do not want to encounter the words "a case in which," because we then know it might be the fourth line down before we get the desired subject.

We need not have feared. The next arrival is that longed-for subject, "the D.C. Court of Appeals." Fine. Now we want its verb. We get it: "held." That verb is followed by one of our trouble words, "that." When we see a "that," we know to expect the immediate arrival of yet another subject-verb duo.

And we get subject 2, "the qualifying word 'estimate.'" We are already dealing with "similarly" and "the D.C. Court of Appeals held that." This is already a small handful, but as legal readers, we are used to this kind of verbal chunking. Now

our main need is to meet verb 2 while we still have subject 2 fresh in our mind. Unfortunately, verb 2 is not what we next encounter. Instead we find a qualification of subject 2—"used in conjunction with the stipulations and conditions. . . ." The handful is growing larger.

This new arrival contains a word that causes us just a bit of an extra burden, beyond that of our needing to recognize the words and their meanings. The new arrival is our second trouble word, "and." "And" tells us to be prepared to receive a second element that will talk to, and neatly balance, whatever element appeared just before the "and." Our new task here is an easy one: The "and" connects two single, similar words, "stipulations" and "conditions." We can handle twin words like these well enough; but we are now in a bifurcated sub-unit of a qualifying unit of the main clause. And all this while we are still awaiting the arrival of verb 2.

But now we are confronted by a four-letter word that so often causes major problems—"that." This "that" is "that" 2. "That" is not offensive here by itself, but only by what it promises: the arrival of another subject-verb duo, the third such unit in this sentence. Here is where the reading task becomes seriously challenging. The arrival of subject 3, "the quantities," makes us generate that unique kind of reading energy that we reserve for the arrival of verbs. We need to be able to finish this part of the reading task as soon as possible: Subject —> VERB! The problem is that we are already waiting to experience this kind of closure with the arrival of verb 2. At this moment, therefore, we have to generate the verb energy for verb 3 while somehow continuing to maintain a similar kind of verb energy in expectation of the later arrival of verb 2. That is complicated—and burdensome!

Verb 3—"were"—arrives immediately, thank goodness. The moment after this, we learn those quantities were "to be used to canvass bids"; but we then encounter a most troubling word—"and." We are now in a bifurcated sub-unit of a bifurcated sub-unit of a qualifying unit of the main clause. We need to know as soon as possible what this "and" is connecting. We see the quotation marks just before and just after the "and." Good. We now know that the "and" connects two quoted items.

A new expectation sets in: We want the two units connected by "and" to balance each other neatly—just like "stipulations and conditions" did earlier. When we experience a phrase like "to be used to canvass bids," as readers we weigh it, hoping its length and depth will be counterbalanced by the quoted item that comes after the "and." This phrase has three accented syllables: "to be USED to CANvass BIDS." We therefore prepare for the second quoted item to have three accents, which would make it as easy as possible to handle the two of them as a unified duo.

Unfortunately, this second item is not so easy to handle: "not to be the basis for any payment by the ultimate consumer of the products." The words "not" and "basis" and "payment" use up the quota of three musical beats we were expecting; but three gets extended all the way to six—"NOT to be the BASIS for any PAYment by the ULTimate conSUMer of the PROducts." This makes our balancing act a very difficult one indeed.

The next two words, our silent assassins, defeat us entirely—"and that." The "and" adds yet another sub-level of bifurcation. "That" 3, even worse, leads us to expect subject 4 and verb 4, which arrive on cue—"payments would be made." Whatever verb-reading energy we had managed to conserve for the arrival of verb 2 must now be expended on verb 4. And we are now faced with another, insuperable problem: Does "that" 3 qualify "that" 2, which in turn qualifies "that" 1? Or are 2 and 3 parallel with each other? Or . . . ! We are now using all of our reader energy to figure out the sentence's structure; we have none left with which to contemplate the sentence's substance. We drown.

Yes, the subject-verb separation causes the central problem; but it is the damage done to us by the bifurcating "and" and the subject-verb-expecting "that" repeated multiple times that do us in entirely.

The revision is simplicity itself: Get subject 2 and verb 2 together. It then becomes clear that the three quoted items are the three reasons that support the conclusion: This contract was transformed into a requirements contract.

> Similarly, in *Weaver*, the D.C. Court of Appeals held that the qualifying word "estimate" transformed the contract into a requirements contract because it was used in conjunction with the following stipulations and conditions: (1) that the quantities were "to be used to canvass bids"; (2) that they were "not to be the basis for any payment by the ultimate consumer of the products"; and (3) that payments would be made "only for actual quantities of work completed."

By the way, this is a 77-word revision of the original 68-word sentence. ■

IN THE

COURT OF SPECIAL APPEALS OF MARYLAND

SEPTEMBER TERM, 2013

NO. 2519

ADNAN SYED,

Appellant

v.

STATE OF MARYLAND,

Appellee

APPEAL FROM THE CIRCUIT COURT
FOR BALTIMORE CITY
(Martin P. Welch, Sr., Judge)

BRIEF OF APPELLEE

STATEMENT OF THE CASE

Appellee, the State of Maryland, accepts the Statement of the Case set forth in the brief of Appellant, Adnan Syed.

QUESTIONS PRESENTED

1. Whether the court correctly dismissed Adnan Syed's claim of ineffective assistance of counsel with respect to his attorney's judgment not to pursue an alibi defense dependent on a single potential witness, Asia McClain?

2. Whether the court correctly rejected Syed's claim of ineffective assistance of counsel for declining to act on Syed's alleged request to seek a plea offer from the prosecution?

Comment [A1]: These comments are from Ross Guberman, author of *Point Made: How to Write Like the Nation's Top Advocates* (Oxford 2014). He can be reached at ross@legalwritingpro.com.

STATEMENT OF FACTS

A. The Murder of Hae Min Lee

On January 13, 1999, Adnan Syed strangled to death and buried in a shallow grave his ex-girlfriend, 18-year-old, Hae Min Lee. (T. 2/2/00 at 39-41; T. 2/23/00 at 22-23, 38). Syed and Lee, both students at Woodlawn High School, had broken up and reunited at least twice during the course of their turbulent ten-month relationship, but never before had Lee become involved with someone else. (T. 1/28/00 at 237-40; T. 2/16/00 at 300; State's Exhibit 2). That changed two weeks before the murder, when Lee went on a first date with a new romantic interest, an older co-worker named Donald Cliendinst. (T. 2/1/00 at 72).

The week of the murder, as Lee's affection for Syed visibly flickered, her relationship with Cliendinst at once became sexually intimate and public at school. (*See* T. 1/28/00 at 239; T. 2/1/00 at 88; T. 2/4/00 at 12). That same week, Syed activated a new cell phone, which was instrumental in Lee's murder, and told Jay Wilds — an accessory to the crime enlisted by Syed — that he intended "to kill that bitch" (referring to Lee) because of how she was treating him. (T. 1/28/00 at 185; T. 2/4/00 at 125-26; T. 2/18/00 at 186). On the morning of January 13, Syed lent Wilds his vehicle and his new cell phone and directed him to await his call. (T. 2/4/00 at 125-26). That day at Woodlawn, Syed lured Lee away from the high school campus, falsely claiming he needed a ride to pick up his car. (T. 1/28/00 at 209; T. 1/31/00 at 8). Syed then strangled Lee inside her vehicle and stashed her body in the trunk of the car. (T. 2/2/00 at 39-41; T. 2/4/00 at 131). After the murder, Syed bragged to Wilds that he had killed Lee with his bare hands and that she had tried to apologize to Syed with her last breath. (T. 2/4/00 at 142-43). The two men disposed of Lee's crumpled body in Leakin Park in Baltimore City and abandoned her car near Edmondson Avenue. (T. 2/4/00 at 148-51; T. 1/27/00 at 202).

1. The Verdict of the Jury

On February 25, 2000, Syed was convicted of murder and all related charges at the conclusion of a six-week trial during which the State presented overwhelming evidence of Syed's guilt. (T. 2/25/00 at 133-35). Syed and his celebrated attorney, Christina Gutierrez, received a

Comment [A2]: In just a single opening paragraph, the State effectively recounts the murder and even suggests a possible motive.

Comment [A3]: It's awkward to pair the adverb "visibly" with the "flickered" metaphor. Perhaps "as Lee stopped showing affection toward Syed."

Comment [A4]: Other way around: "became at once sexually intimate and public."

Comment [A5]: Change to "had been." The brief often confuses the simple past and the past perfect, making it harder for the reader to track the story.

Comment [A6]: Good choice of a strong verb.

Comment [A7]: Although it's not a mixed metaphor like "visibly flickered," "falsely claiming" is also awkward, especially because of its legal connotation. Try just "pretending that he needed."

Comment [A8]: Another effective verb choice.

Comment [A9]: This important sentence should have been split in two, with the order of the points reversed to track chronology. Right now, the first three points in this section are in reverse chronological order.

Comment [A10]: Add "had" here.

preview of the prosecution's case when Syed's first trial ended with the judge granting a defense motion for a mistrial. (T. 12/15/99 at 255). Emboldened after speaking with jurors following the mistrial, the defense was confident in its case and eager for trial. (T. 1/10/00 at 33).

At the second trial, as set forth in greater detail below, the State's case included, *inter alia*, the testimony of Wilds who helped Syed bury the victim and later led police to the victim's car (T. 2/4/00 at 115-64); witnesses who spoke of Syed's possessive behavior toward Lee, his ploy to get a ride from Lee after school on the day she disappeared, and his presence with Wilds that afternoon and evening (T. 2/17/00 at 136-37; T. 1/28/00 at 209; T. 1/31/00 at 8; T. 2/15/00 at 193; T. 2/16/00 at 209-11); toll records and tower location data corresponding to Syed's cell phone, which corroborated the testimony of Wilds and other witnesses, and placed Syed at Leakin Park that night a short distance from where Lee's corpse was unearthed (*See* T. 2/8/00 & T. 2/9/00); a map page to Leakin Park, ripped from a map book with Syed's palm print on the back cover, both left in Lee's abandoned car (T. 1/31/00 at 58-60; T. 2/1/00 at 24-29); the diary of Hae Min Lee recounting the decline of her relationship with Syed and the bloom of her love for Cliendinst (State's Exhibit 2); a letter seized from Syed's bedroom, written by Lee imploring Syed to respect her wishes and move on, with the ominous words "I'm going to kill" written in a separate script on the back side of the note (T. 1/28/00 at 247-55); as well as Syed's peculiar conduct after the murder and his incongruous statements to police (T. 1/28/00 at 26-29, 149; T. 1/31/00 at 8, 25-27; T. 2/16/00 at 209-13).

The defense mounted a vigorous challenge to the State's case, but in view of the prosecution's evidence, the jury's verdict was unimpeachable.

2. The Evidence at Trial

Hae Min Lee's decomposing body was found on February 9, 1999, nearly four weeks after she vanished from Woodlawn High School. (T. 2/23/00 at 4). On February 12, 1999, an anonymous caller encouraged police to concentrate on Adnan Syed; the caller also gave police the name, high school, and home phone number of a friend of Syed's. (T. 2/24/00 at 58-60). According to the caller, Syed had told this friend that if he (Syed) ever hurt his girlfriend he

Comment [A11]: The "set forth" and the "inter alia" mar what has so far been a compelling narrative line.

Comment [A12]: Add a comma here. "Who" is nonrestrictive, not restrictive. The State makes this mistake throughout the brief.

Comment [A13]: Add a comma here.

Comment [A14]: These facts are compelling, but they lose their force in this sterile and bureaucratic presentation. Bullet points would have helped.

would drive her car into a lake. (*Id.*). Police traced the home number provided by the caller to one of Syed's closest friends, Yasser Ali. According to Syed's cell phone records, Ali received two calls from Syed's cell phone on the night of the murder. (*Id.* at 60; State's Exhibit 34; T. 2/3/00 at 79-83). Although police originally considered other suspects, particularly Alonzo Sellers (the person who came across the body in Leakin Park), the evidence uniformly converged on Syed beginning with the tip provided by the anonymous caller. (*See* State's Exhibit 29; T. 2/1/00 at 71-75; T. 1/31/00 at 10-11; T. 2/24/2000 at 21-26, 58-60, 71-72; T. 2/17/00 at 226-31).

Ensconced in a relationship complicated by culture and custom, Syed and Lee were nevertheless consumed with one another. (T. 2/3/00 at 85-87; T. 1/28/00 at 140-43; T. 2/16/00 at 299, 309). At the same time, to friends and in her diary, Lee described Syed as possessive, jealous, and overprotective. (T. 2/17/00 at 136-37; State's Exhibit 2). When police executed a search warrant at Syed's residence, they found a November 1998 letter from Lee tucked into a textbook, in which Lee sought to reassure Syed that they would both survive a breakup: "Your life is NOT going to end. You'll move on and I'll move on. But, apparently you don't respect me enough to accept my decision . . . I NEVER wanted to end like this, so hostile + cold. Hate me if you will. But you should remember that I could never hate you." (T. 1/27/00 at 184-86; State's Exhibit 38). Syed's apparent answer was scrawled on the back: "I'm going to kill." (State's Exhibit 38).

By December 1998, Lee felt compelled to keep her growing interest in Cliendinst a secret from Syed, concerned he would never forgive her. (State's Exhibit 2). Her anxieties were not without basis. Syed had told a classmate, Deborah Warren, that he was convinced Lee was having a relationship with Cliendinst while she was still involved with him. (T. 2/16/00 at 301-03). Syed was reassured by Warren at the time, but by the week of the murder, as Warren testified and Cliendinst confirmed, Lee had spent the night with Cliendinst. (T. 2/16/00 at 304; T. 2/1/00 at 88). And by then teachers and classmates alike knew of the relationship. (T. 1/28/00 at 145, 250; T. 2/4/00 at 12; T. 2/16/00 at 304).

Comment [A15]: "Uniformly converged" is awkward, and "uniformly" is yet another example of an adverb that does more harm then good. Does the State mean "all the evidence led to Syed"?

Comment [A16]: Add a comma here.

Comment [A17]: This phrase is fantastic, and it gives needed context to the State's theory of the case.

Comment [A18]: Change to "each other." "One another" is for three or more.

Comment [A19]: This is a great example of why you rarely want two wind-up phrases before you get to the main event. "To friends and in her diary" makes no sense here, and it would work better after "Syed."

Comment [A20]: The "in which" appears to be modifying the textbook, which makes no sense. (Plus you don't need a comma, because it's restrictive.) Try "they found tucked into a textbook a November 1998 letter from Lee in which she sought."

Comment [A21]: This modifying phrase should have followed "Lee" and preceded "felt compelled." It makes no sense here. And add "that" after "concerned."

Comment [A22]: This is oddly sterile, even bureaucratic. "Her anxieties were understandable"?

During the trial, the State also proved the steps Syed took in the 24 hours before he killed Lee. On a newly-acquired cell phone, which was activated a day before the murder, Syed called Wilds to determine if he was available the next day. (T. 2/4/00 at 119; State's Exhibit 34). That same evening, after talking with Wilds, Syed attempted to call Hae Min Lee three times just before and after midnight. (State's Exhibit 34). During the third call, Syed gave Lee his new number, which she scribbled in the margin of her diary on the same page where she wrote "Don" 166 times. (State's Exhibit 2). Opposite this page is Lee's last diary entry, dated January 12, the night before she was killed: "I love you, Don. I think I have found my soul mate. I love you so much." (*Id.*).

Syed's first call the next morning was to Wilds, whom Syed then left school to pick up. (T. 2/4/00 at 121-23; State's Exhibit 34). While driving, Syed told Wilds about how hurt he was by Lee's treatment of him, how mad she made him, and said to Wilds, "I'm going to kill that bitch." (T. 2/4/00 at 125). Wilds — who pled guilty to being an accessory to the murder and agreed to take the stand for the State — testified that Syed left him his cell phone and car, instructing him to be ready to retrieve Syed when he called. (T. 2/4/00 at 125-26).

In addition, Crystal Myers, a mutual friend of Syed and Lee, testified about a conversation she had with Syed at school on the day Lee was killed. Syed told her that Lee was supposed to drive him after school to pick up his car, either from the repair shop or from Syed's brother. (T. 1/28/00 at 209). Syed similarly advised Officer Scott Adcock — who called Syed on January 13 after Lee was reported missing — that he was supposed to get a ride home from Lee, but that he was delayed and assumed Lee had left by the time he was ready. (T. 1/31/00 at 8). Two weeks later, on February 1, Syed retracted these statements when Officer Joseph O'Shea confronted him with what he had said to Officer Adcock. This time, contradicting what Syed had told Myers (*i.e.*, that Lee was going to give him a ride to pick up his car) and what he told Officer Adcock (*i.e.*, that Lee was supposed to give him a ride home), Syed stated that he would not have needed a ride from Lee since he had his own car. (T. 1/31/00 at 27).

Comment [A23]: The State didn't prove the steps Syed took. It proved WHAT steps Syed took.

Comment [A24]: Don't hyphenate phrasal adjectives when the first word ends in –ly.

Comment [A25]: It's more credible in a fact section to use words that the party in question might have used. "Determine" doesn't sound natural here. Try "find out."

Comment [A26]: Try "on which she had written."

Comment [A27]: The list needs parallel structure: Syed told Wilds about X and Y and then said Z.

Comment [A28]: The language here is not credible. "Telling him to be ready to pick Syed up."

Comment [A29]: Cut i.e. in both places — it's superfluous. Better yet, set off the contrasting accounts with dashes.

Sixth Amendment is sacrosanct, and there are no doubt defendants who are deprived of it. Adnan Syed, however, is not among them.

Comment [A203]: A highly effective closing line.

CONCLUSION

For the foregoing reasons, the State respectfully requests that the judgment of the Circuit Court for Baltimore City be affirmed.

Respectfully submitted,

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EIGHT COMMON WRITING MISTAKES IN MOTION PRACTICE

BY ROBERT DUBOSE

LIKE ANY GOOD CLICK-BAIT, THE TITLE PROMISES A LIST. But the goal is more than to list common writing mistakes — such a list easily could exceed 100 mistakes. The goal is to identify the common mistakes in motion practice that most interfere with persuasion.

A strategy for persuading judges

My choice of the mistakes in this list reflects a writing strategy to persuade judges through motion practice. That strategy is: (1) to help the judge understand the heart of the argument quickly, and (2) to convey the heart of the argument by highlighting a few key facts regarding the requested relief. Once the motion or response accomplishes those tasks, it then should include as many details as necessary to prove and support the argument.

This strategy grows out of two observations:

First, judges need to understand the main argument quickly. Most trial judges have limited time. With a docket often exceeding 20 motions per day, few judges have time to read every page of every motion and response. They need only the information necessary to make a ruling. And they need that information quickly.

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Second, judges are most likely to be persuaded by a few key facts. Most rulings on motions turn on a single fact or set of facts that are pivotal to the relief requested. Even when the parties disagree about the law, their dispute usually turns on the facts. To illustrate, consider the most common types of disputes in motion practice:

- *How the legal rule applies to the facts.* For many motions, the parties agree on the governing legal rule; the dispute in applying the rule turns on the facts.

- *Which legal rule applies.* Often each side will point to a competing legal rule, each of which dictates a different result. Although the dispute concerns which rule applies, the judge's decision between rules typically turns on facts. For instance, the judge must decide whether the facts of the case at hand more closely resemble the line of cases that apply one rule or whether they are distinguishable.

- *How the judge should exercise discretion.* The law often gives the judge discretion about how to rule on disputed issues, such as trial continuances and many discovery disputes. In those instances, judges typically decide the dispute based on which result is more just or fair — a decision that rests on facts.

The common mistakes frustrate the judge's needs. They either prevent the judge from understanding the heart of the argument quickly or distract the judge from deciding the issue.

The strategy is not to limit motions to a few facts or legal citations. An effective motion may need extensive support. The strategy is to enable a busy judge to focus on the highlights of the argument, even if the motion includes much more than the highlights.

Mistake 1 — Failing to start with an impactful summary

Too many motions and responses begin with something other than a summary. Some of the worst sections to place at the start of a motion are:

- a detailed procedural history of the case, untethered to the issue in dispute;
- a long introduction of the facts of the case that do not bear on the relief requested in the motion; or
- a long discussion of general legal standards or principles that neglects to apply that law to the argument.

This information wastes time. It delays the judge from understanding the heart of the argument. Although procedural history, facts, or law may be relevant, those details should be incorporated within the framework the argument to help the judge understand how those details support the argument.

After the title of the document, a motion should summarize the argument. When the summary appears first, it orients the judge to everything else that follows. And if the judge has only a few minutes to review the document before the hearing, an impactful summary will give the judge the core of the argument.

The key to an impactful summary is to present the primary argument and the strongest supporting points — usually the few facts most important to the requested relief. Too often, summaries offer only general conclusions. A conclusory summary rarely persuades the judge who lacks the time to read the entire document.

Most good summaries include:

- **The relief requested.** The judge will evaluate the rest of the argument in light of that relief.
- **The most persuasive legal details.** Identify the governing legal rule or rules that support the argument. The most persuasive law is the rule or principle that specifically addresses the point of dispute between the parties, rather than some neutral, general principle.
- **The most persuasive factual details.** Identify one or two pivotal facts most likely to persuade the judge. These should be the facts that persuade the judge to apply the law in your client's favor.

If the judge has time to read only the summary that contains this information, the judge will at least understand the heart of the argument.

A summary should be short, usually half a page. A summary that extends beyond the second page defeats the purpose — to conveying the highlights quickly.

Mistake 2 — Failing to use persuasive argument headings
Unless a motion is very short or makes only one argument, it should include argument headings. Headings serve important purposes:

a—Headings should summarize an argument. They help a judge by summarizing the section of argument that follows in one persuasive sentence. A judge should be able to read just the headings of a motion and understand all of the main points.

b—Headings help judges locate an argument. Frequent, concise headings help the judge find a particular argument.

c—Headings help judges structure their processing of details. By focusing the judge on the outline of the main steps in the argument, headings help a judge process how the details support those main steps.

d—Headings signal a new argument. Headings help a judge's brain switch gears because they signal a new argument. They prevent the judge from missing it.

Argument headings should be persuasive. Neutral headings do not persuade (e.g., "Summary judgment standard"). Each heading should be a complete sentence that summarizes the argument of the section (e.g., "ShopCo has not met its summary-judgment burden because it has failed to prove each element of its waiver defense").

Mistake 3 — Failing to connect the dots of the argument
Too often, advocates skip steps in the logic of the argument. The advocate may assume a step in the logic and expect the judge will make the same assumption. But judges do not necessarily make the same assumption — even if the assumption is logical.

For instance, summary judgment motions and responses frequently recite the standard for summary judgment: "The party moving for traditional summary judgment has the burden to submit sufficient evidence that establishes that there is no genuine issue as to any material fact and that it is entitled to judgment as a matter of law." Standing alone, that standard does little to persuade or help the judge. The best way to persuade the judge is to explain how the evidence meets or fails to meet that standard.

A persuasive motion or response should connect the dots. It should lay out all steps in the reasoning of the argument.

Mistake 4 — Misusing passive voice and nominalization
This mistake is not *using* passive voice, but *misusing* it. Too often, advocates misuse passive voice in a way that obscures and weakens the argument.

A grammar refresher: there are two ways to help identify passive voice. First, the subject of the sentence always receives the action (e.g., "Mary was fired."). Second, the verb in the passive voice contains at least two words (e.g., "was fired"). Passive voice is the opposite of the active voice, where the subject of the sentence performs the action (e.g., "ShopCo fired Mary").

Passive voice can obscure or weaken an argument in several ways:

- It can obscure the actor's identity when the reader needs to know who the actor is. The sentence "Mary was fired" does not identify who did the firing.
- It fails to assign responsibility. The sentence "Mistakes were made" does not assign any responsibility to the person who made them. Yet legal writing is often about assigning responsibility (e.g., who caused the accident, who has the burden of proof, who must satisfy the conditions).
- It weakens the action. It adds a word to the verb. And because it separates the actor from the action, it lessens the action.

Passive voice can be a useful tool when used properly, such as when:

- The actor is unknown (e.g., "First Savings was robbed").
- The actor is unimportant (e.g., "The original hearing date was cancelled").
- The focus of the sentence is something other than the actor (e.g., in an argument about the requirements to prove reckless driving, "Reckless driving cannot be proved by a ticket for failure to carry insurance").
- The sentence contains multiple subjects, which make the subject confusing without passive voice (e.g., "Expert testimony cannot be supported by unproven assumptions, untested theories, or a failure to exclude other causes").

Be aware of passive voice. Avoid it unless it serves a useful purpose.

Mistake 5 — Using intensifiers

Intensifiers are adverbs or adverbial phrases that emphasize other words, usually ending in -ly and almost always ending in -y. Examples include absolutely, clearly, certainly, highly, extremely, obviously, and very.

Paradoxically, intensifiers do not make an argument stronger or more emphatic. They sound like shouting. Worse, they often suggest the advocate is attempting to overcome a step in the argument that the advocate cannot prove (e.g., "ShopCo's conduct clearly reflects fraudulent intent").

Avoid intensifiers. When you have the urge to use one, ask whether the reason is to compensate for a weakness or assumption in the argument. That question can help you identify and fix the problem.

Mistake 6 — Disparaging opposing counsel

Judges are distracted and often offended by language that disparages opposing counsel. Advocates most commonly disparage, not by explicit name-calling, but by describing opposing counsel's intent.

One common disparagement uses an adjective to characterize the opposition's argument. Words like "disingenuous" and "blatant" essentially accuse opposing counsel of deceiving the court (e.g., "ShopCo's blatant misinterpretation of the contract is disingenuous"). These adjectives go beyond describing the argument and impliedly accuse the opponent of ill intent. A more persuasive argument focuses not on the opponent's intent but with the problems with its argument (e.g., "The words the parties used in their contract contradict ShopCo's interpretation").

Another common disparagement makes assertions about opposing counsel's motive or strategy (e.g., "Seeking to distract from its egregious conduct, ShopCo attempts to deflect the blame on its independent contractor"). Focus on the argument itself, not the opponent's motives or strategy.

Disparagement often backfires, causing the disparager to lose more credibility than the opposing counsel being disparaged. This is because most judges see disparagements as unprofessional. *See* The Texas Lawyer's Creed—A Mandate for Professionalism, reprinted in TEXAS RULES OF COURT 865, 865 (West 2012) (instructing lawyers to not make 'disparaging personal remarks' about opposing counsel").

Disparagement also distracts from real persuasion. The best

argument highlights the pivotal facts on which the legal rule turns — not opposing counsel's intent or strategy.

Mistake 7 — Misusing block quotations

Quotations of evidence or authority are one of the most important tools of motion practice. By showing the exact words that a court, witness, or document used, a quotation helps verify that the law or evidence supports an argument. When a motion fails to quote the controlling statute or rule, for instance, the judge may become suspicious that the authority does not stand for the stated argument.

But beware of lengthy quotations. Block quotations — especially when longer than four or five lines — often cause the judge to skim or skip over the quote entirely. Thus, when an advocate uses a long block quotation to make a point, it can cause the judge to overlook the point altogether.

Block quotations often are a symptom of lazy legal writing. Rather, than connecting the dots of the argument, many advocates simply cut and paste a block quotations to make their point. The block quotation should never be a substitute for reasoned argument. The most important points of a motion or response should appear in the main body of the argument and never only in the block quote.

Although overused, block quotations may be helpful, even necessary in some situations — such as in a dispute about a lengthy provision in a statute or a contract. Most judges want to see all relevant parts of the disputed provision, rather than just reading an advocate's paraphrase of the provision.

When long quotations are necessary, it helps to introduce them by first giving the judge context — especially by explaining the main point of the quotation and how it supports the argument. Consider a block quote as backup support that some judges may want to read, but that other judges may skip.

Mistake 8 — Misusing typographical emphasis

In oral hearings, the judge is rarely persuaded by an advocate who yells. Effective oral advocacy requires modulation of volume, remaining always within a respectful range.

The same is true of written advocacy. The typographical equivalents of yelling are the misuse of ALL CAPS, First-Word Capitalization, underlining, *italics*, and **bold** — ***OR WORSE SOME COMBINATION OF THESE***, especially when used for emphasis. Aggressive typography is not persuasive argument. Persuasive argument concisely points to the factual, legal, or logical problems with the other side's analysis. Aggressive typography distracts from that analysis.

Not all typographical emphasis amounts to yelling. In a few situations these tools can enhance, rather than distract from, an argument.

- **Capitalization** is the standard tool for concise section titles, such as "FACTS," or "ARGUMENT." But avoid using capitalization in argument text or even sentence-length headings. Both all caps and first-word capitalization make a sentence more difficult to read. Thus, their effect is often the opposite of what the advocate intended.

- **Bold text** is useful for headings. It sets headings apart from the rest of the text, which allows the judge to find them more quickly.

- **Italicized or bold text** also can be useful for occasional, brief emphasis. For instance, readers are more likely to place emphasis on words or phrases at the end of a sentence. It rarely helps to italicize or bold words at the end of the sentence because the reader naturally places emphasis there. In contrast, readers place *the least emphasis* on words in the middle of a sentence. If it is impossible to move words to the end of the sentence for emphasis, bold or italics can help direct attention to words in the middle. But because overuse of typographical emphasis is distracting, use it sparingly.

Avoid these mistakes. More importantly, keep in mind the persuasive strategy they reflect. A motion or response should persuade a busy judge by conveying the heart of the argument clearly, without distraction, as quickly as possible.

Robert Dubose is a partner in the appellate boutique Alexander Dubose & Jefferson, LLP ★

FRAMING ISSUES FOR THE TRIAL COURT

BY CHAD BARUCH

Do I understand your question, man . . . .

Bob Dylan, *Shelter from the Storm*, on
At Budokan (Columbia Records 1979)

MOST LAWYERS UNDERSTAND THE IMPORTANCE of framing issues on appeal. But too often, these same lawyers overlook the importance of doing the same thing for the trial judge. While the way we frame issues in trial and appellate courts may differ, doing so remains vitally important at both levels of the judiciary. Particularly in the trial court, a strong issue statement serves as an arrow pointing the judge in your client's direction.

A story from Senior United States District Judge Bruce Jenkins illustrates the importance of framing issues properly. It involves two priests who were arguing over the propriety of smoking and praying simultaneously. They agreed to let the bishop decide the question. The priest who opposed the practice asked the bishop: "Is it proper to smoke while praying?" The bishop's obvious answer was: "No." The second priest went to the bishop and asked: "Is it proper to pray while smoking?" The bishop's equally obvious answer was: "It is fine to pray at any time."[1] The same question, framed two different ways, yields very different results.

How each party frames that issue may go a long way toward deciding who prevails on it.

This article discusses when and how to frame issues for trial judges. It also provides examples of how to do so.

What Pleadings Should Have Issue Statements? Pretty much all of them that aren't unopposed! When opposing parties present a contested matter to the trial court—whether in the form of a continuance motion, a motion to compel discovery, or a dispositive motion—they present some issue for judicial decision. How each party frames that issue may go a long way toward deciding who prevails on it. So, put some time into how you frame the issue for the trial judge.

Where Should Issues be Framed for the Trial Court? Appellate rules generally require a statement of the issues. For example, the United States Supreme Court requires that the "question presented" be stated on the first page of the brief. But in the trial court—with no requirement for a statement of issues—it makes more sense to frame the issue in an introduction to the pleading. This enables you to frame the issue—to point the court in your client's direction—right from the start.

What Are the Issues? Determining how to present the central issue in a dispute usually involves answering three questions. First, what is the dispute—at its core—really about? Second, why should your client win it? And, finally, what must the court do to effectuate that result? If you can answer each of these questions in a sentence or two, you are well on your way to framing the issue successfully for the trial judge.

What Are My Style Choices When It Comes to Framing Issues? One method of framing the issue—whether in a single, stand-alone sentence or in a sentence at the end of a longer deep-issue statement—is to use what sometimes is known as the "Under-Does-When" approach:

> Under [controlling law], does [legal question],
> when [legally significant facts]?

Of course, we all know the old-school way of stating the issues: a painfully long, often convoluted sentence starting with the word *whether*. The usual approach under this method is:

> Whether [legal question], under [controlling law],
> when [legally significant facts].[2]

Bryan Garner effected a sea change in issue-framing with his theory of the "deep issue." According to Garner, the most effective presentation of an issue will—

- consist of separate sentences;
- contain no more than 75 words;
- convey the story of the case;
- end with a question mark;

- appear at the beginning of document; and
- be simple enough for anyone to understand.[3]

It would be difficult to overestimate the influence of Garner's advocacy in this area. Just two decades after he proposed it, Garner's "deep issue" approach now at least stands on equal footing with the traditional "Whether . . . ." method of framing issues—and may well have surpassed it.

So Which Method Should I Choose? Ah, now here is a way to provoke an argument among appellate lawyers! Many lawyers cling fiercely to the old-school method of stating the issue in a single sentence. Others evidence a Javert-like obsession with Garner's deep issue approach. But do you remember what they told us in law school was the right answer to almost any legal question? That's right—*it depends*. Some issues can be summed up in a single sentence. And if you can frame the issue completely and persuasively in one sentence, you should. Remember, though, a superficial issue statement doesn't help anyone. So, for example, this issue won't advance your cause: *Should the court grant summary judgment?* Most cases just don't lend themselves to a single-sentence statement of the issue—especially in the trial court, where the facts may play a more meaningful role.

The bottom line is that every case is different. Don't be afraid to use different approaches in different cases.

How About Some Examples? Sure! Here is an example of the introduction to a response to a motion for leave to join an additional party:

> ABC Developer filed this lawsuit seeking specific performance of Smith's contract for the purchase of a condominium unit. Smith now seeks leave to join the construction lender on the project as a necessary party. But can a lender that is not a party to the purchase contract possibly be a necessary party in a suit to enforce it?

Here is the introduction to a response to a motion to compel discovery:

> Texas law casts a skeptical eye on requests for production of personal income tax returns—even for *in camera* review. Here, Johnny Morris alleges that Edgar Mercurdo caused two corporate entities to transfer funds and assets to other entities to avoid paying Morris his share of purported profits. Morris seeks Mercurdo's personal tax returns to support this claim. But Mercurdo has produced all of the entities' financial records—including general ledgers and tax returns—going back a decade. Is Morris entitled to Mercurdo's personal tax returns when all information about the entities' transfers is available from the records already produced?

Here is the introduction from a motion to compel arbitration:

> In determining whether an arbitration agreement is substantively unconscionable, circumstances matter. An arbitration may be substantively unconscionable in an adhesion contract between a credit card company and consumer, but not in a contract negotiated between Apple and Microsoft. Here, eschewing any effort to prove the circumstances surrounding his agreement to this arbitration provision, Jones says it must be unconscionable simply because it isn't mutual. But does non-mutuality—standing alone and without any reference to surrounding circumstances—necessarily render an arbitration agreement substantively unconscionable?

Here are examples of introductions to introductions to other motions and responses, including dispositive motions:

> Jane Doe sued ABC Corporation for gender discrimination under Title VII. ABC seeks summary judgment based exclusively on after-acquired evidence. But does federal law permit a gender discrimination claim to be decided based on after-acquired evidence?

> The attorney-immunity doctrine prevents a party from suing the opposing lawyer for conduct undertaken as part of the attorney-client representation. Yet that is just what XYZ Company seeks to do here. XYZ sues not only its former litigation adversary but its adversary's lawyers too. XYZ says it can sue the lawyers because they committed fraud on their client's behalf. But even XYZ admits that all acts by the lawyers occurred as part of representing their client. Are XYZ's claims based on the lawyers' alleged fraudulent acts barred by the Texas Supreme Court's recent decision rejecting the so-called "fraud exception" to attorney immunity?

> This lawsuit alleges losses to three financial

> institutions by Smith's legal malpractice in failing to discover conflicts, implement procedures to assure compliance with ethical standards, train and educate lawyers working on financial institution matters in their ethical and professional duties, and assure that those lawyers were adequately supervised. Are these activities "professional services for others" within the meaning of the insuring agreement so that the insurance company has a duty to defend the underlying lawsuits against Smith?
>
> The jury convicted John Doe of illegal entry after deportation. The government asks this Court to assess criminal history points for Doe's previous conviction for money laundering. But Doe entered his guilty plea in that case without the benefit of counsel or a valid waiver of rights. Given Doe's uncontroverted testimony of the lack of waiver or counsel—and the absence of any record from the underlying case to contradict it—would assessing these points violate the sentencing guidelines?

Finally, here are two introductions to decisions by the United States Supreme Court using an approach similar to Garner's recommendation. I think both of them do a nice job of framing the issue for the reader:

> Petitioner is a boy who was beaten and permanently injured by his father, with whom he lived. Respondents are social workers and other local officials who received complaints that petitioner was being abused by his father and had reason to believe that was the case, but nonetheless did not act to remove petitioner from his father's custody. Petitioner sues respondents claiming that their failure to act deprived him of his liberty in violation of the Due Process Clause of the Fourteenth Amendment to the United States Constitution. We hold that it did not. DeShaney v. Winnebago Cnty. Dep't of Soc. Servcs., 489 U.S. 189, 191 (1989).
>
> After publicly burning an American flag as a means of political protest, Gregory Lee Johnson was convicted of desecrating a flag in violation of Texas law. This case presents the question whether his conviction is consistent with the First Amendment. We hold that it is not. Texas v. Johnson, 491 U.S. 397, 399 (1989).

Conclusion: Framing the Issues. No matter which method you choose for framing the issue, the most important thing is to do so crisply, cleanly, and persuasively—which means providing the trial judge with the context necessary to understand how your case presents the legal issue to be decided. Happy drafting!

Chad Baruch is a board-certified appellate attorney at Johnston Tobey Baruch in Dallas. ★

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[1] G Fred Metos, *Drafting Effective Statements of Issues*, Champion (Mar, 22, 1998) at 49.

[2] Clay Greenberg & Matthew Weingast, *Persuasive Issue Statements*, The Writing Center, Georgetown Un versity Law Center (2015), *available at*: https://www.law.georgetown.edu/wp-content/uploads/2018/07/Geenberg-Weingast-Issue-Statement.pdf.

[3] Bryan A. Garner, *The Deep Issue: A New Approach to Framing Legal Questions*, 5 Scribes J. Legal Writing 1, 1 (1994–1995).

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25 Ways to Write Like John Roberts

BY ROSS GUBERMAN (HTTPS://WWW.LEGALWRITINGPRO.COM/BLOG/AUTHOR/ROSSGUBERMAN/) · DECEMBER 3, 2017

In the market for New Year's writing resolutions?

Consider Chief Justice Roberts's 2017 opinion in *Buck v. Davis* (https://www.law.cornell.edu/supremecourt/text/15-8049#writing-15-8049_OPINION_3) as a source.

Starting in January, Brief Catch (http://www.briefcatch.com/) will help you make all these edits and many more. Until then, here are 25 ways to write more like the Chief.

1. Replace full dates with phrases.

> *Two months later, Buck returned to federal court . . .*
>
> *Within days, the Texas Attorney General, John Cornyn, issued a public statement . . .*
>
> *By the close of 2002, the Attorney General had confessed error . . .*
>
> *In 2006, a Federal District Court relied on that failure . . .*

2. Include the occasional metaphor or other figure of speech.

> *[T]he impact of that evidence cannot be measured simply by how much air time it received at trial or how many pages it occupies in the record. Some toxins can be deadly in small doses.*

3. Include some very short sentences.

> *In June 2000, the Court did so.*
>
> *Not, however, in Buck's.*
>
> *But the converse is not true.*
>
> *These were remarkable steps.*
>
> *But one thing would never change: the color of Buck's skin.*
>
> *And it was potent evidence.*

4. Add interest through the occasional dash, colon, question mark, or semicolon.

> *The statute sets forth a two-step process: an initial determination whether a claim is reasonably debatable, and then—if it is—an appeal in the normal course.*
>
> *And for good reason: At the time Buck filed his § 2254 petition . . .*
>
> *Would he do so again?*
>
> *The question for the Court of Appeals was not whether Buck had shown that his case is extraordinary; it was whether jurists of reason could debate that issue.*

5. Add interesting and varied transitions.

> *It follows that the Fifth Circuit erred in denying Buck . . .*
>
> *But then again, these were—as the State itself put it at oral argument here—"extraordinary" cases.*
>
> *Dr. Quijano's report said, in effect, that the color of Buck's skin made him more deserving of execution.*
>
> *The Fifth Circuit, for its part, failed even to mention . . .*
>
> *To be sure, the State has repeatedly . . .*
>
> *True, the jury was asked to decide two issues . . .*
>
> *Indeed, in one recent case . . .*
>
> *Of course, when a court of appeals properly applies . . .*
>
> *To that end, the court observed that a change in decisional law . . .*

6. Use parallelism and repetition for effect.

> *Our law punishes people for what they do, not who they are.*
>
> *Dr. Quijano's opinion coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing.*

7. Don't fear "that." (https://www.legalwritingpro.com/articles/stop-cutting-that/)

> *The first, Dr. Patrick Lawrence, observed that Buck had . . .*
>
> *From this he concluded that Buck "did not present any problems in the prison setting."*
>
> *We have held that a litigant seeking . . .*
>
> *Buck contends that his attorney's introduction . . .*

8. Change "regarding" and "with respect to" to "on" or "about."

> *Buck's attorney called a psychologist, Dr. Walter Quijano, to offer his opinion on that issue.*
>
> *[T]he prosecution's questions about race and violence on cross-examination . . .*
>
> *A defense lawyer navigating a criminal proceeding faces any number of choices about how best to make a client's case.*

9. Change "further" to "also."

> *Buck also argued that the State's decision to treat him differently from the other defendants . . .*
>
> *The court also dismissed the contention that the nature of Dr. Quijano's testimony argued for reopening the case.*

10. Change "despite the fact that" to "although."

> *Although we may reach the issue in our discretion . . .*
>
> *Although the State attempts to justify its decision to treat Buck differently from . . .*

11. Change "Moreover" and "Additionally" at the beginning of a sentence to "And."

> *And the court had already concluded that . . .*
>
> *And in this case, the State's interest in finality deserves little weight.*

12. Change "due to the fact that" to "because."

> *Because Buck had . . .*
>
> *Because Buck's petition . . .*

13. Change "However" at the beginning of a sentence to "But" or "Yet."

> *But he also stated that one of the factors . . .*
>
> *But the question for the Fifth Circuit was not whether . . .*
>
> *But our holding on prejudice makes clear that . . .*

14. Change "is unable to" or "lacks the capacity to" to "cannot."

> *Buck cannot obtain relief unless he is entitled to the benefit of this rule . . .*

15. Change "in the event [that]" to "if."

> *If the jury did not impose a death sentence . . .*
>
> *[B]oth parties litigated this matter on the assumption that Martinez and Trevino would apply if Buck reopened his case.*

16. Change "where" for conditions to "if" or "when."

> *We held that when a state formally limits the adjudication of claims of ineffective assistance of trial counsel to collateral review . . .*
>
> *When a defendant's own lawyer puts in the offending evidence . . .*

17. Change "similar to" to "like."

Like Dr. Lawrence, Dr. Quijano thought it significant that . . .

[H]is case would be treated like Saldano's . . .

18. Change "is required to" to "had to" or "must."

> *Given that the jury had to make a finding of future dangerousness before . . .*
>
> *To satisfy Strickland, a litigant must also demonstrate prejudice.*

19. Change "upon" to "on."

> *Based on these considerations, Dr. Lawrence determined that . . .*
>
> *In 2006, a Federal District Court relied on that failure . . .*

20. Change "demonstrates" to "shows."

> *A defendant who claims to have been denied effective assistance must show both that counsel . . .*
>
> *[T]he prisoner has failed to show that his claim is meritorious.*

21. Change "such" to "that."

> *Texas confessed error on that ground, and this Court vacated the judgment below.*

22. Change "subsequently" to "later" or "then."

> *. . . and then had confessed error in the other cases . . .*
>
> *His case then entered a labyrinth of state and federal collateral review . . .*
>
> *An officer would later testify that Buck was laughing at the scene.*

23. Change "in order to" to "to."

> *To satisfy Strickland . . .*

24. Change "pursuant to" to "under."

> *The court noted that underStrickland, Buck . . .*
>
> *Under state law, the jury could impose a death sentence only if . . .*

25. Change "whether or not" to "whether."

> *[T]he only question is whether the applicant has shown that . . .*
>
> *In determining whether Buck was likely to pose a danger in the future . . .*

Want help making edits like these efficiently and effectively? Sign up (http://www.briefcatch.com/) to become an early adopter of Brief Catch (http://www.briefcatch.com/). Launching in January 2018!

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Judges Speak Out Behind Closed Doors: How Your Briefs Might Bug Them, and How You Can Make Them Smile Instead (https://www.legalwritingpro.com/blog/judges-speak-out/)

SUPREME COURT OF THE UNITED STATES

No. 04–1477

GARY KENT JONES, PETITIONER *v.* LINDA K. FLOWERS ET AL.

ON WRIT OF CERTIORARI TO THE SUPREME COURT OF ARKANSAS

[April 26, 2006]

CHIEF JUSTICE ROBERTS delivered the opinion of the Court.

Before a State may take property and sell it for unpaid taxes, the Due Process Clause of the Fourteenth Amendment requires the government to provide the owner "notice and opportunity for hearing appropriate to the nature of the case." *Mullane* v. *Central Hanover Bank & Trust Co.*, 339 U. S. 306, 313 (1950). We granted certiorari to determine whether, when notice of a tax sale is mailed to the owner and returned undelivered, the government must take additional reasonable steps to provide notice before taking the owner's property.

I

In 1967, petitioner Gary Jones purchased a house at 717 North Bryan Street in Little Rock, Arkansas. He lived in the house with his wife until they separated in 1993. Jones then moved into an apartment in Little Rock, and his wife continued to live in the North Bryan Street house. Jones paid his mortgage each month for 30 years, and the mortgage company paid Jones' property taxes. After Jones paid off his mortgage in 1997, the property taxes

went unpaid, and the property was certified as delinquent.

In April 2000, respondent Mark Wilcox, the Commissioner of State Lands (Commissioner), attempted to notify Jones of his tax delinquency, and his right to redeem the property, by mailing a certified letter to Jones at the North Bryan Street address. See Ark. Code Ann. §26–37–301 (1997). The packet of information stated that unless Jones redeemed the property, it would be subject to public sale two years later on April 17, 2002. See *ibid.* Nobody was home to sign for the letter, and nobody appeared at the post office to retrieve the letter within the next 15 days. The post office returned the unopened packet to the Commissioner marked "'unclaimed.'" Pet. for Cert. 3.

#1 Dates

Two years later, and just a few weeks before the public sale, the Commissioner published a notice of public sale in the Arkansas Democrat Gazette. No bids were submitted, which permitted the State to negotiate a private sale of the property. See §26–37–202(b). Several months later, respondent Linda Flowers submitted a purchase offer. The Commissioner mailed another certified letter to Jones at the North Bryan Street address, attempting to notify him that his house would be sold to Flowers if he did not pay his taxes. Like the first letter, the second was also returned to the Commissioner marked "unclaimed." *Ibid.* Flowers purchased the house, which the parties stipulated in the trial court had a fair market value of $80,000, for $21,042.15. Record 224. Immediately after the 30-day period for postsale redemption passed, see §26–37–202(e), Flowers had an unlawful detainer notice delivered to the property. The notice was served on Jones' daughter, who contacted Jones and notified him of the tax sale. *Id.*, at 11 (Exh. B).

Jones filed a lawsuit in Arkansas state court against the Commissioner and Flowers, alleging that the Commissioner's failure to provide notice of the tax sale and of Jones' right to redeem resulted in the taking of his prop-

In *Mullane*, we stated that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it," 339 U. S., at 315, and that assessing the adequacy of a particular form of notice requires balancing the "interest of the State" against "the individual interest sought to be protected by the Fourteenth Amendment," *id.*, at 314. Our leading cases on notice have evaluated the adequacy of notice given to beneficiaries of a common trust fund, *Mullane*, *supra;* a mortgagee, *Mennonite*, 462 U. S. 791; owners of seized cash and automobiles, *Dusenbery*, 534 U. S. 161; *Robinson* v. *Hanrahan*, 409 U. S. 38 (1972) *(per curiam);* creditors of an estate, *Tulsa Professional*, 485 U. S. 478; and tenants living in public housing, *Greene* v. *Lindsey*, 456 U. S. 444 (1982). In this case, we evaluate the adequacy of notice prior to the State extinguishing a property owner's interest in a home.

We do not think that a person who actually desired to inform a real property owner of an impending tax sale of a house he owns would do nothing when a certified letter sent to the owner is returned unclaimed. If the Commissioner prepared a stack of letters to mail to delinquent

---

service cannot be accomplished or certified mail is returned, see Fla. Stat. §197.522(2)(a) (2003); Minn. Stat. §281.23(6) (2004); S. C. Code Ann. §12–51–40(c) (Supp. 2005). And a few States require a diligent inquiry to find a property owner's correct address when mailed notice is returned. See Miss. Code Ann. §27–43–3 (2002); Nev. Rev. Stat. §361.595(3)(b) (2003); Pa. Stat. Ann., Tit. 72, §5860.607a (Purdon 1990); R. I. Gen. Laws §44–9–25.1 (2005).

See also 26 U. S. C. §6335(a) (requiring the Internal Revenue Service to make a reasonable attempt to personally serve notice on a delinquent taxpayer before relying upon notice by certified mail); 28 U. S. C. §3203(g)(1)(A)(i)(IV) (requiring written notice to tenants of real property subject to sale under the Federal Debt Collection Practices Act); 12 U. S. C. §3758(2)(A)(iii) (requiring written notice to occupants before foreclosure by the Secretary of Housing and Urban Development); §3758(2)(B)(ii) (requiring that notice be posted on the property if occupants are unknown).

taxpayers, handed them to the postman, and then watched as the departing postman accidentally dropped the letters down a storm drain, one would certainly expect the Commissioner's office to prepare a new stack of letters and send them again. No one "desirous of actually informing" the owners would simply shrug his shoulders as the letters disappeared and say "I tried." Failure to follow up would be unreasonable, despite the fact that the letters were reasonably calculated to reach their intended recipients when delivered to the postman.

By the same token, when a letter is returned by the post office, the sender will ordinarily attempt to resend it, if it is practicable to do so. See *Small* v. *United States*, 136 F. 3d 1334, 1337 (CADC 1998). This is especially true when, as here, the subject matter of the letter concerns such an important and irreversible prospect as the loss of a house. Although the State may have made a reasonable calculation of how to reach Jones, it had good reason to suspect when the notice was returned that Jones was "no better off than if the notice had never been sent." *Malone*, *supra*, at 37. Deciding to take no further action is not what someone "desirous of actually informing" Jones would do; such a person would take further reasonable steps if any were available.

In prior cases, we have required the government to consider unique information about an intended recipient regardless of whether a statutory scheme is reasonably calculated to provide notice in the ordinary case. In *Robinson* v. *Hanrahan*, we held that notice of forfeiture proceedings sent to a vehicle owner's home address was inadequate when the State knew that the property owner was in prison. 409 U. S., at 40. In *Covey* v. *Town of Somers*, 351 U. S. 141 (1956), we held that notice of foreclosure by mailing, posting, and publication was inadequate when town officials knew that the property owner was incompetent and without a guardian's protection. *Id.*, at

attention." *Ibid.* An occupant, however, is not charged with acting as the owner's agent in all respects, and it is quite a leap from Justice Jackson's examples to conclude that it is an obligation of tenancy to follow up with certified mail of unknown content addressed to the owner. In fact, the State makes it impossible for the occupant to learn why the Commissioner is writing the owner, because an occupant cannot call for a certified letter without first obtaining the owner's signature. For all the occupant knows, the Commissioner of State Lands might write to certain residents about a variety of matters he finds important, such as state parks or highway construction; it would by no means be obvious to an occupant observing a certified mail slip from the Commissioner that the owner is in danger of losing his property. In any event, there is no record evidence that notices of attempted delivery were left at 717 North Bryan Street.

Mr. Jones should have been more diligent with respect to his property, no question. People must pay their taxes, and the government may hold citizens accountable for tax delinquency by taking their property. But before forcing a citizen to satisfy his debt by forfeiting his property, due process requires the government to provide adequate notice of the impending taking. U. S. Const., Amdt. 14; *Mennonite*, *supra*, at 799.

B

In response to the returned form suggesting that Jones had not received notice that he was about to lose his property, the State did—nothing. For the reasons stated, we conclude the State should have taken additional reasonable steps to notify Jones, if practicable to do so. The question remains whether there were any such available steps. While "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt," *Greene,* 456 U. S., at 455, n. 9, if there were no reasonable addi-

him that his attempt at notice had failed.

As for *Mullane*, it directs that "when notice is a person's due . . . [t]he means employed must be such as one desirous of actually informing the absentee might reasonably adopt to accomplish it." 339 U. S., at 315. Mindful of the dissent's concerns, we conclude, at the end of the day, that someone who actually wanted to alert Jones that he was in danger of losing his house would do more when the attempted notice letter was returned unclaimed, and there was more that reasonably could be done.

As noted, "[i]t is not our responsibility to prescribe the form of service that the [government] should adopt." *Greene*, *supra*, at 455, n. 9. In prior cases finding notice inadequate, we have not attempted to redraft the State's notice statute. See, *e.g.*, *Tulsa Professional*, 485 U. S., at 490–491; *Robinson*, 409 U. S., at 40; *Schroeder* v. *City of New York*, 371 U. S. 208, 213–214 (1962); *Walker*, 352 U. S., at 116; *Covey*, 351 U. S., at 146–147. The State can determine how to proceed in response to our conclusion that notice was inadequate here, and the States have taken a variety of approaches to the present question. See n. 2, *supra*. It suffices for present purposes that we are confident that additional reasonable steps were available for Arkansas to employ before taking Jones' property.

* * *

There is no reason to suppose that the State will ever be less than fully zealous in its efforts to secure the tax revenue it needs. The same cannot be said for the State's efforts to ensure that its citizens receive proper notice before the State takes action against them. In this case, the State is exerting extraordinary power against a property owner—taking and selling a house he owns. It is not too much to insist that the State do a bit more to attempt to let him know about it when the notice letter addressed to him is returned unclaimed.

Self-Evaluation Questions for Students in Written Advocacy

Professor Lonny Hoffman

Questions to answer after you finish a draft but before we have talked about it

1. What are its strengths?

2. What are its weaknesses?

3. Did you build in enough time for this project, including all necessary time for re-writing to take into account the feedback others gave you before it was due? If not, how could you better allocate your time in the future?

4. The next time you have a similar project, what will you do differently?

5. What other pre-writing or writing challenges would you like to talk about based on having done this exercise?

Questions to answer after you finish your draft and after we have talked about it

1. Do you understand all the feedback you have received?

2. Do you have a general idea how you will go about using the feedback (either to improve this paper or on your next project)?

3. How was our discussion helpful? How could it have been made more helpful?

Peer Evaluation

I use peer evaluation to help you become a better critic of other people's work. Improving how you give constructive feedback can also help you become more self-aware about your own writing.

Your classmates will receive your evaluation of their work. The Golden Rule certainly bears recollecting as you give feedback, as does the reminder that what matters is the quality, not quantity, of your comments. A single good suggestion is worth more than a page of redlined edits.

Written Advocacy
Children's Rights Case
Assignment: Rewrite Introduction to Plaintiffs' Reply Brief

The questionable arguments that Defendants Governor Rick Perry, Texas Department of Protective Services and Commissioner John Specia (hereinafter referred to as "Defendants") elaborately set forth in their motion opposing class certification rely on gross mischaracterizations of Plaintiffs' claims and misstatements of the law. The governing authorities that must guide this Honorable Court's decision, *M.D. ex re Stukenberg v. Perry*,[1] *Wal-Mart Stores, Inc. v. Dukes*,[2] and *Comcast Corp. v. Behrens*,[3] all make crystal clear, beyond any shadow of a doubt, that the Plaintiffs' minimal burden at the certification stage is to show this Honorable Court that FRCP 23 has been satisfied and their burden is obviously ***not*** to prove the merits of their claims. Plaintiffs readily meet their burden, which is why the Defendants' above-mentioned arguments should be summarily disregarded. Their complaint targets specific "policies and practices" that the courts have previously identified as amenable to being adjudicated on a classwide basis. Defendants' argument must be rejected and a class certified in this case.

[1] 675 F.3d 832 (5th Cir. 2012).
[2] 131 S. Ct 2541 (2011)
[3] 133 S. Ct 1426 (2013).