For Fantastic Sams MSJ Assignment:

Assume that you filed suit for your client on August 27, 2014 (this is the actual day that suit was filed).

When you turn in your first draft, you can assume that the day is January 22, 2016 (which is the actual day that the lawyer for Fantastic Sams filed its motion for summary judgment.). Note that by assuming your MSJ is filed on Jan 22, 2016, you can use the invoices in your course materials as the current amounts owed through that date (that is, through Jan 22, 2016).

Hoffman, Lonny

From: Hoffman, Lonny
Sent: Wednesday, February 14, 2018 3:00 PM
To: C_Law_Class_SP18-HOFFMANL-WRC-Written-Advocacy
Subject: some helpful dates for your Fantastic Sams MSJ project
Attachments: SG Associate Training 2017.pptx

Best to assume that you filed suit for your client on August 27, 2014 (this is the actual day that suit was filed).

And, when you turn in your first draft to me on Friday, best to assume that that day is actually January 22, 2016 (which is the actual day that the lawyer for Fantastic Sams filed its motion for summary judgment.). Note that by assuming your MSJ is filed on Jan 22, 2016, you can use the invoices on CM135-136 as the current amounts owed through that date (that is, through Jan 22, 2016).

One last thing: I meant to send the powerpoint that Alex Kaplan went through with us in class. Here it is (attached)

LH

Professor Lonny Hoffman
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Attorneys for Plaintiff,
Fantastic Sams Salons Corp.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FANTASTIC SAMS SALONS CORP.

Plaintiff,

vs.

FRANK MOASSESFAR and PARVANEH MOASSESFAR,

Defendants.

Case

DECLARATION OF JENNIFER FELDER IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Complaint Filed: August 27, 2014
Trial Date: April 5, 2016

MSJ Date: February 22, 2016
Time: 1:30 p.m.
Courtroom: 8

Judge: Honorable Otis D. Wright, II
312 N. Spring St.,
Los Angeles, CA 90012
Courtroom 8, 2nd Floor

I, Jennifer Felder, declare as follows:

1. I am an Operation and Education Specialist for Plaintiff Fantastic Sams Salons Corp. ("Plaintiff" or "Fantastic Sams"). I have held this position since July 2010. As an Operations employee, I am responsible for, among other things, assisting and supporting Fanstatic Sams Franchisees located in Southern California. I have personal knowledge of each fact stated in this Declaration. If called upon to testify as to the information set forth herein, I could and would do so competently.

2. On July 14, 2014, I went to the Moassesfars' former Fantastic Sams franchise located at 19526 Ventura Blvd, Tarzana, CA.

3. As of July 14, 2014, the Moassesfars were operating a hair salon business at the Tarzana Location. It appeared to me that the Moassesfars had taken no steps whatsoever to de-identify their business from Fantastic Sams or remove any of the Fantastic Sams trademarks or product from the Tarzana Location.

4. Attached to the Folio of Evidence as **Exhibit F** are true and correct copies of pictures I took on July 14, 2014, at Defendants' Tarzana salon, located at 19526 Ventura Blvd. Tarzana, California, after Defendants' Salon License Agreements had been terminated.

5. The Moassesfars operated the salon located at 19526 Ventura Blvd. Tarzana, California until October 15, 2014.

6. On July 14, 2014, I went to the Moassesfars' Fantastic Sams franchise located at 19340 Nordhoff St. Northridge, California.

7. As of July 14, 2014, the Moassesfars were operating a hair salon business at the Northridge Location. It appeared to me that the Moassesfars had taken no steps whatsoever to de-identify their business from Fantastic Sams or remove any of the Fantastic Sams trademarks or product from the Northridge Location.

8. Attached to the Folio of Evidence as **Exhibit G** are true and correct copies of pictures I took on July 14, 2014, at Defendants' Northridge salon, located at 19340 Nordhoff Street Northridge, California, after Defendants' Salon License Agreements had been terminated.

9. The Moassesfars operated the salon located at 19340 Nordhoff St. Northridge, California until October 15, 2014.

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Attorneys for Plaintiff,
Fantastic Sams Salons Corp.

UNITED STATES DISTRICT COURT

CENTRAL DISTRICT OF CALIFORNIA

WESTERN DIVISION

FANTASTIC SAMS SALONS CORP.

Plaintiff,

vs.

FRANK MOASSESFAR and PARVANEH MOASSESFAR,

Defendants.

DECLARATION OF MARK ACHORN IN SUPPORT OF PLAINTIFF'S MOTION FOR PARTIAL SUMMARY JUDGMENT

Complaint Filed: August 27, 2014
Trial Date: April 5, 2016

MSJ Date: February 22, 2016
Time: 1:30 p.m.
Courtroom: 8

Judge: Honorable Otis D. Wright, II
312 N. Spring St.,
Los Angeles, CA 90012

I, Mark Achorn, declare as follows:

1. I am the Controller of Plaintiff Fantastic Sams Salons Corp. ("Plaintiff" or "Fantastic Sams"). I have held this position for 2.5 years. I have personal knowledge of each fact stated in this Declaration. If called upon to testify as to the information set forth herein, I could and would do so competently.

2. Plaintiff entered into a Salon License Agreement (license number 1-10630) with both Defendant Parvaneh Moassesfar and Defendant Frank Moassesfar, dated February 13, 2007, which permitted and required Defendants to operate a Fantastic Sams salon at 19526 Ventura Blvd. Tarzana, California.

3. Plaintiff entered into a Salon License Agreement (license number 1-10811) with Defendant Frank Moassesfar, dated November 21, 2007, which permitted and required Frank Moassesfar to operate a Fantastic Sams salon at 19340 Nordhoff Street Northridge, California.

4. Licensees are required to pay a weekly license fee and weekly national advertising fee to Plaintiff, for each franchise salon.

5. Licensees are required to pay Plaintiff the weekly license fee and weekly national advertising fee via weekly electronic draft.

6. During the week of January 13, 2011, Plaintiff attempted to draft the weekly license fees and weekly national advertising fees due for Defendants' Tarzana location, from Defendants' bank account, but was unable to do so.

7. After Plaintiff attempted to draft the weekly license fees and weekly national advertising fees due for Defendants' Tarzana location, during the week of January 13, 2011, Plaintiff was notified that Defendants' bank account had been closed.

8. Since the week of January 13, 2011, the Defendants have failed to remit any weekly license fees or weekly national advertising fees for the Tarzana salon to Plaintiff.

9. During the week of February 19, 2012, Plaintiff attempted to draft the weekly license fees and weekly national advertising fees due for Defendants' Northridge location, from Defendants' bank account, but was unable to do so.

10. After Plaintiff attempted to draft the weekly license fees and weekly national advertising fees due for Defendants' Northridge location, during the week of February 19, 2012, Plaintiff was notified that the bank account had been closed.

11. Since the week of February 19, 2012, the Defendants have failed to remit any weekly license fees or weekly national advertising fees for the Northridge salon to Plaintiff.

12. On May 30, 2014, Plaintiff provided Defendants with written notice of their material defaults, as to both Salon License Agreements, and five (5) days to cure those defaults ("Default Notice"). The Default Notice specified that Defendants' failure to timely cure their defaults would result in termination of both Salon License Agreements, as of June 6, 2014. Attached to the Folio of Evidence as **Exhibit C** is a true and correct copy of the Default Notice.

13. Defendants failed to cure their defaults within the five (5) day cure period, for either salon.

14. Plaintiff did in fact terminate both of the Defendants' Salon License Agreements, as of June 6, 2014.

15. Defendants owe Plaintiff $21,540.84 in past due weekly license fees under the Salon License Agreement for the Tarzana location. Attached hereto as **Exhibit D** is a true and correct copy of an invoice for the fees Defendants owe Plaintiff for the Tarzana salon.

16. Defendants owe Plaintiff $8,151.36 in past due weekly national advertising fees under the Salon License Agreement for the Tarzana location. Attached hereto as **Exhibit D** is a true and correct copy of an invoice for the fees Defendants owe Plaintiff for the Tarzana salon.

17. Defendants owe Plaintiff $22,541.04 in past due weekly license fees under the Salon License Agreement for the Northridge location. Attached hereto as **Exhibit E** is a true and correct copy of an invoice for the fees Defendants owe Plaintiff for the Northridge salon.

18. Defendants owe Plaintiff $8,151.36 in past due weekly national advertising fees under the Salon License Agreement for the Northridge location. Attached hereto as **Exhibit E** is a true and correct copy of an invoice for the fees Defendants owe Plaintiff for the Northridge salon.

SALON LICENSE AGREEMENT

BETWEEN

FANTASTIC SAMS SALONS CORPORATION
50 Dunham Road, 3rd Floor
Beverly, Massachusetts 01915
Tel: 978-232-5600
Fax: 978-232-5601

AND

P.P
PARVANEH H.H.H

Frank & Vanna Moassesfar
Name(s) of Licensee

4408 Alfarena Place
Street

Tarzana	CA	91356
City	State	Zip Code

818	344.5939
Area Code	Telephone

Area Code	Facsimile

Date of Salon License Agreement

February 13, 2007 P.M
H.H.H

FANTASTIC SAMS LICENSE AGREEMENT
LICENSE INFORMATION

Name of Licensee: FARVADER Frank & Vanna Moassesfar P.M M.M.M

Licensee's Address and/or Principal Place of Business: 4408 Alfarena Place Tarzana, CA 91356

Location (or Target Area, if Location not specified): To Be Determined

License Number: 17106 20

Amount of Initial License Fee: $30,000.00 P.M M.M.M

Prior Agreements, if any: None

This LICENSE AGREEMENT (hereinafter referred to as this "Agreement") is made and entered into this 15 day of February, 2007, by and between Fantastic Sams Salons Corporation ("Salons Corp"), a corporation organized and existing under the laws of the State of Delaware and Frank & Vanna Moassesfar (hereinafter referred to as "Licensee").

WHEREAS, Fantastic Sams Franchise Corporation, a Delaware corporation having its principal place of business located at 50 Dunham Road, Beverly, Massachusetts 01915 (referred to in this Agreement as "FSFC"), and its predecessors have developed a family haircare system (referred to as the "Fantastic Sams System") for family haircare centers (referred to as the "Fantastic Sams Salons") that includes, but is not limited to, the common use and promotion of the name "Fantastic Sams" and other registered marks (referred to as the "Marks"), educational and training programs, centralized advertising programs, and standard policies, procedures, color schemes and techniques for operating the Fantastic Sams Salons;

WHEREAS, Fantastic Sams Salons offer haircare services, including cuts, shampoos, styles, perms and color, to men, women and children, and offer a full line of haircare products for sale;

WHEREAS, FSFC has granted to Salons Corp the exclusive right to sublicense the Fantastic Sams System in certain states, which FSFC may from time to time revise and update, and the Fantastic Sams name, logo and other identifying marks used in the Fantastic Sams System;

WHEREAS, Salons Corp, in turn, grants to Licensee the right to use the Fantastic Sams System and to operate under the name "Fantastic Sams," and Licensee wishes to obtain the right to utilize and benefit from the assistance of Salons Corp, the Fantastic Sams System and the Marks;

WHEREAS, Licensee further represents that it is not obtaining a license for any speculative or investment purpose and has no present intention to sell or transfer or attempt to sell or transfer its license or licensed business in whole or in part; and

WHEREAS, Licensee understands and acknowledges the importance of the high and uniform standards of quality, cleanliness, convenience, service and value imposed by Salons Corp in order to maintain the value of the Marks, and the necessity of operating the business of Licensee in compliance with the standards of Salons Corp.

NOW, THEREFORE, in consideration of the promises and in further consideration of the mutual undertakings of the parties, including the payment of all fees, Salons Corp and Licensee agree to abide by the terms and conditions of this Agreement and further agree as follows:

1. GRANT OF LICENSE

a. Salons Corp grants to Licensee, and Licensee hereby accepts, a license to operate one (1) Fantastic Sams Salon utilizing the Fantastic Sams System at the Location or within the Target Area indicated above in the LICENSE INFORMATION SECTION, which shall be within Salons Corp's exclusive regional area. Licensee may select the Location for the Fantastic Sams Salon, but Salons Corp has the right to approve on a reasonable basis any selected Location. Licensee may not use any other location for a Fantastic Sams Salon without the prior written consent of Salons Corp.

b. If the Salon Location has not yet been determined as of the date of this Agreement, then the Salon Location will be described or otherwise defined in an exhibit signed by the parties and attached to this Agreement. LICENSEE's selection of the Salon Location will be subject to the prior written approval of SALONS CORP. LICENSEE must open its Fantastic Sams Salon within 365 days of the execution of this Agreement. At SALONS CORP's option, SALONS CORP may grant a one-time extension for unanticipated construction delays. Any extension must be requested by LICENSEE before the expiration of the 365-day time period, and any extension granted must be in writing and signed by SALONS CORP and LICENSEE. The duration of any extension shall be determined by SALONS CORP and LICENSEE. In the event no extension is given and 365 days pass before a Salon is opened, or any extension has expired without a Salon opening, this Agreement will automatically terminate without further action, and SALONS CORP shall be entitled to keep any and all funds paid by LICENSEE.

c. Regardless of whether or not Licensee has opened a Fantastic Sams Salon on a timely basis, all of Salons Corp's initial obligations related to Licensee's opening of a Fantastic Sams Salon shall be deemed to have been satisfied as of the last day of the calendar year

following the calendar year in which this Agreement is executed, and all fees allocable thereto shall be deemed to have been earned as of that day.

2. EXCLUSIVE AREA

Salons Corp will not grant to any individual, firm, association or corporation any right to operate a Fantastic Sams Salon within an exclusive area that extends to a one-half (½) mile radius of Licensee's Salon Location ("Exclusive Area").

By granting Licensee an Exclusive Area, Salons Corp is not promising that other Fantastic Sams Salons will not draw customers or advertise for customers within Licensee's Exclusive Area. Rather, Salons Corp agrees not to locate another Fantastic Sams Salon within a one-half (½) mile radius of the Salon Location.

Salons Corp reserves the absolute and unconditional right to grant franchises for, and to operate, Fantastic Sams Salons, and to otherwise use the Fantastic Sams System, at sites outside of Licensee's Exclusive Area, even if such sites may compete for customers within Licensee's Exclusive Area. Furthermore, Licensee acknowledges that companies under common ownership with FSFC are not limited as to the establishment of businesses selling haircare products or services under trademarks other than Fantastic Sams®, or as to the establishment of other channels of distribution for Fantastic Sams® branded haircare products, either within or outside of Licensee's Exclusive Area.

3. FEES

a. Initial License Fees.

(1) Initial License Fee/Assignment Fee/Renewal Fee. In consideration of the License granted in Section 1, Licensee shall pay Salons Corp the non-refundable sum of Thirty Thousand Dollars ($30,000). This fee is fully earned and non-refundable by SALONS CORP upon signing this Agreement.

(2) Licensee acknowledges and agrees that nothing in this Agreement constitutes an option to Licensee to purchase additional Fantastic Sams licenses. No right to purchase additional Fantastic Sams licenses shall be implied by this Agreement or by any exhibit or schedule attached hereto. Salons Corp reserves the right, in its sole discretion, as to whether and when it will sell or grant additional Fantastic Sams licenses to Licensee. In every case, Licensee will be required to satisfy Salons Corp's standards and criteria with respect to the purchase of any Fantastic Sams License Agreement.

b. Weekly Fees.

(1) Weekly License Fees. In consideration for the grant of the right to use the Fantastic Sams System and the Marks described in Section 1 of this Agreement, Licensee must pay weekly to Salons Corp the sum of Three Hundred, Twenty-six and 45/100 Dollars ($326.45)

per hair salon payable in advance on Monday of each week commencing on a date that is the earlier of the date of the salon opening or twelve (12) months from the date first written above, unless extended in writing by Salons Corp. This amount will be modified annually according to Paragraphs 3.b.(3) and 3.b.(4) below. Licensee shall continue to pay the Weekly License Fee to Salons Corp throughout the term of this Agreement, or for so long as it uses any part or all of the Fantastic Sams System or the Marks, whichever period is longer, whether such use is authorized or not, except as otherwise provided in Section 11 of this Agreement. Licensee does not have the "right of offset" and, as a consequence, Licensee will timely pay all weekly fees due to Salons Corp regardless of any claims or allegations Licensee may allege against Salons Corp.

(2) Weekly National Advertising Fee. In further consideration of the grant of the right to use the Fantastic Sams Systems and the Marks described in Section 1 of this Agreement, Licensee shall pay weekly to Salons Corp the nonrefundable sum of One Hundred Eighteen and 45/100 Dollars ($118.45). This fee shall be payable in advance on Monday of each week, commencing on a date that is the earlier of the date of the hair salon opening or twelve (12) months from the date first written above, unless extended in writing by Salons Corp. This amount will be modified annually according to Paragraph 3.b.(3) below. Licensee shall continue to pay the Weekly National Advertising Fee to Salons Corp throughout the term of this Agreement, or for so long as it uses any part or all of the Fantastic Sams System or the Marks, whichever is longer, whether such use is authorized or not, except as otherwise provided in Section 11 of this Agreement.

(3) Modification of Weekly Fees. (a) The above-referenced Weekly License Fees and Weekly National Advertising Contributions reflect rates in effect for the fiscal year commencing in August 2005. The amount of the weekly fees will be modified by a cost of living adjustment annually beginning with the work week ending on the first Friday in August of each year following execution of this Agreement. The annual modification of the weekly fees will be based on the average of the Unadjusted Percent Change in the Personal Care Services Item of the Consumer Price Index from the first calendar quarter in any preceding year to the first calendar quarter of the year the modification would be in effect, as set forth in the Consumer Price Index, All Urban Consumers, U.S. City Average, 1982-1984 = 100, Other Goods and Services, Personal Care Services or other similar index. The product of the weekly fees multiplied by the Average Unadjusted Percent Change for the first quarter of that year will be added to the prior weekly fees to arrive at the new weekly fees for the year beginning with the work week ending on the first Friday in August of any year.

(a) During June of each year following the execution of this Agreement, Salons Corp will forward to Licensee the following:

(i) Copies of the Monthly Consumer Price Index for the months constituting the first calendar quarter of the year;

(ii) The calculation of the Average Unadjusted Percent Change for the first calendar quarter; and

(iii) The new weekly fees.

(b) Upon receipt of the information concerning the basis for and calculation of the new weekly fees, Licensee will have the responsibility of contacting Salons Corp to correct any mistake in the basis for or calculation of the new weekly fees.

(4) Annual Increase to Weekly License Fees. In addition to the annual cost of living adjustment to the weekly fees described above, the Weekly License Fee will also be increased each year by an additional amount of Three Dollars ($3) per week, commencing with the work week ending on the first Friday in August of each year.

(5) Payment Procedure for Weekly Fees. Upon execution of this Agreement, Licensee agrees to execute the forms and complete the reasonable procedure of Salons Corp to establish a bank draft or electronic transfer arrangement whereby Salons Corp will be able to present a draft for the weekly fees to the bank or other financial institution used by Licensee. The payment week commences each Saturday and continues through the following Friday, with the payment of all weekly fees scheduled for Monday of each week. Licensee will not pay the fees directly to Salons Corp, unless expressly requested to do so. Licensee agrees to have sufficient funds in its account for the bank draft or electronic transfer to be honored by its bank or other financial institution and agrees to advise Salons Corp in advance of any change in its bank, financial institution or account. Salons Corp agrees to submit bank drafts or electronic transfer requests only for the correct weekly fees of Licensee.

(6) Multiple Salon Weekly License Fee Adjustment.

(a) Notwithstanding the provisions in Paragraph 3.b.(1) above for the payment of Weekly License Fees, for each week during the term of this Agreement, Licensee shall be entitled to an adjustment on certain Weekly License Fees payable under this Agreement subject to the following conditions:

(i) Licensee shall own and be currently operating four (4) or more licensed Fantastic Sams Salons within Salons Corp's exclusive regional area;

(ii) The ownership, directly and indirectly, of each licensed Fantastic Sams Salons shall be identical; and

(iii) Licensee must not be in default under this Agreement, under any other Fantastic Sams License Agreement, or under any other agreement with Salons Corp or any affiliate of Salons Corp;

(b) (i) If Licensee meets the conditions set forth above, Licensee shall be entitled to an adjustment on Weekly License Fees payable under this Agreement. Licensee shall pay Weekly License Fees per salon equal to the amount corresponding to the number of licensed Fantastic Sams Salons open and operating, as indicated in the following schedule:

Number of Licensed Fantastic Sams Salons Open and Operating	Adjusted Weekly License Fees Payable Per Salon
4	$315.07
5	$307.97
6	$298.40
7	$291.60
8	$281.74
9	$274.03
10	$267.86
11 – 15	$259.54
16 or more	$249.34

(ii) The above-referenced adjusted Weekly License Fees shall be subject to the cost of living adjustment and the annual increase to Weekly License Fees provided in this Agreement, as described in Paragraphs 3.b.(3) and 3.b.(4).

(iii) The above adjustment does not apply to any other fees or amounts payable under this Agreement or any other agreement with Salons Corp or any affiliate of Salons Corp.

(iv) The above adjustment shall be automatically suspended without notice during any period in which Licensee is in default under this Agreement or any other agreement with Salons Corp or any affiliate of Salons Corp.

(v) If the number of opened Fantastic Sams Salons owned by Licensee changes, then the above adjustment, if any, shall be modified effective as of the next week following the change in the number of opened Fantastic Sams Salons.

c. Weekly Regional Advertising Fee. Salons Corp has the right to establish a local and/or regional advertising council of Licensees. Licensee agrees to join and participate in any local and/or regional advertising council established by Salons Corp. Any local and/or regional advertising council may adopt its own rules and procedures, but such rules and procedures will not restrict Licensee's rights or obligations under this Agreement. However, the actions of any such council, including special local or regional assessments for promotional and advertising purposes, will be binding upon Licensee; provided, however, no council action may modify the terms and conditions of this Agreement.

d. Training Fees.

(1) Prior to the opening of Licensee's initial licensed Fantastic Sams Salon, Licensee is required to attend the New Owner's Training Program conducted or endorsed by Salons Corp in California, Massachusetts or at other locations in the United States designated by Salons Corp. With respect to the purchase of Licensee's first licensed Fantastic Sams Salon, Salons Corp shall pay the training program costs for Licensee to attend this training program. Licensee shall be responsible to pay for all travel, lodging, meals and incidental expenses. If

Licensee elects to send additional persons to the New Owner's Training Program, Licensee shall pay an additional tuition of Six Hundred Ninety-five Dollars ($695) for each such additional person, as well as a charge for classroom materials, not to exceed $150, and Licensee shall be responsible for all other costs incurred in connection with attendance at the New Owner's Training Program by the additional representative of Licensee, including, but not limited to, travel, lodging, meals and other incidental expenses.

(2) If Licensee (a) acquires a second or subsequent Fantastic Sams License, (b) renews a Fantastic Sams License, or (c) receives an assignment of a Fantastic Sams License, Licensee shall be required to attend the New Owner's Training Program conducted or endorsed by Salons Corp in California, Massachusetts or at other locations designated by Salons Corp, unless waived in writing by Salons Corp. In such cases, Licensee shall pay all costs incurred by Licensee in attending such New Owner's Training Program, including, but not limited to, training program costs due to Salons Corp or other third party (which may be greater than the costs set forth above) and travel, lodging, meals and other incidental expenses.

4. SALONS CORP OBLIGATIONS

In consideration for the Weekly License Fee, Salons Corp will make available to Licensee the following services:

a. **Instruction.** (1) To provide owner, management and hair classes and courses regularly at the facilities established by Salons Corp. The curricula for these classes and courses will include, but not be limited to, office management and control procedures, system organization, hair technology and trends, and personnel policy. Any and all traveling, living and other expenses incurred by anyone attending the classes or courses must be paid by Licensee. Salons Corp reserves the right to charge reasonable sums for the training materials and products used in any training session. Licensee and its employees have the right to attend such training sessions without purchasing such training materials and products from Salons Corp.

(2) With respect to the purchase of Licensee's first licensed Fantastic Sams Salon, to pay the program training costs for Licensee's attendance at the New Owner's Training Program conducted or endorsed by Salons Corp in California, Massachusetts or at other locations designated by Salons Corp, which training is required of all new Fantastic Sams licensees;

b. **Training and Consultation.** To make available personnel of Salons Corp to conduct consultation and training sessions at facilities established by Salons Corp to enable Licensee to properly implement or maintain the Fantastic Sams System. If requested by Licensee, Salons Corp will furnish skilled personnel, at Licensee's expense, to assist in solving special problems.

c. **Seminars.** To provide each year regional seminars for its licensees. Although attendance is not mandatory at the regional seminars and is not a precondition to being a licensee, Licensees, stylists and managers should consider attending the seminars. In addition to the

regional seminars, Salons Corp will provide annually non-mandatory hair cutting and chemical application seminars for the stylists of Licensee.

d. Advertising and Merchandising. To consult with and recommend to Licensee such merchandising, marketing and advertising materials, data and advice as, from time to time, may be developed by Salons Corp and deemed by it to be helpful in the operation of a Fantastic Sams Salon.

5. LICENSEE OBLIGATIONS

Licensee agrees to fulfill the following obligations:

a. Payment of Weekly Fees. To pay and to comply with the payment procedure for Weekly License Fees, Weekly National Advertising Fees, Weekly Regional Advertising Fees, Training Fees and all other fees or other amounts payable in connection with this Agreement.

b. Use of Marks. To use the Marks and the Fantastic Sams System only in the manner and to the extent specifically licensed by this Agreement and as specifically set forth by SALONS CORP in its standard Fantastic Sams operations, policy and procedure manuals (the "Manuals"). Thus, LICENSEE shall not advertise, publish or circulate any documents or other matter relating to Fantastic Sams except as approved by SALONS CORP prior to publication. LICENSEE will not use any of the Marks as a part of an Internet domain name or e-mail address without the prior written consent of FSFC. LICENSEE acknowledges that this Agreement grants a license to use only the Fantastic Sams System and Marks, and does not grant LICENSEE the right to use any other tradenames or marks owned by FSFC or any company under common ownership with FSFC.

c. Management. To devote full time and best efforts or to employ someone to devote full time and best efforts to establish and develop the business of the Fantastic Sams Salon. Licensee must attend at least one (1) owner and management training course offered by Salons Corp before the Fantastic Sams Salon is opened for business or before the owner or manager begins to operate the Fantastic Sams Salon. Licensee will pay the tuition, travel and other expenses of all managers to all required training sessions wherever located, except as otherwise provided in Section 3.d of this Agreement.

d. Payment of Obligations. Licensee agrees that the image of the Fantastic Sams System in its community is an integral part of Licensee's success. To that end, Licensee agrees to promptly pay all obligations incurred in the course of business and operation of the Fantastic Sams Salon, including, but not limited to, property lease payments, equipment rental payments, business taxes and license fees, employee salaries, wages and withholding taxes and product invoices.

e. Fantastic Sams Salon Appearance. To construct, remodel and/or equip the Fantastic Sams Salon in accordance with the building and equipment plans that are standard in the Fantastic Sams System. Further, Licensee specifically agrees to purchase or lease and install

12. TERMINATION

a. Mutual Termination of Agreement. The parties hereto may mutually agree in writing to terminate this Agreement.

b. Immediate Termination by Salons Corp. This Agreement shall automatically terminate, without notice from Salons Corp, under any one or more of the following:

(1) If Licensee fails or refuses, within thirty (30) days after Salons Corp provides Licensee with proper documentation to be completed, to return all executed documents necessary to permit Salons Corp's bank to automatically draft Licensee's bank or other financial institution for weekly fees;

(2) If Licensee's bank fails or refuses to honor any authorized bank draft or other prepayment arrangement for any weekly fee during the term of this Agreement for two (2) consecutive weeks or four (4) weeks during any calendar year, except in the case of mistake, negligence or wrongful act of Licensee's bank or Salons Corp;

(3) If Licensee's bank fails or refuses to honor a check or draft presented twice to Licensee's bank, such check or draft having been drawn on Licensee's account for payment of any obligation incurred in performance of this Agreement, for any reason other than the mistake, negligence or wrongful act of Licensee's bank or Salons Corp;

(4) If Licensee abandons the license relationship for this Fantastic Sams Salon or any Fantastic Sams Salon operated pursuant to an agreement with Salons Corp by ceasing to operate the Fantastic Sams Salon without the intent to re-open it or by removing the Fantastic Sams sign or signs while continuing to operate the haircare salon;

(5) If Licensee closes the Salon Location for any reason other than fire, flood or other natural disaster and fails to re-open at the same or different approved location within 30 days, or fails to assign this Agreement to someone else who re-opens within 30 days from the date of closure;

(6) If Licensee is convicted of any criminal misconduct relevant to the operation of the licensed business;

(7) If Licensee receives three (3) notices of default, as provided below in Subsection (c) in any consecutive twelve (12) month period, whether or not such defaults are cured;

(8) If Licensee breaches any of its obligations under this Agreement to maintain the confidentiality of information relating to the Fantastic Sams System;

(9) If Licensee, or any shareholder of a corporation or member of a limited liability company, if the Licensee is a corporation or limited liability company, becomes the subject of any voluntary or involuntary petition of bankruptcy, subject to applicable law;

(10) If Licensee makes any assignment for the benefit of its creditors;

(11) If Licensee makes an assignment of this Agreement other than in compliance with this Agreement; or

c. **Salons Corp May Terminate Agreement.** Salons Corp has the right to terminate this Agreement for any material breach of this Agreement. For purposes of this action, a material breach of this Agreement consists of one (1) or more of the following:

(1) Material breach by Licensee of any term of this Agreement or of any other agreement between Salons Corp and Licensee, including, without limitation, any real estate lease or sublease, equipment lease, promissory note, asset sale agreement, or the Fantastic Sams Multi-Unit Development Agreement;

(2) Breach of any equipment lease with FSFC, its subsidiaries or affiliates;

(3) Non-payment of any invoice, tax, payroll, license fee, lease payment, payment due under any promissory note, or any other obligation incurred in the course of Licensee's business to Salons Corp, FSFC or any other business creditor;

(4) Failure to perform any obligation created by a local, regional or national Licensee council of Fantastic Sams licensees;

(5) Suspension, revocation or other impairment of the business license of Licensee;

(6) Use of the Marks, or System by Licensee, its employees or agents in a manner contrary to the terms of this Agreement or the Manuals or for a purpose not first authorized in writing by Salons Corp and in any manner or for any purpose that materially impairs the exclusivity of the Marks or their attendant goodwill;

(7) Commission of any act by Licensee or its agents that detracts from the successful operation of any Fantastic Sams Salon or the business operation of FSFC or Salons Corp;

(8) Violation of any business policies, practices, procedures or obligations prescribed or set forth in the Manuals, as they may be amended from time to time;

(9) Failure to pass a hair salon inspection after having once been inspected during the calendar year prior and been given a notice of deficiency; or

(10) Failure to notify Salons Corp of the death or incapacity of Licensee or any of Licensee's principals within thirty (30) days of such event.

(11) If Licensee fails to comply with any applicable laws, ordinances, regulations, and other requirements of any federal, state, county, municipal or other government including, but not limited to all health, safety, cosmetology, environmental, discrimination, sexual harassment, or disability statutes, regulations and laws and/or any laws relating to employees.

d. **Procedure for Termination.** (1) With the exception of subsection b. of this section, regarding automatic termination, upon the occurrence of a material breach of this Agreement, Salons Corp will forward to Licensee written notice of intent to terminate. Should state law require a minimum notice period be given to Licensee for termination, Salons Corp will abide by such law. In the absence of such law, the termination will be effective thirty (30) days from date of mailing of the written notice. For purposes of this section, the written notice of intent to terminate will be sent by certified mail or other receipted delivery service, and if Licensee consists of one (1) or more persons, corporations, partnerships or other entities, notice of communication to one (1) person, shareholder, partner or one (1) member of an entity will constitute notice to all.

(2) Licensee will have thirty (30) days from the date of such notice within which to cure the default of this Agreement. If the default is not timely cured, this Agreement will be terminated.

(3) Termination of this Agreement by Salons Corp will not be an exclusive remedy and will not in any way affect the right of Salons Corp to receive, collect and enforce weekly fees or other amounts payable by Licensee or to enforce, in any manner, the provisions of this Agreement against Licensee. All fees, including, but not limited to, Weekly License Fees and National Advertising Fees, calculated until the date of expiration of this Agreement had this Agreement not been terminated or transferred, or the date Licensee ceases using any or all of the Marks, whichever is the later date, shall be immediately due and payable.

e. **Responsibility of Licensee upon Termination.** (1) In no event will termination of this Agreement for any reason relieve Licensee of its obligations, debts or responsibilities accrued under this Agreement. Immediately upon the termination of this Agreement for any reason, all of Licensee's rights will terminate and it must cease to use, by advertising or otherwise, directly or indirectly, any part or all of the Fantastic Sams System, including the Marks and any other devices, trademarks, service marks, trade names, slogans, manuals, symbols and name.

(2) Upon termination or expiration of this Agreement in any manner, Licensee:

(a) Shall cease using all of the Marks, trade dress, business format, signs, structures and forms of advertising indicative of the Fantastic Sams System and Fantastic Sams products;

(b) Within thirty (30) days after the expiration or termination of this Agreement, shall make, or cause to be made, at Licensee's expense, such changes in signs, buildings and structures to distinguish the Licensee's premises from its former appearance and from all other Fantastic Sams Salons, including, but not limited to, redecorating of walls, removal of floor mats, distinctive window graphics and any other property bearing the Fantastic Sams Marks or any other mark owned by Salons Corp or FSFC;

(c) Shall grant Salons Corp the right and option to purchase the exterior sign of Licensee bearing the "Fantastic Sams" name for One Hundred Dollars ($100); and shall permit Salons Corp or Salons Corp's representatives to enter upon Licensee's premises without further consent by Licensee, including granting Salons Corp the right to have the locks opened to Licensee's premises and to enter into locked premises without further permission or presence by Licensee, for the purpose of removing Licensee's interior and/or exterior Fantastic Sams signs, equipment, fixtures, products and other items bearing the Fantastic Sams names and Marks;

(d) Within thirty (30) days after the expiration or termination of this Agreement, shall notify all telephone, directory and listing companies of the termination of Licensee's right to use the franchise names and the Marks and authorize the transfer of telephone numbers and directory listings to Salons Corp or Salons Corp's designated licensee, and Licensee shall appoint Salons Corp as its attorney-in-fact to effect such transfers;

(e) Shall execute any and all documents and take such actions as Salons Corp or FSFC may deem reasonably necessary or desirable to evidence the fact that Licensee has ceased using the Marks and that Licensee has no further interest or right therein whatsoever;

(f) Shall pay immediately, all fees and monies due Salons Corp, including all Weekly License and National Advertising Fees for so long as the Marks are used or until the expiration date of this Agreement, had this Agreement not been terminated, whichever is later;

(g) Shall immediately return to Salons Corp, at Licensee's expense, all Manuals and other books, forms or brochures, and training, educational and marketing materials related to the Fantastic Sams System and perform any and all unfulfilled obligations created under this Agreement for the benefit of Salons Corp;

(h) Shall refrain, for a period of two (2) years from the effective date of expiration or termination of this Agreement, from directly or indirectly participating as an owner, partner, member, shareholder, director, officer, employee, consultant, lender, or agent, or serve in any other capacity in any business engaged in the sale or rental of products or services

the same as or similar to those of the Fantastic Sams System within a five-(5) mile radius of the Fantastic Sams Salon operated pursuant to this Agreement;

(j) Shall refrain from directly or indirectly participating as an owner, partner, member, shareholder, director, officer, employee, consultant, lender or agent, or serve any other capacity in any business engaged in the sale or rental of products or services the same as or similar to those of the Fantastic Sams System, within a two and one-half (2 1/2) mile radius of any Fantastic Sams Salon for the remainder of the unexpired term of this Agreement had this Agreement not been terminated or for a period of two (2) years from the date of termination, whichever period is longer (unless otherwise unenforceable under the laws of the State of California);

(j) Shall not operate, advertise or do business under any name or in any manner that might tend to give the general public the impression that the Fantastic Sams license is still in force or that Licensee is any longer connected in any way with Salons Corp or FSFC, or any longer has any right to the use of the Fantastic Sams System or the Marks associated with it;

(k) Shall not make use or avail himself of any of the trade secrets of, trade dress, or information imparted by Salons Corp or FSFC or disclose or reveal any such information or any portion thereof to others;

(l) Shall not construct, equip, help, aid or assist any person or persons in the construction or equipping of any premises incorporating the trade dress, distinctive features, or equipment layout that Salons Corp or FSFC has originated and developed and that are identifying characteristics of premises operated by Fantastic Sams licensees; and

(m) Shall execute, if required by Salons Corp, a Mutual Termination and Release Agreement and other documents required by Salons Corp.

(3) Upon termination of this Agreement, Licensee shall continue to be responsible for making lease payments pursuant to any site lease, or sublease, or equipment lease with a lessor, owner or agent.

13. ARBITRATION AND DISPUTE RESOLUTION

a. Except for matters relating to the collection of monies owed to Salons Corp by Licensee and as to remedies for injunctive relief concerning the Marks and goodwill, any controversy or claim arising out of or relating to this Agreement or with its interpretation or breach, including claims of fraud in the inducement, must be settled by arbitration in accordance with the Commercial Arbitration Rules of the American Arbitration Association. The parties hereto, therefore, bind themselves to arbitrate their differences in Orange County, California. The parties agree further that (a) an Arbitrator may render an interim ruling, including injunctive relief, and (b) all claims of any type by either party, including defenses, are included in the jurisdiction of Arbitration.

b. Licensee understands and acknowledges that he is waiving any right to a jury trial of any claims against any person arising out of or relating to this Agreement, including claims of fraud in the inducement.

c. Licensee and Salons Corp agree that any claim arising out of this Agreement, whether for rescission or damages or any other type of remedy at law or in equity shall be brought within the later of one (1) year from the date of the act or failure to act by any person or six (6) months from the date claimant knew or should have known of the act or failure to act by the party sought to be charged.

d. Either party will send written notice invoking the binding arbitration provisions of this section to (1) the other party, and (2) the Regional Office of the American Arbitration Association. Each party has ten (10) days from the date of mailing by the American Arbitration Association of a written list of proposed arbitrators within which to return the written list of proposed arbitrators with their choices of arbitrators, to the American Arbitration Association. The arbitrator selected by Salons Corp and the arbitrator selected by Licensee will both select a third arbitrator. The parties further consent to the jurisdiction of any appropriate court to enforce the provisions of this section and/or to confirm any award rendered by the panel of arbitrators.

e. Any cost or other expenses, including attorney's fees and cost incurred by the successful party, arising out of or occurring because of the arbitration proceedings, will be assessed against the unsuccessful party. For purposes of this paragraph, a party will be considered unsuccessful if it withdraws its demand for arbitration prior to a decision by the arbitrators.

f. Nothing contained in this Agreement will bar the right of Salons Corp to seek and obtain temporary injunctive relief from a court of competent jurisdiction in accordance with applicable law against threatened conduct that will cause loss or damage, pending completion of the arbitration.

g. It is the express intent of Salons Corp and Licensee that any arbitration between Salons Corp and Licensee shall be of Licensee's individual claim and that the claim subject to arbitration shall not be arbitrated on a class-wide basis.

h. The term "Licensee," for purposes of this arbitration clause, shall include the shareholders, owners, guarantors, principals, members, or partners of license, or any person or entity claiming by or through any of the foregoing.

i. The terms "Salons Corp" and "FSFC" shall include the officers, directors, shareholders, agents or employees of each, regardless of whether they are signatories to this Agreement.

j. Licensee specifically agrees and acknowledges that claims arising out of or relating to this Agreement in any way against or by any person or entity, whether a signatory to

this Agreement or not, shall be settled through arbitration. Licensee further acknowledges that the owner of the Marks licensed herein, FSFC, is a beneficiary of this paragraph of this Agreement and may enforce all rights herein in an arbitration proceeding. In reliance on this Agreement, FSFC extends its required acceptance to this Agreement as evidenced by its signature below.

14. TERM AND RENEWAL.

a. This Agreement, unless terminated for any reason, shall continue in full force and effect for a period of ten (10) years from the date the Salon is opened for business or eleven (11) years from the date of execution of this Agreement, whichever is earlier; provided, however, in the event this Agreement is executed as a result of an assignment or renewal, this Agreement, unless sooner terminated for any reason, shall expire on M.M.M.M, PM

b. Provided that Licensee has complied with all the terms and conditions set forth in this Agreement, and any other agreements between Licensee and Salons Corp or any agreements between Licensee and any other person or entity which agreement directly affects Salons Corp, Licensee may renew this Agreement for an additional period of ten (10) years upon the payment of a renewal fee equal to twenty-five percent (25%) of the then-current Initial License Fee determined without regard to any multiple-salon discount. In no event shall such renewal fee exceed Seven Thousand Five Hundred Dollars ($7,500.00).

c. As a condition of renewing this Agreement, Licensee must comply with the following:

(1) Unless waived by Salons Corp, give notice to Salons Corp in writing at least six (6) months prior to the renewal date of its intent to renew this Agreement;

(2) Make such capital expenditures that reasonably may be required to renovate, paint, redecorate, purchase equipment and modernize the Fantastic Sams Salon, premises, signs, or equipment to confirm to the then-current image of the Fantastic Sams System, as defined in the Manuals or otherwise, either prior to execution of the renewal or on such schedule as Salons Corp may agree;

(3) Attend the New Owner's Training Program conducted or endorsed by Salons Corp in California, Massachusetts or in other locations designated by Salons Corp, if required to attend by Salons Corp (see Paragraphs 3.d, and 4.a. of this Agreement);

(4) Execute a general release of claims, mutual termination and release or any other release document in favor of FSFC, Salons Corp and NAI, terminating the prior Agreement; and

(5) Execute the form of License Agreement currently being offered by Salons Corp to new licensees.

This Agreement is executed on the first date written above.

LICENSOR:

FANTASTIC SAMS SALONS CORPORATION

By: _____
Brian J. Sheehan
Title: Chief Financial Officer

LICENSEE:

Frank & Vanna Moassesfar

By: _____
Frank Moassesfar
Title:

By: _____
~~Vanna~~ Moassesfar
Title: PARVANEH P.M

LICENSEE'S GUARANTORS:
(All Shareholders if Licensee is a corporation)
(All Partners if Licensee is a partnership)
(All Members if Licensee is a limited liability corporation)

By: _____ By: _____

By: _____ By: _____

ACCEPTED BY:

FANTASTIC SAMS FRANCHISE CORPORATION

By: _____
Title: Brian J. Sheehan
Date: Chief Financial Officer
2/15/07

SALON LICENSE AGREEMENT

BETWEEN

FANTASTIC SAMS SALONS CORPORATION
50 Dunham Road, 3rd Floor
Beverly, Massachusetts 01915
Tel: 978-232-5600
Fax: 978-232-5601

AND

Frank Mossesfar
Name(s) of Licensee

4408 Alfarena Place
Street

Tarzana CA 91356
City State Zip Code

818 344.5939
(Area Code) Telephone

Area Code Facsimile

Date of Salon License Agreement

11/21, 2007

This Agreement is executed on the first date written above.

LICENSOR:

FANTASTIC SAMS SALONS CORPORATION

By: Brian Sheehan

Title: Brian J. Sheehan Chief Financial Officer

LICENSEE:

FRANK MOASSESFAR

By: Frank Moassesfar

Title: Pres.

By: _____

Title: _____

LICENSEE'S GUARANTORS:
(All Shareholders if Licensee is a corporation)
(All Partners if Licensee is a partnership)
(All Members if Licensee is a limited liability corporation)

By: _____ By: _____

By: _____ By: _____

ACCEPTED BY:

FANTASTIC SAMS FRANCHISE CORPORATION

By: Brian Sheehan

Title: Brian J. Sheehan Chief Financial Officer

Date: 11/30/07

Fantastic Sams®
HAIR SALONS

Corporate Headquarters
50 Dunham Road
Beverly, MA 01915
(978) 232 5600

May 30, 2014

VIA FEDEX TO HOME AND SALON
AND VIA ELECTRONIC MAIL

Mr. Frank Moassesfar
Ms. Parvaneh Moassesfar
4408 Alfarena Place
Tarzana, CA 91356
tarzanafantasticsams@hotmail.com

NOTICE OF RIGHT TO CURE AND TERMINATION OF FANTASTIC SAMS® SALON LICENSE AGREEMENTS UPON FAILURE TO CURE

Re: Fantastic Sams® Salon License Agreements dated February 13, 2007 and November 21, 2007 (the "License Agreements") by and between Fantastic Sams Salons Corporation ("FSSC"), Frank Moassesfar and Parvaneh Moassesfar, as individuals (jointly and severally "Licensee") for the operation of the franchised *FANTASTIC SAMS* hair salons located at 19526 Ventura Blvd., Tarzana, CA 91356 ("Salon #10630) and 19340 Nordhoff St., Northridge, CA 91324 ("Salon #10811") respectively ("the Salons").

Dear Mr. and Mrs. Moassesfar :

PLEASE BE ADVISED that as of the date of this Termination Notice, Licensee has failed to meet its contractual obligations with FSSC as set forth in the License Agreements, copies of which are attached hereto.

FINANCIAL DEFAULTS

Pursuant to Paragraphs 3.b and 3.c of the License Agreements, Licensee is required to pay a weekly license fee (the "License Fee") and a weekly national advertising fee ("NAF") and, if applicable, a weekly regional advertising fee ("RAF") (collectively, the "Weekly Fees") to FSSC. The Weekly Fees are to be paid via weekly electronic draft presented to Licensee's bank account. Licensee is required by the License Agreements to establish and maintain an account for such purpose and to authorize its bank to permit automatic draft of all such Weekly Fees.

During the week of January 13, 2011, we attempted to draft the Weekly Fees for Salon #10630 and were notified by your bank that your account had been closed. Since that time we have been unable to draft any Weekly Fees. As of the week of April 4, 2014, you owe a total of **$111,102.60** in unpaid Weekly Fees for Salon #10630.

During the week of February 19, 2012, we attempted to draft the Weekly Fees for Salon #10811 and were notified by your bank that your account had been closed. Since that time we have been unable to draft any Weekly Fees. As of the business week ending April 4, 2014, you owe a total of **$76,471.00** in unpaid Weekly Fees for Salon #10811.

Paragraph 12 b.2 of the License Agreements states that the License Agreement shall automatically terminate, without notice from Salons Corp if:

> "LICENSEE'S bank fails or refuses to honor any authorized bank draft of other prepayment arrangement for any weekly fee during the term of this Agreement for two (2) consecutive weeks or four (4) weeks during any calendar year, except in the case of mistake, negligence or wrongful act of Licensee's bank or Salons Corp."

Paragraph 12.e.2.(f) of the License Agreements states that upon termination or expiration of the License Agreement(s) in any manner, Licensee:

> "Shall pay immediately, all fees and monies due Salons Corp, including all Weekly License and National Advertising Fees for so long as the Marks are used or until the expiration date of the License Agreement(s), had this License Agreement(s) not been terminated, whichever is later."

License Agreement #10630 expires February 16, 2017 and License Agreement #10811 expires December 31, 2019.

PLEASE BE FURTHER ADVISED that, pursuant to Cal. Bus. & Prof. Code § 20021(j) you must cure these financial defaults within five (5) days.

SHOULD YOU FAIL TO MAKE FULL PAUYMENT OF ALL OUTSTANDING WEEKLY FEES WITH FIVE (5) DAYS, pursuant to paragraph 12.e.2.(f) of the License Agreement, FSSC hereby elects to terminate the License Agreements effective June 6, 2014, and hereby demands that Licensee immediately pay FSSC the sum of **$499,857.94**, representing the following:

(a) **$213,015.43** representing all Weekly Fees due and owing for Salon #10630 through and including March 31, 2014 and all such amounts that would have been payable under the License Agreement from April 5, 2014 through the last day of the remaining term of the License Agreement for Salon # 10630 (See Detail Attached), and

(b) **$286,842.51** representing all Weekly Fees due and owing for Salon #10811 through and including March 31, 2014 and all such amounts that would have been payable under the License Agreement from April 5, 2014 through the last day of the remaining term of the License Agreement for Salon #10811 (See Detail Attached).

PLEASE BE FURTHER ADVISED that in view of the termination of the License Agreements if Licensee fails to timely cure its financial defaults, FSSC hereby demands that Licensee comply with all of its post-termination obligations, as set forth in Paragraph 12 c. thereof, which, in summary, requires that Licensee:

(1) Shall cease using all of the Marks, trade dress, business format, signs, structures and forms of advertising indicative of the Fantastic Sams System and Fantastic Sams products;

(2) Within thirty (30) days after the expiration or termination of this Agreement, shall make, or cause to be made, at Licensee's expense, such changes in signs, buildings and structures to distinguish the Licensee's premises from its former appearance and from all other Fantastic Sams Salons, including, but not limited to, redecorating of walls, removal of floor mats, distinctive window graphics and any other property bearing the Fantastic Sams Marks or any other mark owned by Salons Corp or FSFC;

(3) Shall grant Salons Corp the right and option to purchase the exterior sign of Licensee bearing the "Fantastic Sams" name for One Hundred Dollars ($100); and shall permit Salons Corp or Salons Corp's representatives to enter upon Licensee's premises without further consent by Licensee, including granting Salons Corp the right to have the locks opened to Licensee's premises and to enter into locked premises without further permission or presence by Licensee, for the purpose of removing Licensee's interior and/or exterior Fantastic Sams signs, equipment, fixtures, products and other items bearing the Fantastic Sams names and Marks;

(4) Within thirty (30) days after the expiration or termination of this Agreement, shall notify all telephone, directory and listing companies of the termination of Licensee's right to use the franchise names and the Marks and authorize the transfer of telephone numbers and directory listings to Salons Corp or Salons Corp's designated licensee, and Licensee shall appoint Salons Corp as its attorney-in-fact to effect such transfers;

(5) Shall execute any and all documents and take such actions as Salons Corp or FSFC may deem reasonably necessary or desirable to evidence the fact that Licensee has ceased using the Marks and that Licensee has no further interest or right therein whatsoever;

(6) Shall pay immediately, all fees and monies due Salons Corp, including all Weekly License and National Advertising Fees for so long as the Marks are used or until the expiration date of this Agreement, had this Agreement not been terminated, whichever is later;

(7) Shall immediately return to Salons Corp, at Licensee's expense, all Manuals and other books, forms or brochures, and training, educational and marketing materials related to the Fantastic Sams System and perform any and all unfulfilled obligations created under this Agreement for the benefit of Salons Corp;

(8) Shall refrain, for a period of two (2) years from the effective date of expiration or termination of this Agreement, from directly or indirectly participating as an owner, partner, member, shareholder, director, officer, employee, consultant, lender, or agent, or serve in any other capacity in any business engaged in the sale or rental of products or services the same as or similar to those of the Fantastic Sams System within a five (5) mile radius of the Fantastic Sams Salon operated pursuant to this Agreement;

(9) Shall refrain from directly or indirectly participating as an owner, partner, member, shareholder, director, officer, employee, consultant, lender or agent, or serve any other capacity in any business engaged in the sale or rental of products or services the same as or similar to those of the Fantastic Sams System, within a two and one-half (2 1/2) mile radius of any Fantastic Sams Salon for the remainder of the unexpired term of this Agreement had this Agreement not been terminated or for a period of two (2) years from the date of termination, whichever period is longer (unless otherwise unenforceable under the laws of the State of California);

(10) Shall not operate, advertise or do business under any name or in any manner that might tend to give the general public the impression that the Fantastic Sams license is still in force or that Licensee is any longer connected in any way with Salons Corp or FSFC, or any longer has any right to the use of the Fantastic Sams System or the Marks associated with it;

(11) Shall not make use or avail himself of any of the trade secrets of, trade dress, or information imparted by Salons Corp or FSFC or disclose or reveal any such information or any portion thereof to others;

(12) Shall not construct, equip, help, aid or assist any person or persons in the construction or equipping of any premises incorporating the trade dress, distinctive features, or equipment layout that Salons Corp or FSFC has originated and developed and that are identifying characteristics of premises operated by Fantastic Sams licensees; and

(13) Shall execute, if required by Salons Corp, a Mutual Termination and Release Agreement and other documents required by Salons Corp.

(14) Shall be responsible for making lease payments pursuant to any site lease, or sublease, or equipment lease with a lessor, owner or agent.

Licensee's failure to comply with the requirements of Paragraph 12.e above and/or the continued use of the *Fantastic Sams* System and Trademarks and/or other intellectual property of the ***Fantastic Sams*** System (the "Intellectual Property") at either or both of the Salons following termination of the License Agreements shall give rise to additional claims against Licensee for trademark infringement, unfair competition, and false association in violation of Sections 32 and 43(a) of the Lanham Act. Licensor hereby **DEMANDS** that Licensee cease and desist from all use of any of the Intellectual Property and remove all such Intellectual Property from the Salons and complete de-identification of the Salons in accordance with the Checklist enclosed, by **June 11, 2014**. In the event that you fail to respond or comply with this demand, FSSC, for itself and for is affiliate, Fantastic Sams Franchise Corporation, reserves all of their rights to protect the Intellectual Property, including, seeking injunctive relief, disgorgement of profits, treble damages, costs and attorney's fees.

Very truly yours,

Kenneth Kaplan

Kenneth S. Kaplan
General Counsel and Secretary

FANTASTIC SAMS
CUT & COLOR

STATEMENT

California Region
500 Cummings Center, Suite 1100
Beverly, MA 01915
978-232-5600 FAX 978-232-5601

DATE: January 22, 2016

Frank Moassesfar
Parvaneh Moassesfar
4408 Alfarena Place
Tarzana, CA 91356

Salon 10630 (Tarzana, CA)

DESCRIPTION	AMOUNT
Past due royalty fees covering the period August 27, 2013 thru July 25, 2014	$ 17,182.56
Past due royalty fees covering the period July 26, 2014 thru October 15, 2014	$ 4,358.28
Total past due royalty fees:	$ 21,540.84
Past due NAF fees covering the period August 27, 2013 thru July 25, 2014	6,502.08
Past due NAF fees covering the period July 26, 2014 thru October 15, 2014	1,649.28
Total past due NAF fees:	$ 8,151.36
	$ 29,692.20

Make all money orders or cashiers checks payable to FANTASTIC SAMS FRANCHISE CORP.

Past Due Amount Is Due Upon Receipt

FANTASTIC SAMS
CUT & COLOR

STATEMENT

California Region
500 Cummings Center, Suite 1100
Beverly, MA 01915
978-232-5600 FAX 978-232-5601

DATE: January 22, 2016

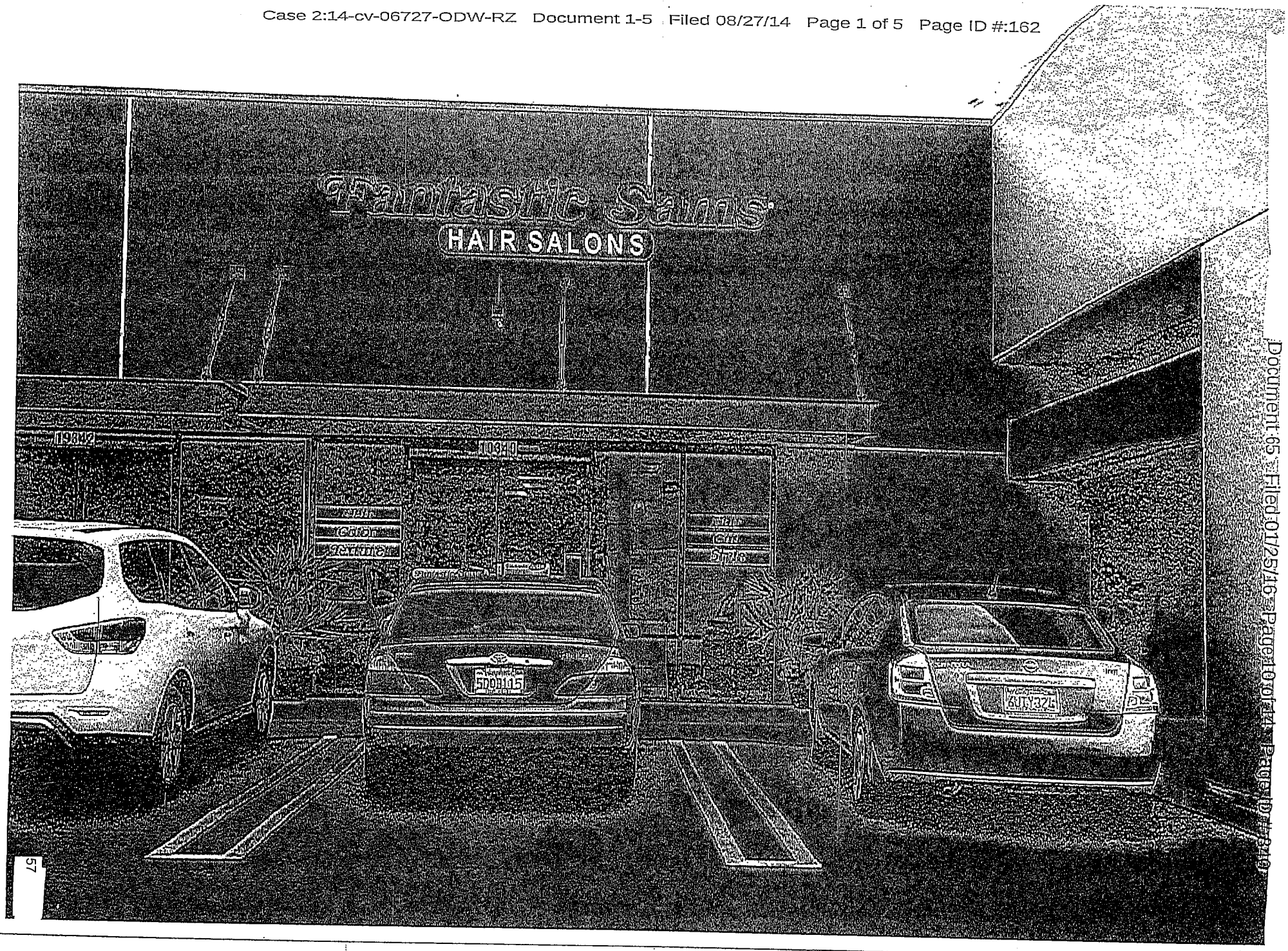
Frank Moassesfar
Parvaneh Moassesfar
4408 Alfarena Place
Tarzana, CA 91356

Salon 10811 (Northridge, CA)

DESCRIPTION	AMOUNT
Past due royalty fees covering the period August 27, 2013 thru July 25, 2014	$ 17,980.32
Past due royalty fees covering the period July 26, 2014 thru October 15, 2014	$ 4,560.72
Total past due royalty fees:	$ 22,541.04
Past due NAF fees covering the period August 27, 2013 thru July 25, 2014	6,502.08
Past due NAF fees covering the period July 26, 2014 thru October 15, 2014	1,649.28
Total past due NAF fees:	$ 8,151.36
	$ 30,692.40

Make all money orders or cashiers checks payable to FANTASTIC SAMS FRANCHISE CORP.

Past Due Amount Is Due Upon Receipt



Cal. Civ. Proc. Code § 437c (relevant sections below)

(a) (1) A party may move for summary judgment in an action or proceeding if it is contended that the action has no merit or that there is no defense to the action or proceeding. The motion may be made at any time after 60 days have elapsed since the general appearance in the action or proceeding of each party against whom the motion is directed or at any earlier time after the general appearance that the court, with or without notice and upon good cause shown, may direct.

(b) (1) The motion shall be supported by affidavits, declarations, admissions, answers to interrogatories, depositions, and matters of which judicial notice shall or may be taken. The supporting papers shall include a separate statement setting forth plainly and concisely all material facts that the moving party contends are undisputed. Each of the material facts stated shall be followed by a reference to the supporting evidence. The failure to comply with this requirement of a separate statement may in the court's discretion constitute a sufficient ground for denying the motion.

(c) The motion for summary judgment shall be granted if all the papers submitted show that there is no triable issue as to any material fact and that the moving party is entitled to a judgment as a matter of law. In determining if the papers show that there is no triable issue as to any material fact, the court shall consider all of the evidence set forth in the papers, except the evidence to which objections have been made and sustained by the court, and all inferences reasonably deducible from the evidence, except summary judgment shall not be granted by the court based on inferences reasonably deducible from the evidence if contradicted by other inferences or evidence that raise a triable issue as to any material fact.

(d) Supporting and opposing affidavits or declarations shall be made by a person on personal knowledge, shall set forth admissible evidence, and shall show affirmatively that the affiant is competent to testify to the matters stated in the affidavits or declarations. An objection based on the failure to comply with the requirements of this subdivision, if not made at the hearing, shall be deemed waived.

(f) (1) A party may move for summary adjudication as to one or more causes of action within an action, one or more affirmative defenses, one or more claims for damages, or one or more issues of duty, if the party contends that the cause of action has no merit, that there is no affirmative defense to the cause of action, that there is no merit to an affirmative defense as to any cause of action, that there is no merit to a claim for damages, as specified in Section 3294 of the Civil Code, or that one or more defendants either owed or did not owe a duty to the plaintiff or plaintiffs. A motion for summary adjudication shall be granted only if it completely disposes of a cause of action, an affirmative defense, a claim for damages, or an issue of duty.

(p) For purposes of motions for summary judgment and summary adjudication:

(1) A plaintiff or cross-complainant has met his or her burden of showing that there is no defense to a cause of action if that party has proved each element of the cause of action entitling the party to judgment on the cause of action. Once the plaintiff or cross-complainant has met that burden, the burden shifts to the defendant or cross-defendant to show that a triable issue of one or more

material facts exists as to the cause of action or a defense thereto. The defendant or cross-defendant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

(2) A defendant or cross-defendant has met his or her burden of showing that a cause of action has no merit if the party has shown that one or more elements of the cause of action, even if not separately pleaded, cannot be established, or that there is a complete defense to the cause of action. Once the defendant or cross-defendant has met that burden, the burden shifts to the plaintiff or cross-complainant to show that a triable issue of one or more material facts exists as to the cause of action or a defense thereto. The plaintiff or cross-complainant shall not rely upon the allegations or denials of its pleadings to show that a triable issue of material fact exists but, instead, shall set forth the specific facts showing that a triable issue of material fact exists as to the cause of action or a defense thereto.

Cal Civ Code Section 1636:

A contract must be so interpreted as to give effect to the mutual intention of the parties as it existed at the time of contracting, so far as the same is ascertainable and lawful.

Cal Civ Code Section 1639:

When a contract is reduced to writing, the intention of the parties is to be ascertained from the writing alone, if possible; subject, however, to the other provisions of this Title.

Potentially relevant cases:

For a plaintiff's entitlement to summary judgment, see Aguilar v. Atlantic Richfield Co., 25 Cal.4th 826 (2001); Coyne v. Krempels, 36 Cal.2d 257 (1950)

For summary judgment standards in a contract case, there are a number of cases you could use, including *Parsons v. Bristol Development Co.*, 62 Cal.2d 861 (1965); *Wolf v. Sup. Ct.*, 114 Cal. App. 4th 1343 (2004); *Pac. Gas & Elec. Co. v. G.W. Thomas Drayage & Rigging Co.*, 69 Cal. 2d 33 (1968); *City of El Cajon v. El Cajon Police Officers' Assn.*, 49 Cal.App.4th 64 (1996); *Bank of the West v. Superior Court,* 2 Cal.4th 1254 (1992); *City of Hope National Medical Center v. Genentech, Inc.*, 43 Cal.4th 375 (2008); *Wolf v. Walt Disney Pictures & Television*, 162 Cal. App. 4th 1107 (2008); *Santisas v. Goodin*, 17 Cal. 4th 599 (1998); *Lockyer v. R.J. Reynolds*, 107 Cal.App.4th 516 (2003)

For elements of a breach of contract claim, see *Reichert v. General Ins. Co.* (1968) 68 Cal.2d 822, 830.)

For a few franchise breach cases, in particular, see *Jay Bharat Developers, Inc. v. Minidis*, 167 Cal.App.4th 437 (2008); *Postal Instant Press, Inc. v. Sealy*, 43 Cal. App. 4th 1704 (1996); *Safaei v. IHOP Corp.*, 2010 WL 3760253 (4th Dist., Sept. 28, 2010).

For right to recover damages in a contract case, see *Postal Instant Press, Inc. v. Sealy*, 43 Cal. App. 4th 1704 (1996); *Metzenbaum v. R.O.S. Associates*, 188 Cal.App.3d 202 (1986); *Brandon & Tibbs v. George Kevorkian Accountancy Corp.*, 226 Cal.App.3d 442 (1990).

(2005)

ALTON CRAIN, Plaintiff,

v.

TEXAS CAN!, ET AL., Defendants.

No. 3-04-CV-2125-M.

United States District Court, N.D. Texas, Dallas Division.

August 16, 2005.

MEMORANDUM ORDER

JEFF KAPLAN, Magistrate Judge.

Defendants have filed a motion to extend the deadlines for completing discovery and filing dispositive motions. For the reasons stated herein, the motion is denied.

I.

This is a civil action brought under Title VII of the Civil Rights Act of 1964 ("Title VII"), as amended, 42 U.S.C. § 2000e, *et seq.*, and the Family and Medical Leave Act of 1993 ("FMLA"), 29 U.S.C. § 2601, *et seq.* Plaintiff initially filed this action *pro se* on September 30, 2004. Thereafter, the court appointed a lawyer to represent him. In their joint status report, the parties proposed a discovery deadline of August 15, 2005 and a dispositive motion deadline of September 15, 2005. (*See* Jt. Conf. Rep., 12/20/04 at 2-3, ¶¶ 5 & 9(A)(2)).[1] The court adopted these suggested deadlines in its scheduling order entered on January 14, 2005. (*See* Sch. Order, 1/14/05 at 2-3, ¶¶ 4 & 9). The scheduling order allows the parties to extend the discovery deadline by agreement, "provided . . . the extension does not affect the trial or pretrial submission or dispositive motion dates[.]" (*Id.* at 3, ¶ 9).

Before the scheduling order was entered, defendants served plaintiff with 20 interrogatories and 70 requests for production. (Plf. App. at 7, ¶ 40). Plaintiff responded to this written discovery on January 26 and 31, 2005. (*Id.*). Plaintiff also served his Rule 26(a) initial disclosures in January, identifying 31 people with knowledge of relevant facts and seven categories of documents. (*Id.* at 11-20). That same month, defense counsel requested dates for plaintiff's deposition. (*Id.* at 4-5, ¶ 35). Counsel for plaintiff agreed to produce his client for deposition in early March, but opposing counsel never responded with proposed dates. (*Id.*). In subsequent discussions, counsel for plaintiff agreed to make his client available for deposition before any scheduled mediation. Once again, defense counsel did not follow-up with specific dates. (*Id.*). Not until July 27, 2005—just 19 days before the discovery cutoff—did defense counsel ask to depose some or all of the 31 witnesses identified by plaintiff in his initial disclosures. (*Id.* at 5, ¶ 36; *see also id.* at 24). Counsel for plaintiff suggested three dates for these depositions and two dates for the deposition of his client, but defense counsel was unavailable on those dates. (*Id.* at 26). When defense counsel requested an extension of the discovery deadline, counsel for plaintiff agreed to produce his client for deposition after the discovery cutoff, but otherwise refused to extend this deadline. (*Id.*). Plaintiff also opposes an extension of the deadline for filing dispositive motions pending the completion of mediation. This motion followed.

II.

In order to obtain an extension of the deadlines for completing discovery and filing dispositive motions, defendants must demonstrate "good cause" for modifying the scheduling order. *See* FED. R. CIV. P. 16(b).[2] The "good cause" standard focuses on the diligence of the party seeking an extension of pretrial deadlines. *See AMS Staff Leasing v. Starving Students, Inc.*, 2004 WL 251555 at *1 (N.D. Tex. Jan. 7, 2004) (Kaplan, J.) (citing cases). Mere inadvertence on the part of the movant and the absence of prejudice to the non-movant are insufficient to establish "good cause." *Id.* Instead, the

movant must show that "despite his diligence, he could not have reasonably met the scheduling deadline." *Id.*; *see also* 6A C. WRIGHT & A. MILLER, FEDERAL PRACTICE AND PROCEDURE § 1522.1 at 231 (2d ed. 1990).

Defendants argue that "good cause" exists for extending these deadlines because of past scheduling difficulties and the fact that many of the witnesses identified by plaintiff reside out of town. In addition, defendants maintain that postponing the depositions and the filing of dispositive motions "will permit the parties to fully present relevant evidence and arguments in this case while potentially minimizing the cost of the litigation if the case can be resolved at mediation." (Def. Mot. at 2). However, defense counsel wholly fails to explain why she waited until July 27, 2005—more than six months after plaintiff served his initial disclosures and just 19 days before the discovery cutoff—to request dates for the depositions of 31 witnesses. Without such evidence, defendants cannot demonstrate "good cause" for extending the discovery deadline. Nor have defendants established "good cause" for extending the September 15, 2005 deadline for filing dispositive motions, which is three weeks after the completion of mediation.[3]

CONCLUSION

Defendants' motion to extend the discovery and dispositive motions deadlines is denied. However, defendants may depose plaintiff after the expiration of the discovery deadline as previously agreed by counsel.

SO ORDERED.

[1] Counsel for plaintiff points out that defendants insisted on an August 15, 2005 discovery deadline. Plaintiff preferred a deadline of September 9, 2005. (*See* Plf. App. at 4, ¶ 33).

[2] Fed. R. Civ. P. 16(b) provides, in pertinent part, that "[a] schedule shall not be modified except upon a showing of good cause . . ."

[3] A settlement conference is currently scheduled for August 24, 2005 before U.S. Magistrate Judge Irma C. Ramirez.

Legal Writing: How to Write For Partners

(http://abovethelaw.com/career-files/how-to-write-for-partners/)

By: ROSS GUBERMAN (HTTP://ABOVETHELAW.COM/AUTHOR/ROSS-GUBERMAN)

With the help of many clients, I recently surveyed thousands of law-firm partners about the writing skills they want to see associates develop.

Across the country and across practice areas, partners agree on what they'd like to change about associate drafts. I've organized their responses according to my four Steps to Standout Legal Writing (http://www.legalwritingpro.com/services/four-steps.php). I've also included a fifth category that covers usage and mechanics.

A few sample responses follow.

Step One: Concision

Partners say they spend too much time cutting clutter and other distractions from associate drafts. Anything that interrupts the message-wordy phrases, jargon, legalese, redundancy, blather, hyperbole- is a candidate for the chopping block.

- "Get to the point, no 'throat clearing.'"
- "[Avoid] unnecessary or inaccurate phrases such as in order, at this point in tome or almost unique. Similarly, avoid using words such as utilize when use is sufficient."

Step Two: Clarity

Partners acknowledge that most legal topics are dry and complex, but they still believe associates could do much more to produce clear, active, and direct writing.

- "Your sentences [should not] average more than 25 words."
- "Sound like a human being."

Step Three: Structure

In associate drafts, partners find that the structure often tracks the associate's research rather than the reader's likely questions. Many partners long for the days when attorneys mapped out their sections and paragraphs before writing a single word.

- "Don't save the punch line for the end. Let your reader know the point you are making up front."
- "This is not an academic exercise; keep the consumer's goal in mind and deliver what it is they need to know efficiently."

Step Four: Using Authorities

These days, nearly all associates find the authorities they need. But partners want associates to do more than just copy or summarize those authorities; they want to know how each authority supports the associate's points explicitly.

- "This may be as much an analytical skill as a writing skill, but I have been struck by how often junior associates think sending you five cases is an appropriate response to a research assignment."
- "[A]ssociates should work on better integrating their discussions of the facts and the law in briefs, i.e., doing more than just stating the facts and stating the law, but explaining how the facts apply to the law"

Usage and Mechanics

The painful truth: At even the best firms, many partners want associates to work on grammar, usage, and proofreading. Although these "mechanical" skills may not matter much in law school, they are priceless on the job.

- "Proper grammar! It is quite disappointing how many incorrect usages and constructions many of our incoming (and experienced) lawyers demonstrate in their writing."
- "Even first drafts should be polished- no typos, poor grammar, or incorrect citations."

See more: What Makes for Brilliant Writing (http://abovethelaw.com/career-files/legal-writing-what-makes-for-brilliant-writing/) and Legal Writing's 3 Biggest Mistakes (http://abovethelaw.com/career-files/legal-writing-pro-3-biggest-mistakes-and-how-to-fix-the/)

THE WRITING CENTER
GEORGETOWN UNIVERSITY LAW CENTER

EMAILING PROFESSIONALLY[1]

Nowadays, much of a lawyer's (or any professional's) correspondence transpires over email. Accordingly, emailing professionally is vital to a lawyer's success. In this handout, you will find a set of general guidelines for emailing professionally—some basics and some additional tips to help you develop your professional identity through email.

Of course, what follows is general advice and may not apply in your agency/firm/organization. Nothing can replace your diligent effort to determine office culture and, specifically, how it relates to emailing. Still, we are confident that practicing the emailing "do"s and "don't"s that follow will serve you well in whatever professional setting your find yourself.

I. The Basics: "Do"s & "Don't"s

CHOOSE A PROFESSIONAL EMAIL ADDRESS

Often, your agency/firm/organization will choose your email address for you. However, if it does not, make sure you choose a professional email address. As a general rule, keep it simple; your name (and *only* your name) will typically suffice.

Examples of professional email addresses include:

- harbaugh@umich.edu
- jimharbaugh@umich.edu
- jharbaugh@umich.edu
- jim.harbaugh@umich.edu
- jim_harbaugh@umich.edu

Examples of unprofessional email addresses include:

- queteepielolz@umich.edu
- iluvmichfootball@umich.edu
- maizeandblue4lyfe@umich.edu
- puppiesforlunch@umich.edu
- lawiz4loozers@umich.edu

USE PROFESSIONAL SALUTATIONS & CLOSINGS

A salutation sets the tone for any type of correspondence. A closing is a reader's last impression of a writer. Accordingly, a writer's choice of salutation and closing are essential to establishing and maintaining a professional tone in a writer's correspondence. Determining what qualifies as an appropriate salutation/closing requires a careful mix of common sense, awareness of organizational culture, and awareness of your audience. And, in your initial correspondence with an individual, always err on the side of formality. Below are some general guidelines.

[1] *Composed by Luci Hague & Alex Winkelman*

Appropriate salutations include:

- Mr./Ms. [Insert Surname],
- Dear Mr./Ms. [Insert Surname],
- Hello Mr./Ms. [Insert Surname],
- Hi Mr./Ms. [Insert Surname],

Inappropriate salutations include:

- Hey,
- Sup,
- Yo,
- Heyo,

Appropriate closings include:

- Sincerely,
- Best,
- Best regards,

Inappropriate closings include:

- Peace out,
- Adios,
- Kisses,

CREATE A PROFESSIONAL SIGNATURE BLOCK

It is common practice for a professional to include a signature block after the body of her email. Typically, a signature block includes the professional's name, title, phone number, email address, agency/firm/organization name, agency/firm/organization address, and a confidentiality disclaimer. See below for an example of a professional signature block. As always, however, the example below is but one of many styles in which a professional can format a successful signature block.

Jim Harbaugh [Name]
Head Football Coach, General Counsel [Title]
University of Michigan, Ann Arbor [Organization Name]

5555 State Street [Address, Line #1]
Ann Arbor, Michigan 55555 [Address, Line #2]
Phone: (555) 555-5555 [Phone Number]
Fax: (666) 666-6666 [Fax Number]
Email: Lharbaugh@umich.edu [Email Address]

This e-mail is confidential and may be privileged. Use or disclosure of it by anyone other than a designated addressee is unauthorized. If you are not an intended recipient, please delete this e-mail from the computer on which you received it immediately.

II. Style: Email as a Part of Professional Identity

EMAIL STYLE: BASIC POINTERS

1) If you have previously received an email from the person with whom you've been in contact, it's usually safe to mirror the sender's choices in salutation, closing, and sentence length. For example, if the person to whom you're sending an email has previously signed off with his or her first name, unless you have a reason to address the person by his or her title and last name, you can begin your next email with a salutation and the person's first name. When in doubt, however, it's generally better to err on the side of formality—especially if the email is your first communication with someone.
2) If you expect to send emails to multiple recipients, know your supervisor's preference about when to send emails with the CC function and when to use the BCC function.
3) Be judicious with use of the "Reply All" function, even if you're one of many recipients of an email. Unless there is a clear reason for every recipient to receive the text of your email, consider whether it may be appropriate to reply to the sender individually.

4) In order to avoid sending emails too early, leave the recipient email address blank until you're satisfied with the substance and style of the email. Then, insert the recipient's email when you're ready to send the email out.

EMAIL FORMATTING

a. Subject Lines

Effective subject lines can be useful in previewing the substance of an email, and may be especially helpful if your email addresses two or more distinct subjects. When in doubt, keep subject lines as concise as possible so that they can be read quickly and so that the recipient's screen can display the entire line. Consider asking whether your supervisor has a preference for what to include or leave out in email subject lines.

Examples of potentially effective subject lines:

- Today's schedule
- 2/10 discussion: following up
- Assignment for Monday and class next week

Examples of likely ineffective subject lines:

- [No Subject]
- RE:
- Document

b. Font Choices

Keep your font choice simple. It's usually safest to opt for the default font in your email application. Remember that special fonts and characters may be distorted in the sending process. Even if you find an uncommon font more visually appealing, it may detract from the substance of your message and may be distracting to the recipient. Use of colorful text is likewise inadvisable because it may make the email more challenging for the recipient to read.

Examples of likely effective font choices:

- Calibri
- Arial
- Times New Roman
- Garamond

Fonts worth avoiding include:

- Comic Sans
- *Any script font*
- A font that appears in capital letters
- Papyrus

c. Emoticons and Hashtags

Despite their common use in informal communications, emoticons and hashtags are generally inappropriate in a professional setting. Moreover, several email applications may distort the ☺ or ☹ symbols, and replace the emoticon with a "J" or other letter or symbol. Unless the organizational culture of your workplace is distinctly emoticon-friendly, you're likely better off avoiding emoticons altogether.

EMAIL SUBSTANCE

- Breaking up longer text lists into bulleted or numbered lists may be an effective choice if you want the recipient to focus on each item individually.
- Headings may be useful organizational tools if your email addresses several different topics.
- Punctuation matters. An exclamation point at the end of a sentence may be useful to convey enthusiasm in a less formal context, but it may be inappropriate in an office setting.

Use your judgment depending on the relative level of enthusiasm in your office culture and the frequency with which your colleagues and supervisors use (or don't use) exclamation points.

- Be sure to spell-check emails just as you would spell-check a document. If you're sending a particularly important email, consider drafting the text in a word processing application and printing it to proofread separately.
- Consider breaking up long sentences. If your supervisor is reading your email on a phone or other handheld device with a small screen, long sentences and sentences with semicolons may be more challenging to follow.
- Because it's impossible to hear inflections and tone in an email as would happen in an ordinary conversation, word choice is especially important. Select your words carefully and make sure they're tailored to the message you want to convey.

III. To Email or to Call?

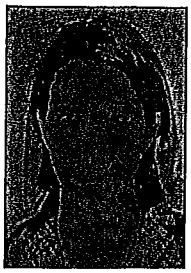
Despite its usefulness, email is not always the most effective method of communication with a supervisor or colleagues. The choice may reflect an organization's particular culture. If you're just starting a new position, try to get a sense of when your colleagues use email and when they prefer to pick up the phone or stop by another's office. If you have a particularly simple question, it may be easier to stop by your colleague's desk instead of taking the time to type and send your email.

Email may be useful if you want to establish a record of asking a certain question, or if the response will likely contain information that you need to reference in the future. If the information is especially important, consider saving the email to its own file folder or printing a hard copy for your records.

IV. Other Resources

There are many useful resources available regarding the professional use of email and methods of using email to enhance your professional success. As with any document, use judgment and discretion about which guidance may be most helpful for your professional context.

- Joyce E.A. Russell, *Career Coach: How to use e-mail effectively, wisely, and professionally*, Aug. 30, 2010, *available at* http://www.washingtonpost.com/wp-dyn/content/article/2010/08/27/AR2010082704679.html.
- Wayne Schiess, *E-Mail Like a Lawyer*, Mich. Bar. J. (Sept. 2010), *available at* https://www.michbar.org/journal/pdf/pdf4article1741.pdf.



E-Mails to Clients: Avoiding Missteps

By Kristin J. Hazelwood

In 1998, the KBA Ethics Committee issued E-403, concluding that, absent "unusual circumstances," a Kentucky lawyer may communicate with a client via unencrypted e-mail without violating the lawyer's duty of confidentiality.[1] Despite its popularity[2] and ease of use, e-mailing with a client still poses special concerns. Not all communications are appropriate for e-mail, and, even when e-mail is appropriate, drafting the e-mail demands more of the writer than the typical e-mail.

Is E-mail Appropriate for this Communication?

Here are some questions a careful lawyer should consider before e-mailing with a client:

Does this communication deal with an extraordinarily sensitive matter? In E-403, the Ethics Committee stated that unencrypted e-mail with a client is appropriate absent "unusual circumstances." "Unusual circumstances" that can make e-mail inappropriate include a communication involving an "extraordinarily sensitive matter."[3] When the client would suffer serious adverse consequences from disclosure of the e-mail, the lawyer should take extra steps (like encryption) to ensure its security.

Does a third person have access to the e-mail account or device that the client uses? According to a recent ABA ethics opinion, because a lawyer has the obligation to use reasonable care to protect the client's confidential information, a lawyer ordinarily has an ethical obligation to instruct the client not to use a computer or other telecommunications device or e-mail account for sensitive (or may even any attorney-client) communications if another person has a right to access it.[4] Specifically, the ABA was concerned with the situation in which a client uses an employer's e-mail account or an employer's computer or smartphone to access a web-based e-mail account.[5] If the employer's policies give it a right of access to e-mails sent via the employer's account or device, then the employee does not have a reasonable expectation of privacy in the e-mail.[6] That same analysis applies when members of a family share an e-mail account or when the client (or the lawyer) uses a public or borrowed computer such as at a library or hotel.[7]

Does the communication convey bad or emotionally charged news? E-mail's short and direct form make drafting e-mails that convey the appropriate tone challenging. Much as a lawyer would call or meet with a client to discuss a hearing with an unfavorable result rather than write a letter, the lawyer should similarly resist the temptation to e-mail such news to the client. In conveying bad or emotionally charged news to a client, the lawyer needs to be able to respond to the client's verbal and nonverbal cues.[8] That responsiveness is not possible with e-mail.

Would I want to hear this communication read in court? Just like with letters, a lawyer should always be mindful of the longevity of e-mail and the ease with which it can be shared with others. Forwarding e-mailed documents is particularly problematic because of the metadata that can unknowingly be passed along with a document.

Does this E-mail Look Like Professional Correspondence?

Writing professional e-mail is tricky because it involves the use of an informal mode for serious matters. Consider these questions in evaluating the content and form of an e-mail:

Have I proofread and edited carefully? Shortcuts in social e-mail may be the norm, but they should never become

part of professional e-mail.[9] Not much calls into question a lawyer's intellectual capabilities faster than grammatical errors.[10] The careful lawyer proofreads and polishes an e-mail just as carefully as a brief being filed in court.[11]

Is the e-mail concise? Recipients expect e-mails to be short. At least one scholar has recommended the "no scrolling" rule: The recipient should be able to read the entire message on a single computer screen and should not have to scroll down to read it.[12] Now that e-mails are often read on smartphones and tablets, the need for concise e-mails is even more pressing.

Is the e-mail reader-friendly? Focus the client on the legal issue by creating a subject line that conveys the specific purpose of the e-mail and change it as the thread evolves.[13] To make sure that the client understands and knows how to respond to your message, use a simple, block format for your e-mail and put questions that need to be answered at the beginning of the message.[14] Put extra space between the chunks (either paragraphs or numbered items) for readability.

Have I double-checked the list of recipients? Check the recipient list carefully to make sure everyone on the list really needs to be included, especially when replying to a message.[15] It's frustrating to have one's inbox clogged with unnecessary messages. Even more problematic, if the e-mail contains confidential information and goes to an opposing party or some other third party, the consequences for the client could be disastrous. Although the Kentucky Rules of Professional Conduct deal with the issue of inadvertent disclosure[16] and even if the e-mail contains a privilege statement, the lawyer can easily avoid the embarrassment and risk to the client by double-checking the list of recipients. Waiting until after writing the body of the e-mail to add the recipients will help identify who should receive it.

E-mail can be a valuable tool for lawyers, but its misuse can create ethical and credibility problems. Carefully considering the particular message and client as well as the e-mail's form and content will help avoid missteps.

ENDNOTES

1. Ky. Bar Ass'n Ethics Comm., Op. E-403 (1998).
2. Kristen Konrad Robbins-Tiscione, *From Snail Mail to E-mail: The Legal Memorandum in the Twenty-First Century*, 58 J. Legal Educ. 32, 32-33 (2008).
3. Ky. Bar Ass'n Ethics Comm., Op. E-403 (1998). The Illinois State Bar Association opinion on which the Ethics Committee relied in E-403 listed "extraordinarily sensitive matters" as an "unusual circumstance" that would make unencrypted e-mail unethical. Ill. State Bar Ass'n, Adv. Op. 96-10 (1997).
4. ABA Comm. on Ethics &Prof'l Responsibility, Formal Op. 11-459 (2011).
5. *Id.*
6. *Id.*
7. *Id.*
8. Tracy Turner, *Email Etiquette in the Business World*, 18 Persps.: Teaching Legal Res. & Writing, Fall 2009, at 18-19.
9. Kendra Huard Fershee, *The New Legal Writing: The Importance of Teaching Law Students How to Use E-mail Professionally*, 71 Md. L. Rev. Endnotes 1, 16 (2011).
10. *Id.*
11. Ian Gallagher, *A Form and Style Manual for Lawyers* 181 (2005).
12. Wayne Schiess, *Writing for the Legal Audience* 33-34 (2003); *see also* Gallagher, *supra*, at 181-82 (emoticons and texting abbreviations should never be part of professional email).
13. Schiess, *supra*, at 38.
14. *Id.* at 40. According to Professor Schiess, this format is preferable because formatting is often lost when an email is transmitted.
15. Gallagher, *supra*, at 180 ("The lesson here is that you must think carefully about who is receiving every communication you send . . . and what the implications of the receipt of the document are.").
16. Ky. Sup. Ct. R. 3.130 (4.4).

Two examples sent to me of very good client communications.

Here's the first:

In the crane case, we are in the process of responding to a large set of document requests from Deep South. There are numerous requests related to the refinery's Hurricane Ike claim, including requests for documents related to (a) the Ike property damage claim submitted to OIL; (b) the Ike business interruption arbitration; and (c) the damage calculations and source data submitted to the insurers for the refinery interruption loss.

Although the refinery and Navigant have controlled for and excluded the effects of Ike in calculating the crane damages, we don't think there is a strong objection to be made to prevent Deep South from obtaining discovery regarding the refinery portion of the Hurricane Ike claim to ensure there is no double-counting. And we don't want to delay the crane case by objecting to the production of documents that Judge Wilson is very likely going to order us to produce.

So our plan is to produce (subject to relevancy objections) the following to Deep South in response to its Ike-related document requests: (a) the schedules/materials LYB has regarding the Ike property damage claim submitted to OIL; (b) the pleadings in the Ike arbitration (statement of claim, statement of defence, and reply); and (c) the final proof of loss calculations (and supporting data) for the refinery loss as submitted to insurers by Navigant.

Please let us know if you disagree with this approach or want to discuss.

Thanks.

Here's the second:

CONFIDENTIAL & PRIVILEGED: ATTORNEY-CLIENT COMMUNICATION AND WORK-PRODUCT

Mark – Attached is a motion to compel filed by plaintiffs late yesterday.

The motion seeks net worth information from Houston Refining, LP. (The underlying discovery responses and objections were lodged by Mills Shirley on June 20, 2011; the requests were served on May 16.)

The motion is set for hearing on September 19 at 10:00 am. Our deadline to file a response is Thursday, September 15.

We will confer with you more later about a response. But we wanted to point out at least the following issues now:

1) Plaintiffs' counsel did not confer with us on these issues. We checked with Etta, and there was no attempt to confer with them on these objections either. We will argue that the motion should be struck for failure to comply with the local rules and for a misrepresentation to the court regarding their efforts to confer.

2) The motion is patently devoid of argument on facts or law. This seems to be a habit of Vuk and Sean. They file a one-page motion asking for relief, inducing defendants to file a long response trying to counter arguments that haven't even been made yet; then plaintiffs come back with a reply that narrows the issues and / or points out the problems with the defendant's speculative arguments. We may point this out to the court to call them out on this practice.

3) Last Friday the Texas Supreme Court issued an order granting oral argument on a mandamus case involving this same issue. The case is No. 110007, IN RE ASCENSION MARTINEZ, JR.. The case arises from a San Antonio court of appeals opinion issued last December upholding an order compelling a party to produce net worth documents. (That opinion is attached.) The Texas Supreme Court set oral argument in this case for December 7, 2011. Without speculating too much on what they might do, the fact that they took the case is at least some indication that they will clarify the law on these issues and it could have some bearing on our position here (even though oral argument is set for after our trial date).

Again, we can discuss specific response arguments more later and we will send any response to you before filing. Also, we should discuss whether Houston Refining is even able (or willing) to produce responsive documents if so compelled by the trial court. We will likely need to know this for any response.

Thanks, and let us know if you want to discuss,

- John

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Writing for Your Audience: The Client

by Wayne Schiess

We all write letters to non-lawyer clients at some time. Yet what we write is often poorly targeted to that audience. A partner in a prestigious law firm recently told me that he is "appalled" at the writing style of letters that his colleagues send to clients: the tone and style are too stuffy and legalistic.

As lawyers, we need to be aware that when we write to clients, we face a dramatic shift in audience. In this article I address three typical characteristics of legal language that appear too often in client letters: legalisms, legal citation, and overformality. I'll paraphrase George Bernard Shaw (who used *literature* and *literary* where I'm using *law* and *legal*):

In law the ambition of a novice is to acquire the legal language; the struggle of the adept is to get rid of it.[1]

Avoid Using Legalisms

Legalisms are "the circumlocutions, formal words, and archaisms that characterize lawyers' speech and writing."[2] They are the distinctive characteristics of traditional legal-writing style.

Wayne Schiess

Wayne Schiess is the director of legal writing at the University of Texas School of Law in Austin. He is the author of more than two dozen articles on practical legal-writing skills, plus four books, and he served as the drafting consultant for the Texas Pattern Jury Charges Plain-Language Task Force. Find him at http://legalwriting.net.

But you ought to banish them from client letters. Simply put, do not use traditional legal writing style when writing to clients. Try *not* to sound like a lawyer. That's a challenge because legalisms abound in what lawyers read and in what they normally write. Many lawyers will continue to use legalistic words and phrases when writing to clients, primarily for two reasons.

First, some lawyers use legalisms to impress or intimidate the client. Under this theory, the client who is baffled by the language is the client who needs the lawyer. I say impress the client with your knowledge of the law, with your ability to get favorable results, and with your hard work.

Second, some lawyers use legalisms out of habit or reflex. Sometimes lawyers forget what they didn't know. That happens to teachers all the time. You teach the concept from the perspective of one with 10 or 20 years' experience, forgetting that your audience has no experience. But skilled teachers—and practitioners—adapt their writing to the audience.

Here is an example of how it can be done.

Examples of Legalisms

Read this excerpt from a practitioner's letter to a new client. Typical legalisms are highlighted.

> *Dear Mr. Wilkins:*
>
> *Enclosed please find the retainer agreement. Please sign and return* ***same*** *at your earliest convenience.*
>
> ***Pursuant to*** *our conversation of December 20, 2001, I have conducted legal research on the question as to whether your arbitration claim was timely under the Texas Seed Arbitration Act. Tex. Agric. Code Ann. § 64.006(a) (Vernon 2001) (the "Act"). According to Texas* ***common law*** *construing the Act, the court would apply the plain-meaning* ***canon of construction,*** *Fitzgerald v. Advanced Spine Fixation Systems, Inc.,* 996 S.W.2d 864, 865 (Tex. 1999), *and should hold that* ***said*** *claim was timely.*
>
> *Unfortunately, this conclusion is not guaranteed and is subject to certain qualifications discussed* ***herein.*** See, e.g., Continental Cas. Ins. Co. v. Functional Restoration Assocs., *19 S.W.3d 393, 399 (Tex. 2000).*

These boldface terms are almost exclusively "legal"; that is, only lawyers use them. These words and phrases fall into different categories: *same*, *pursuant to*, *said*, and *herein* are commonly used by lawyers, but do not have unique legal meanings; *common law* and *canon of construction* have specialized legal meanings. But you can replace all of them with common terms:

Instead of	Write
same	it, the agreement
Pursuant to	As discussed in, As we agreed
common law	court cases, judicial decisions
canon of construction	rule, method of interpreting statutes
said	the, your
herein	here, in this letter

By removing the legalisms, you make the text easier for the client to understand, and you avoid sounding pompous.

Limit Formal Legal Citations or Simplify Them Greatly

The example letter I excerpted contains three legal citations. All three use correct form.[3] All three direct the reader to the proper authority. All three state the proposition they are cited for. So what's the problem?

First, they clutter up the text. Legal readers are used to citations and, frankly, are apt to skip over them. But to the uninitiated, they are large road humps. They're too long to be ignored, and yet they are not textual sentences, so readers must slow down and try to figure them out. Good client writing doesn't ask the reader to slow down and figure things out.

Second, they contain specialized information that most clients won't understand. In particular, the volume-reporter-page portion of the citation can be baffling: 996 S.W.2d 864. Certainly that means nothing to the nonlawyer client.

Third, citation signals must certainly seem strange to the client. What is *See, e.g.?* Signals are a perfect example of something that has a specialized legal meaning. Their mean-ing is not intuitive, but is specially defined in citation manuals. We should not expect our clients to consult a citation manual.

So rather than lard your client letters with legal citations, choose from these options:

Option 1: Omit citation to legal authority altogether

Ask yourself these questions: How important is it for my client to know the citation to the Texas Agriculture Code? Can't I just say *Texas law* or *Texas statutes*? Does my client need to know that the case I am relying on is *Fitzgerald v. Advanced Spine Fixation Systems, Inc.*, that it is found in volume 996 of the South Western Reporter, Second Series, page 864, and that it was decided by the Texas Supreme Court in 1999? (Besides, is my client going to know what the South Western Reporter, Second Series is? Or that it's abbreviated S.W.2d?)

Completely omitting the citations in client letters really cleans up the text and makes the document much more readable. But some lawyers will not want to go that far. And in some situations, you *do* want the client to know the names and sources of the authority.

Option 2: Put the citations in footnotes

This technique has much the same effect as omitting the citations because now the long, baffling road humps are gone, and the client can read the text smoothly. Most clients will treat the footnotes as "legal stuff" and will ignore them, and those who want the bibliographic information can find it in the footnotes. But footnotes are a mixed blessing. Some clients will be annoyed that some information is at the bottom of the page and requires them to nod up and down to take it all in.

Option 3: Use a shortened form of the citation

Rather than list the entire case name and bibliographic information, simply refer to the case in a shorthand way. Leave the details in your memo to the file. Under Option 3, our letter excerpt might look like this (with the legalisms replaced):

> *Dear Mr. Wilkins:*
>
> *Enclosed please find the retainer agreement. Please sign and return it at your earliest convenience.*
>
> *As we discussed in our conversation of December 20, 2001, I have conducted legal research on the question as to whether your arbitration claim was timely under the Texas Seed Arbitration Act. According to a Texas case called* Fitzgerald, *the court would apply the plain-meaning rule and should hold that your*

claim was timely.

Unfortunately, this conclusion is not guaranteed and is subject to certain qualifications discussed in this letter. For example, one qualification arises from a Texas Supreme Court case called Continental Casualty *decided in 2000.*

Use a Colloquial Tone

By "colloquial," I do not mean slangy or substandard language. The phrase "colloquial tone" means "a conversational style."[4] Of course, we should usually not write to clients in the same way we speak or carry on conversation. That is far too informal and would appear unprofessional. But we *can* write in a clear, simple, and direct way that avoids pompous, turgid prose.

Ultimately, lawyers should reduce—slightly—the level of formality when writing to clients. What is too formal and what is too informal will often be a matter of taste, but consider a few examples from our revised excerpt. I have highlighted the words and phrases that strike me as unnecessarily formal or stuffy.

Dear Mr. Wilkins:

Enclosed please find** the retainer agreement. Please sign and return it **at your earliest convenience.

*As we discussed in our conversation of December 20, 2001, I have **conducted legal research** on **the question as to whether** your arbitration claim was timely under the Texas Seed Arbitration Act. According to a Texas case called* Fitzgerald, *the court would apply the plain-meaning rule and should hold that your claim was timely.*

***Unfortunately**, this conclusion is not guaranteed and is **subject to certain qualifications** discussed in this letter. For example, one qualification arises from a Texas Supreme Court case called* Continental Casualty *decided in 2000.*

None of these phrases is wrong or bad; they simply elevate the formality unnecessarily. They create a distance between the writer and the reader—a distance you do not want between you and your client.

Here are some possible revisions:

Formal Phrase	Comment
Enclosed please find	This phrase and its sister, *Please find enclosed,* have been criticized since 1880.[5] Try *Here is* or *I have enclosed.*
at your earliest convenience	Almost harmless, but stuffy; try *as soon as you can* or *when you can.*
conducted legal research	One word, *researched,* is turned into three.
the question as to whether	A common legal space filler; prefer *whether.*
Unfortunately	Perfectly correct, but long. Short transition words make your writing easier to read.[6] Use *But.* (And yes, you can start a sentence with *But.*
subject to certain qualifications	Highly formal; perhaps we should omit it or revise it in a complete reworking of the sentence. Suggestion: *there are exceptions.*

By avoiding legalisms, limiting citations, and adopting a less formal tone, we now have a shorter, clearer, and more readily understandable letter.

Here is our final revision:

Dear Mr. Wilkins:

Here is the retainer agreement. Please sign and return it as soon as you can. As we discussed in our conversation of December 20, 2001, I have researched whether your arbitration claim was timely under the Texas Seed Arbitration Act. According to a Texas case called Fitzgerald, *the court would apply the plain-meaning rule and should hold that your claim was timely.*

But this conclusion is not guaranteed; there are some exceptions, which I discuss in this letter. For example, one exception arises from a Texas Supreme Court case called Continental Casualty *decided in 2000.*

Endnotes

1 Quoted in John R. Trimble, *Writing With Style: Conversations on the Art of Writing* 183 (2d ed., Prentice Hall 2000).

2 Bryan A. Garner, *A Dictionary of Modern Legal Usage* 516 (2d ed., Oxford U. Press 1995).

3 Both are correct under either *The Bluebook: A Uniform System of Citation* (Columbia Law Review Ass'n et al. eds., 17th ed. 2000) and Association of Legal Writing Directors & Darby Dickerson, *ALWD Citation Manual: A Professional System of Citation* (Aspen L. & Bus. 2000).

4 Garner, *A Dictionary of Modern Legal Usage* at 171.

5 Garner, *A Dictionary of Modern Legal Usage* at 314. *See also,* Bryan A. Garner, *The Elements of Legal Style* 112 (Oxford U. Press 1991).

6 Garner, *Legal Writing in Plain English* at 50.

On the Papers

A NEW APPROACH TO LEGAL WRITING

GEORGE D. GOPEN

The author is a professor of the practice of rhetoric at Duke University.

Our school systems have taught writing inefficiently and ineffectively throughout our history. Educators have not understood well how the communication process takes place. As a result, they have resigned themselves to treating the symptoms of bad writing as if those manifestations were instead the causes.

They have labored mightily to eradicate those symptoms in their students—believing, as it were, that if one never again coughed or sneezed, one would never have a cold. They have bought into a litany of advice about good writing, so long and widely accepted as to be considered unquestionable. Here are some of the major pieces of that advice, each followed by my opinion of its accuracy and helpfulness:

- Avoid the passive. (Wrong.)
- To make it better, make it shorter. (Wrong.)
- Never allow a sentence to exceed 29 words. (Wrong.)
- Write the way you speak. (Wrong.)
- To see if your writing is good, read it out loud. (Wrong.)
- Avoid the use of the verb "to be." (Wrong.)
- Every paragraph should start with a topic sentence. (Wrong.)

In this series of articles, I will try not only to explain why this old approach does not work, but also to demonstrate a more effective way to perceive and control how written English functions—in a way especially relevant to litigators.

Our school systems' traditional approach to teaching writing (which has its roots in the eighteenth century) has gone awry for many reasons, most of which are connected to a single underlying problem: They have been concentrating on the wrong person—the writer. They have given all those students a continually artificial task—to fill a number of empty pages exclusively for the purpose of being evaluated on how well they can do that. Having created this exclusively academic task, they then have to help the students accomplish it. They teach outlining and thought generation; they demand students follow rigid formats not encountered in the adult, professional world, such as the five-sentence paragraph and the five-paragraph theme. And, sometimes most arduously of all, they concentrate on teaching students how to avoid grammatical error. Students come to believe—accurately—that if they work hard and fill the right number of pages with energy, they cannot fail. If they improve since last time, they will do well.

All of this fails to suit the realities of any profession, but especially that of the trial lawyer. Can you imagine a judge, after studying an attorney's brief, exclaiming, "This is a terrible brief; but you have worked hard, and it is so much better than the one you turned in last month, you win the case." In the real world, no one cares how hard the writer tried nor what progress has been made. Where writing in the real world is concerned, the important person is not the writer; it is the reader.

The bottom-line question about writing quality is simply this: Did the reader get delivery of what the writer was intending to send? If the answer is "yes," the writing was good enough; if it is "no," the writing was not good enough. And it matters little how impressive or dazzling the writing *seemed* to be along the way.

To get control of writing, litigators must understand as much as they can about how the reader goes about the act of reading. It is insufficient to compose a sentence that is *capable* of being interpreted in the way that best serves your case. Instead you must compose it so the odds are as high as possible that an intelligent reader *will be led* to interpret it in the way you intended. We have all been taught writing according to what the writer should and should not do. The perspective

should be shifted to consider what readers actually do. That will be the task of this series of articles.

The interpretive process any reader uses is controlled by three main factors: structural location, grammatical construction, and context.

Structural location. The importance of a writer controlling the structural location of information in a sentence is the extraordinary new news here. Readers take the majority of their clues for the interpretive process not from word choice nor from word meaning, but rather from structural location. *Where* a word appears in a sentence will control much of *what* a reader is likely to do with it. We all know these things intuitively as readers. I will try to make them conscious for you as writers.

Trial lawyers, it can be argued, have the hardest writing task there is.

In trying to make sense of an English sentence, the reader needs to perceive the correct answers to *all* five of the following essential questions if the reader is to understand correctly what the writer was intending to say:

- What is going on here?
- Whose story is this?
- How does this sentence connect backward to the previous sentence?
- How does this sentence lean forward to where we might go from here?
- What is the most important piece of information in this sentence, which I should be reading with extra emphasis?

Remarkably, the interpretive clues to the answers to all five questions are conveyed to the reader mainly by structural location of the sentence's information. More simply stated, as readers we know *where* to look for *what*. Since readers expect these answers to appear in specific places in the English sentence, I call this way of looking at the language the Reader Expectation Approach. Future articles will look at each of these questions and their answers individually.

Grammatical construction. Readers pay different amounts of attention to information depending on in what kind of "unit of discourse" it appears. (A unit of discourse is any group of words that has a beginning and an end—phrase, clause, sentence, paragraph, section . . . all the way up to the complete document or book.) As we look at sentences, I am going to consider only three grammatical units, discarding all those complicated terms you may or may not have had to memorize in high school ("compound clause," "complex clause," "compound-complex clause," etc.). These three are the ones that most influence readers regarding the relative importance of their contents:

- The "main clause." This group of words has a subject and verb and could stand by itself as a complete sentence.
- The "qualifying clause." This group of words has a subject and verb but cannot stand by itself as a complete sentence. (Think of a clause that begins with the word "although.") I have created this term. You will not find it in the grammar books.
- The "phrase." This group of words is a complete unit but lacks either or both a subject and a verb.

Quite simply, readers tend to give more weight to information if it appears in a main clause than if it appears in a qualifying clause—and even less weight than that if it appears in a mere phrase. This is of far greater importance than has been generally understood in any writing of complexity and force, as legal writing tends to be. Sometimes this concern for grammatical construction will coalesce with the concerns for structural location mentioned above; sometimes it will conflict. Writing cannot be made an easy thing; but we can get better at it. Thought is hard.

Context. Context controls meaning. No single sentence "means" by itself but only in combination with the other sentences that surround it. That may sound obvious; or it may sound profound. It is both. It causes problems when we try to talk about improving the construction of a given sentence—which these articles will spend a good deal of time doing. Two differing versions of the same sentence may both be excellent for two different purposes; but in a given context, one will serve better than the other. I will try to keep us aware of this as we go.

Trial lawyers, it can be argued, have the hardest writing task there is—much harder than that of doctors or scientists or philosophers. Legal writing is more difficult not because the subject matter is more complex than medicine or science or abstract philosophical thought, but rather because of the nature of its audience. When those other professionals write something, their audiences bend over backwards to figure out what the writer was trying to say.

In stark contrast, however, the audience for a legal brief is often openly and energetically hostile. It may be a senior partner who will try to find every possible weakness because "Nothing gets out of this office until it is perfect." Or it may be a judge, who, while holding in one hand your well-argued brief, in the other hand is holding an equally energetically argued brief proffered by the opposition. Or it may be an adversary who, though completely aware of what you were trying to say, will expend great energy to show that it doesn't say that or says something else or is essentially nonsense. The existence of the hostile audience makes legal writing the hardest there is. With these articles in LITIGATION, I hope to be of help to you in fighting that fight. ■

On the Papers

MISCONCEIVING THE WRITING TASK: THE TOLL BOOTH SYNDROME

GEORGE D. GOPEN

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

Lawyers are educated people. Lawyers are smart people. Lawyers write for a living. Why then is so much legal writing so unnecessarily hard to read? At least in part, it stems from a misconception of the nature of the writing task.

We learn to write in schoolrooms. For a great majority of professionals, even after they have long left those schoolrooms, writing remains an academic kind of task—a burden to be dispensed with at the earliest moment possible. They receive an "assignment"; they talk with the appropriate people; they search through the library; they read whatever they need to read; they "organize their thoughts," perhaps in some sort of outline form; and then, when the thinking has mercifully come to an end, they "write it up." They "reduce it to words."

Wrong from the start. Writing is not something that happens after the thinking process has ceased. It *is* a thinking process. The English teacher's one-liner makes good sense: "How do I know what I mean till I see what I say?" Naturally, if a writer believes the thought process has been completed before the writing begins, then the writing process becomes sheer drudgery. But this misconception of the "process" of writing is based on a deeper misconception of the "purpose" of writing. This latter misconception can be described in a metaphor I call the "toll booth syndrome."

The Toll Booth Syndrome

The year is 1980. Picture the following: You are well known in your field. You have been summoned for three weeks to New York to consult on an important case. Staying with friends in suburban Connecticut, you commute by car into Manhattan at 5:30 a.m. to avoid the rush hour. On one particular day, you have spent from 6:00 a.m. to 9:30 p.m. in the office, with nothing to show for it. Everything that could go wrong did go wrong. At 9:30, you make your way down to the parking lot, through wind and rain. You fight your way through 90 minutes of crosstown traffic and finally find yourself battling the dark and the elements on Route 95 as you head toward Connecticut.

Just before you leave the state of New York, you see a sign: "Toll booth, 1 mile, 40 cents, exact change, left lane." You search in your pocket for change and find you have precisely three coins—a dime, a nickel, and a quarter—just the right amount. You enter the exact change lane. In front of you is a shining red light, but no barrier; to the left of you is the hopper. You are tired and irritable as you roll down the window, the wind and rain greeting you inhospitably. You heave the change at the hopper. The quarter drops in; the dime drops in; but the nickel hits the rim and bounces out. What do you do? Do you put the car in Park, get out, and grovel in the gravel for your nickel? No. Do you put the car in Reverse and switch to another lane where a human being can make change for your dollar bill, after which you can return to your original lane? No. You go through the red light. It is raining; it is nearing midnight; there are no police in sight; and if you did get caught, you would be able to show the proof of your good intentions in the gravel. The alternatives are just too burdensome. You go through the red light.

If you do this, I would argue you do it because you have chosen to ignore the fundamental purpose of paying tolls. You do not think that in order to continue on that road, you must transfer 40 cents of your accumulated wealth to the state government, with which it will keep the roads in good repair and pay toll booth operators. Instead, you rationalize that in order to continue on the road, *you must be dispossessed of 40 cents*—and you have been. It is therefore moral, if perhaps a bit risky, for you to plunge further on into the Connecticut darkness.

The same holds true for the writing task. Most writers do not care primarily that the intended audience actually receive their 40 cents' worth of communication; they care only that after digesting all that information and forming all those ideas, they now need only dispossess themselves of it all onto the paper. That done, all is done. If a reader complains of the lack of X later on, the writer can lead the reader to the hidden spot in the gravel where some traces of X exist, faintly gleaming through the grime in which it has become embedded.

For students, the rhetorical act of writing is not communication; rather it is a demonstration—that work has been done. That works in school. There, students are usually rewarded for demonstrating that they have done a great deal of work, have found the right facts, and have devised a way to get them down on the page. The teacher will recognize the work has been done and will reward it with an acceptable grade. Students tend to assume that the teacher already knows what thoughts can and should be made out of the facts recorded on the page. More often than not, they are right to assume this. Down deep, students are convinced writing is all performance, a private charade between student and teacher, with both in on the game.

In the professional world, it matters not how much work the writer has done; it matters only that the reader actually gets delivery of precisely that which the writer had intended to send. Communication in that professional world requires that the 40 cents' worth of thought actually be received by the reader—not just that it be jettisoned into the air and onto the page by the writer. For legal writing especially, the reader will often not be anything like a teacher, who gives the writer credit for having done the job. The legal reader is often partially or wholly hostile. He might be a senior partner who insists "Nothing gets out of this firm until it is perfection itself." Or she might be a judge who has your brief in one hand and an opposing one in the other, balancing them to weigh their strengths and weaknesses; or it might be an adversary who—perfectly aware of what it is you were trying to say—will bend over backward to demonstrate that it does not or cannot say that. Legal writers must write clearly and forcefully enough to control—insofar as that is possible—the interpretational acts of all possible readers. The 40 cents' worth of ideas must not be merely *possible* to perceive; it must become the dominant interpretation that almost all readers *will be led* to perceive. It is insufficient to produce a sentence that is merely capable of being interpreted in the way you want; the sentence will be sufficient only when it demands that most readers assent to the interpretation you intend to convey.

The legal reader is often partially or wholly hostile.

That control of the interpretation process can be gained by knowing what most readers are likely to do with the prose you give them. Knowing what readers expect to find where in a sentence depends on understanding the "reader expectations" this series of articles has been exploring.

I have room here to explore one further issue. I have briefly mentioned the process of arranging your thoughts in an outline before writing. Many of us were taught to do this in grammar school and high school. After you get your information, you make a carefully lettered and numbered outline, from which you then generate your prose. Early in my consulting career, lawyers—especially lawyers in their 50s—would approach me in private to ask if it really is necessary to make such a carefully constructed outline before writing. There were two possible answers the questioner might find distressing: One was "yes"; the other was "no." "Yes" was painful to those who had not made a single outline since grade 12; "No" was painful for those who had spent 9 percent of their career making such outlines and then disposing of them so no one would know they had been created. In both cases, the questioners were wondering if their careers might have blossomed a good deal more had they known "the truth" about outlining.

My answer to all such questioners: It is absolutely essential to make a carefully numbered and lettered outline of your writing if you cannot write without one. Otherwise, don't bother. No one cares. No one is going to give you "credit" for having made the outline if the final product was not successful. Over-outlining can be really debilitating. The rest of the writing process might then be limited to filling in the missing parts for those outlined sentence fragments and eradicating all the numbers and letters. That is the process that produces all those mind-numbingly dull and pedestrian student papers. Teachers like outlines. Clients like results. ■

On the Papers

THE IMPORTANCE OF STRESS: INDICATING THE MOST IMPORTANT WORDS IN A SENTENCE

GEORGE D. GOPEN

The author is professor of the practice of rhetoric at Duke University.

Have you heard the advice, "Write the way you speak"? It is bad advice.

When you speak—and especially when you speak in court—you have a number of ways you can demonstrate to your listeners which of your words you would like them to emphasize the most. You can wave your hands or use body language. You can pronounce a word at a higher decibel level than its neighbors. You can vary your sound—higher or lower, softer or louder, faster or slower. But on paper, all these indications of emphasis disappear. You are left only with word choice and word placement.

You, being the author, know what you wanted to say. You look at your sentence: It seems obvious to you how it should be "performed" by any reader. But an author is often the worst person in the world to estimate how others will read a sentence. It is insufficient for you to construct sentences that *can* be interpreted the way you want. You must construct them so a huge percentage of your readers *will actually* interpret them correctly. We all understand the importance of making the best possible decisions concerning word choice; but, surprising though it may seem, word location is a far more important tool to master. How can you manipulate the placement of words to signal to your readers when they should be reading a particular term with special emphasis?

It would be nice, would it not, if we were allowed to print all such to-be-emphasized words in red? Take, for example, the sentence used in teaching typing: "The quick brown fox jumps over the lazy dog." If I told you there was only one word in that sentence uppermost in my mind at the moment, what would be your chances of guessing that word correctly? Given that there are seven important-looking words, your chances would be close to one out of seven, or 15 percent. How would your chances improve if I were to print that word in red? Or even just in all caps?

The quick brown fox jumps over the LAZY dog.

Now you could hardly mistake what was most important to me. If I were to speak the sentence to you, I could emphasize "lazy" with my voice; but on the page, that emphasis cannot be "heard." It must somehow be made apparent to the eye.

What if I were to rewrite the sentence like this: The quick brown fox can jump over the dog because the dog is lazy.

Now more than 90 percent of readers might guess that "laziness" is foremost in my mind. This is a phenomenon peculiar to the English language.

We value any moment in a sentence when the grammatical structure comes to a full halt. I call such a location the "stress position."

A period always accomplishes this closure; but the same effect is realized by any properly used colon or semicolon. It can never be created by a comma, because there are too many different signals a comma can send. We always have to go beyond a comma to find out what kind of pause it is asking us to make. Commas never signal full syntactic closure.

Here is an example I have used with thousands of students and clients to teach the efficacy of the stress position:

> As used in the foundry industry, "turnkey" means responsibility for the satisfactory performance of a piece of equipment in addition to the design, manufacture, and installation of that equipment. P et al. agree that this definition of turnkey is commonly understood in the foundry industry.

Take a moment to underline any words in these two sentences that you think the writer might be wanting you to stress.

When I ask as few as a dozen students or clients to do this, *all* of the following terms get underlined by someone: foundry industry; turnkey; responsibility; satisfactory performance; design, manufacture, and installation; P et al.

Note that "a piece of equipment"

to make this list; and yet, that is the term that occupies the first sentence's sole stress position. The author had only one opportunity to indicate his most significant words, and he blew it. As a result, he left all of us guessing; and in a group of a dozen people, almost everyone will choose a different assortment. Everyone thinks he or she has successfully made sense of the sentence; but often not a single person has correctly guessed what was in the author's mind. Here is the example again, with his sole intended emphasis printed in all caps:

> As used in the foundry industry, "turnkey" means responsibility for the SATISFACTORY PERFORMANCE of a piece of equipment in addition to the design, manufacture, and installation of that equipment. P et al. agree that this definition of turnkey is commonly understood in the foundry industry.

In my experience, in a lecture hall filled with 200 people, no more than four will have underlined "satisfactory performance" and *only* "satisfactory performance." The failure of communication is that severe.

Note that no term in the second sentence of the example is in caps. Any such sentence should not be a sentence. Its information should be tucked into some other sentence—and *not* in a stress position.

When is a sentence too short? When it has no viable candidate for the stress position. When is a sentence too long? When it has more viable candidates for stress positions than there are stress positions. It matters not how many words a sentence contains. It matters a great deal that the number of stress-worthy terms is the same as the number of stress positions.

You have probably heard the advice, "To make a sentence better, make it shorter." Forget it. It is wrong. Here is a good replacement for it: To make a sentence as good as it can be, make sure that the information you wish the reader to stress always appears in a stress position—next to a period, colon, or semicolon. (I will return to the use of the colon and semicolon in a future article.)

You are your client's advocate. Your prose must act as your advocate.

Am I suggesting that if our author had only transported "satisfactory performance" to the end of a single sentence, most readers would have understood his intentions? Yes. Here is one possibility:

> As P et al. agree, the foundry industry uses the term "turnkey" to signify responsibility not only for the design, manufacture, and installation of a piece of equipment but also for its satisfactory performance.

Now more than 90 percent of readers will get his message.

What if P et al.'s agreement had also been something worthy of stress? Then we might create a second stress position, just for that:

> P et al. agree: The foundry industry uses the term "turnkey" to signify responsibility not only for the design, manufacture, and installation of a piece of equipment but also for its satisfactory performance.

What if the other three functions ("design, manufacture, and installation") were also worthy of stress? Then we might create an additional stress position for them:

> P et al. agree: The foundry industry uses the term "turnkey" to signify responsibility for a piece of equipment's design, manufacture, and installation; but the industry also uses the term to indicate responsibility for its satisfactory performance.

Important news: Locating the stress-worthy information of a sentence elsewhere than in a stress position is the single most widespread and crippling problem in professional English writing today. Of the 245 MDs and PhDs I have worked with at a prominent federal agency, only one did not suffer from this epidemic problem.

Most judges will read your brief only once. Are you really content to have them guessing—sentence after sentence—what word or words they should be emphasizing? You are your client's advocate. Your prose must act as your advocate.

This is neither a mechanical nor a cosmetic concern. Because it involves the core of your thinking in any sentence, you can "repair the damage" only by reentering your thought process and inquiring, "What *is* the most important thing I want to say here?" It is not an easy fix. If you habitually put the important thing some place other than the stress position, your habit will persist unless you fight against it, consciously and with substantial mental energy.

Begin by using this new advice as a revision tactic. Write your sentence as you normally would. Then go back and ask yourself which word or words you would print in red or in caps if allowed to do so. Get those words right next to a period, colon, or semicolon. Try it. You'll like it. So will your readers.

One last concern: When should you use artificial emphasis—italics, underlining, caps, bold, etc.? Use it whenever the nature of our grammar makes it impossible or awkward to get the emphatic word next to a colon, semicolon, or period. For examples, see all the italicized words in this article. ■

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On the Papers

HOW TO OVERBURDEN YOUR READER: SEPARATE YOUR SUBJECT FROM YOUR VERB

GEORGE D. GOPEN

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

We should stop evaluating the readability of our sentences by looking at the combination of the meanings of words and look instead at the structure in which the words are assembled. Take this sentence, for example:

1a. The trial court's conclusion that the defendants made full disclosure of all relevant information bearing on the value of Knaebel's stock is clearly erroneous.

The sentence is hard to read. Why? It feels long, but not because it contains 24 words. Nor are any of its words unfamiliar. It is hard to read because of its structure. Its verb ("is") is separated from its subject ("conclusion") by 17 words—71 percent of the sentence. This is a burdensome wait because of the reader's expectation that every grammatical subject will be followed almost immediately by its verb.

The subject tells us who is doing the action; the verb tells us what is happening. Those two pieces of information need to be experienced together. In our reading process, we need to "hear" them reverberating at the same silent decibel level. Waiting for the verb to appear is like waiting for the second shoe to drop. If that arrival is delayed long enough, eventually it commands all available attention.

As a result, anything that intervenes between subject and verb is read as interruptive. If the interruption is brief and easily distinguishable, it causes no problem:

SUBJECT, however, VERB....

If it is slightly longer, but digestible in one gulp, it still will not be likely to overburden us:

SUBJECT, except on Tuesdays, VERB....

If, however, that interruption grows to great length, we begin to grow weary under the burden of continually having to wait for the verb's arrival:

SUBJECT, except on Tuesdays, but not if it is raining, unless it had also rained on the previous Monday, VERB....

But worst of all is the case when the interruptive material is the information the writer wanted us to emphasize the most. Its structural location tells us one thing—"Don't pay much attention to me because you're still waiting for the verb to arrive"; but the author intends that information to be shouting, "Look at me! I'm the most important thing here!" That is the most serious problem with sentence (1a) and thousands of sentences just like it.

The moment we read the grammatical subject "conclusion," we gear up to experience the arrival of its verb. But instead of the verb, we get a "that" clause. During the reading of the "that" clause, much of our reading energy must be set aside to continue anticipating the arrival of the main verb.

But within the interruptive "that" clause, we encounter a second subject-verb combination. When that subordinate subject appears, we formulate a second verb-arrival expectation—this time for the verb of the "that" clause. We are now dealing with two expectations aimed at the arrival of two separate verbs, the second of which must arrive first. That is a complicated reading task.

When that second verb finally arrives, so long awaited, it tells us nothing that we did not already know about the subject. Then we encounter a negative label, "clearly erroneous," and the door slams shut. We realize that whatever the sentence was meant to communicate, we have missed it.

We tend to blame ourselves for such a lack of comprehension. If that describes you, then, please, stop feeling bad. The fault here is not yours, but the writer's. If you have been paying a modicum of attention to a sentence but find its sense imperceptible even though its words are recognizable, it is most likely the fault of the writer. Perhaps all the necessary words are on the page, but they do not appear in the proper structural locations to send you the necessary instructions for the interpretive process.

We can repair the damage easily enough: Just move the verb next to its subject and reconstruct further as seems necessary.

For our sample sentence, we can move the main verb, "is," next to its subject, "conclusion."

The revision of the first clause:

1b. The trial court's conclusion is clearly erroneous....

"Is" is the verb; but is it the action? The author told me he intended two actions—"conclusion" and "erroneous"—the second of which was more important than the first. We can signal that to the reader by making them both verb forms, but giving the main verb over to the more important action:

1c. The trial court clearly erred in concluding that....

Notice how we are now free to pay full attention to whatever comes after the "that." We are no longer holding something in reserve, waiting for a main verb that has yet to arrive. We also are now informed that we should color everything in the "that" clause stupid.

We must understand, however, that version (1c) is not necessarily the "right" version, or even a "better" one. It certainly is stronger in the force of its accusation of the court's error, but there are times when such strength can be a drawback. What, for instance, if the writer will have to appear in front of this court two months later to argue a different case? Under that condition, "The trial court clearly erred in concluding that..." could now be too strong. In such a case, what could we do?

The court had done two actions: (1) it had "erred," which it was not supposed to do, and (2) it had "concluded," which it was supposed to do. To soften the accusation, we could shift the focus to the more acceptable action by making "concluded" the main verb. We would reduce the inappropriate action to the grammatical status of an adjective:

1d. The trial court erroneously concluded that....

This is softer than (1c).

Might there be a situation in which (1d) is still too harsh? If so, to soften it even further, add marshmallow: We could have the court do nothing, by not allowing it to be the grammatical subject. We could put the blame on the "conclusion":

1b. The trial court's conclusion is clearly erroneous....

Let us turn now to the contents of the "that" clause:

...that the defendants made full disclosure...

Once again the author had failed to communicate to us the action by announcing it in the verb. The defendants did not "make" anything; they "disclosed" something—or failed to disclose it. We can make that action clearer by making it the verb:

1e. ...that the defendants fully disclosed...

If we opt for the strongest version of the initial clause, here is our complete revision:

1f. The trial court clearly erred in concluding that the defendants fully disclosed everything they knew that was relevant to the value of Knaebel's stock.

The concepts communicated by sentence (1f) are not as difficult as they appeared to be in sentence (1a). The sentence no longer seems long, even though it has the same number of words as the original. The big difference: Sentence (1f) does not misuse reader energy by mis-locating its information. To experience how powerful that mis-location can be, read once again the original sentence (1a), noting how difficult the sentence remains, even though we have just spent a great deal of energy contemplating its contents:

1a. The trial court's conclusion that the defendants made full disclosure of all relevant information bearing on the value of Knaebel's stock is clearly erroneous.

As long as we have to wait for the arrival of the verb, we cannot be paying enough appropriate attention to the intervening material.

There are two additional reasons (1f) reads with so much more ease than (1a):

- In (1f), no piece of information arrives for which we are not already somewhat prepared; and
- The arrival of every new word seems to "lean forward" with possibilities as to where we might go from here.

These are two benchmarks of good, clear writing. To demonstrate how these function in sentence (1f), here is a slow-motion replay of how a reader well might experience the interpretive journey:

The trial court...
("Well, what did they do?")
clearly erred...
("Made a mess of things, did they? How did they do that?")
in concluding...
("In concluding what?")
that the defendants...
("And what did they do?")
fully disclosed...
("What did they disclose?")
everything they knew...
("Knew? About what?")
that was relevant...
("Relevant to what?")
to the value of Knaebel's stock.
("Ah, yes.")

Important: I am not suggesting a new rule that we should never interrupt between a subject and its verb. Rather, I am indicating that whenever you do this, the intervening material will be read with far less emphasis. Sometimes that is to be desired.

2a. You may never, except on Sunday, park in the A lot.

2b. You may never park in the A lot, except on Sunday.

Sentence (2a) undercuts the exception; sentence (2b) emphasizes it. Reader expectations should serve you not as rules, but rather as tools. ■

On the Papers

CONTROLLING CROWDED SENTENCES

GEORGE D. GOPEN

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High school students can continually get all As on essays if they construct one-clause sentences and put them in an order so that teachers will be able to infer the logical connections that assumably connect them. This works well because teachers almost always know more than the students about the topic at hand. But professionals, especially lawyers, are usually writing for audiences that do not yet know all the writer has to say. Professionals are people paid to articulate the necessary connections.

Lawyers cannot tell judges, "Here are the facts; here are some precedents; we win." The other side might well be able to turn in the identical brief, leaving the judge to figure it all out for herself. My favorite appellate judge claimed that about 95 percent of the briefs submitted were of almost no help to her in the decision-making process.

Having gotten all the right components into a single sentence, lawyers believe that all that material will be reassembled in the reader's mind just the way the author intended. The opposing lawyer, however, might well be able to demonstrate how the same sentence fits his case perfectly. The question then becomes this: How can a writer control the use to which the reader will put all the semantic material assembled into a long, information-packed sentence? There are answers to this question, some of which we deal with here.

I use as my example a sentence from page 1121 of the textbook *Constitutional Law* by Edward Barrett Jr., and William Cohen (Foundation Press 1981)—a book I chose at random from my shelves and a page to which I opened at random. In other words, these principles will apply to any multi-clause sentence you can find. At issue was the case of *Whitney v. California*, 274 U.S. 357 (1927). The defendant was Anita Whitney, who in 1919 had joined the new Communist Labor Party. She was a delegate to a convention to organize a California branch of the party. Our sample sentence from the textbook follows:

> 1a. There she supported a resolution which would have committed the organization to the use of peaceful and lawful methods of change, but this resolution lost and the convention adopted a program resembling Gitlow's Left Wing Manifesto.

(Note: Benjamin Gitlow (1891–1965) was a prominent socialist who helped to found the Communist Party, U.S.A. After years as a leading American communist, Gitlow found himself so at odds with Stalin's government that he transformed himself into a right-wing conservative, writing two books that became highly influential in the McCarthy movement against communism. But at the time of the convention attended by Whitney, he was a far left-wing communist.)

Whitney had been found guilty of helping to criminalize syndicalism. Justice Brandeis (joined by Justice Holmes) wrote a memorable concurring opinion, warning that freedom of speech issues were involved in Whitney's support of "peaceful and lawful" actions.

The issue at hand for us, however, is not one of free speech but rather of clear and convincing writing. Our example sentence contains three major facts:

- Whitney was supporting "peaceful and lawful methods of change."
- Her resolution lost.
- Gitlow's far more extreme manifesto won.

The example sentence, however, contains only one stress position—that created by the sentence's period. (For a discussion of the nature of the stress position, please see my earlier article on the subject in LITIGATION, Vol. 38, No. 1 (Fall 2011), at 20–21.) A stress position is any moment of full syntactic closure. This occurs at any properly used period, colon, or semicolon. It can never occur at a comma. The occupant of the stress position tends to be what a reader will perceive as being the sentence's most stress-worthy material. Its location there has the same force as if those words had been printed in red, bold, italics, or capital letters. As a result, the example sentence

above (for most readers) calls our attention to the victory of the Gitlow manifesto above the rest of its contents.

What if that was not the authors' intention? None of their words, nor their facts, would be incorrect; and yet most readers would read the sentence in a way that was not in accord with the authorial intention. As writers, we have effective ways to control what most readers will tend to emphasize. These ways are not 100 percent surefire. Any avid pro-communist or anti-communist or free-speech reader might well find what he or she wants to find. But for the 90-plus percent of the readers who are trying their best to understand what the authors are trying to say, the reader expectations about giving extra emphasis to material in stress positions will carry the interpretive day.

Again—no "rules" here. Each of the revisions that follow here will affect most readers most of the time—which is a great improvement over letting the readers figure out how to assemble the 36 words for themselves. Many Plain English experts claim a sentence is too hard to read if it exceeds 29 words. That is wrong. After 29 words, sentences just become harder to write. Clear writing can produce clear sentences of well more than 100 words.

So let us look at four revisions of this sentence, each of which controls reader emphasis by manipulating the placement of information in stress positions.

Variation No. 1

If the authors wished us only to know certain facts existed, without their offering a way for us (at the moment) to connect them, they would do well to give each of the three major facts its own, separate, and therefore potentially equal, stress position. They could do this by using the same punctuation mark for each—the period. This would result in three separate sentences:

1b. There she supported a resolution which would have committed the organization to the use of peaceful and lawful methods of change. This resolution lost. Instead, the convention adopted a program resembling Gitlow's Left Wing Manifesto.

I do not hold with those who advise "to make it better, make it shorter." The brevity of these sentences is not their strength; it represents rather their equality of weight and focus.

Variation No. 2

If, instead, the authors had wished us to understand that Whitney's losing and Gitlow's winning should attract our attention equally—even though the two statements about winning and losing add up to the same result—then they could have accorded her effort a stress position by the use of a colon. A colon followed by a main clause (one able to stand by itself as a sentence) functions as a kind of "equals" sign. It states, "I'm saying the same thing again, but in a different way." In these cases, the colon should be followed by a capital letter, which warns the reader to expect a main clause—and not just a list of examples. (The latter is the more common use of the colon.)

1c. There she supported a resolution which would have committed the organization to the use of peaceful and lawful methods of change, but this resolution lost: The convention instead adopted a program resembling Gitlow's Left Wing Manifesto.

Variation No. 3

If, instead, the authors had wanted to subject her efforts to a mere supporting role, saving the sole emphasis for the Gitlow triumph, then they could have done the following:

- Demote the material on her to something less weighty than a main clause.
- Mark the end of the information on her efforts by a comma, which lacks the power to create a stress position.

1d. Whitney having failed in her resolution to require peaceful and lawful methods of change, the convention adopted a program resembling Gitlow's Left Wing Manifesto.

Variation No. 4

If, instead, the authors had wanted to present us with a two-part narration, the first of which deals with and stresses Whitney's efforts, and the second part of which spotlights the Gitlow victory, then summoning a semicolon to produce stress for her suggestion would give her the "Part 1" of the story; and the final period would then give Gitlow's approach the victorious "Part 2."

1e. There she supported a resolution which would have committed the organization to the use of peaceful and lawful methods of change; this resolution having been defeated, the convention adopted a program resembling Gitlow's Left Wing Manifesto.

Variation No. 5

If, instead, the authors had wanted to build sympathy for Whitney, they could have given her information two stress positions instead of one, drawing more attention to her efforts.

1f. There she supported a resolution which would have committed the organization to the use of peaceful and lawful methods of change; but this resolution lost. The convention instead adopted a program resembling Gitlow's Left Wing Manifesto.

As we can see, these four marks of punctuation—the period, the colon, the semicolon, and the comma—can be used by writers to control how readers will go about assigning function, weight, and prominence to the same facts. Punctuation marks do these tasks whether we intend them to or not. It is important we control them to make readers function the way we want them to function. ■

On the Papers

IMPORTANT: AVOID BEGINNING SENTENCES WITH "THE COURT HELD THAT . . ."

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"The Court held that . . . ." "The plaintiff alleged that . . . ." This construction is littered over the history of legal writing. It does a great deal of damage to the reader's interpretation process. It usually should be avoided. Lawyers often tell me they have no problem reading such a construction: That they have been doing it all their professional lives. They insist it does not obscure meaning. They are right in one sense only: Having become so habituated to it, they do not perceive the damage it does to them as readers, sentence after sentence. This article explains that damage and how to avoid it.

Background: Last summer in these pages, I explained that there are only three units of discourse we need to control in order to indicate to readers the various levels of importance they should give our information—the main clause, the qualifying clause (my term), and the phrase. *See The Number Two Problem in Legal Writing: Solved*, 40 LITIG. 21 (Summer 2014).

A main clause has both a subject and a verb; it can stand by itself as a sentence. A qualifying clause has both a subject and verb but cannot stand by itself as a sentence—usually because it starts with a word like "although" or "that." And a phrase has a beginning and an end but lacks either a subject or a verb or both.

The major significance of these distinctions: Readers value the information in main clauses more than that in qualifying clauses. Placing the sentence's most important information in qualifying clauses makes it harder for the reader to perceive the author's intended meaning. The same holds true for wasting main clauses on unimportant information. Put these two flaws together in one sentence—like one that begins "The Court held that . . ."—and your reader quietly and unknowingly suffers double damage.

> 1a. The Court held that the defendants had not complied with the requirements established in the original contract in a timely manner.

The problem with this sentence is not its length but its structure. The main clause is "The Court held *X*." *X* in this case happens to be a whole qualifying clause—everything from "that" until the end of the sentence. Unfortunately for the reader, the qualifying clause contains all the sentence's most important information.

If we can imagine a reader's reading process in ultra-slow motion, note what happens when the reader reaches the word "that": The reader has to keep those four initial words in mind—somewhere in mind—all the way to the end of the sentence. Otherwise, the sentence cannot reach its full syntactic conclusion. The energy the reader uses to do this is energy that should have been reserved for reading the important information that follows.

What to do? Demote the main clause to a qualifying clause; promote the qualifying clause to a main clause. Then the important information will be located in the unit to which we naturally pay our greatest attention.

While this may sound highly technical, and probably difficult to accomplish, it is usually quite a simple revision. In this case, demote "The Court held that" from main clause to qualifying clause by changing it to "As the Court held." This allows you to get rid of the "that." (Think of it as a four-letter word.) What used to be the qualifying clause, no longer burdened by its beginning with "that," now becomes the main clause, with no further revision required:

> 1b. As the Court held, the defendants had not complied with the requirements established in the original contract in a timely manner.

Note the difference in the use of reader energy. When we get to the comma after "held," we can toss away the whole four-word qualifying clause that preceded it ("As the Court held . . ."); in turn, that allows us to summon a fresh "here comes the main clause" breath of energy for the new main clause. Our energies are properly summoned and efficiently expended. The unimportant material is treated as

unimportant; the important material is read with focused emphasis.

Sometimes the wasted main clause at the beginning can be demoted all the way down to the level of a phrase:

> 2a. The plaintiffs alleged that the defendants had not complied with the requirements established in the original contract in a timely manner.

"The plaintiffs alleged *X*" can be reduced to a phrase by the elegant replacement of the verb "alleged" with its related nominalization, "allegations":

> 2b. According to the plaintiffs' allegations, the defendants had not complied with the requirements established in the original contract in a timely manner.

Nominalizations are often the scourge of legal writing—but not here. In a previous column, I spent a good deal of time warning about the use of nominalizations—a technical term for nouns related closely to verbs. *See Ensuring Readers Know What Actions Are Happening in Any Sentence*, 38 LITIG. 15 (Winter 2012). Like most things in life, nominalizations should be judged neither good nor bad in and of themselves, but only on the basis of the context in which they appear. As I explained there, nominalizations usually do damage when they usurp the action from the verb.

For example:

> 3a. The CEO made a *decision* to conduct a *review* of the matter.

If the author of this sentence intended the italicized words to be its main actions, the nominalizations make those actions harder to identify. The main verb is wasted on "made." The CEO wasn't "making" something. "To conduct" sounds suspiciously like an important action, even though it is a second-class verb form—not a main verb, but merely an infinitive. It sounds more action-packed than the nominalized word "decision"—although, according to the author, it was not intended to be.

To make the actions more immediately and more easily perceivable, we need only change the nominalized action words into verbs:

> 3b. The CEO *decided to review* the matter.

However, if the CEO notices a growing discontent among people who perceive her as increasingly tyrannical, she might do well to opt for the (3a) version, in which the actions are softened and undercut. The (3b) version is not "better" than (3a); it just does things differently. Your rhetorical needs should dictate your rhetorical choices.

So changing (2b) to read "According to the plaintiffs' allegations" unplugs the action-type energy emitted by the (2a) version, which began "The plaintiffs alleged that . . ." We *wanted* to undercut the energy on "alleged," sending the verbal, action-type energy forward to "had not complied."

> 2b. According to the plaintiffs' allegations, the defendants had not complied with the requirements established in the original contract in a timely manner.

Here is a *good* use of nominalizations.

There is yet a further good achieved by both revisions (1b) and (2b). A multi-clause sentence appears to most readers as being the story of whoever or whatever shows up as the subject of the main clause. (For a fuller discussion of this, see my column *Whose Story Is This Sentence? Directing Readers' Perceptions of Narrative*, 38 LITIG. 17 (Spring 2012)). Here again is example (1a):

> 1a. The Court held that the defendants had not complied with the requirements established in the original contract in a timely manner.

Because "the Court" is the subject of the main clause, the sentence asks to be read as the story of the Court. When we revised the sentence, that changed:

> 1b. As the Court held, the defendants had not complied with the requirements established in the original contract in a timely manner.

Now the subject of the main clause is "the defendants," whose story the sentence really intended to tell.

So am I heading in the direction of a new rule that says never begin a sentence with a short main clause followed by a much longer "that" clause? No. I have only one rule (other than the grammatical rules, which are rules—wrong-headed though they sometimes manage to be). That rule is "NO RULES." Any rule you have heard about producing good writing is wrong at least some of the time. Some of our most hallowed pieces of writing advice, rigidified into rule-ish demands, are outright outrages:

> Avoid the passive. (Wrong.) (For a discussion of this, see my column, *Why the Passive Voice Should Be Used and Appreciated—Not Avoided*, 40 LITIG. 16 (Winter 2014).)
>
> To make it better, make it shorter. (Wrong.)
>
> To determine the quality of your sentence, read it aloud. (Wrong.)
>
> Write the way you speak. (Wrong.)

When would it be good writing to begin a sentence with "The Court held that . . ."? When "held" really is the main action you want to feature. If you are trying to distinguish between the Court merely remarking in dicta and the Court holding, then a pair of sentences beginning "The Court observed that . . ." and "However, the Court held that . . ." would do very well indeed. Context controls meaning. ■

The Appellate Record : Texas Appellate Lawyer & Attorney Kendall Gray for Fifth Circuit & Supreme Court Appeals

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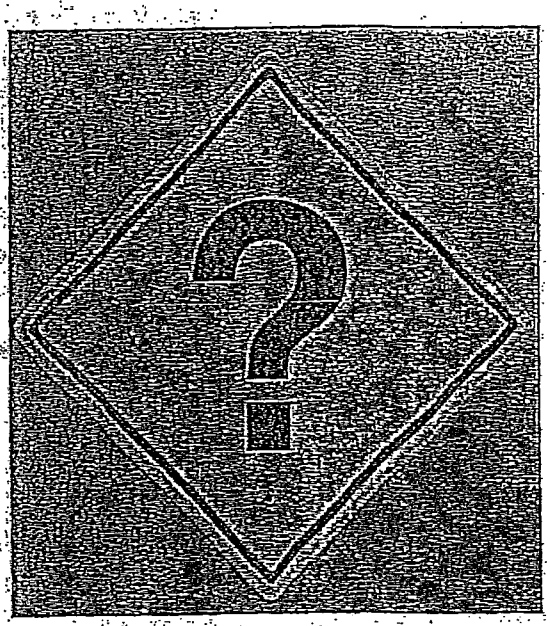
Font Advice

Posted on October 5, 2012 by Kendall Gray



I received an inquiry from a reader the other day asking about fonts--a perfect excuse for another a nerd-er-rific post on fonts and typography. He wrote:

> Dear Appellate Record:
>
> I continue to enjoy reading your blog. One question: What font do you prefer for your appellate briefs? Do you use a different font for trial court filings?
>
> Signed,
>
> The Fonts of San Francisco

Providing advice on font choice is a grave responsibility for a blogger. Being a font role model is even more daunting. But we here at the Appellate Record will not shirk.

To whom much has been given, much shall be required.

After the jump, the fonts we use and why.

So you want to choose a font.

Congratulations. You have taken the first step.

No longer will you allow software engineers at Microsoft decide what your brief looks like. No longer will you be defaulting to their . . . uhm . . . defaults.

You wouldn't let someone with a pocket protector choose the suit you wear to oral argument. Why would you let them choose how your brief looks?

So now what? How do you choose a font? The answer to that question is a combination of what the court requires, what the court allows, how the font was designed, and only a little bit of personal taste.

Just a couple of weeks ago I encountered a state supreme court that still has a requirement for electronic copies on a 3.5 inch floppy disk in its rules. Similarly backward, there are some courts that actually require briefs in Courier font (*wretch*) or Times New Roman, which is a horrible choice for briefing.

If the court allows you to choose a font so long as you comply with a font size requirement, think about what you are using the font for. For briefs--whether in the trial court or the court of appeals--you are writing with a relatively long line length, more like a book than a newspaper. So choose a font that is designed for books, not a font designed for the narrow columns of a newspaper like Times New Roman.

If you don't believe me-believe the Seventh Circuit. Their website guide to briefing says:

> Typographic decisions should be made for a purpose. The Times of London chose the typeface Times New Roman to serve an audience looking for a quick read. Lawyers don't want their audience to read fast and throw the document away; they want to maximize retention. Achieving that goal requires a different approach—different typefaces, different column widths, different writing conventions. Briefs are like books rather than newspapers. The most important piece of advice we can offer is this: read some good books and try to make your briefs more like them.

> Use typefaces that were designed for books. Both the Supreme Court and the Solicitor General use Century. Professional typographers set books in New Baskerville, Book Antiqua, Calisto, Century, Century Schoolbook, Bookman Old Style and many other proportionally spaced serif faces. Any face with the word "book" in its name is likely to be good for legal work. Baskerville, Bembo, Caslon, Deepdene, Galliard, Jenson, Minion, Palatino, Pontifex, Stone Serif, Trump Mediäval, and Utopia are among other faces designed for use in books and thus suitable for brief-length presentations.

For body text, this usually means I use Book Antiqua or Century Schoolbook. Both are very clear, readable, graceful, and don't call attention to themselves as being quirky. If I have my 'druthers, I like to use Century Schoolbook, but not everyone has that on their machines. So when I collaborate outside the firm, Book Antiqua is a safer choice.

Of course, I use a different font altogether for headings. But that's a post for another day.

Hope that answers the question, and thanks for reading.

Tags: Nerdlaws

Comments (3)Read through and enter the discussion with the form at the end

Ron Kovach - *October 9, 2012 2:37 PM*

Presentation goes a long way thanks for your work.

Catherine - *November 6, 2012 11:13 AM*

On using different fonts in headers: I tried it when I was at the Justice Department. I was told never to try such a thing again because the higher-ups couldn't countenance such radicalism. (No one disputed that the text looked better.) I realize the government will be the last to embrace the concept, but how would you make the case that using a different font for headers will not end Life as We Know It?

Kendall - *November 6, 2012 11:20 AM*

Catherine, I use two things to argue in favor of my radicalism:

First, there is some research showing sans serif fonts read moderately better in headings. Check out painting with print.

Second, common sense. There is a reason why street signs and freeway signs and other short bursts of declarative information are in sans serif fonts. Legibility. Text must be readable, but headings and headlines must be legible and quickly absorbed. Mimic a freeway sign.

Thanks for reading.

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

City of Houston, *Plaintiff,*	§	
v.	§	
Towers Watson & Co.,	§	Jury Trial Demanded
Defendant.	§	

Agreed Motion to Modify the Scheduling Order
Due to an Expert's Serious Illness

Per FRCP 16(b)(4), plaintiff City of Houston (the "City") respectfully asks to extend certain dates in the scheduling order by approximately 45 days and to obtain a new trial date. This motion is necessary due to the unfortunate and unexpected potentially terminal illness of one of the City's two experts. This request is not made for the purposes of delay.

Defendant Towers Watson & Co. ("Towers") consents to the relief sought in this motion and has agreed to the proposed schedule below.

The Court has the discretion to grant such an extension where good cause exists. *See* FRCP 16(b)(4); *Betzel v. State Farm Lloyds*, 480 F.3d 704, 707 (5th Cir. 2007). Good cause exists for this short postponement to allow the City to replace its expert where terminal illness has required him to withdraw, and where Towers does not oppose the extension.

I.
Status of Litigation

The City filed its Complaint on August 1, 2014. Dkt. 1. A scheduling order was entered. Dkt. 28. Towers filed a motion to dismiss, and the parties agreed to stay discovery while the motion was pending. Judge Harmon denied Towers' motion on September 23, 2015, Dkt. 35, and the parties then consented to trial and all proceedings before Judge Stacy.

As the parties proceeded with document discovery, the parties requested (and this Court granted) two additional agreed modifications to the scheduling order to accommodate difficulties presented by the confidentiality requirements of certain necessary third-party documents. Dkt. 52, 71. The most recent June 20, 2016 Docket Control Order ("DCO") set this case for trial on October 31, 2017, set the deadline for the City's expert disclosures to February 20, 2017, the deadline for Towers' experts to April 17, 2017, the deadline for discovery cutoff to May 23, 2017, and the deadline for dispositive briefing to July 31, 2017. Dkt. 71.

Because no depositions had yet taken place by early January 2017, the parties extended by one month the expert disclosure dates for both parties, as well as the final discovery cutoff, without changing the trial date. By the parties' agreement, the City's current expert disclosure date is now March 22, 2017, Towers' expert disclosure date is May 17, 2017, discovery is set to close on June 22, 2017, and all other dates remained unchanged.

The parties have taken 11 depositions in the last six weeks, more depositions have been scheduled, and the parties are cooperating diligently to complete fact discovery.

II.
Expert's Serious Illness

This motion concerns one of the City's two experts, an actuarial expert with opinions on liability-related issues such as the standard of care and Towers' work and professional negligence in preparing actuarial analysis related to the Houston Firefighters' Relief and Retirement Fund ("HFRRF"). The expert's opinions would have aided the jury's understanding of the accepted standards of actuarial practice that apply to Towers' communications, work, and analysis related to HFRRF, and the extent to which Towers did or did not comply.

On February 28, 2017, this expert told the City's counsel that he is suffering from a terminal disease that has worsened to the point that his health now prevents him from preparing

his opinions and expert report in this matter, that his illness has precluded his ability to review necessary materials and to give opinions, and that his availability and ability to appear at a deposition or at the October 2017 trial is highly unlikely due to the progression of his illness.

The City promptly undertook to retain a replacement expert whose schedule allows for appropriate review of the relevant materials and time to evaluate and provide opinions in the same areas that the original expert was to address. This replacement expert also is a highly credentialed pension actuary.

The City regrets having to report this situation to the Court. The City has conferred with Towers and appreciates Towers' expression of concern for the expert and agreement to modify the schedule subject to the Court's approval.

III.
Agreed Extension of the Scheduling Order

The parties have agreed on these proposed dates for a third amended DCO, subject to the Court's schedule and approval:

Event	Current deadline	Proposed deadline
City's expert reports	Wed., March 22, 2017	Mon., May 8, 2017
Supplements to interrogatory responses (confirmed in writing, but not in the Court's order)	Sun., May 28, 2017	Sun., May 28, 2017
Towers' expert reports	Wed., May 17, 2017	Fri., June 30, 2017
Discovery Cutoff	Thurs., June 22, 2017	Tues., August 1, 2017
Dispositive Motions, including *Daubert* motions	Mon., July 31, 2017	Fri., September 15, 2017
Non-dispositive motions	Fri., September 15, 2017	Thurs., November 2, 2017
Joint pre-trial order	Fri., October 13, 2017	Mon., December 18, 2017
Trial	Tues., October 31, 2017	January 16, 2018 *

* If the Court's schedule permits, the City respectfully requests (and Towers consents) that this case be set for trial on January 16, 2018. Two of the City's attorneys (Harrison and

Kaplan) are set for what is expected to be a two week jury trial starting February 26, 2018 in the Eastern District of Louisiana, and an early January 2018 trial date in this case should avoid a trial conflict.

This Court has broad discretion in managing its docket pursuant to FRCP 16(b)(4). This extension of deadlines by approximately 45 days will facilitate the completion of necessary discovery and avoid prejudice to the City based on circumstances outside its control, with only minimal postponement of the current schedule. The City brings this agreed motion in the interest of justice, not for delay.

IV.
Conclusion

The City respectfully requests that the Court grant this motion. A proposed Order is attached.

Respectfully submitted,

SUSMAN GODFREY L.L.P.

/s Geoffrey L. Harrison

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Counsel for Plaintiff City of Houston

Certificate of Conference

Counsel for the City (Geoffrey Harrison) conferred with counsel for Towers (Alex Romain) on March 14, 2017 (in person) and on March 15, 16, and 17 (by phone or email) regarding the matters set forth in this motion, and Towers consents to the relief sought in this motion.

/s Geoffrey L. Harrison
Geoffrey L. Harrison

Certificate of Service

I certify that on March 17, 2017, a true and correct copy of this document properly was served on counsel of record via electronic filing in accordance with the USDC, Southern District of Texas Procedures for Electronic Filing.

/s Geoffrey L. Harrison
Geoffrey L. Harrison

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CITY OF HOUSTON, TEXAS,

Plaintiff,

v.

TOWERS WATSON & CO.,

Defendant.

[PROPOSED] SECOND AMENDED SCHEDULING ORDER

1. **MOTIONS FOR LEAVE TO AMEND PLEADINGS AND JOIN NEW PARTIES** will be filed by: 1/11/2016
   Party requesting joinder will furnish copy of this Scheduling Order to new parties.

2. **EXPERT WITNESSES** for the **plaintiff** will be named and a report of the experts' opinions furnished by: 2/20/2017

3. **EXPERT WITNESSES** for the **defendant** will be named and a report of the experts' opinions furnished by: 4/17/2017

4. **DISCOVERY** must be completed by: 5/23/2017
   Counsel may, by agreement, continue discovery beyond the deadline, but no continuance will be granted because of information acquired in post-deadline discovery.

5. **DISPOSITIVE MOTIONS** including *Daubert* motions will be filed and served by: 7/31/2017

6. **NON-DISPOSITIVE MOTIONS** will be filed by: 9/15/2017

7. **JOINT PRE-TRIAL ORDER** will be filed by: 10/13/2017
   Plaintiff is responsible for filing the Pretrial Order on time.

8. **TRIAL** is set for 9:30 AM 10/31/2017

Signed at Houston, Texas this 20th day of June, 2016.

Frances H. Stacy

FRANCES H. STACY
UNITED STATES MAGISTRATE JUDGE

IN THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

City of Houston, *Plaintiff,*
v.
Towers Watson & Co., *Defendant.*

§ Jury Trial Demanded

~~[PROPOSED]~~ Third Amended Scheduling Order

1. **EXPERT WITNESSES** for the plaintiff will be named and a report of the experts' opinions furnished by: **May 8, 2017**

2. **SUPPLEMENTS TO INTERROGATORY RESPONSES** for both parties furnished by: **May 28, 2017**

3. **EXPERT WITNESSES** for the defendant will be named and a report of the experts' opinions furnished by: **June 30, 2017**

4. **DISCOVERY** must be completed by: **August 1, 2017**
Counsel may, by agreement, continue discovery beyond the deadline, but no continuance will be granted because of information acquired in post-deadline discovery.

5. **DISPOSITIVE MOTIONS** including *Daubert* and other expert challenges will be filed and served by: **September 15, 2017**

6. **NON-DISPOSITIVE MOTIONS** will be filed by: **November 2, 2017**

7. **JOINT PRE-TRIAL ORDER** will be filed by: **December 18, 2017**
Plaintiff is responsible for filing the Pretrial Order on time.

~~8. **DOCKET CALL** is set for 1:30 PM~~ N/A

9. **TRIAL** is set for ~~the two weeks starting:~~ 9:00 a.m. January 16, 2018

SIGNED at Houston, Texas this 27th day of March, 2017.

Hon. Frances H. Stacy
United States Magistrate Judge

4839733v1/014161

UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF TEXAS
HOUSTON DIVISION

CITY OF HOUSTON, TEXAS, Plaintiff, v. TOWERS WATSON & CO., Defendant.	Ci **EXPEDITED CONSIDERATION REQUESTED**

DEFENDANT'S MOTION TO STAY PRETRIAL DEADLINES AND TRIAL DATE PENDING RULINGS ON MOTIONS

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Counsel for Defendant
WTW Delaware Holdings LLC

Defendant Towers respectfully moves this Court to stay or suspend all pretrial deadlines, including the trial date, in this case pending the Court's resolution of (i) Towers' *Daubert* Motion to Exclude the Expert Testimony of Kim Nicholl (Dkt. No. 102), (ii) Towers' Motion for Summary Judgment (Dkt. No. 117)—both of which would dispose of this case—and (iii) the City's Motion for Leave to Serve a Supplemental Expert Report (Dkt. No. 104). Alternatively, Towers requests that all deadlines be extended for whatever time period the Court needs to rule on these motions.[1] A brief stay for only the time necessary for the Court to rule on these motions will enable the parties to avoid incurring significant costs before the Court decides which portions of the City's allegations—if any—should proceed to trial. The stay would also allow the Court to conserve judicial resources, without any prejudice to the City of Houston. In light of the upcoming pretrial deadlines, Towers respectfully requests expedited consideration of this motion.

* * * * *

Towers has filed two dispositive motions, currently pending before this court: (i) a *Daubert* motion to exclude the testimony of Kim Nicholl (Dkt. No. 102), which has been fully briefed; and (ii) a motion for summary judgment (Dkt. No. 117), which Towers filed on September 8, 2017. Towers' motion for summary judgment may not be ripe for the Court's consideration until the middle of October 2017. The Court entered the operative scheduling order in this matter on March 27, 2017 (Dkt. No. 96) in response to the City's unopposed motion to extend expert report and other deadlines. *See* Agreed Mot. to Modify the Scheduling Order Due

[1] Towers does not request that the entire case be stayed, but only that all further pretrial deadlines and the trial date be suspended.

an Expert's Serious Illness, Dkt. No. 94 at 3. And under the current schedule, the four key remaining deadlines are:

- September 15, 2017: Deadline for dispositive motions, including *Daubert* motions and other expert challenges
- November 2, 2017: Deadline to file non-dispositive motions
- December 18, 2017: Deadline to file joint pre-trial order
- January 16, 2018: Trial

In addition, this Court's procedures require the parties to exchange exhibits on December 8, 2017, 10 days before the joint pretrial order is due on December 18, 2017. *See* Procedures Manual, United States Magistrate Judge Frances H. Stacy, at ¶ 7(c). This will be a monumental task. The parties (including third-parties) have produced 17,338 documents (totaling 164,123 pages) in this case; there are 534 deposition exhibits; and the parties have produced several, extensive and multi-tabbed Excel spreadsheet files attached to the expert reports submitted by the City and by Towers. The parties will also need to agree to several other (earlier) interim deadlines in order to complete the joint pretrial order by December 18, 2017.

Relatedly, the City has filed a motion for leave to serve a supplemental report of Kim Nicholl ("Motion for Leave to Supplement"). Dkt. No. 104. Towers has opposed that motion, but if the Court allows the City to serve a second Nicholl expert report, then Towers would need to re-depose Nicholl, submit its own expert reports in response to Nicholl's new expert opinions, and, if appropriate, file a new *Daubert* motion. *See* Towers' Opposition to Motion for Leave to Supplement (Dkt. No. 114) at 4. It is therefore worth noting that if the Court grants the City's motion for leave, then Towers would not have the opportunity to file a *Daubert* motion regarding Nicholl's new expert opinions unless the court revises the current schedule. Towers does not oppose the supplemental opinions that Nicholl offers based on evidence made available after the

submission of her original report, and allowing those opinions would have no impact on the current schedule. Towers does oppose the City's request to serve untimely and improper supplemental or rebuttal opinions; those new opinions would, in fact, require a revision of the schedule in order to preserve Towers' opportunity to file a *Daubert* motion, if appropriate.

ARGUMENT

"[T]he power to stay proceedings is incidental to the power inherent in every court to control the disposition of the causes on its docket with economic of time and effort for itself, for counsel, and for litigants." *Landis v. N. Am. Co.*, 299 U.S. 248, 254 (1936). In deciding whether to issue a stay, the Court "must weigh competing interests and maintain an even balance." *Id.* at 254–55. Here, the interests weigh in favor of a stay of all pretrial deadlines, including the trial date, pending resolution of Towers' two dispositive motions and the City's Motion for Leave to Supplement its expert report. *See, e.g., Taylor v. Wal-Mart Stores, Inc.*, 2009 WL 826205, at *1 (S.D. Ala. Mar. 30, 2009) (staying case deadlines pending resolution of motion for summary judgment).

First, without a stay, Towers (and, presumably, the City) must begin preparing for trial imminently: drafting pretrial motions and motions *in limine*; preparing the joint pretrial order, exhibits, and deposition designations; meeting with potential witnesses around the country to prepare for trial; and asking witnesses to schedule vacation time (and travel) in preparation for trial.[2] But preparing for trial and drafting pretrial motions without the benefit of the Court's rulings on the three referenced motions would lead to an unnecessary expenditure of the parties' and Court's resources. This is true not only if the Court grants one or both of Towers' dispositive

[2] A January 16, 2018 trial date necessitates perhaps unusually advanced preparation, particularly for witnesses, because of the many holidays (i.e., Thanksgiving, Hanukkah, Christmas, and New Year's) between now and the beginning of trial.

motions—in which case all trial preparation expenses incurred would be unnecessary—but also under a variety of other scenarios.

For example, the Court's rulings on Towers' *Daubert* Motion and the City's Motion for Leave to Supplement Nicholl's Expert Report will necessarily either eliminate or reshape the nature and scope of Nicholl's expert opinions, and therefore the City's theory at trial, about what Towers allegedly did wrong. (Nicholl is the City's only expert on damages.) Similarly, Towers moved for summary judgment as to the sixteen alleged misrepresentations in Paragraph 37 of the City's Amended Complaint, among other things. The Court's ruling on which, if any, of these alleged misrepresentations the City may present to a jury will significantly impact the parties' preparation and pretrial motions practice. Towers also moved for summary judgment on the bases that there was no privity of contract between Towers and the City and that the City did not actually and justifiably rely upon Towers' work. Whether or not privity and reliance are issues for trial will also have a significant impact on trial preparation. A brief stay to allow the Court to rule on the pending motions before the parties begin trial preparations would allow the parties to avoid wasting resources and incurring vast, and potentially unnecessary, expenses.

Second, a brief stay would conserve judicial resources by streamlining the parties' pretrial submissions and ensuring that they are tailored to the claims and issues that may actually be presented at trial. For example, a brief stay will ensure that the Court will not be burdened with adjudicating motions *in limine* that may have been mooted by the Court's ruling after they were filed or with wading through portions of the joint pretrial order that may become irrelevant.

Third, there is no prejudice to the City from a brief stay for only the time necessary for the Court to rule on the pending motions. The events at issue in this litigation occurred between 1999 and 2001. The City waited more than a decade to file this lawsuit, and cannot now

seriously claim a sudden urgency to proceed to trial, particularly because the scope of the City's allegations and Nicholl's expert opinions—and, therefore, Towers' defenses—will remain unclear until the Court rules on the three referenced motions.

CONCLUSION

For the reasons set forth above, Towers requests that the Court stay all pretrial deadlines, including the trial date, pending the Court's ruling on Towers' Motion for Summary Judgment (Dkt. No. 117), Towers' *Daubert* Motion to Exclude (Dkt. No. 102), and the City's Motion for Leave to Supplement the Expert Report of Kim Nicholl (Dkt. No. 104). Alternatively, Towers requests that the Court continue all pretrial deadlines, including the trial date, for whatever time period the Court believes it needs to rule on these motions.

Dated: September 12, 2017

Respectfully submitted,

By: */s/ Alex G. Romain*

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Counsel for Defendant
WTW Delaware Holdings LLC

CERTIFICATE OF CONFERENCE

I certify that counsel for Defendant WTW Delaware Holdings LLC conferred with the City's counsel regarding the Motion to Stay Pretrial Deadlines and Trial Date Pending Rulings on Motions telephonically (September 8, 2017 (Alex G. Romain with James T. Southwick)).

By: */s/ Alex G. Romain*

CERTIFICATE OF SERVICE

I certify that a true and correct copy of the above and foregoing document was duly served electronically on all known counsel of record through the Court's Electronic Filing System on the 12th day of September 2017.

By: */s/ Alex G. Romain*