

DRAFTING APA DOCUMENTS



APA Program Training

August 7, 2001

Drafting APA Documents

- Overview
- Plain-English Legal Writing
- Constructing Documents
 - **The APA Contract**
 - **Recommended Negotiating Position**
 - **Executive Summary and File Memoranda**
 - **Background and File Documentation**
 - **Letters and Correspondence**

Overview



- APA Goal: To become IRS Chief Counsel's finest legal writers
- How can we accomplish our goal?

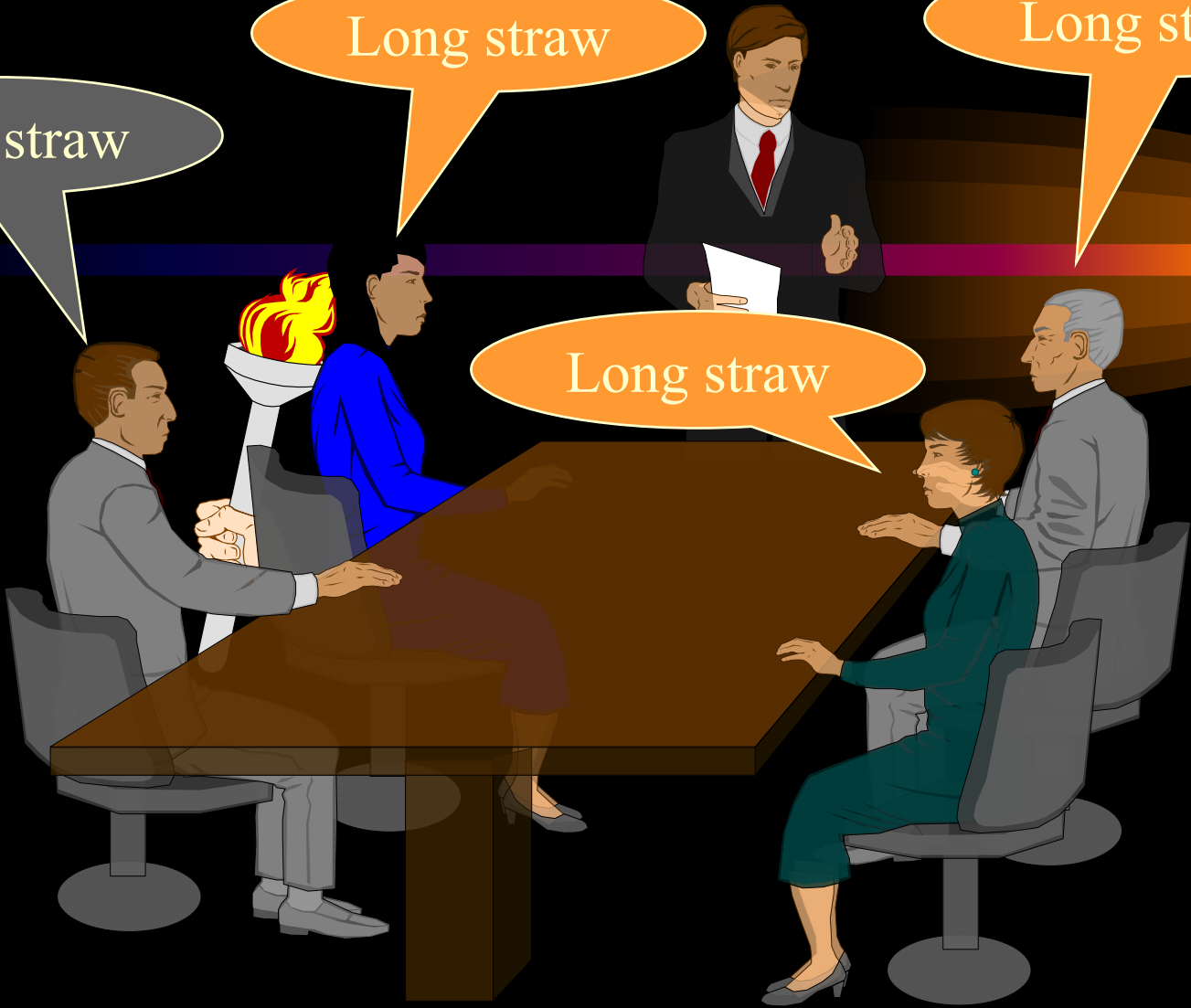


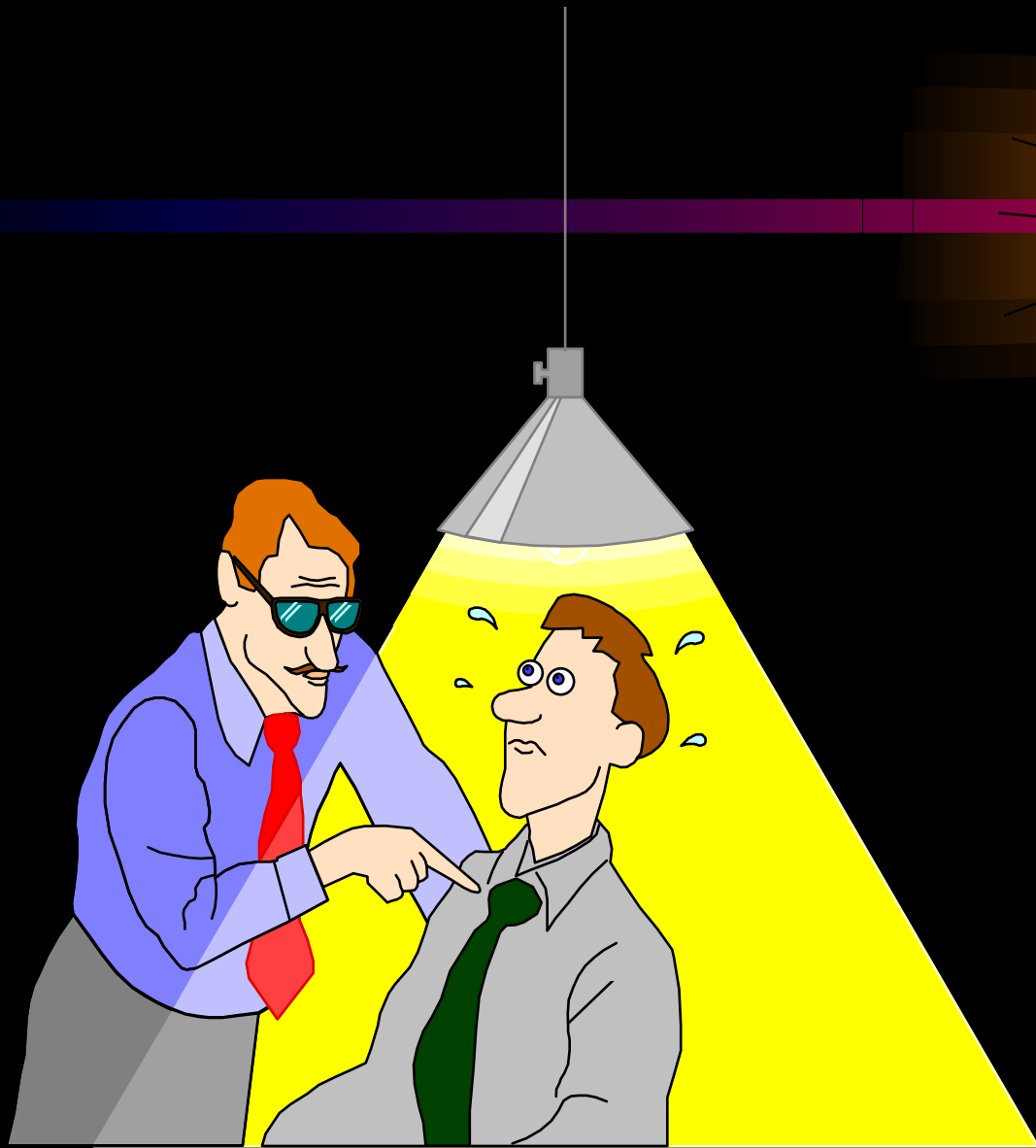
Short straw

Long straw

Long straw

Long straw







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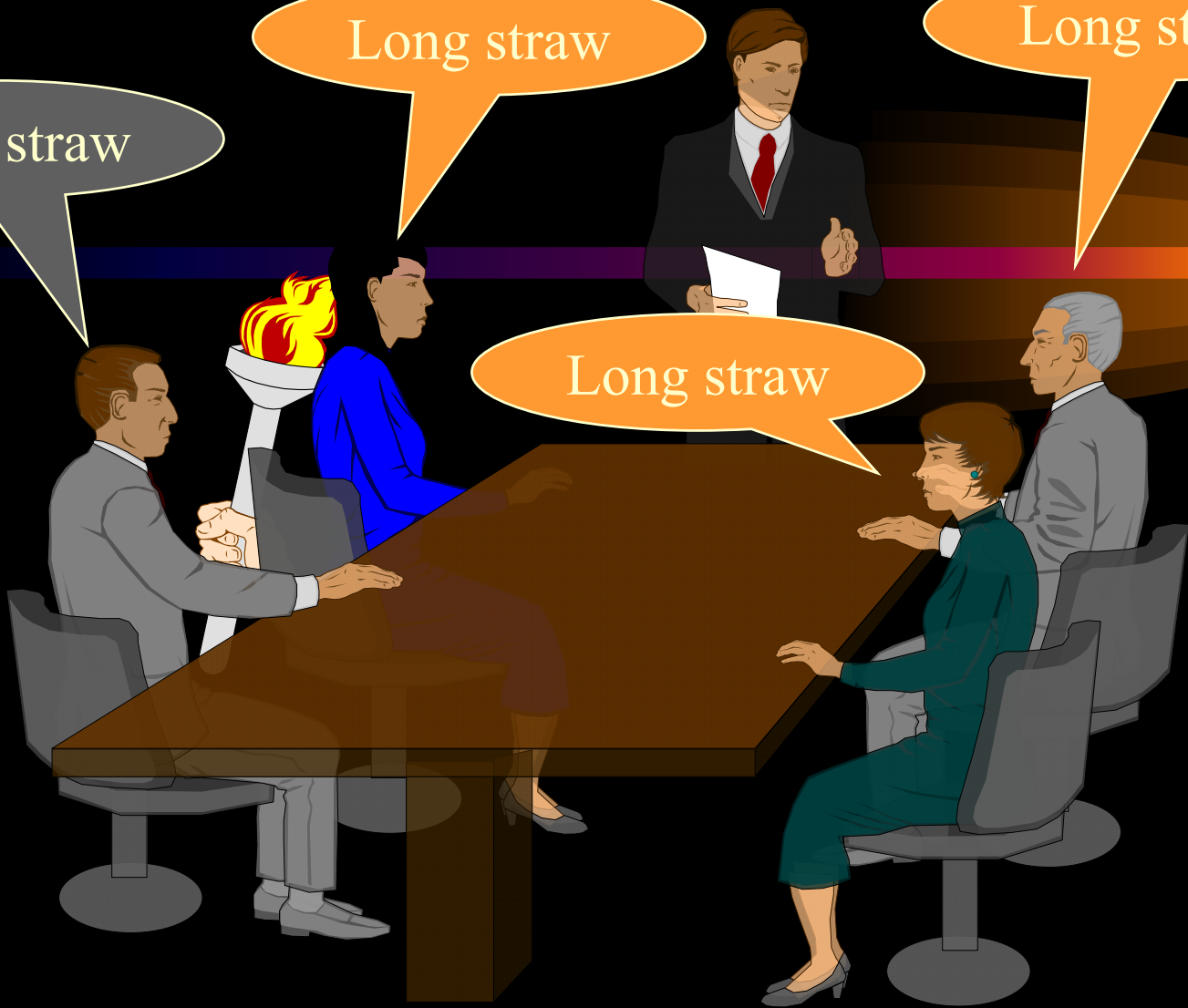


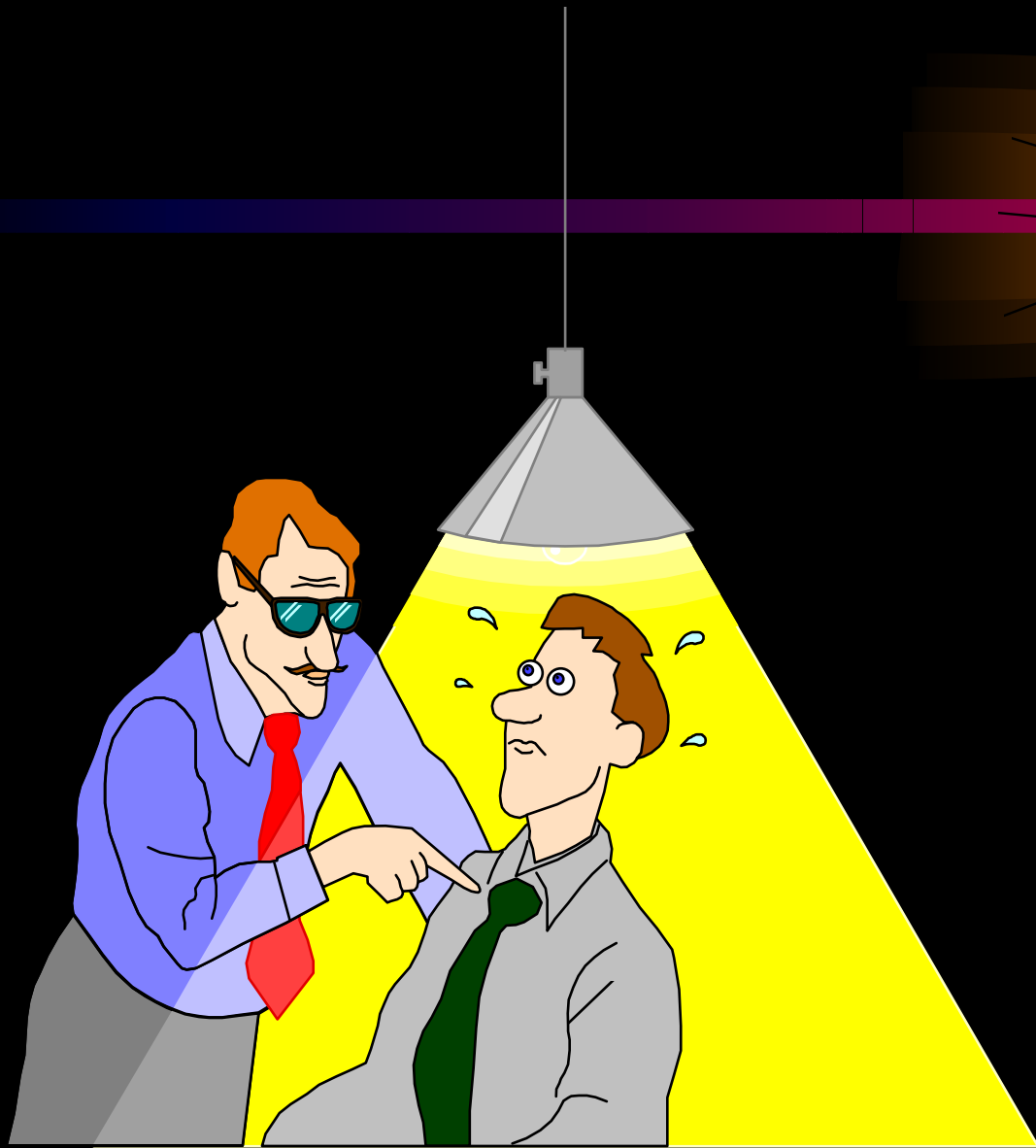
Short straw

Long straw

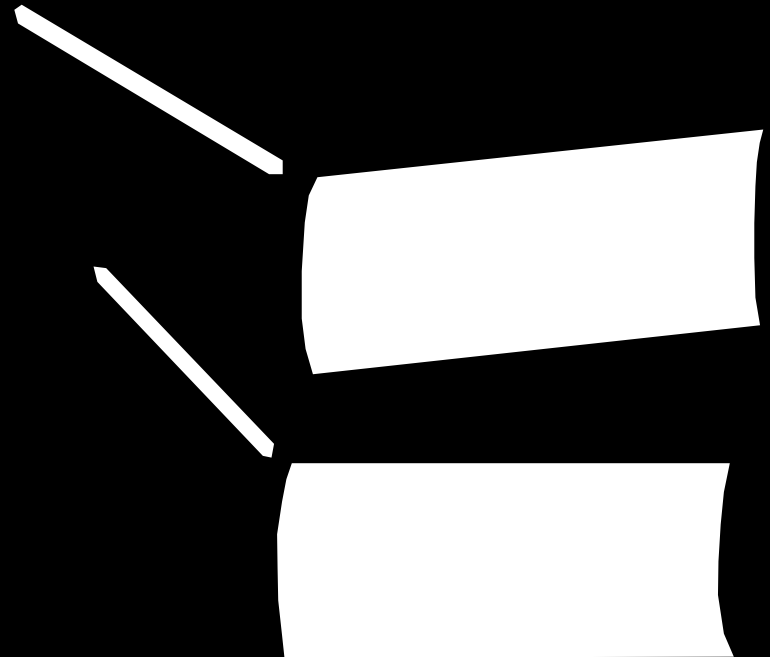
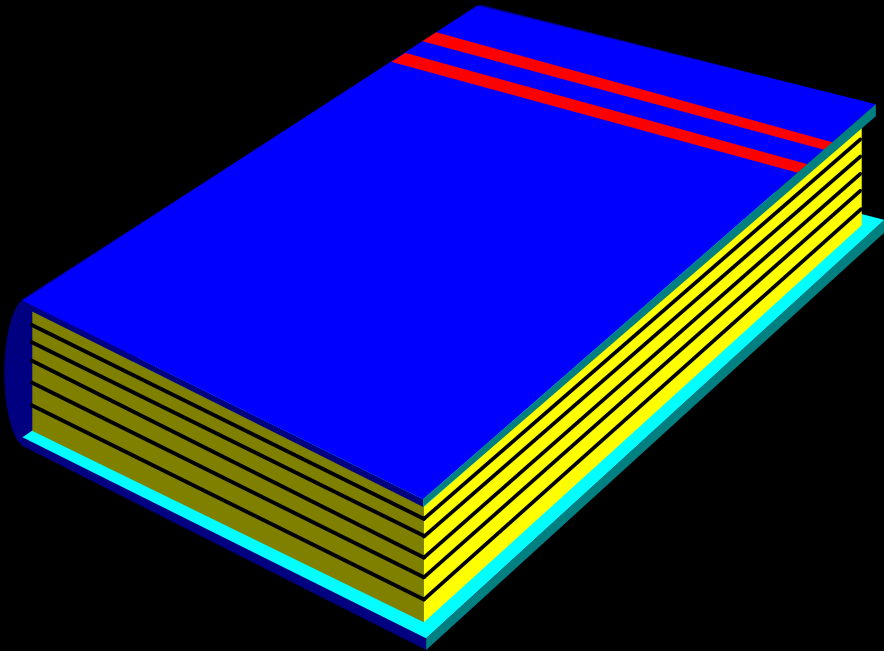
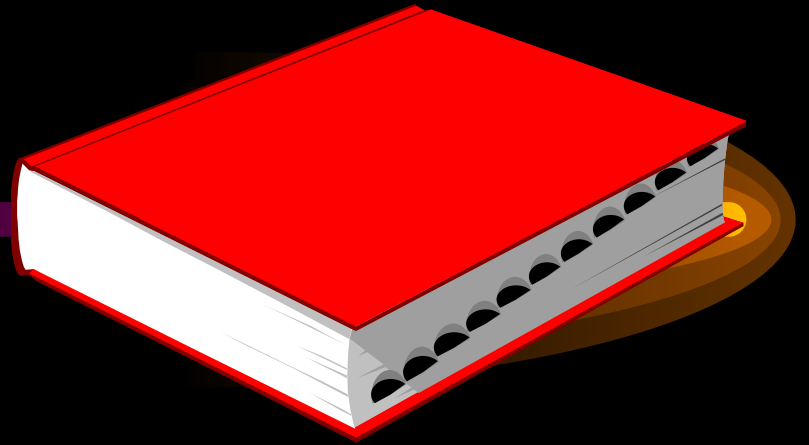
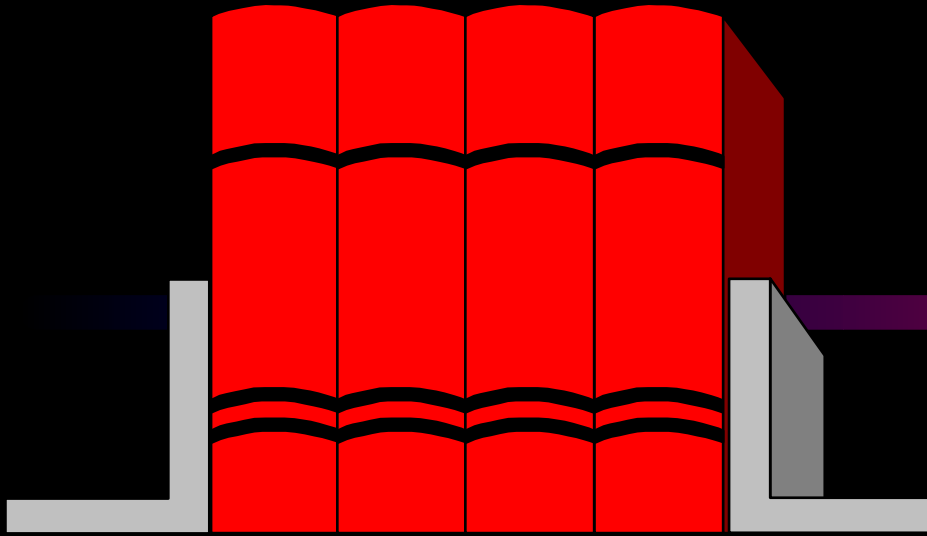
Long straw

Long straw









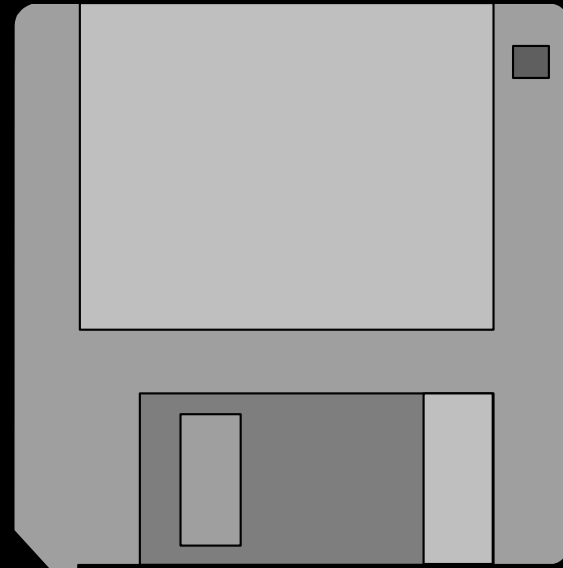
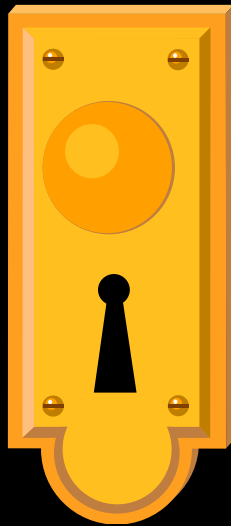
Barrier



- Start with the premise that writing well isn't easy.
 - Garner, *Legal Writing in Plain English* xvii (1st ed. 2001).
- If writing well isn't easy, how can we accomplish the goal of becoming IRS Chief Counsel's finest legal writers?

Solution

- Effective Legal Writing: The Key
- DISC Quality Initiative



Effective legal writing: the key

- However willing you might be to pierce through another writer's obscurity, you must as a writer insist on never putting your own readers to that trouble ...





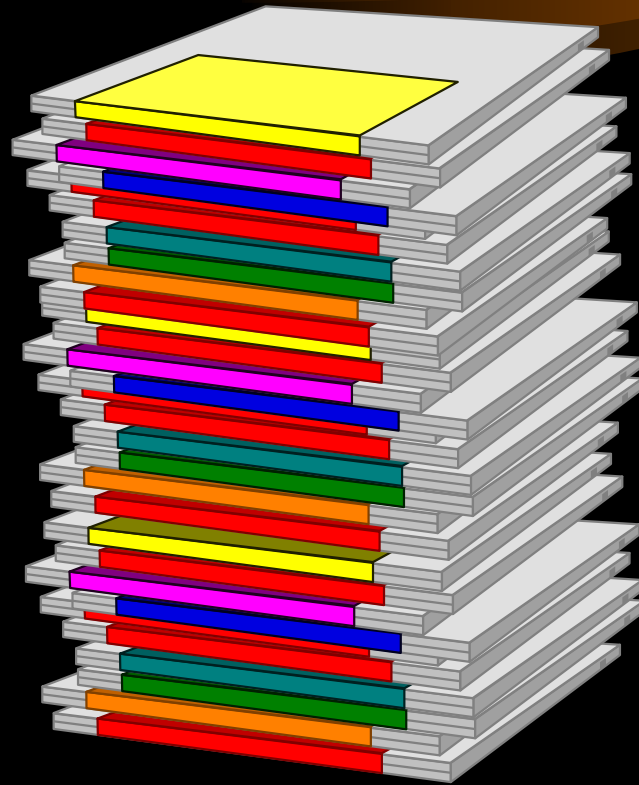
Key, con't

- [Y]ou'll need a penetrating mind as a reader to cut through overgrown verbal foliage ...
- [and] a focused mind as a writer to leave aside everything that doesn't help you swiftly communicate your ideas.

That's the key to becoming an effective legal writer

DISC: A quality initiative

- Dedication
- Inoculation
- Simplicity
- Clarity



Dedication



- Though anyone can learn to write effectively, it takes hard work. Good style is something you must strive to attain.
- In that way it's like skillful golfing: there are comparatively few five-handicappers in the world, and they don't attain that level haphazardly. They work at it.

Dedication, con't

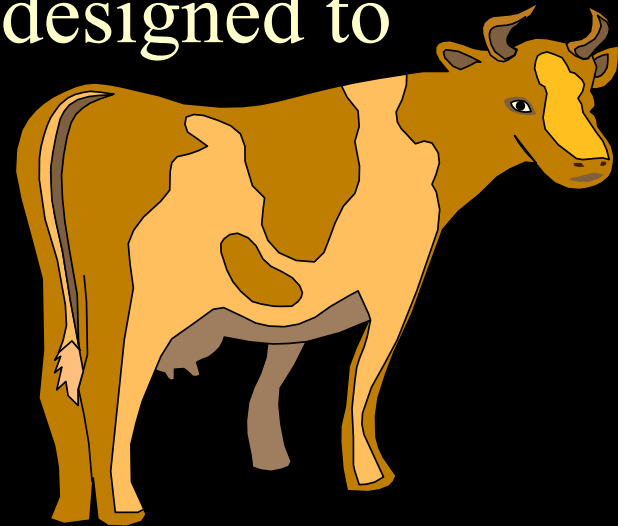
- So remember:
writing is like golf
– you can improve,
but you'll have to
dedicate yourself to
it. The easier path
is to be a duffer.

– *Garner, Legal Writing in Plain English* xvii (1st ed. 2001).



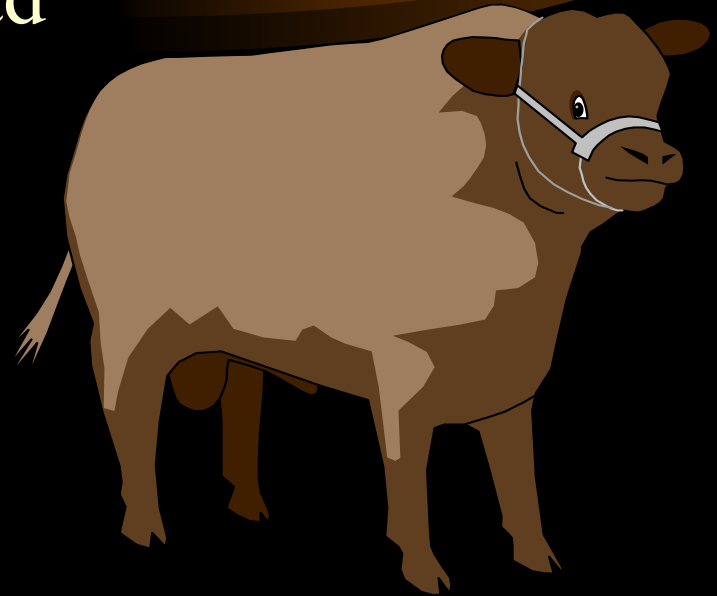
Inoculation

- [I]n law, you're already swimming in a sea of bad writing.
- We learn our trade by studying reams of linguistic dreck – jargon-filled, pretentious, flatulent legal tomes that seem designed to dim any flair for language.



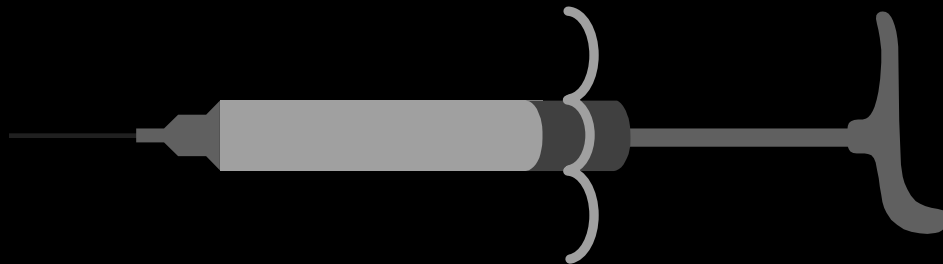
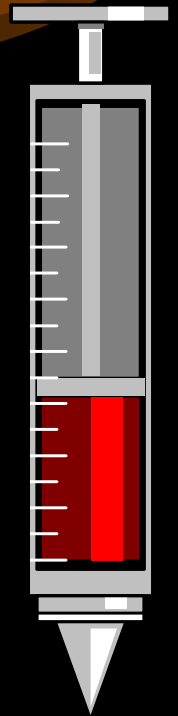
Inoculation, con't

- When on the job, we read poor prose almost exclusively.
- It's wordy and high-flown – oddly antique sounding.



Inoculation, con't

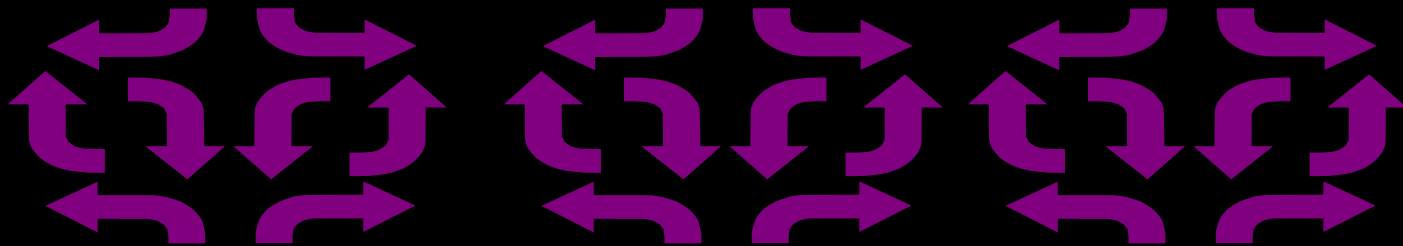
- And a little part of you may well come to believe that you must sound that way to be truly lawyerlike . . .
- You'll have to inoculate yourself against legalese.
 - Garner, *Legal Writing in Plain English* xvii-xviii (1st ed. 2001).





Simplicity

- The world is complex, and so is our law.



- You might think that good legal writing is necessarily complex. You might even be tempted to make your writing more complex than necessary just to impress.

Simplicity, con't

- Part of you will want to do this: you'll feel the impulse to shun simplicity.
- But you'll have to be willing to embrace simplicity – while always resisting oversimplification.
 - Garner, *Legal Writing in Plain English* xviii (1st ec. 2001).

Simplicity, con't



- Praised be he who can state a cause in a clear, simple and succinct manner, and then stop.
 - *Jungwirth v. Jungwirth*, 240 P. 222, 223 (Or. 1925).

Simplicity, con't

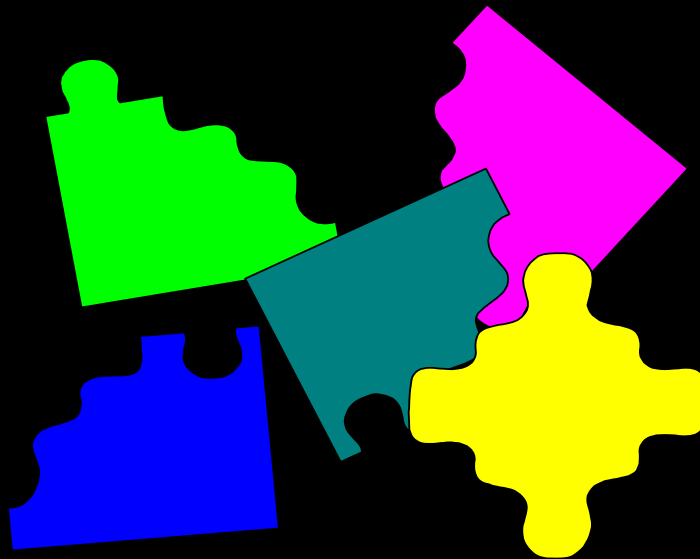


- Effective writing is concise writing. Attorneys who cannot discipline themselves to write concisely are not effective advocates

– *Spaziano v. Singletary*, 36 F.3d 1028, 1031 n.2 (11th Cir. 1994).

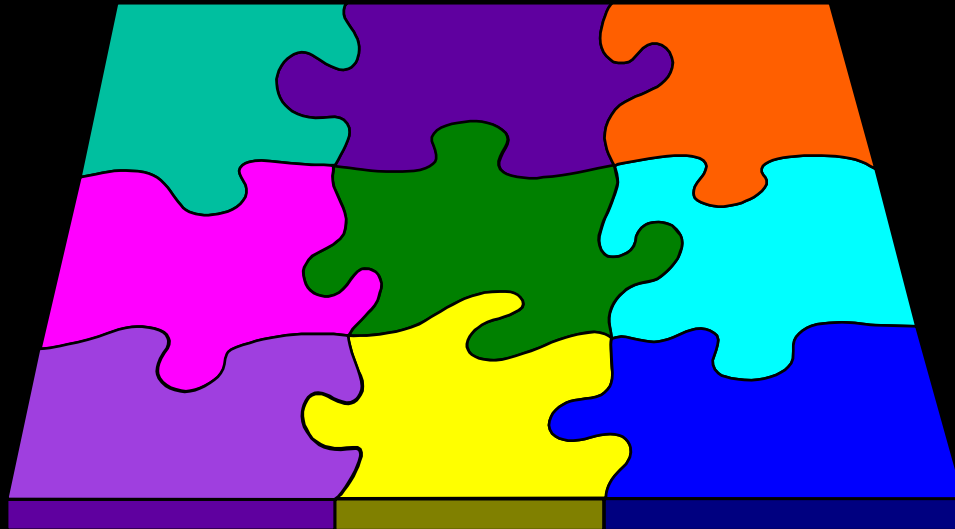
Simplicity, con't

- Achieving simplicity – without oversimplifying – involves a paradox.
- Writers fear simplicity because they don't want to be considered simpleminded.



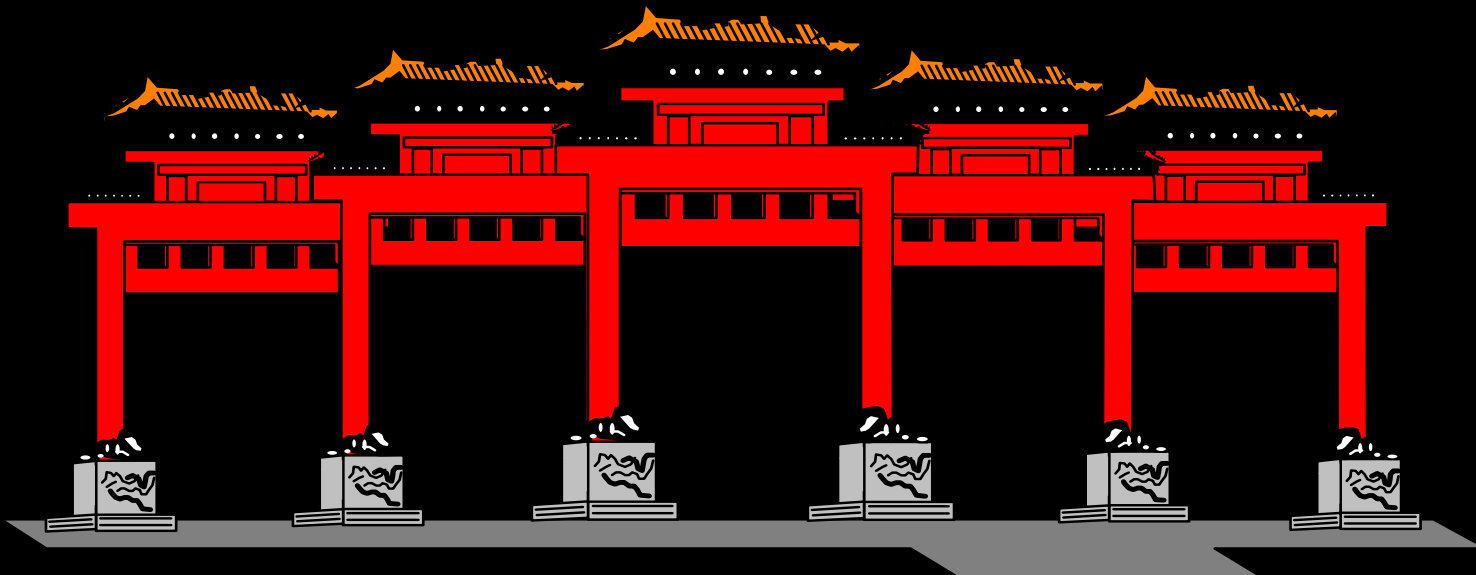
Simplicity, con't

- In fact, though, there's no better way to strike your reader as an intelligent, sensible writer than to simplify.



Simplify, con't

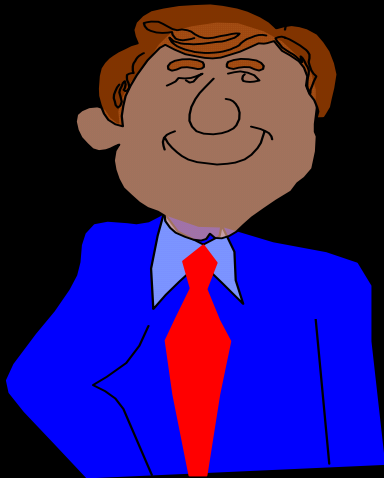
- Psychologically, in other words, there's a gulf between writerly fears and readerly wants. You'll need to bridge it.
 - Garner, *Legal Writing in Plain English* 145 (1st ed. 2001).



Clarity

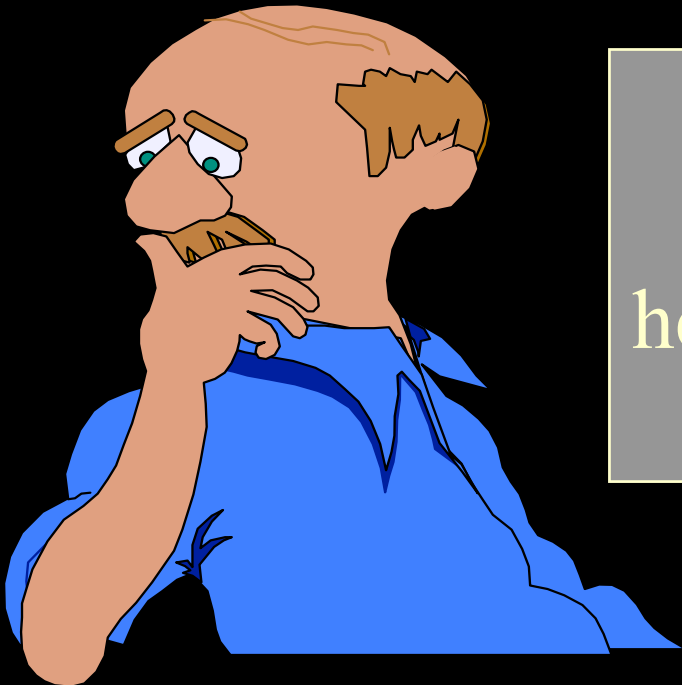
- If you can write – really write – people will assume certain other things about you.
- The most important is that you're a clear thinker.

– Garner, *Legal Writing in Plain English* xviii (1st ed. 2001).



Clarity, con't

- Confusion of expression usually results from confusion of conception.



The act of writing can help clarify one's thoughts.

Clarity, con't

- However, one should spare the reader having to repeat one's own extrication from confusion.
- The object is to be clear, not to show how hard it was to be so.
 - Goldstein & Lieberman, *The Lawyer's Guide to Writing Well* 48 (1989), quoting Hazard.

Clarity, con't

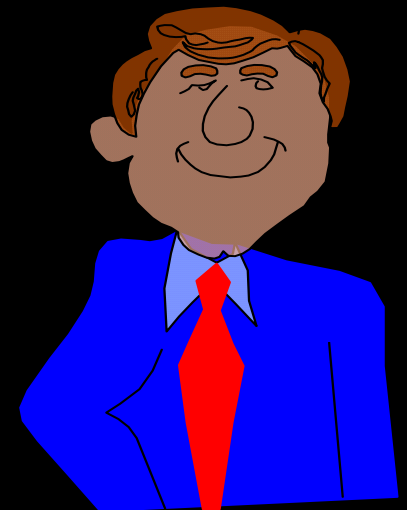
- In the end, you might decide to write in a bold, clear, powerful way.
- It will be a struggle ... combating both the natural human tendencies to write poorly and the unnatural pressure from colleagues to write poorly.



Clarity, con't

- But you'll have struck a blow for yourself and for the law. You'll be championing clarity, cogency, and truth.
- The law could certainly stand to have those qualities in greater abundance.

– Garner, *Legal Writing in Plain English* xix (1st ed. 2001).



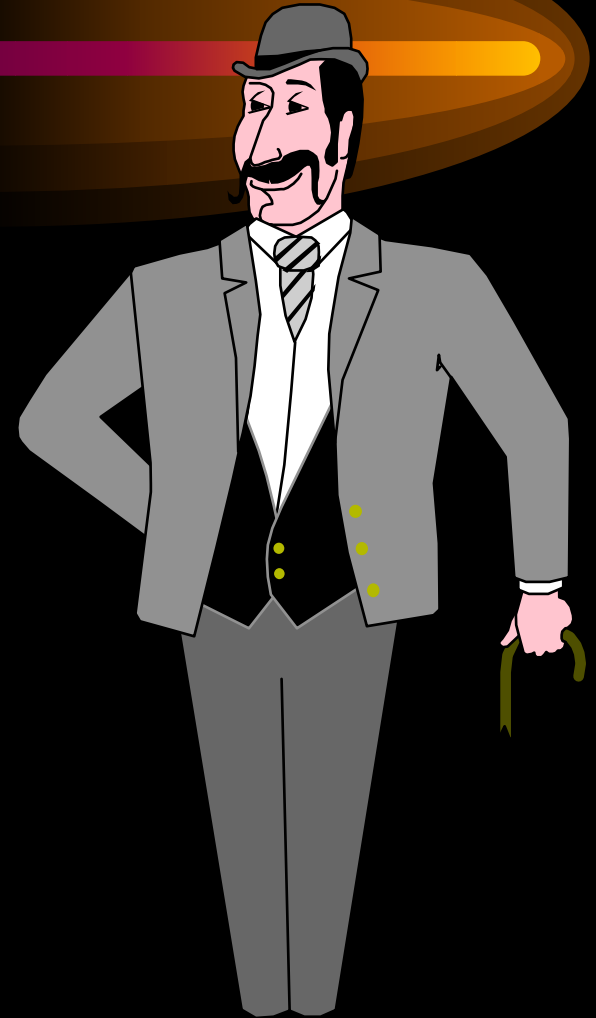
Plain-English legal writing



- What is Plain English?
- Myth: Plain language is not precise
- Writing less like a lawyer
- Find a coach
- Legal-writing politics
- Simply Stated ...

What is plain English?

- [P]lain English is typically quite interesting to read.
- It's robust and direct – the opposite of gaudy, pretentious language.



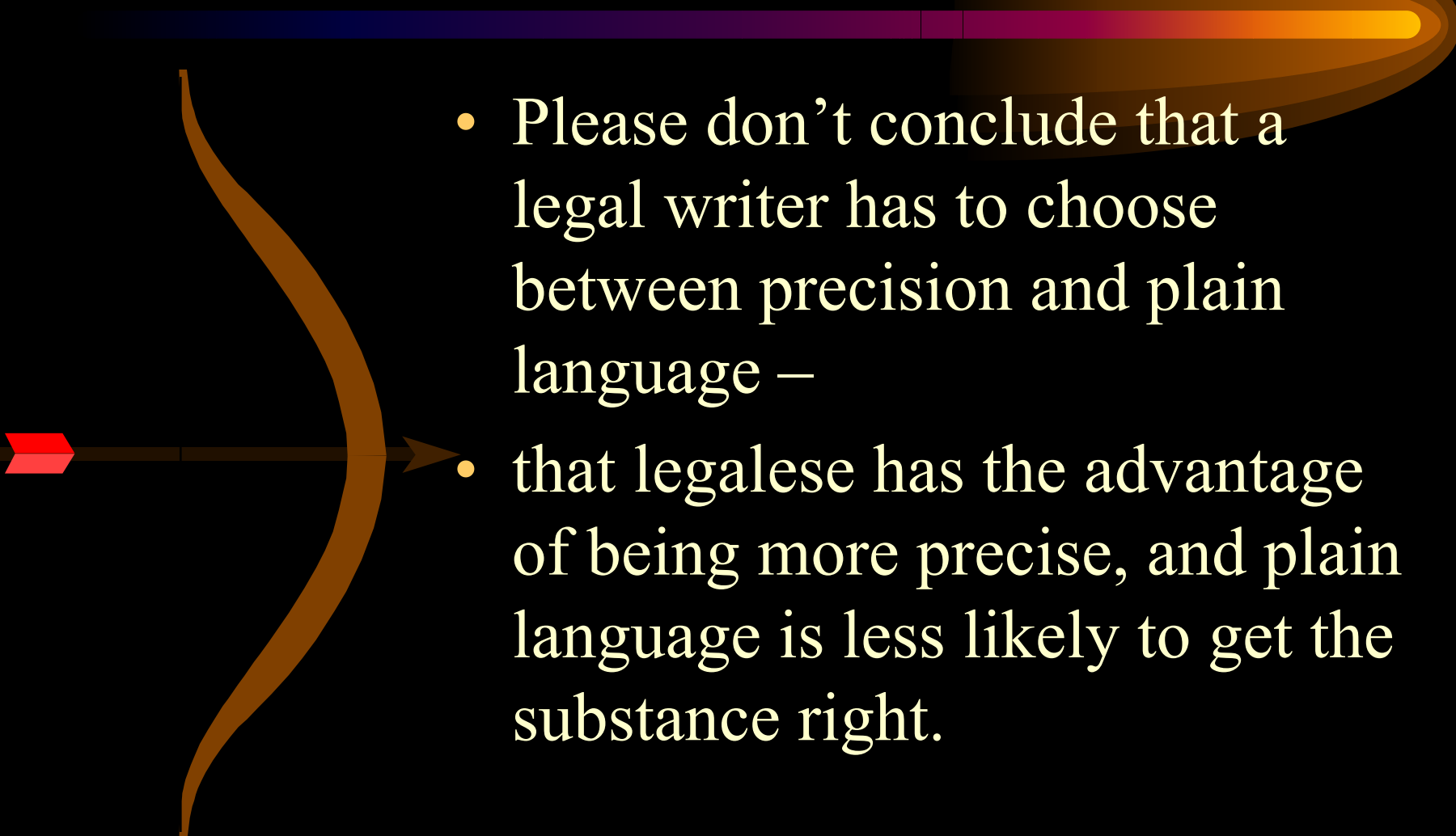
Plain English, con't

- You achieve plain English when you use the simplest, most straightforward way of expressing an idea.
- You can still choose interesting words.
- But you'll avoid fancy ones that have everyday replacements meaning precisely the same thing.

– Garner, *Legal Writing in Plain English* xiv (1st ed. 2001).

Myth:

Plain language is not precise

- 
- Please don't conclude that a legal writer has to choose between precision and plain language –
 - that legalese has the advantage of being more precise, and plain language is less likely to get the substance right.

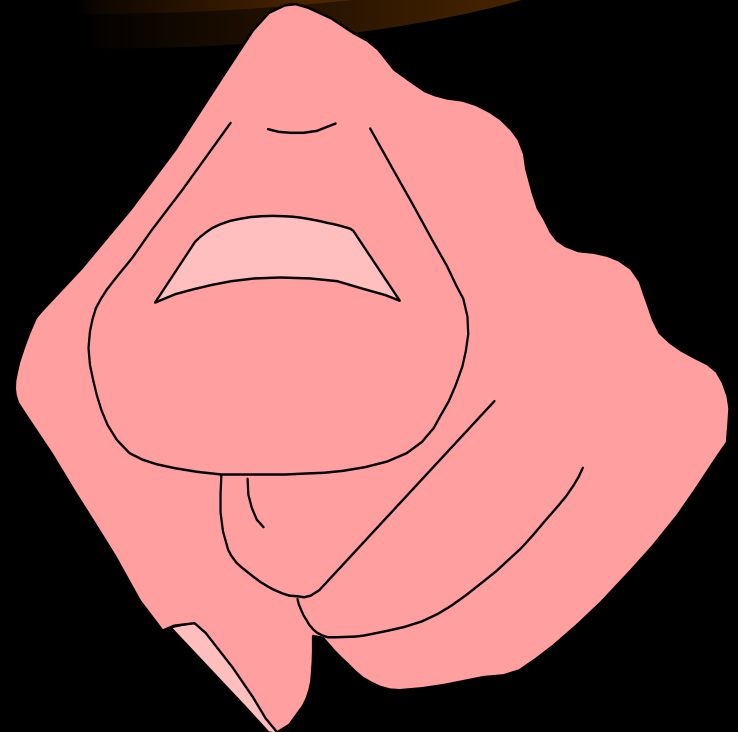
Myth, con't

- That's just not true. In fact, it's the biggest myth of all.
 - Kimble, *The Great Myth That Plain Language is Not Precise*, reprinted in *The Scribes of Legal Writing*, Vol. 7, 109 (Scribes ed. 2000).



- Occasionally, when you try to convert from legalese to plain language, someone will come forward and assert that you made a mistake.
- You missed something in the translation. You inadvertently changed the substance.

Myth, con't





Myth, con't

- Never mind that translating legalese – like translating a foreign language – is no easy matter.
 - Kimble, *The Great Myth That Plain Language is Not Precise*, reprinted in *The Scribes of Legal Writing*, Vol. 7, 109 (Scribes ed. 2000).

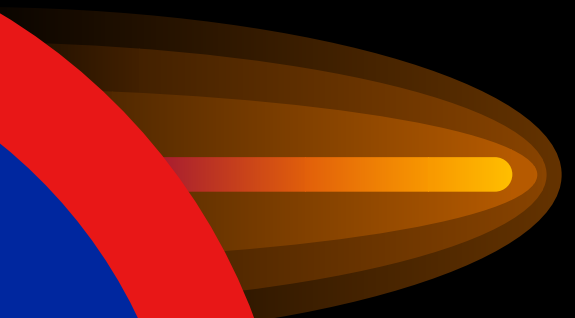


Myth, con't

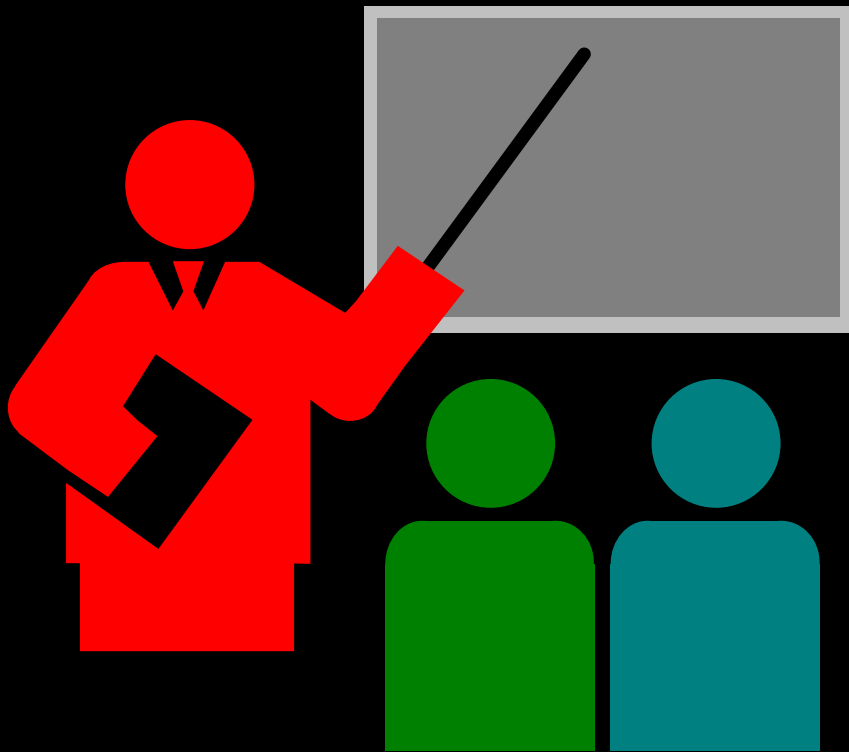
- [But] writers should not be dissuaded.
- Otherwise, the legal profession will never start to level the mountain of bad forms and models that we have created.
 - Kimble, *The Great Myth That Plain Language is Not Precise*, reprinted in *The Scribes of Legal Writing*, Vol. 7, 109, 110 (Scribes ed. 2000).

Write less like a lawyer

- [T]oo many lawyers start imitating the worst writing they saw in law-school casebooks and law journals.
- This, they imagine, is the kind of dense, dreary prose that lawyers are supposed to write.
 - Evans, *Tips for Writing Less Like a Lawyer*, reprinted in *The Scribes of Legal Writing*, Vol. 7, 147 (Scribes ed. 2000).



Find a coach

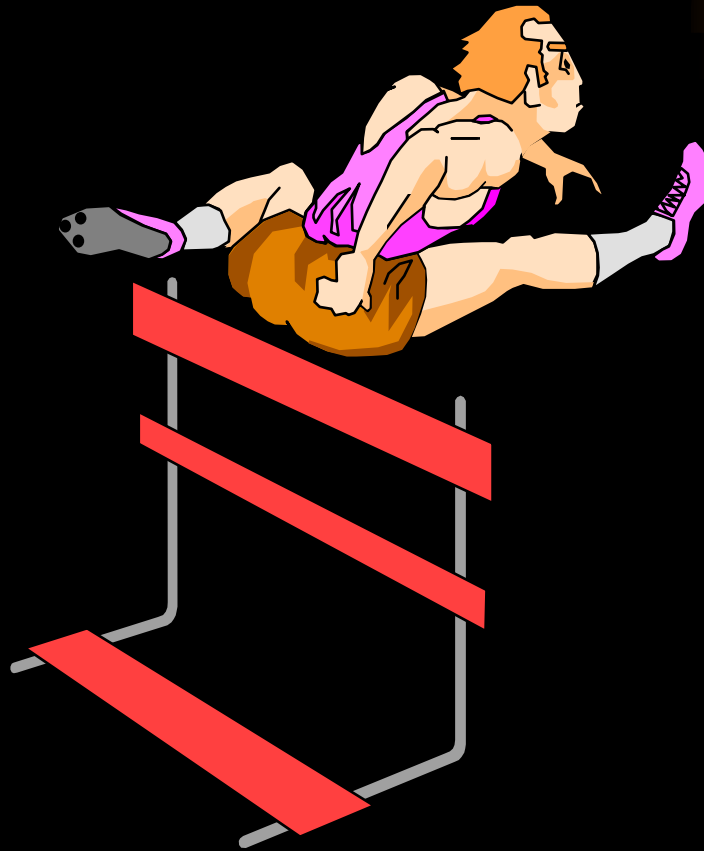


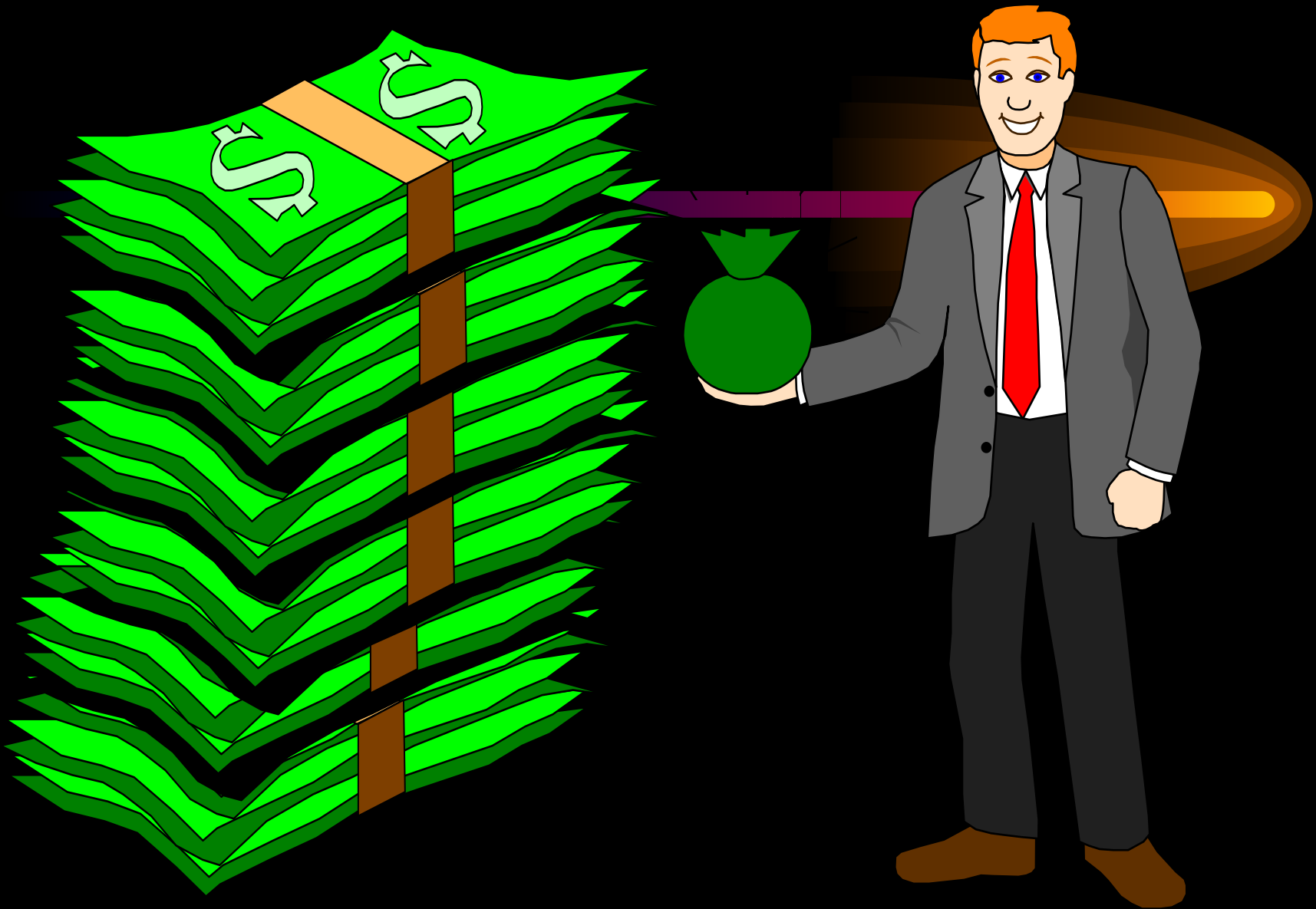


Coaches, con't

- Bryan Garner
- Richard Wydick
- Edward Good
- Beverly Burlingame
- CC Course
- Strunk & White
- SJLW
- CLE (LawProse, etc.)

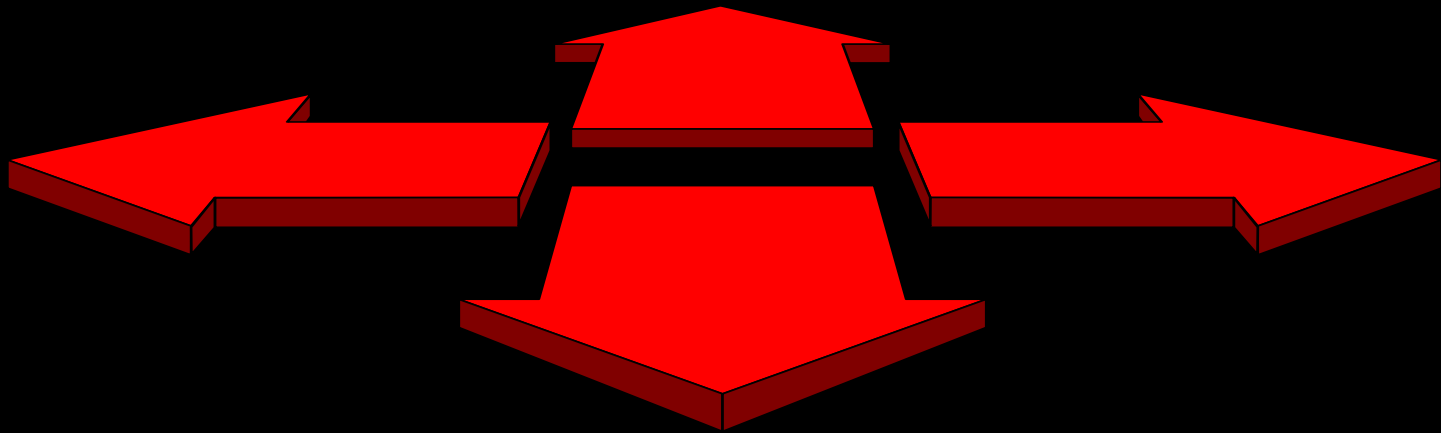
Legal writing politics





Politics, con't

- I've dropped out of the movement for plain legal writing. I used to avoid, but now I embrace, convoluted sentences and legal gobbledygook.
 - Bresler, *Pursuant to Partner's Directive, I Learned to Obfuscate*, reprinted in *The Scribes of Legal Writing*, Vol. 7, 29 (Scribes ed. 2000).



Politics, con't

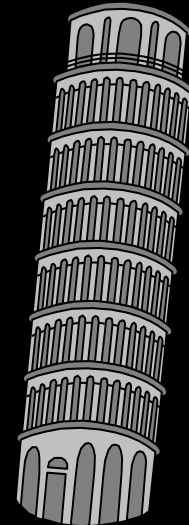
- Writing like a lawyer pained me at first, but ... my signature wasn't going onto the finished product. I still believed in modern legal writing, but I had gone underground.





Politics, con't

- I figured: when in Rome, use Latin.
 - *Id.* at 29, 30.



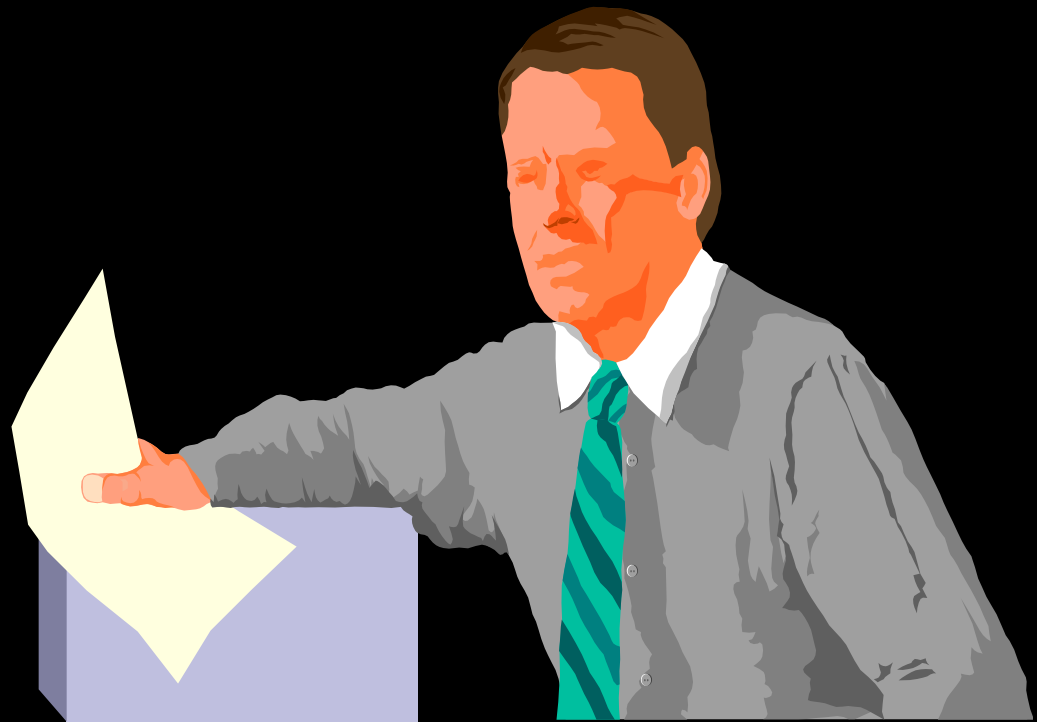


Politics, con't

- So how are you to deal with it?

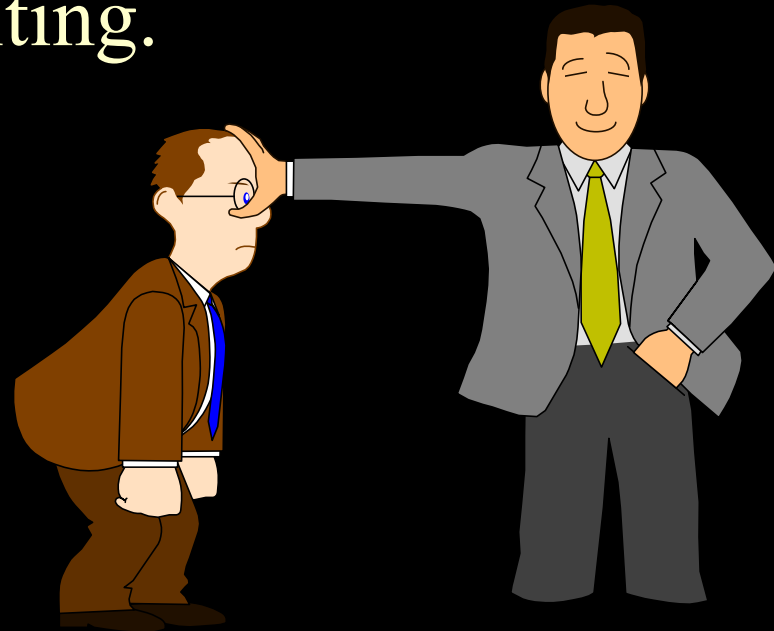
Politics, con't

- The answer is twofold.



Politics, con't

- First ... [d]on't butt heads with someone who refuses to engage in an intelligent discussion about writing.



Politics, con't

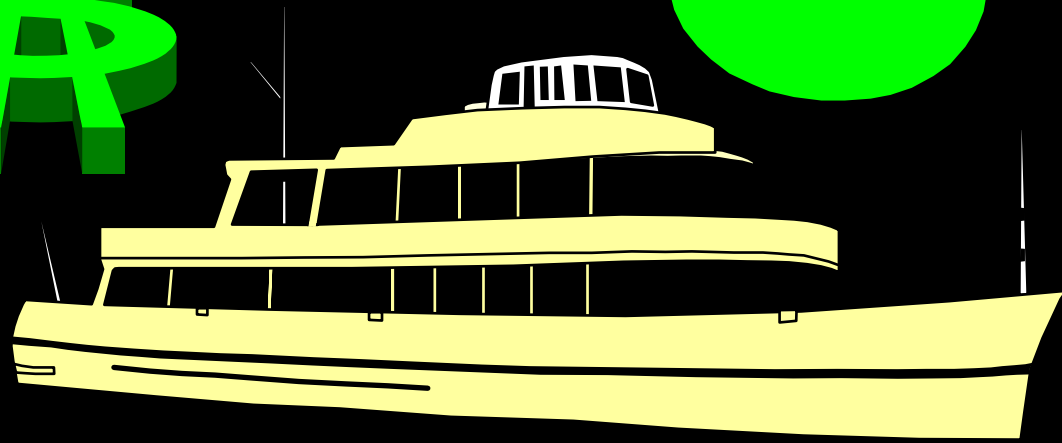
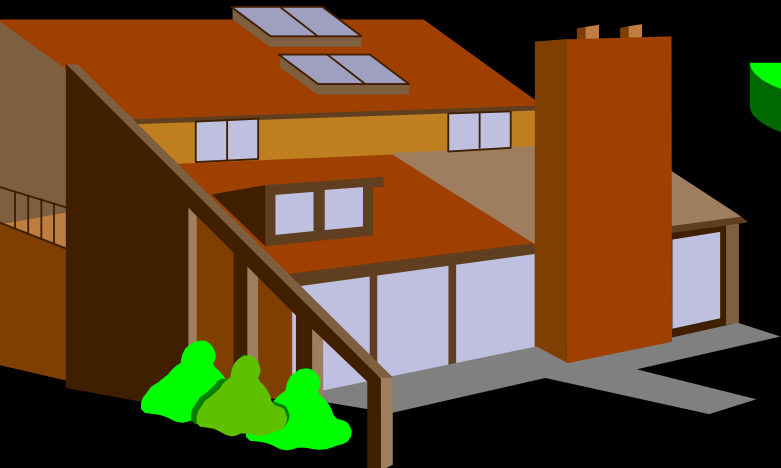
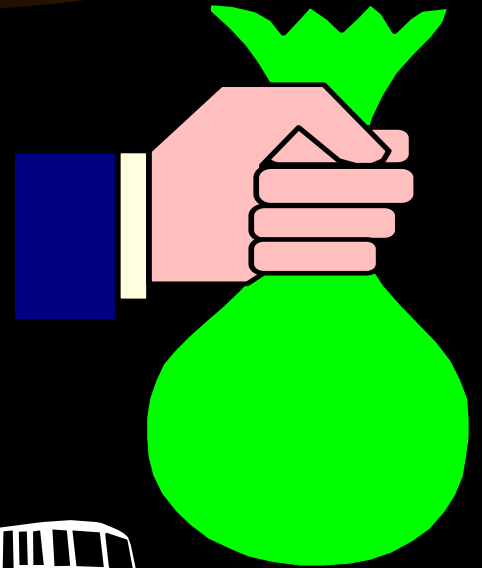
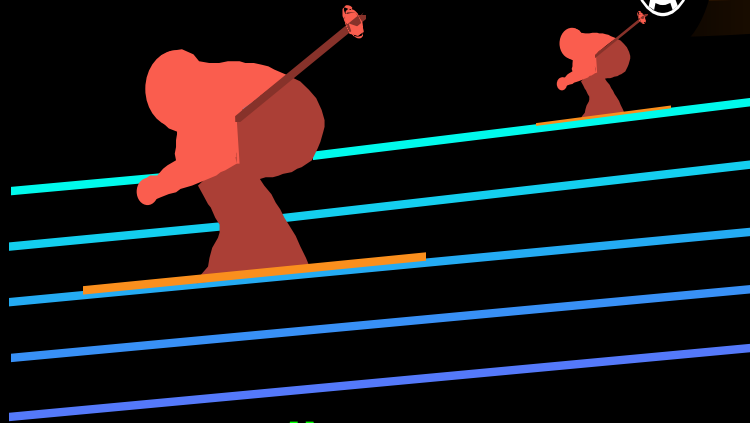
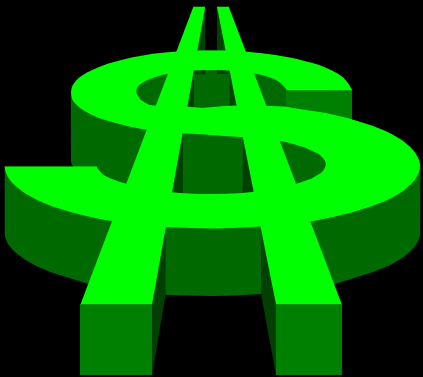
- Second, don't lose your critical sense; instead, cultivate it.
 - Garner, *Legal Writing in Plain English* xvii-xix (1st ed. 2001).



Simply Stated:

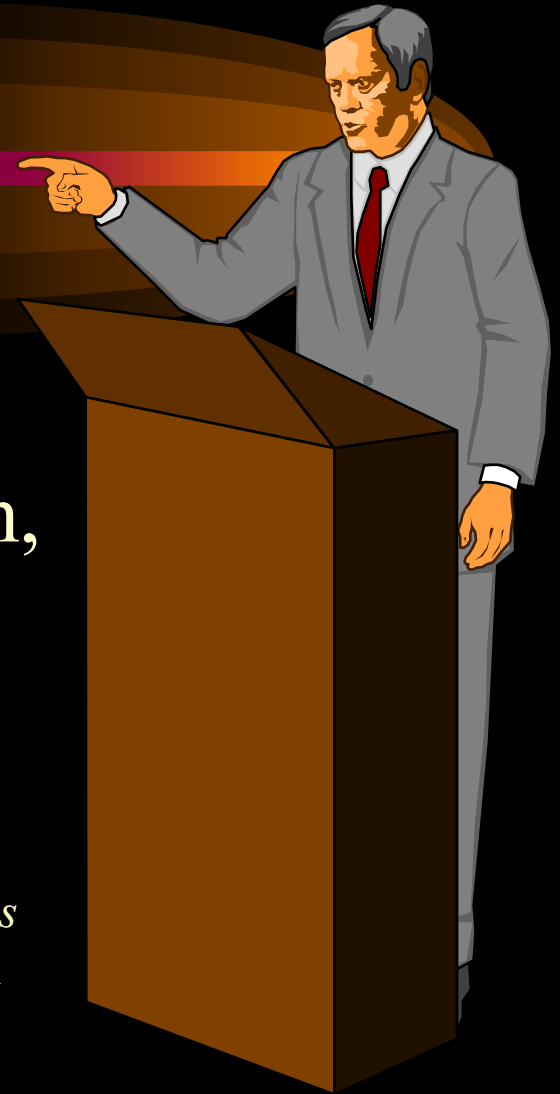


Think critically
and
Apply plain-English Principles



Need help with words?

- Lawyers need great help in language and communication.
- They know too little about them, and what they do know is frequently misguided or hopelessly outmoded.
 - Eagleston, *Plain Language: Changing the Lawyer's Image and Goals*, reprinted in *The Scribes of Legal Writing*, Vol. 7, 147 (Scribes ed. 2000).



Help, con't

- This may seem an outrageous suggestion ... given that lawyers often claim that they are wordsmiths ...



Help, con't

- Yet ... how else ... to explain the long, cumbersome sentences of 200, 300, even 800 words ...
- The absence of coherent organization ...;
- The misunderstandings about punctuation;
- The attachment to so-called “settled terms” no matter how ill-chosen they might be?
 - *Id.*

Principles for all legal writing



- Frame thoughts
- Phrase sentences
- Choose words
- Use proper grammar
- Spell and punctuate correctly

Principles for all legal writing

- There are many types of legal writing ...
- Although each type presents a unique challenge, they all have some things in common.



Principles

- That is, certain principles of good writing apply to the whole gamut ...
 - Framing your thoughts
 - Phrasing your sentences
 - Choosing your words
 - Garner, *Legal Writing in Plain English* xvii-xix (1st ed. 2001).

Framing your thoughts

- What's your biggest challenge as a writer?
- It's figuring out, from the mass of things you might possibly mention, precisely what your points are –
- And then stating them cogently, with adequate reasoning and support.
 - Garner, *Legal Writing in Plain English* 3 (1st ed. 2001).

Framing, con't

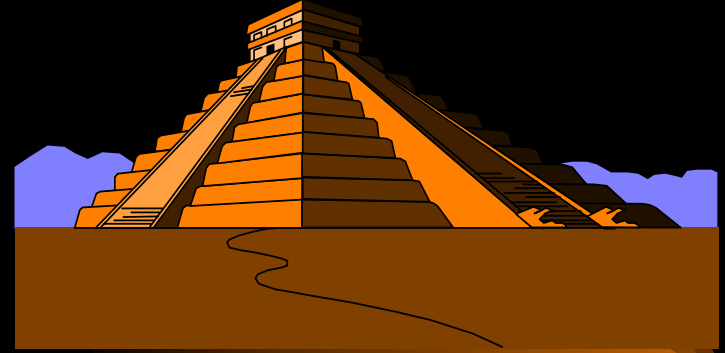
- Although this advice might seem obvious,
- legal writers constantly ignore it.
- The result is a mushy, aimless style.



Framing, con't

- And even with your point in mind, if you take too long to reach it, you might as well have no point at all.
- Only those readers with a high incentive to understand you will labor to grasp your meaning.
 - Garner, *Legal Writing in Plain English* 3 (1st ed. 2001); see also “Get to the Point,” *infra*.

Constructing documents



- Frame
- Plan
- Design
- Write
- Edit
 - Plain English
- Proof
- The Point?
- Review
- Revise
- Finalize

Frame

- Organizing thoughts before writing is pleasant and profitable, but organizing after writing is wasteful, irritating, and inefficient.



- Planning is not the second, third, or fourth step; it must be the first.
 - Tichy, *Effective Writing for Engineers, Managers, and Scientists* 9 (1966).
- [U]ncertainty about which words to use stems mainly from uncertainty about what we want to say.
 - Turk & Kirkman, *Effective Writing: Improving Scientific, Technical, and Business Communication* 39 (2d ed. 1989).

Frame, con't

- Usually, if we have the underlying framework of our ideas straight, the writing of the first full prose draft can go ahead
- much more confidently and rapidly than if we are still trying to work out what sequence of statements we should make.
 - *Id.*

Frame, con't

- Step back mentally from the details and try to see just the essence of the message.
- Admittedly, this is easier said than done;
- but any writer of any message, no matter how complex, can do it if he or she wants.
 - *Ewing, Writing for Results in Business, Government, and the Professions* 56 (1974).

Plan

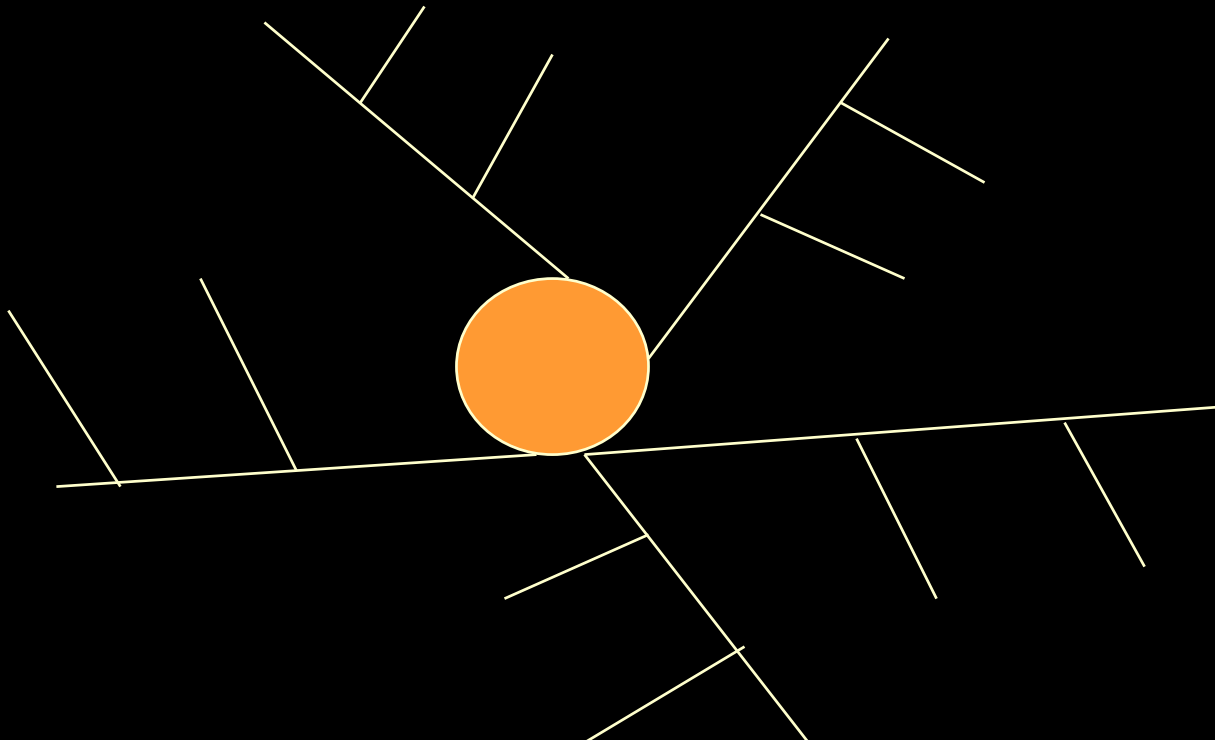


- Have something to say – and think it through.
 - Garner, *Legal Writing in Plain English* 3 (1st ed. 2001); see also “Framing,” *supra*.
- Once you have your points in mind ... you’re ready to begin.
 - But you’re not yet ready to begin writing sentences and paragraphs.
 - You’re ready to start outlining.
 - *Id.*

Plan, con't

- Try nonlinear outlining.

- Garner, *Legal Writing in Plain English* 5 (1st ed. 2001); *see id.* at 7-9 (describing whirlybird outline).



If I draft using boilerplate, do I need a whirlybird?





Plan, con't

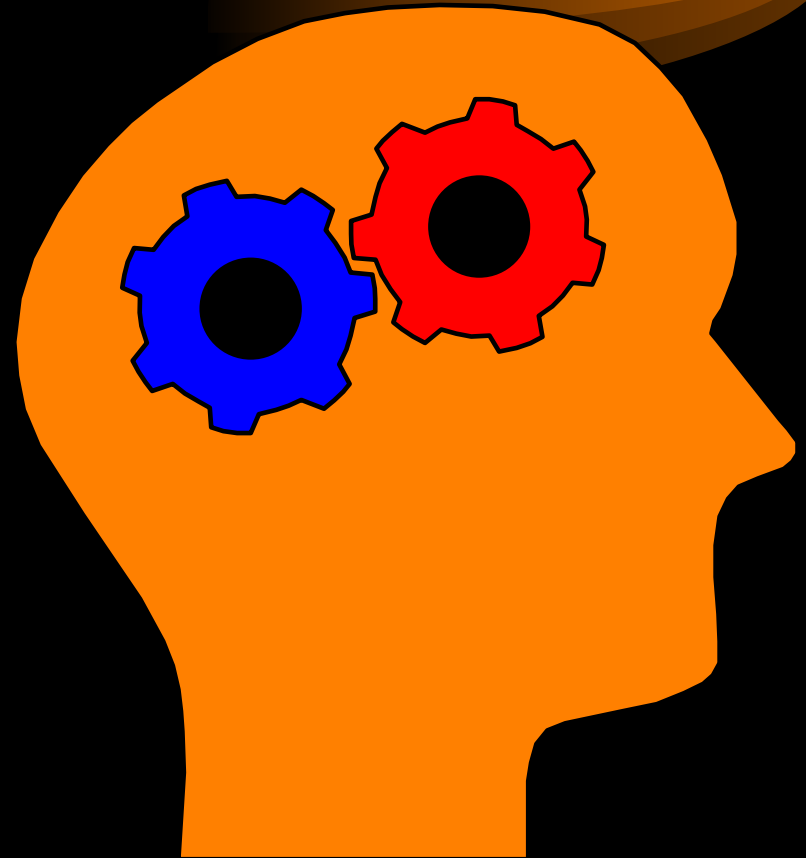
- Whirlybird advantages
 - Stress-free idea generator
 - Free-form categorizer
 - Avoids writer's block
 - Visualizes interconnections
 - Distills key points
 - Facilitates brainstorming
 - Helps to select among options
 - See Garner, *Legal Writing in Plain English* 9 (1st ed. 2001).

Plan, con't

- **Madman, architect, carpenter, judge.**
 - *See Flowers, Madman, Architect, Carpenter, Judge: Roles and the Writing Process, 44 Proceedings of the Conference of College Teachers of English 7-10 (19790; see also Garner, Legal Writing in Plain English 5-6 (1st ed. 2001).*

Madman

- Madman:
- Ideas flow freely



Architect

- Architect:
- Designs the draft



Carpenter

- Carpenter:
- Builds the draft



Judge

- Judge:
- Critical editing



Design



- Use a readable typeface.
- Create ample white space
- Use bullets
- Avoid all caps and initial caps
- Use a table of contents for long documents
 - *See Garner, Legal Writing in Plain English* 9 (1st ed. 2001).

Design - typeface

- When someone starts talking about ...
serified typeface,
most lawyers tune out.
- Yet these matters are anything but trivial.
- [U]se a readable serified typeface ...
 - Garner, *Legal Writing in Plain English* 123 (1st ed. 2001).
- **Serified:**
 - Times new roman
 - Century schoolbook
 - Garamond
 - Book Antiqua
- **Not serified**
 - Arial (but O.K.)
 - Veranda
 - Courier
 - Universal condensed

Design – white space



- To the modern eye, densely printed pages are a turnoff.
- [W]hite space ... makes a page look inviting and roomy.
- The lack of it makes the page look imposing and cramped.
 - *Id.* at 124
- Techniques:
 - Section headings
 - Frequent paragraphing
 - Set-off lists with hanging indents
 - Bullets

Design - bullets

- [Bullet] listing is vital to readability and punchiness.
- Advertisers, journalists, and other professional writers use bullets.
- So should you.
 - *Id.* at 125

Design - caps

- The problem with using all capitals is that individual characters lose their distinctive features ...
- [And] the eye must strain a little – or a lot – to make out words and sentences.
 - *Id.* at 126

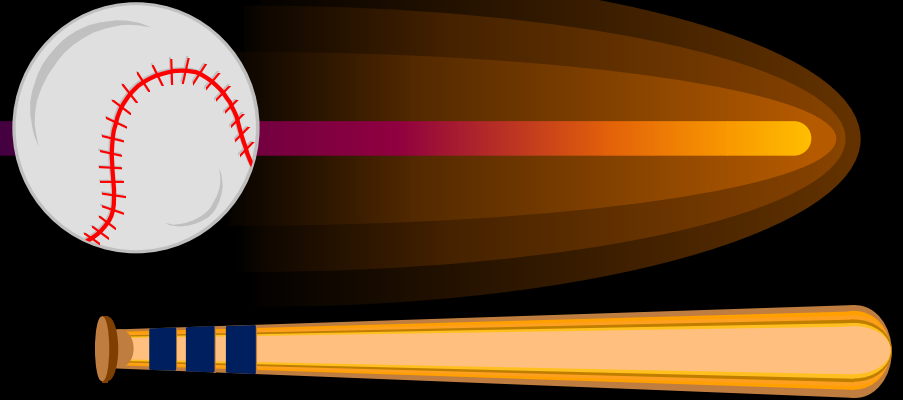
All caps - example

- ***THESE SECURITIES HAVE NOT BEEN APPROVED OR DISAPPROVED BY THE SECURITIES AND EXCHANGE COMMISSION OR ANY STATE SECURITIES COMMISSION NOR HAS THE SECURITIES AND EXCHANGE COMMISSION PASSED UPON THE ACCURACY OR ADEQUACY OF THIS PROSPECTUS SUPPLEMENT OR THE ACCOMPANYING PROSPECTUS. ANY REPRESENTATION TO THE CONTRARY IS A CRIMINAL OFFENSE.***

– Source: *Id.*

- A two-page document doesn't need a table of contents.
- But anything beyond six pages – if it's well organized and has good headings – typically benefits from [one]
 - *Id.* at 127

Write



- “Don’t think, just throw.”
 - Crash (Costner) to Nule (Robbins) in *Bull Durham*.
- [P]olishing at an early stage usually is a waste of time.
 - Miller, *On Legal Style*, 43 Ky. L.J. 235, 239 (1955).

Write, con't

- Convince yourself that you are working in clay not marble, on paper not eternal bronze; let that first sentence be as stupid as it wishes.



Write, con't

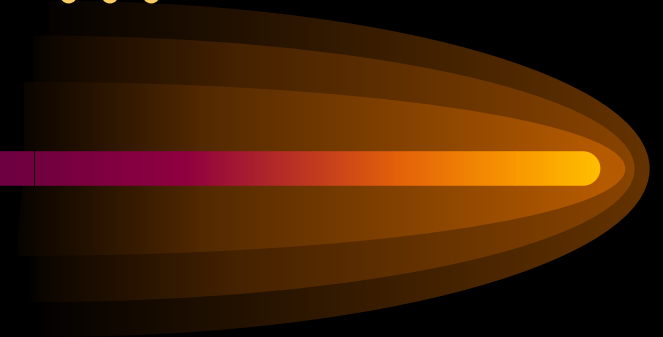
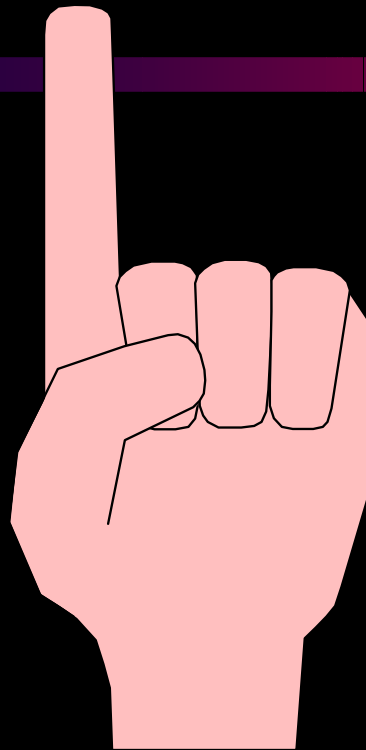
- No one will rush out and print it as it stands. Just put it down; then another.
- Your whole first paragraph or first page may have to be guillotined in any case after your piece is finished: it is a kind of forebirth.
 - Barzun, “A Writer’s Discipline,” in *On Writing, Editing, and Publishing* 8 (2d ed. 1986).

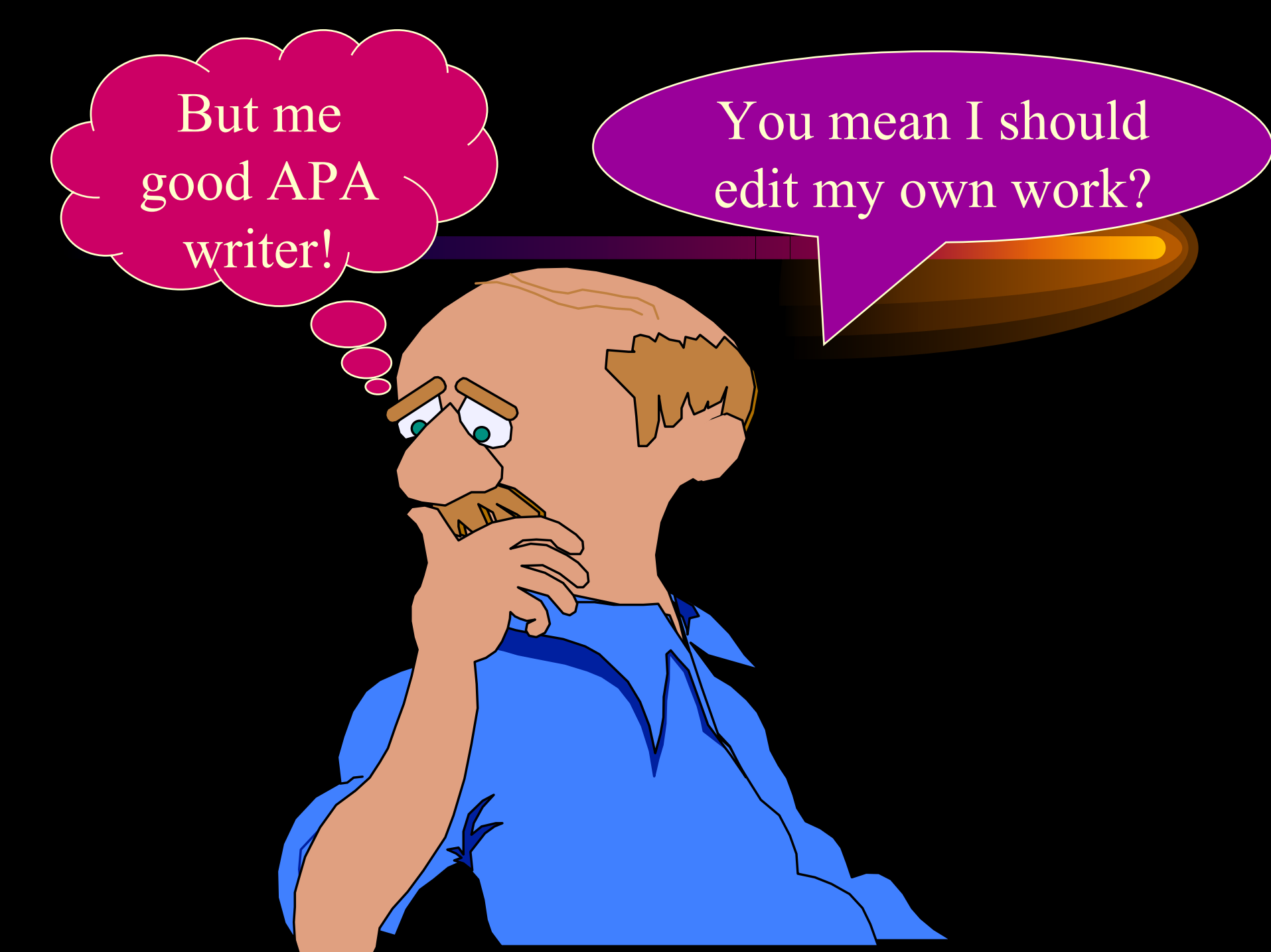
Edit



- Levels:
 - Paragraphs
 - Construct sound paragraphs
 - Sentences
 - Write brisk, uncluttered sentences
 - Words
 - Select the best words
 - Nix the gobbledygook

*A question from the
audience ...*





But me
good APA
writer!

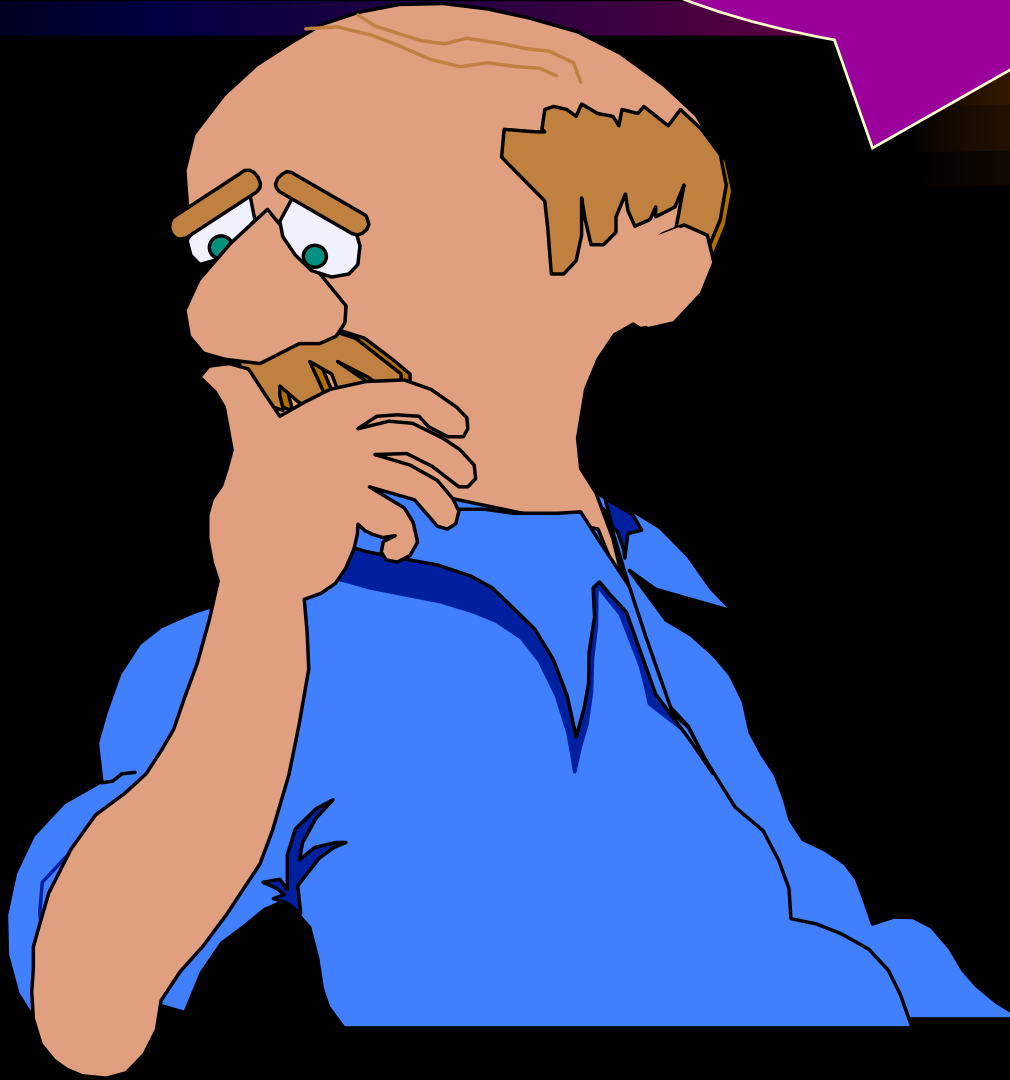
You mean I should
edit my own work?

Sound paragraphs



- Use topic sentences
- Bridge between paragraphs
- Connect sentences
- Provide signposts
- Avoid tiresome repetitions

Bridges? Signposts?
And what's a topic
sentence?



Brisk, uncluttered sentences

- Axe the jargon
- Simplify wordy prepositions
- Avoid over-particularization
- To be or not to be?
- Be active, not passive
- Uncover buried verbs
- Eliminate unnecessary prepositional phrases
- Use real names
- Don't separate verbs
- End with punch
- Cut throat clearing
- Count word savings
- Parallel construction
- Break up long sentences
- "Scare" quotes



But long sentences
sound legal.

What's this about
“word choice”?

The best words



- Cut words
- Clichés
- Use distinctive nouns and verbs
- Avoid heavy connectors
- Hyphenate your phrasal adjectives
- Strike “pursuant to”
- Delete “shall”
- Don’t use “such”
- That or which?
- Ann Dorian
- Ode to Texas
- Avoid word-numerals doublets

Alright already.
What's a topic
sentence?



Use topic sentences



- A topic sentence lets readers know the focus of a paragraph in simple and direct terms
 - Axelrod & Cooper, *The St. Martin's Guide to Writing* 354 (1985).
- Because a topic sentence, with its controlling idea, is a serviceable guide ... you should place it first.
 - Ostrom & Cook, *Paragraph Writing Simplified* 9 (1993).

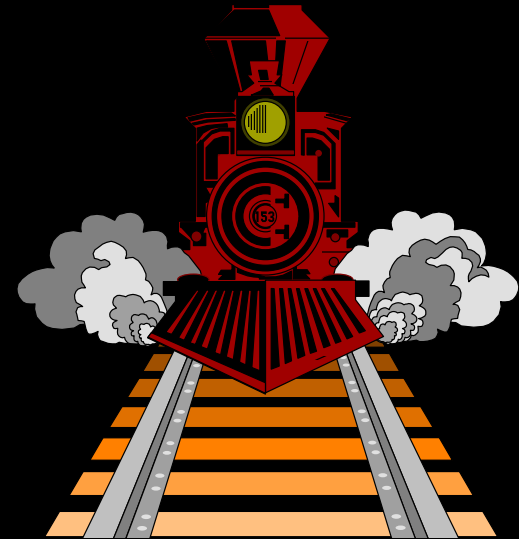
Topic sentence - example

The attorney-client privilege protects confidential communications between a client and the client's lawyer.

Bridge between paragraphs

- [A] sentence should follow one another in harmonious sequence,
- so the paragraphs must fit onto one another
- like the automatic couplings of railway carriages.

- Winston Churchill, *My Early Life*:
- *A Roving Commission* 211-12 (1930).



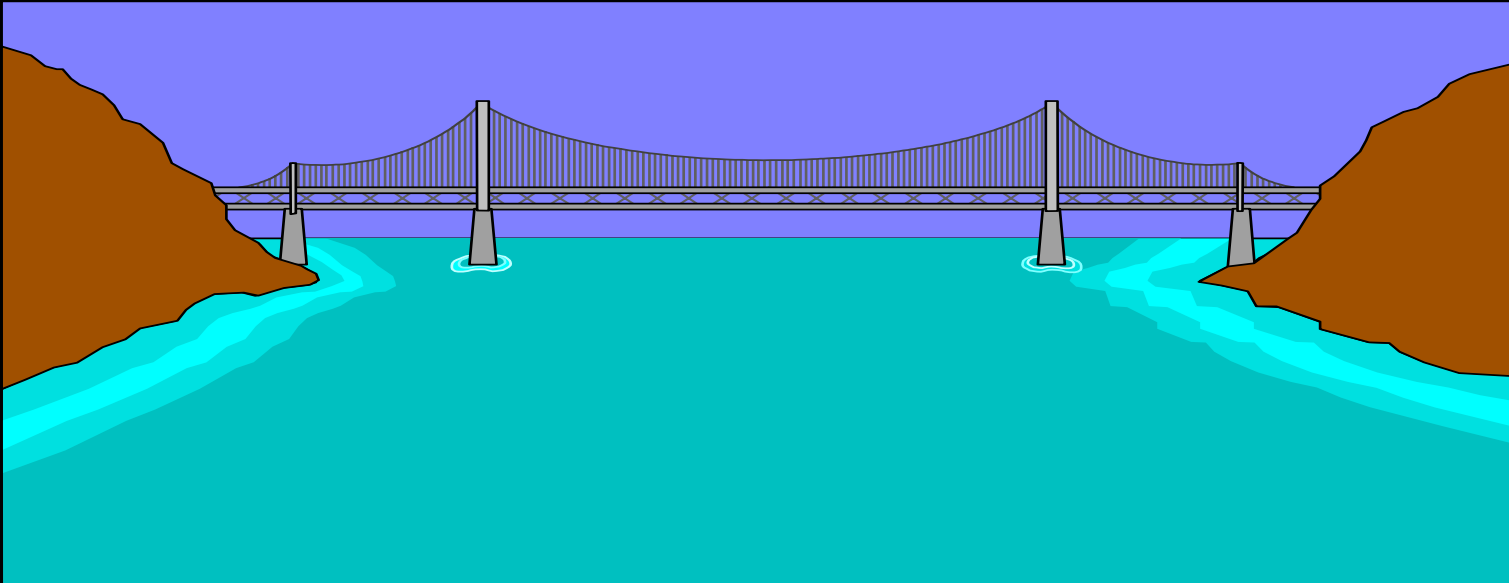
Bridge, con't

- Each topic sentence must somehow hook onto the paragraph above it,



Bridge, con't

- [and] must include some word or phrase to ease the reader's path: a transition
 - Baker, *The Practical Stylist* 42 (1998)



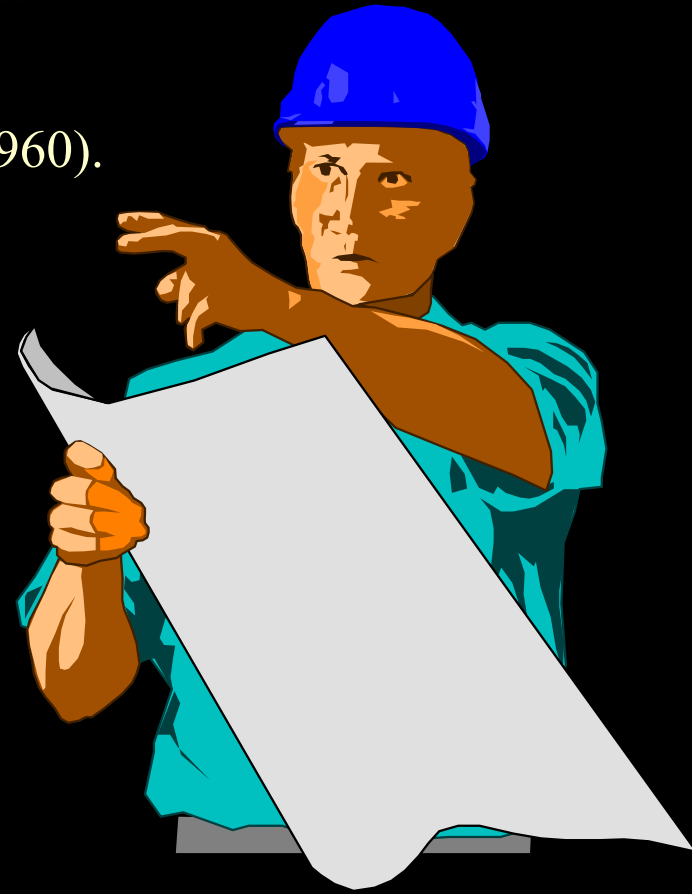
Bridging - example



*See Garner, *Legal Writing in Plain English* 67-71 (1st ed. 2001).*

Connect sentences

- A writer, like a builder, must smooth out the bumps and fill in the holes.
 - Ives, *A New Handbook for Writers* 275 (1960).



Connect sentences, con't

- Transition is the technique of drawing sentences together, dovetailing them ...
- so that the reader's journey from one sentence to the other is ... a smooth ride.
 - Whissen, *A Way with Words* 111 (1982).



Connect - example

Many distributors use purchase orders to buy widgets from manufacturers. SCo is a distributor. Yet SCo did not use purchase orders to buy widgets from PCo, a manufacturer.

Provide signposts

- Signpost your argument every step of the way ...
- *tell* your reader so he can understand precisely where you're going.
 - Trimble, *Writing with Style* 53 (1975).



Signposts - example



The option increases costs in two ways. First, it decreases efficiency. Second, it uses XCo's products, which are twice the cost of YCo's products.

Avoid tiresome repetitions



- Avoid frequent repetition ...
 - Carroll, *A Manual of Writer's Tricks* 55 (2d ed. 1995).
- [T]his is a common problem ... why might that be?
 - First, some legal writers fear pronouns.
 - Second, some writers are simply tone deaf.
 - Garner, *The Winning Brief* 111 (2d ed. 1999).

Repetitions - example

Taxpayer is [thus and so]... Taxpayer is related to [this and that]... Taxpayer during the years in question did [thus and so].... Moreover, Taxpayer did [this and that]... With respect to the Taxpayer's functions, Taxpayer is a [this and that] ... Taxpayer acts in that respect as a [this and that]

Axe the jargon

- [L]egalese is worse than smoking cigarettes. To kick the habit is extremely hard.
 - Flesch, *How to Write Plain English: A Book for Lawyers and Consumers* 2 (1979).





Axe the jargon, con't

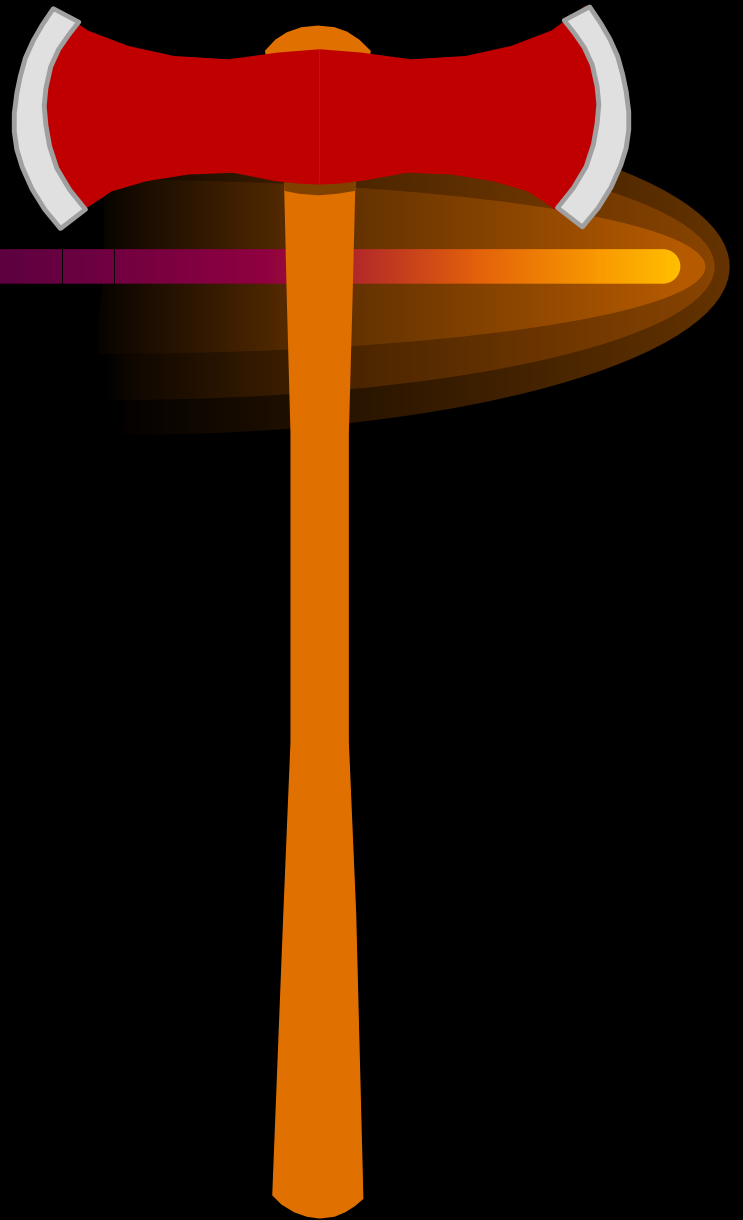
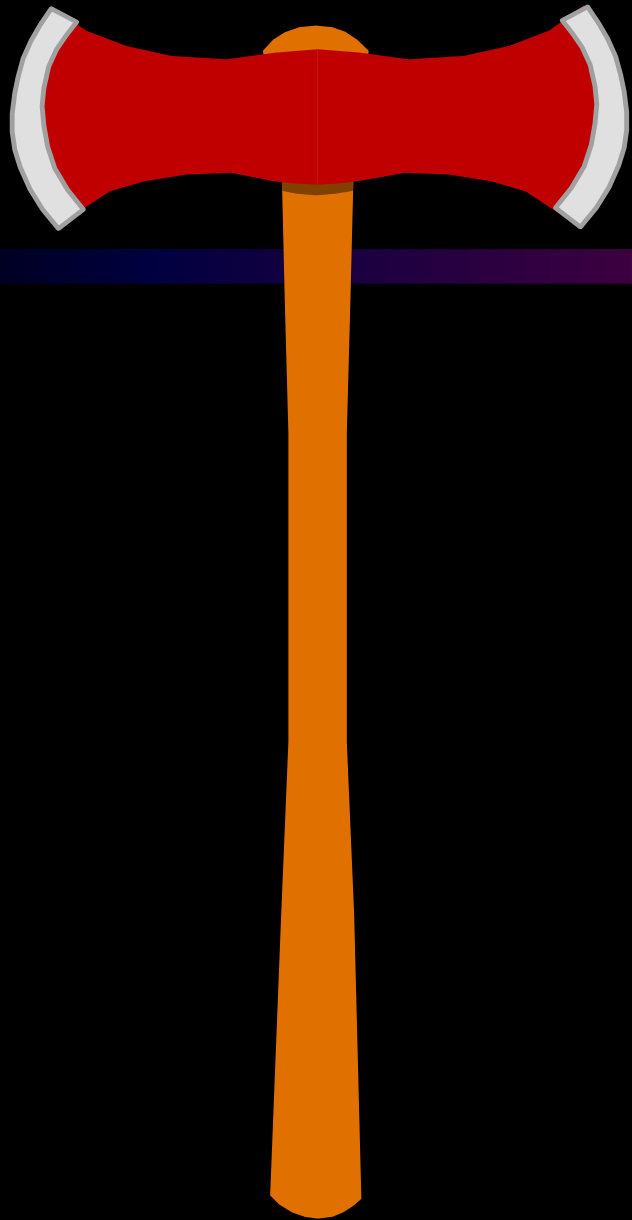
- You are no less a lawyer for being understandable.

–Lutz, “Why Can’t Lawyers Write?”
–in *Appellate Practice Manual* 167, 177
–(Schwab ed. 1992).



Jargon, con't

- [I]t is the second-rate intellect that cultivates a pretentious vocabulary and a solemn and portentous style.
 - Posner, *How I Write*, 4 Scribes J. Legal Writing 45, 49 (1993)
- Pursuant to the above-referenced quotations, and each and all of the ideas embodied therein, notwithstanding anything to the contrary herein contained ...
 - Source: Garner, *The Winning Brief* 146 (2d ed. 1999) (jargon example).



Axe the jargon



- ~~WITNESSETH ...~~
- Now therefore ...
- Wherefore, premises considered ...
- Whereas, pursuant to ...
- To all to whom these presents shall come greeting, know ye, that, I repose ...
- Comes now the plaintiff by and through their undersigned counsel and respectfully says to this honorable court that ...
- Thereby in closing, I remain, very truly and sincerely yours ...

Axe the jargon - exercise

- As to
- Bring an action against
- Herein
- Inasmuch as
- Instant case
- In the event that
- Not less than
- Prior to
- Subsequent to
- Thereafter
- Therein
- About, of, by, for, in
- Sue
- In this
- Since, because
- Here
- If
- At least
- Before
- After
- Later
- In it, in them, inside

The Undersigned ...

Axe the jargon – con't

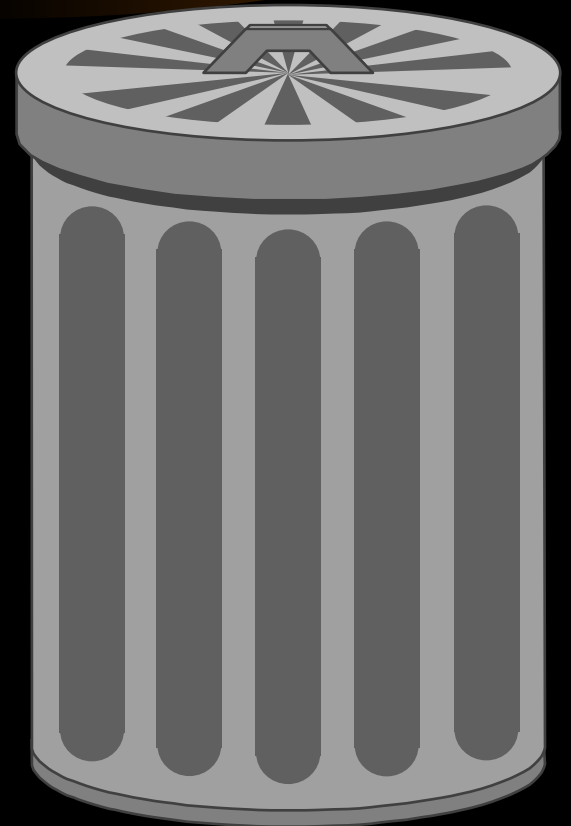
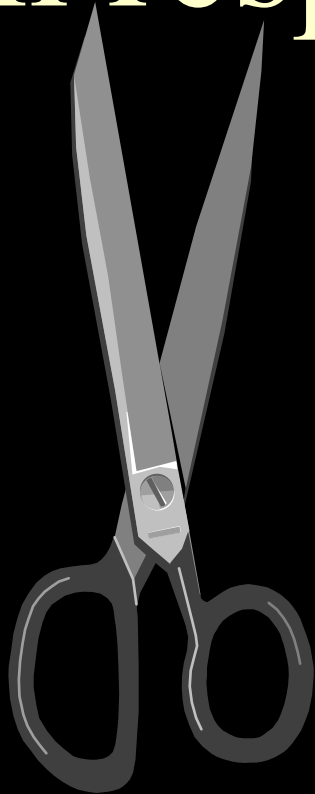
- With a little effort – and by giving “the Undersigned” a name – it’s possible to boil that legal gibberish down ...
- Lawyers recoil from this type of edit until they’ve gotten some experience.
- But with this experience comes the knowledge of how unnecessary much legal claptrap is.
 - Garner, *Legal Writing in Plain English* 35 (1st ed. 2001).

Simplify wordy prepositions

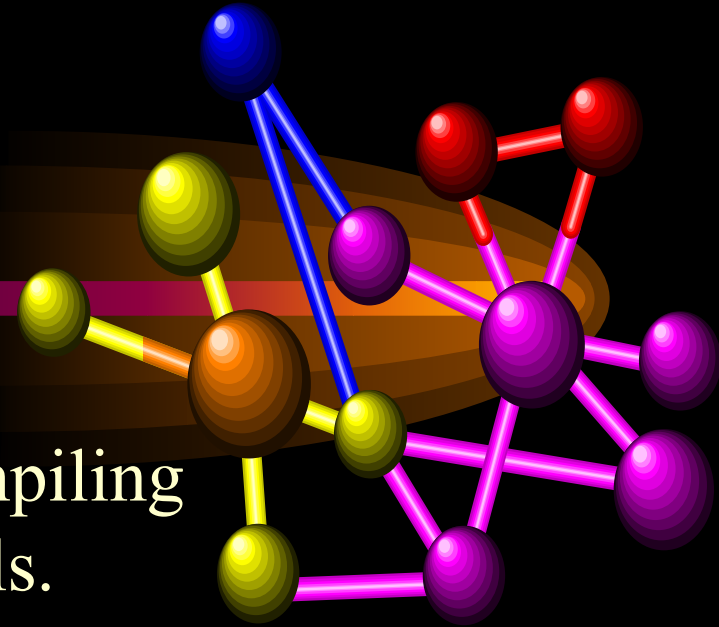
- Train your suspicions to bristle up whenever you come upon “as regards,” “with regard to,” “in respect of,” “in connection with,” “according as to whether,” and the like ...
- You should never use them.
 - Quiller-Couch, *On the Art of Writing* 114 (1916; repr. 1961).

Wordy prepositions, con't

- **With respect to**



Avoid over-particularization

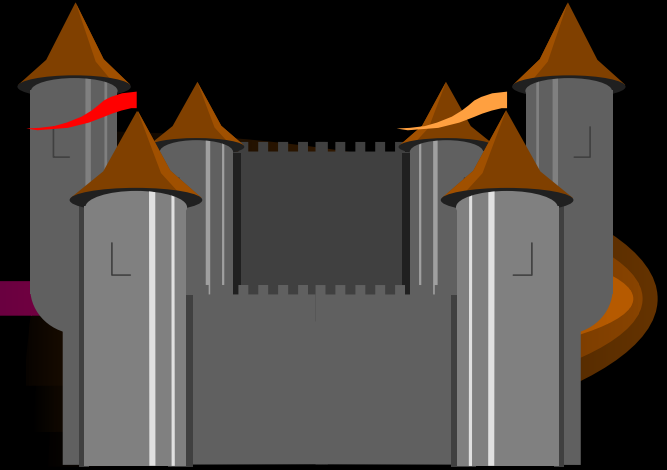


- Being precise doesn't mean compiling details; it means selecting details.
 - Alley, *The Craft of Scientific Writing* 35 (1987).
- [A] reader should not be forced to confront details before the writer has provided a framework for understanding.
 - Bablitch, *Writing to Win*, Complete Law., Winter 1988, at 11.

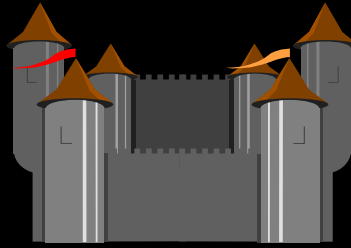
Overparticularization - example

Taxpayer, Smith Company LLP, formerly known as Smithy Company (hereinafter “Smith” or “Taxpayer”), which filed its calendar year tax returns for the years ending December 31, 1999, and December 31, 2000 (hereinafter the “subject years” or the “years at issue”), and which is the sister company to a joint venture with inter alia the Jones Company, a limited partnership in which Smith Company maintains a twenty percent (20%) interest (hereinafter “Jones” or “Partnership”) with respect to such Partnership, filed its Advance Pricing Agreement Request (the “APA Request”) on or about August 6, 2001, with respect to said years, in which ...

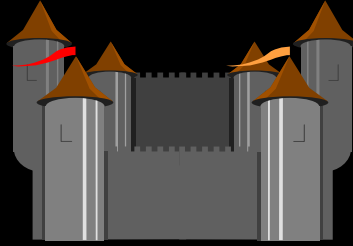
To be or not to be?



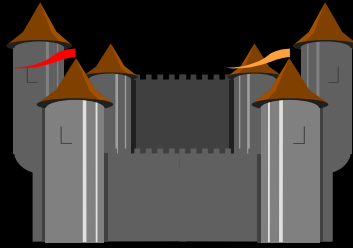
- Although the verb *to be* in all its forms (*is, am, was, were, will be, have been,* and so on) remains the central verb in our language,
- careful writers use it sparingly.
 - Hairston, *Successful Writing* 118 (2d ed. 1986).



- *Be*-verbs lack muscle. When you overuse them, your writing becomes flaccid – even inert.
 - Garner, *The Winning Brief* 155 (2d ed. 1999).
- Verbs act. Verbs move. Verbs do.
- Verbs strike, soothe, grin, cry, exasperate, decline, fly, hurt, and heal.
- Verbs make writing go.
 - Hall, *Writing Well* 83 (4th ed. 1982).



- The stronger the verb, the better the sentence.
 - Ferguson, *Say It with Words* 117 (1959).
- Use simple words, words that create pictures and action and [that] generate feeling.
 - Gerry Spence, *How to Argue and Win Every Time* 104 (1995) (italics omitted).



- To rid ... language of abstraction ... avoid the eight forms of the word: “am,” “is,” “are,” “was,” “were,” “be,” “being,” and “been,”
- whether those words appear fully spelled or as parts of constructions such as “I’m” or “you’re” or “it’s.”
 - Good, “*To Be*” or Not “*To Be*”: *An Easy Way to Improve Legal Writing* (Handout).

To be or not to be – before

- ***Before:*** There *is* no classification in the savings clause, other than the deadline for filing cases that *are* excepted from the amendment.
- ***After:*** The savings clause contains no classification other than the deadline for filing cases, to which the amendment does not apply.
 - Source: Garner, *The Winning Brief* 156 (2d ed. 1999).

To be or not to be - exercise

- Jones is in agreement with Smith.
- Where there is no express agreement, it is ordinarily taken that the authority was to last for what was a reasonable time in light of the circumstances.
- Jones agrees with Smith.
- Absent an express agreement, authority lasts for a reasonable time under the circumstances.

Be active, not passive



What is the passive voice?

- The unfailing test for passive voice is this:
- You must have a *be*-verb plus a past participle (usually a verb ending in *-ed*).
 - Garner, *The Winning Brief* 158 (2d ed. 1999).
- *Example:*
 - The product was sold by the distributor.

Source: Garner, *The Winning Brief* 158 (2d. Ed. 1999).

Passive voice - exceptions


- When is passive okay? When:
 - The actor is unimportant.
 - The actor is unknown.
 - You need to put punch at the sentence's end.
 - You want to hide the actor's identity.
 - The passage's focus is on the thing being acted upon.
 - You need to generalize without using *one* as the subject.
 - The passive voice sounds better.

Uncover buried verbs



- Wordy writing not only droops from weak verbs but sags under bulky nouns -
- Especially long Latinate ones with endings like *tion* and *ment* and *ence*.

Cook, *Line by Line:
How to Improve
Your Own
Writing* 6 (1985).



Buried verbs, con't

- Buried

- allegation
- assistance
- compulsion
- conformity
- distribution
- enforcement
- knowledge
- production
- manufacture

- Uncovered

- allege
- assist
- compel
- conform
- distribute
- enforce
- know
- produce
- make

Buried or passive?

- [B]uried verbs ought to be a sworn enemy of every serious writer.
- In legal writing, they constitute a more serious problem even than passive voice.
 - Garner, *A Dictionary of Modern Legal Usage* 123 (2d ed. 1995).

Buried or passive?

Prior to the promulgation of the 1968
I.R.C. section 482 Treasury
Regulations ...

Before the 1968 I.R.C. section 482
Treasury Regulations were
promulgated ...

Eliminate unnecessary prepositional phrases

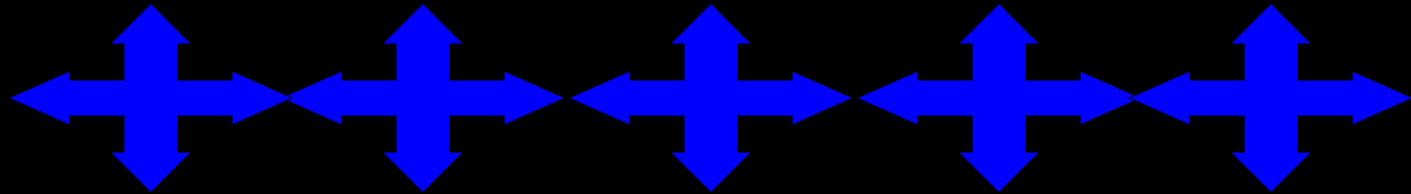
- The overuse of prepositions is a severe and extremely common fault.
 - King, *Why Not Say It Clearly* 34 (1978).
- [T]he word of is, in anything other than small doses, among the surest indicators of flabby writing
 - Garner, *A Dictionary of Modern Legal Usage* 612 (2d ed. 1995).

Unnecessary prepositional phrases - example

- Prior to the distribution of the subject products in the specified territory by the Taxpayer, the function of the distribution of said product was performed by the subsidiary of said distributor in such territory.
- XCo's subsidiary sold widgets outside the U.S. before XCo sold them there.

Use real names

- Imagine a story whose hero has no name!
 - Flesch, *The Art of Readable Writing* 80 (1949; repr. 1967).



- [S]peak of real people, not of categories.
The plaintiff, defendant, and witnesses have names. Use them.
 - Tigar, *Federal Appeals: Jurisdiction and Practice* 333 (2d ed. 1993).

Use real names - example

With respect to the function of the distribution of the products, Taxpayer performs said function with respect to the Western-most territory of Taxpayer's subject jurisdiction.

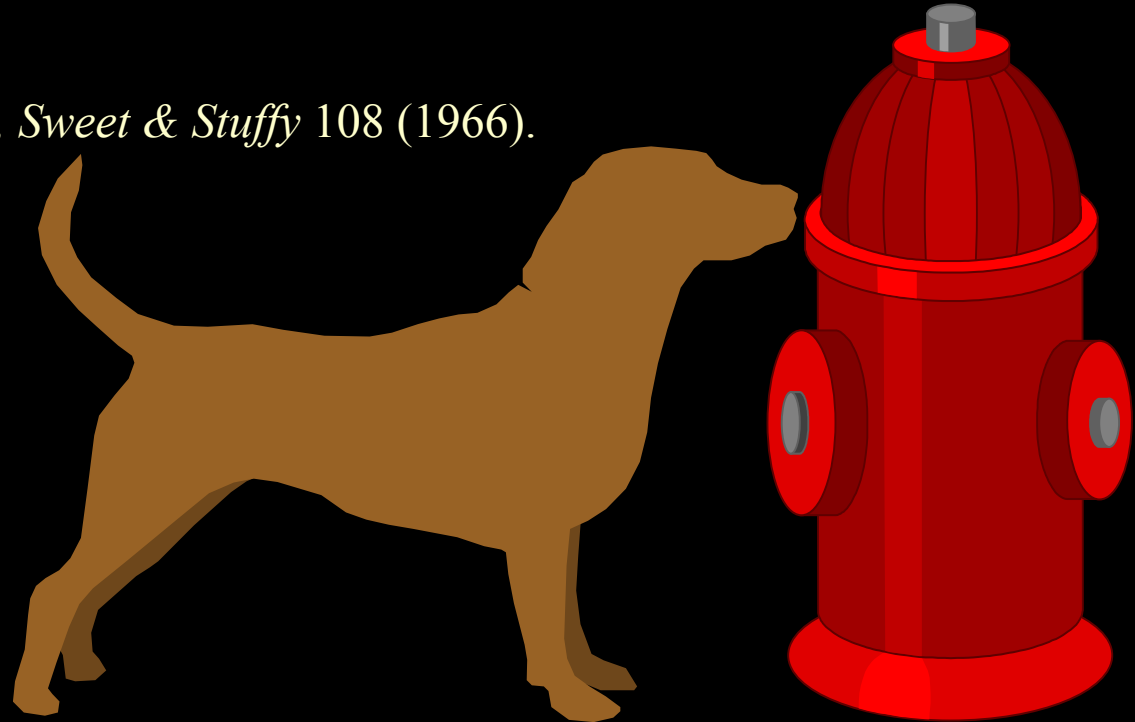
Fat Cat sells gourmet-style cat food west of the Mississippi.



Don't separate verbs

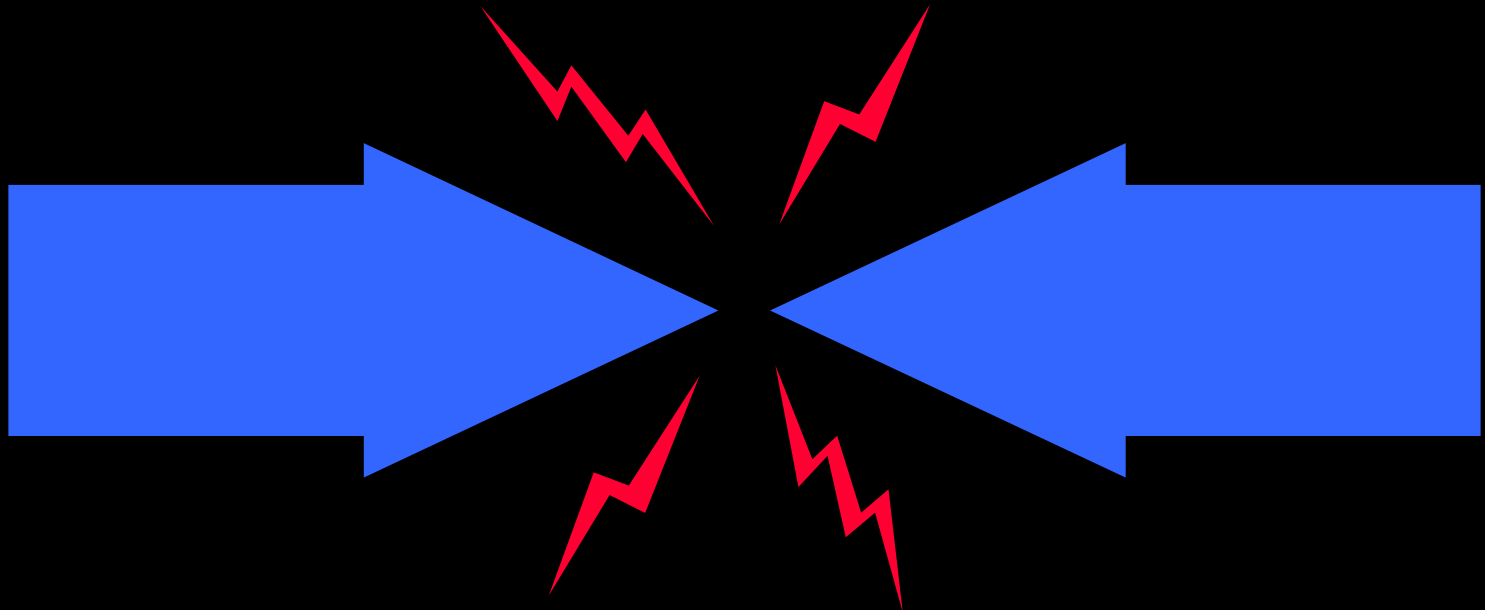
- Don't interrupt subject and verb with intervening subordinate constructions and modifiers.

– Gibson, *Tough, Sweet & Stuffy* 108 (1966).



Subject and verb, con't

- [B]e sure that you have not so separated the subject and the verb that the reader forgets who before learning what.
 - Kass, “The Ba Theory of Persuasive Writing,” in *Appellate Practice Manual* 179, 183 (Schwab ed. 1992).



Subject and Verb, con't

- Keep the subject, the verb, and the object together – toward the beginning of the sentence.
- A sentence has two vital elements: a subject and a predicate
- [L]egal sentences get complicated, and legal writers often complicate them unduly by separating the vital words.
 - Garner, *Legal Writing in Plain English* 23 (1st ed. 2001).

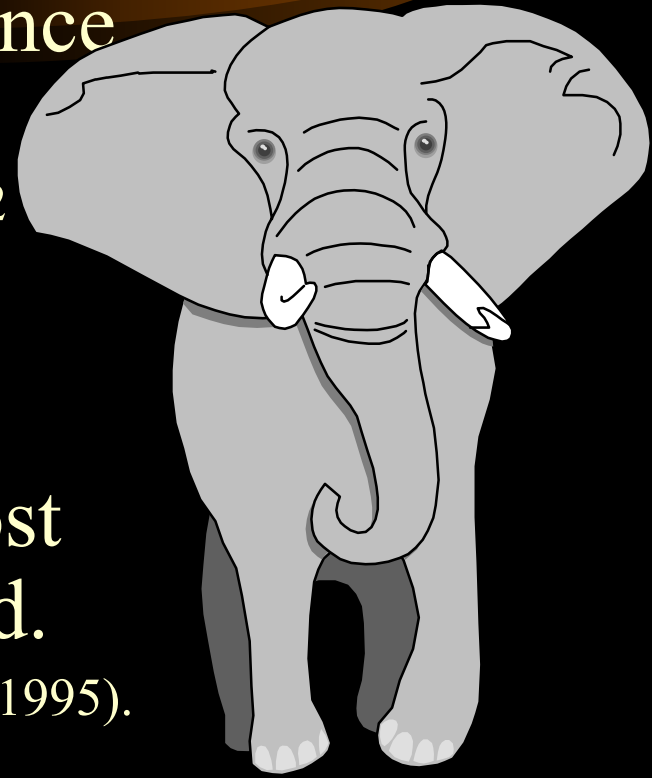
Subject ... verb - example

Taxpayer, in accordance with the information submitted in its Annual Report dated August 6, 2001, shall be deemed to have complied with the transfer pricing methodology (“TPM”) set forth in the APA.

Taxpayer complied with the APA’s TPM. *See* 8/6/01 Annual Report.

End with punch

- The emphatic position in a sentence is the end
 - Bryant & Aiken, *The Psychology of English* 172 (1940).
- Make your sentences rise to a climax; let them reveal their most significant information at the end.
 - Carroll, *A Manual of Writer's Tricks* 63 (2d ed. 1995).



Punch - example

Defendant, John Jones, on or about August 7, 2001, did in fact stab the victim, Sam Smith, with a sharp instrument, to wit a “knife” more commonly used in the performance of certain functions including without limitation the carving or “butchering” of edible “meat,” thus inflicting sufficient damage to Smith such as to cause substantial bodily harm to said person, with the resulting significant loss of blood and the impairment of vital bodily functions.

Jones bludgeoned Smith with a 12-inch butcher knife.

Cut throat clearing

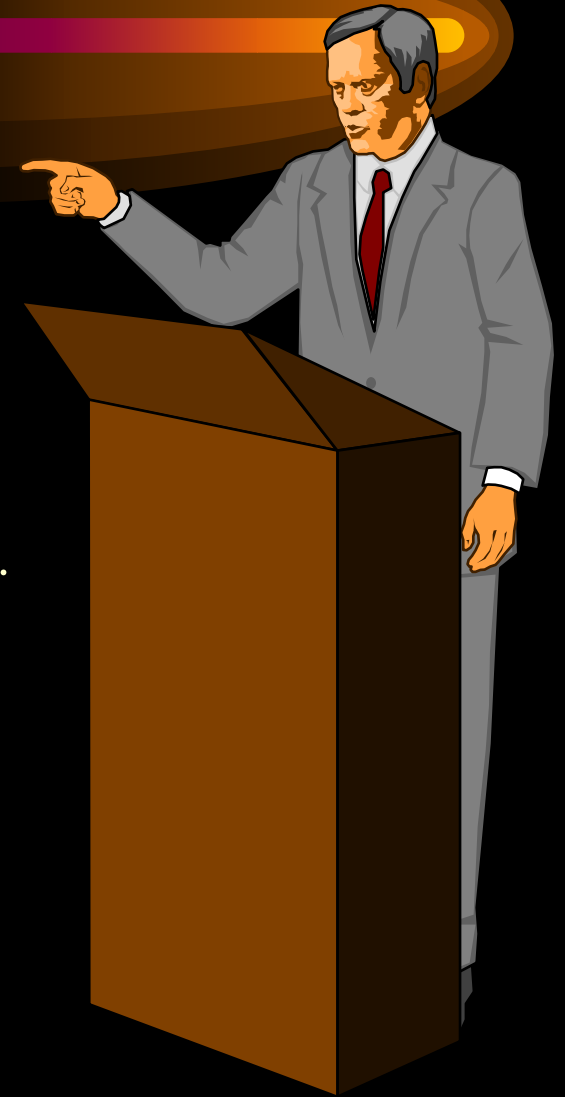
- Make every word count ...
- Forget the opening flourish and say what you mean.
 - Garner, *The Elements of Legal Style* 56 (1991).



Throat clearing, con't

- If you might add, add it. If it should be pointed out, point it out. If it is interesting to note, make it interesting.

– Zinsser, *On Writing Well* 16-17 (5th ed. 1994).



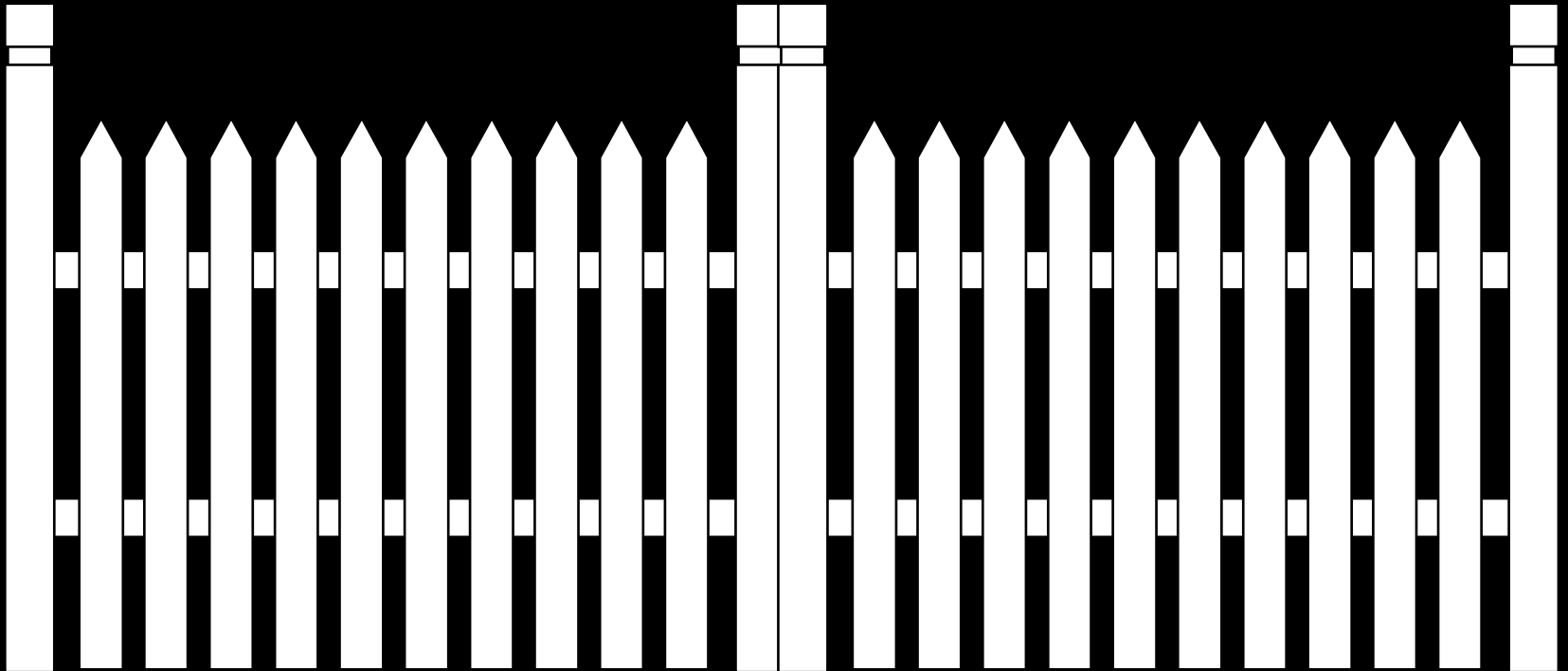
Source: Garner,
The Winning Brief 177
(2d ed. 1999).

Throat clearing, con't

- It is important to remember that
- It is noteworthy that
- It is not unworthy of mention in this regard to note that
- It must also be borne in mind that
- In my considered opinion
- May I respectfully suggest that
- It should not be forgotten that
- It is also of importance to bear in mind the following considerations

Parallel construction

- No long complex sentence will hold up without parallel construction ...



Parallel, con't

Paralleling can be very simple.

Any word will seek its own kind, noun to noun, adjective to adjective, infinitive to infinitive.

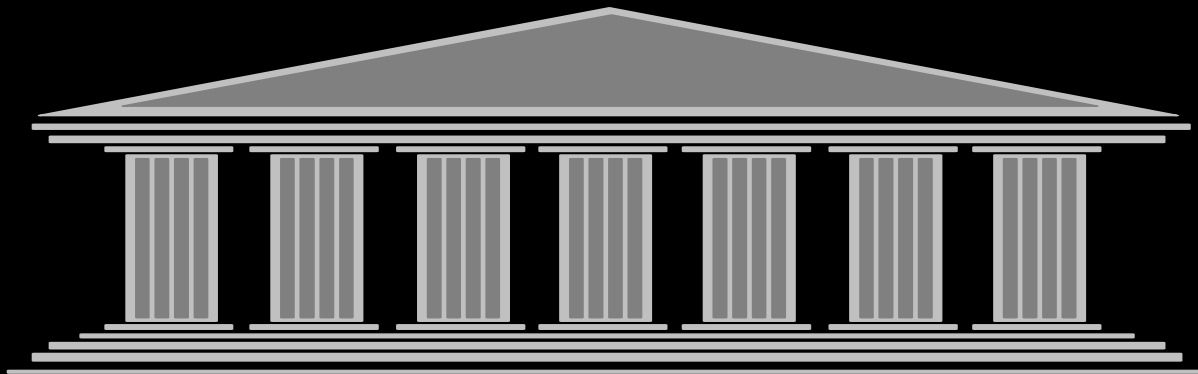
– Baker, *The Practical Stylist*, 4 (8th ed. 1998).

Parallel construction - example

- There are four elements to fraud: (1) a knowing misrepresentation or concealment of (2) the truth of a material fact (3) to induce another (4) to his or her injury.
- Fraud has four elements:
 - Misrepresentation of the truth, or concealment of a material fact;
 - Knowledge by the person who misrepresents or conceals;
 - Reliance on the misrepresentation or concealment;
 - Injury to the person who relies.
- Source: Garner, *The Winning Brief* 185 (2d ed. 1999).

Parallel, con't

- Parallelism helps satisfy every reader's craving for order and rhythm ...
- Only a sloppy thinker breaks up ideas illogically.
 - Garner, *The Winning Brief* 184 (2d ed. 1999).



Break up long sentences



- The length of your sentences will determine the readability of your writing
 - Garner, *Legal Writing in Plain English* 17 (1st ed. 2001).
- Not only do you want a short average; you also need variety.
 - *Id.* At 20.



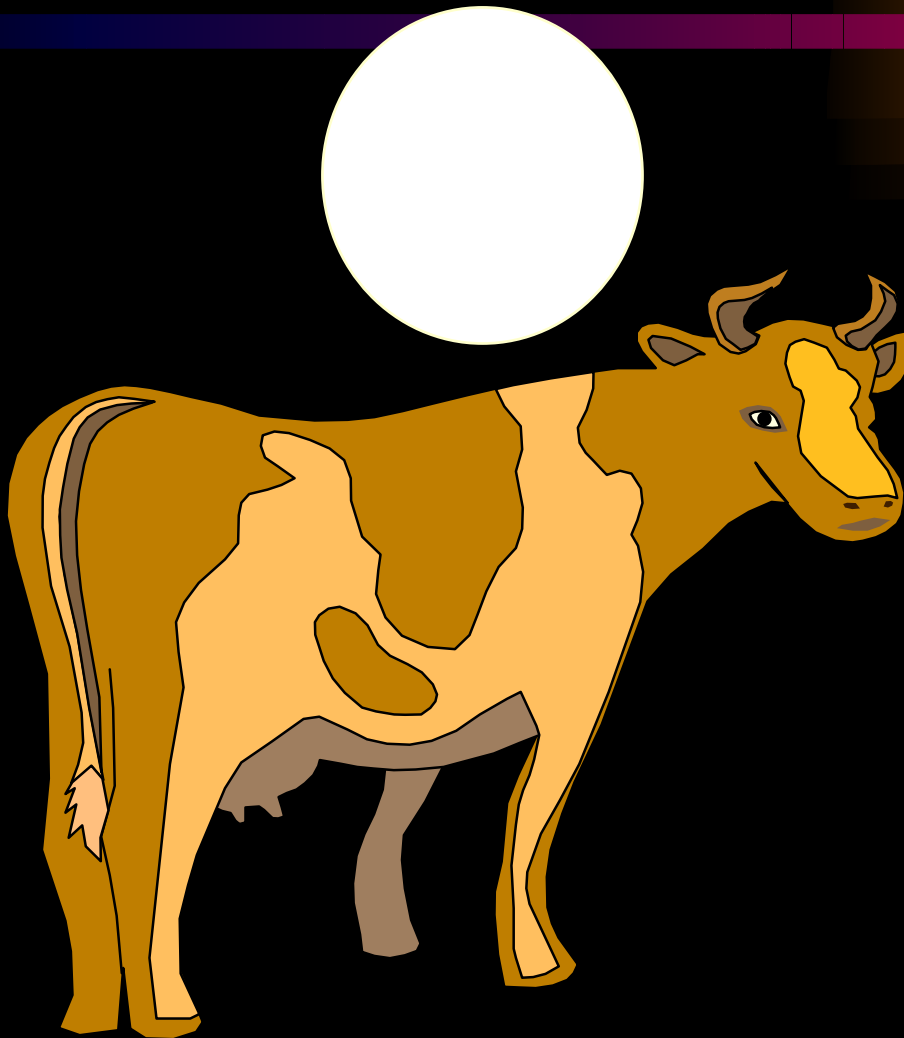
Sentence length, con't

- Group within one sentence the ideas naturally belonging to it.
 - Robins & Perkins, *An Introduction to the Study of Rhetoric* 232 (2d ed. 1921).
- *“If a sentence carries too little information to warrant grammatical independence, treat it as a scrap.”*
 - Trimble, *Editing Your Own Prose* (Unpublished).

Sentence scraps - example

- The cow jumped over the moon. 
- Cows jump. The function of “jumping” was performed by such bovine animal (such “bovine” or the “cow” issue”) with respect to the moon. 

“Scare” quotes



- The cow “jumped” over the moon.

“Scare” quotes, con’t

- Sometimes quotation marks are used by writers to disown words:
- to show the reader that the writer knows they’re slang, or are used unconventionally, or express ideas with which the writer doesn’t agree.

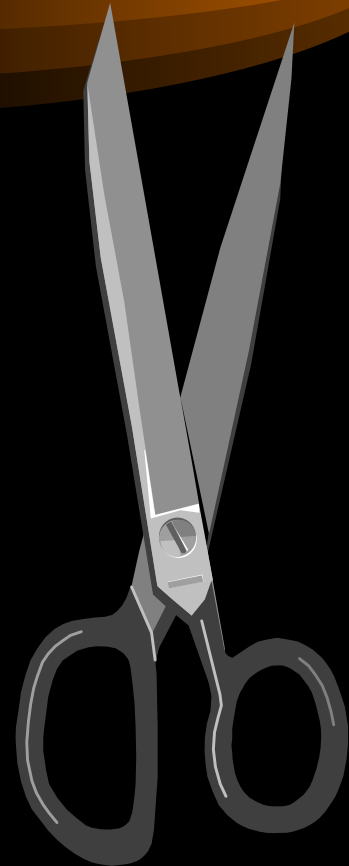
Scare quotes, con't

- [T]he attention-getting device generally ends up looking sophomoric.
 - Kesselman-Turkle & Peterson, *Good Writing* 128 (1981).



Cut words

- [G]ood things happen when you combat verbosity
 - Garner, *Legal Writing in Plain English* 17 (1st ed. 2001).



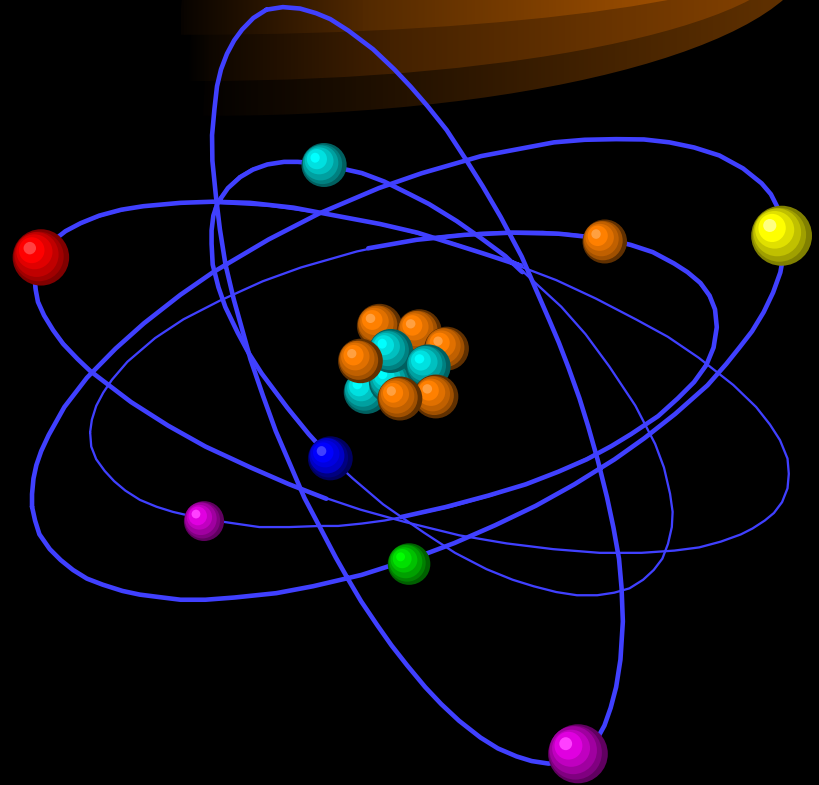
Cut words - example

Before: Taxpayer's representative has steadfastly and repeatedly, and with an apparent intent not to comply, refused all requests for additional information with respect to its request for an Advance Pricing Agreement pursuant to Revenue Procedure 96-53.

After: We requested more information about Smithco's APA Request. You continue to stymie our requests.

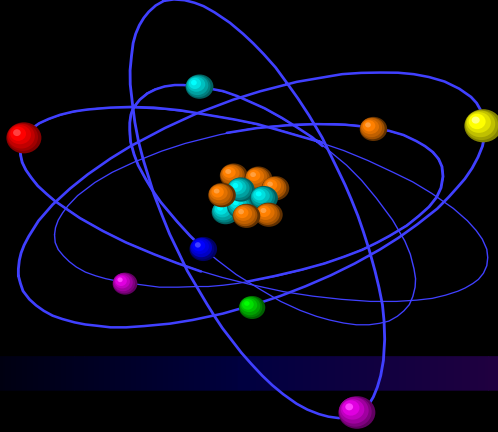
- If it [is] an advantage to express an idea in the smallest number of words,
- then it must be an advantage to express it in the smallest number of syllables.
 - Spencer, “The Philosophy of Style” (1871), in *Essays on Rhetoric* 147, 149 (Bradley ed. 1965).

Save syllables ...



Save syllables - example

- Plaintiff made no assurances to Defendant that this matter would not be litigated in a judicial forum if settlement could not be effected.
- Smith never told Jones that this matter would not go to trial if the parties failed to settle.



Save syllables, con't

- Those who run to long words are mainly the unskilled and tasteless
 - Fowler, *A Dictionary of Modern English Usage* 342 (Gowers 2d ed. 1965).
- Make about two-thirds of your total vocabulary monosyllabic
 - Gibson, *Tough, Sweet & Stuffy* 108 (1966).

Avoid clichés



- Writing memoranda can be creative.
 - Christensen, *How to Write for the Judge, Litigation*, Spring 1983, at 25, 63.
- Don't use [clichés] unwittingly. But they can be effective.
 - Baker, *The Practical Stylist* 243-44 (8th ed. 1998) (distinguishing rhetorical “clinched from sound alone,” from proverbial “metaphors caught in the popular fancy”).

Clichés, con't

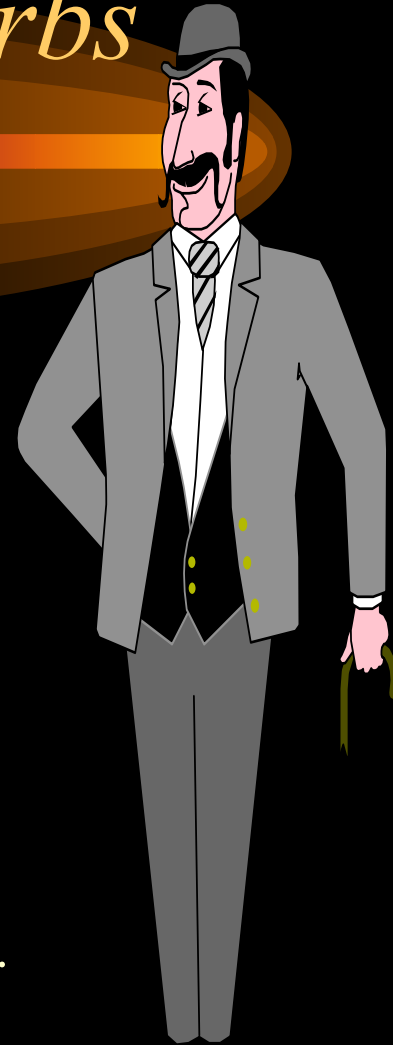
- [P]ut away the sugar bowl, the saccharine pill, the purple crayon, the cliché mill, and the metaphor gun.
- Sickly sweet, sophomoric, cliché-ridden writing ... is unpersuasive.
- The quiet force of facts, arrayed in active declarative sentences, will bear the argument along.
 - Tigar, *Federal Appeals: Jurisdiction and Practice* 334 (2d ed. 1993).

Clichés - example

It is crystal clear that Taxpayer incurred losses of biblical proportions. At the conclusion, and indeed it goes without saying that such losses could only be avoided if Taxpayer were to take it upon advisement to seek a disposition in which it put no punches to achieve stability. However, one must be cautious such that a true and true measure stick is used so that one may avoid comparing apples with oranges in respect of a bona-fide testing mechanism in respect of a bona-fide party. Indeed, the testing mechanism would be fraught with uncertainty and would be reminiscent of rolling of the dice wherein Taxpayer shares the gold mine to the detriment of the U.S. treaty partner which receives the shaft.

Use distinctive nouns and verbs

- Keep your adjectives to a minimum.
Let strong nouns do the work of adjectives.
 - Trimble, *Writing with Style* 79 (1975).
- Write with nouns and verbs, not with adjectives and adverbs.
 - Strunk & White, *The Elements of Style* 71 (3d ed. 1979).



Nouns and verbs - example

- *Nouns*
- Big heavy book = tome
- Rude person = bore
- Unbelievable story = crock
- Boring presentation = snoozer
- *Verbs*
- Abruptly stated = snapped
- Quickly went = ran, rushed
- Said loudly = yelled, screamed
- Cried loudly = bawled, wailed

Picturesque verbs

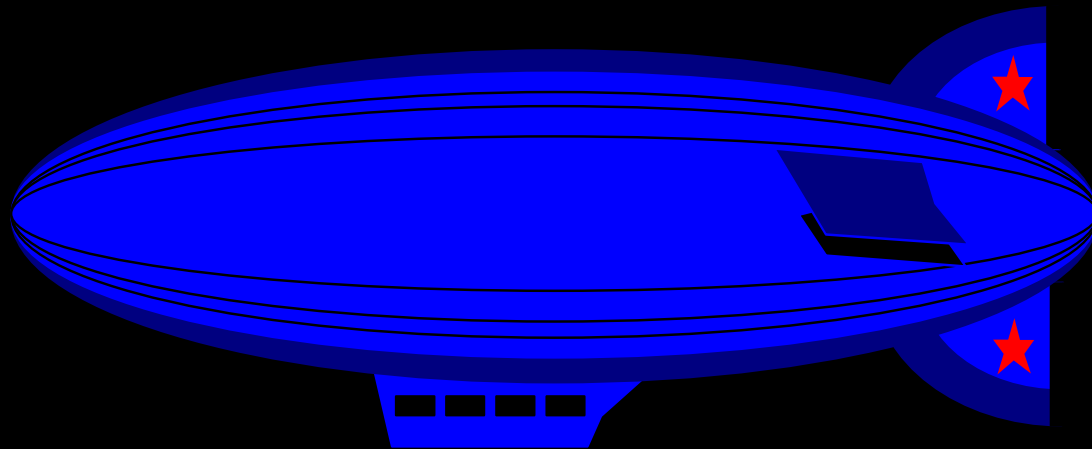


- Bombard
- Blunder
- Burden
- Chastise
- Clash
- Dredge
- Dupe
- Hammer

- Mock
- Plunder
- Pulverize
- Scorn
- Stampede
- Wrangle
- Wreck
- Wreak

Avoid heavy connectors

- *Consequently* is a four-syllable word meaning *so*.
 - Flesch, *The ABC of Style* 71 (1964).
- *Inasmuch as* sounds formal and stilted. Say *since*.
 - *Id.* at 152.
- *Notwithstanding* is much too ponderous for everyday life. Say ... *despite*.
 - *Id.* at 207.



Source: Garner,
The Winning Brief 199
(2d ed. 1999).

Heavy connectors, con't

- accordingly
- consequently
- for the reason that
- furthermore
- nevertheless
- notwithstanding the fact that
- subsequently
- so, thus
- so, thus
- because
- further
- still, but, however
- although
- later

Hyphenate your phrasal adjectives

- Hyphens are particularly necessary to make sense of the noun clusters that occur in technical writing.
 - McDonald, *The Language of Argument* 226 (5th ed. 1986).
- For some unfathomable reason – perhaps they are accustomed to slow, dull, heavy reading – lawyers resist these hyphens.
 - Garner, *A Dictionary of Modern Legal Usage* 657 (2d ed. 1995).



Hyphenate your phrasal
adjectives ...

Hyphenate phrasal adjectives

- Career-damaging scandal
- Democratic-stronghold states
- Equal-protection clause
- Health-care benefits
- Transfer-pricing methodology
- Profit-level indicator
- Unrelated-party transaction
- Garden-variety CPM
- Well-written APA

But be stingy with hyphens

- Phrasal adjectives aside ... [use] *unhyphenated* single words, whatever the word class may be – adjective, noun, adverb, or verb.
 - Garner, *The Elements of Legal Style* 28-29 (1991).

- If you write ... terms with hyphens, as *co-worker*, *pre-trial*, or *non-statutory*, you're running against the grain of well-edited writing.
 - Garner, *The Winning Brief* 240 (2d ed. 1999)

Strike “*pursuant to*”

- The phrase – *pursuant to* – is dangerously addictive. You’ll find that mediocre legal writing teams with the phrase. And you’ll search in vain for it in masterly legal writing. That probably says it all.
 - Garner, *A Dictionary of Modern Legal Usage* 721 (2d ed. 1995).
- Ordinary people say *under ...* There is no reason why lawyers cannot do the same.
 - Asprey, *Plain Language for Lawyers* 128 (1991).

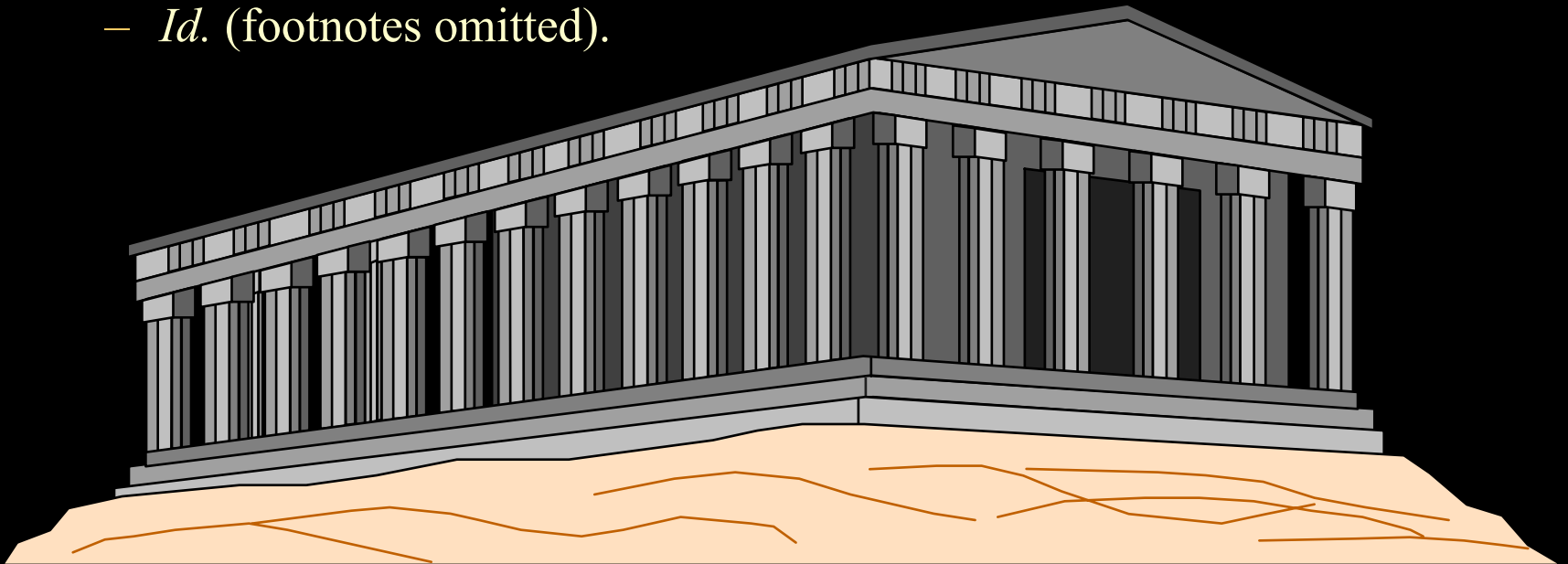
Delete “shall”



- *Shall* isn't plain English.
- But legal drafters use shall incessantly.
- [T]he vast majority of drafters don't know how shifty the word is.
 - Garner, *Legal Writing in Plain English* 105 (1st ed. 2001).

Delete shall, con't

- In just about every jurisdiction, courts have held that shall can mean not just must and may, but also will and is.
 - *Id.* (footnotes omitted).



Such



- *Such* used in place of a regular pronoun is not acceptable to careful writers.
 - Larsen, *The Miss Grammar Guidebook* 108 (1994).
- *Such* is deplorable as a substitute for *this* or *these* or *the* ...
 - Garner, *The Elements of Legal Style* 140 (1991).

That or which?

- Just think what happens in the mind of the person who knows the difference between restrictive and nonrestrictive clauses.
 - Mitchell, *Less Than Words Can Say* 154 (1979).
- What most people don't realize is that one "which" leads to another ... is not welcome in the best company.
 - Thurber, "Ladies' and Gentlemen's Guide to Modern English Usage," in *The Ways of Language: A Reader* 142, 143 (Pflug ed. 1967).

That or which?

- ***Okay:*** We enjoy writing APA documents that contain plain English.
- ***Okay:*** The rule conflicts with 5 U.S.C. section 552, which often is called the Freedom of Information Act.
- ***Ambiguous:*** The company developed a new program for the northeastern divisions which had lost money for three consecutive quarters.
- ***The difference:*** *Can you cut the phrase without altering the meaning?*

That or which, con't

- Fix all remote relative pronouns
 - Ensure that *that* or *which* follow immediately the noun to which it refers.
 - ***Example:*** Recent discovery revealed significant new facts in the instant case that must be investigated in order for the request to be analyzed.

Ann Dorian

- With experience, you'll find that you don't need *and/or*.
 - But more than that, you'll find that *and/or* can be positively dangerous.
 - About half the time, *and/or* really means *or*;
 - About half the time, it means *and*.
 - Garner, *Legal Writing in Plain English* 112 (1st ed. 2001).

Ode to Texas



- S/he
- S/he/it
- [G]endered writing ... will one day be immediately recognized as archaic and ludicrous.
 - Kaye, *A Brief for Gender-Neutral Brief Writing*, N.Y.L.J., 21 Mar. 1991, at 2.
- [L]awyers ... should avoid language that may distract readers with intended or unintended messages about pronouns, sexism, or society.
 - Burlingame, *Reaction and Distraction: The Pronoun Problem in Legal Persuasion*, 1 Scribes J. Legal Writing 87, 88 (1990).

Avoid word-numeral doublets

- To maximize readability, spell out the numbers one to ten only.
- For 11 and above, use numerals – they're more economical.
 - Garner, *Legal Writing in Plain English* 115 (1st ed. 2001).



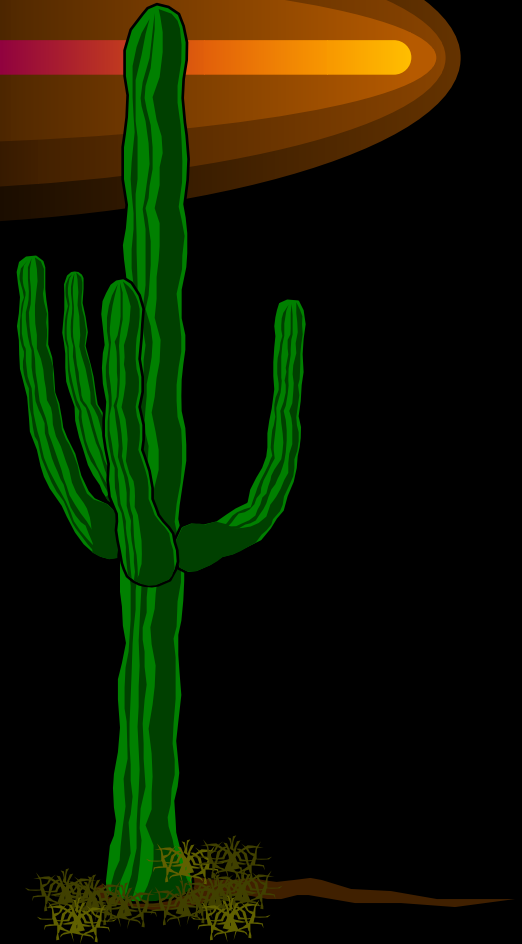
Source: Garner,
Legal Writing in Plain English 115
(1st ed. 2001).

Word-number doublets, con't

- As for word-numeral doublets ... I've mostly heard wrong answers:
 - [They] ... safeguard against typos.
 - [They] ... increase readability.
 - Help ... illegible handwriting ...
 - They prevent discrepancies in numbers.
- The last is the most ludicrous: discrepancies aren't possible unless you write it twice.

Gobbledygook

- Form provisions
- Witticisms
- Write What You'd Say



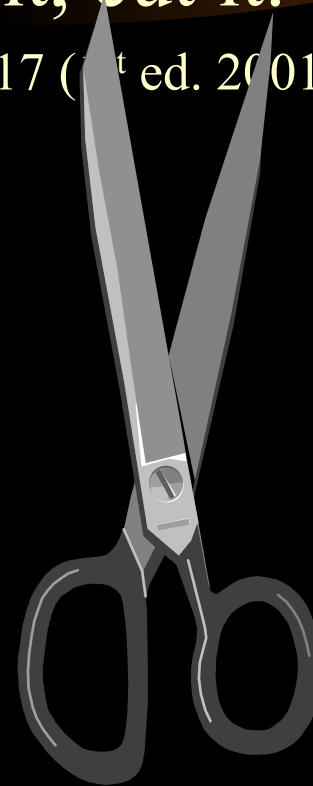
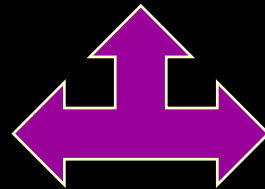
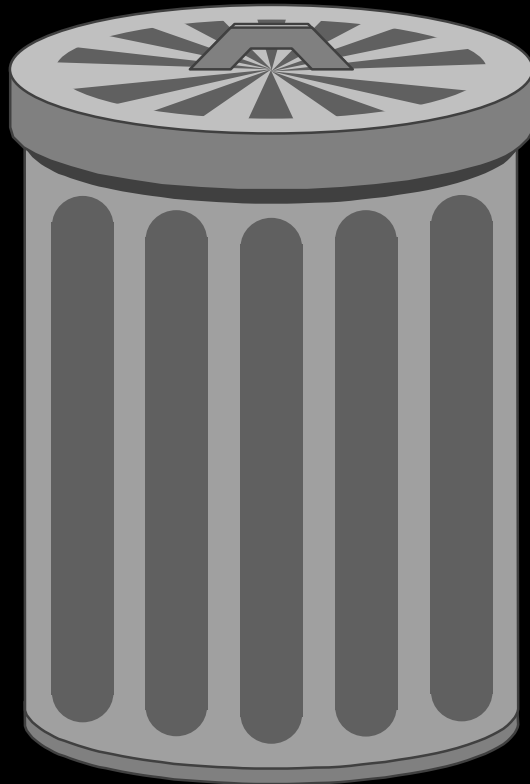
Form provisions



- If you don't understand a form provision –
- or don't understand why it should be included in your document –
- try diligently to gain that understanding.

Form provisions, con't

- If you still can't understand it, cut it.
 - Garner, *Legal Writing in Plain English* 117 (1st ed. 2001).

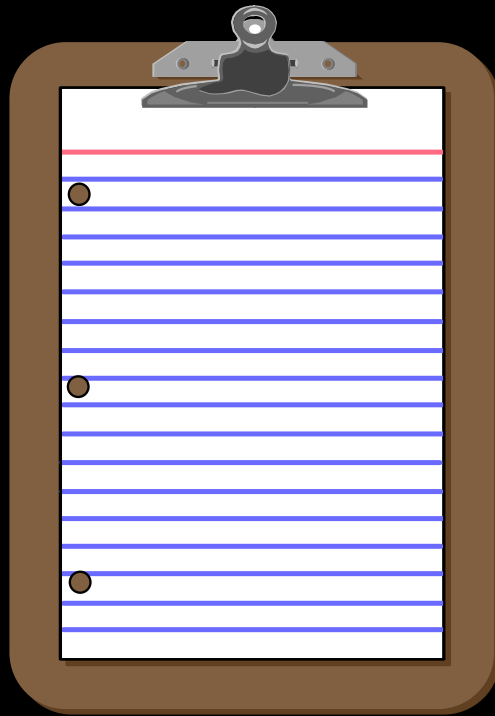
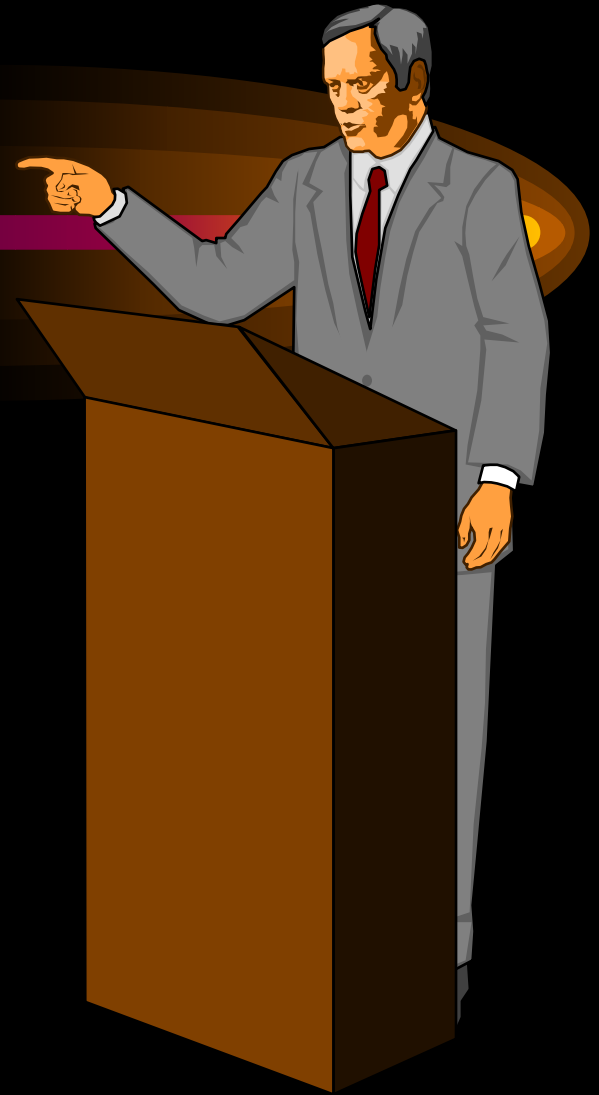


Witticisms



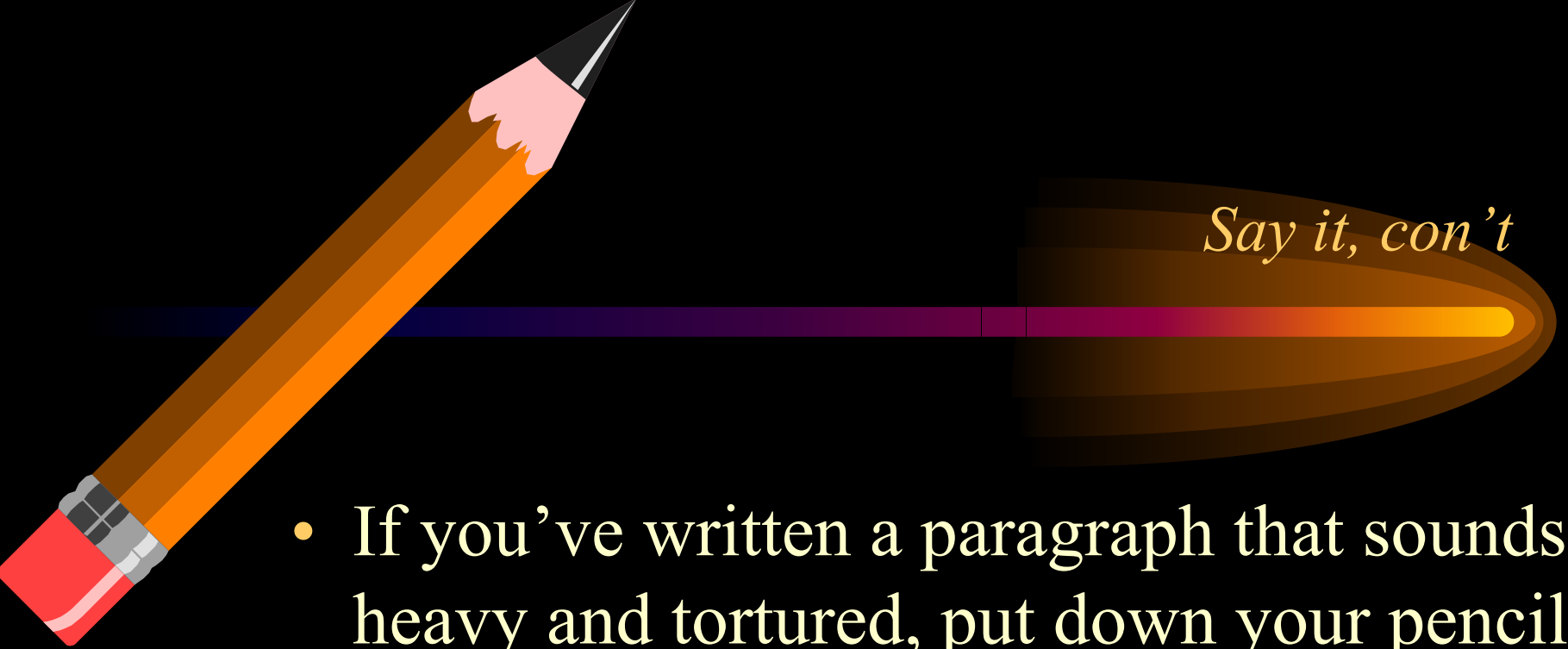
- See clichés.
- The problem with coined terms

Write What You'd Say



Say it, con't

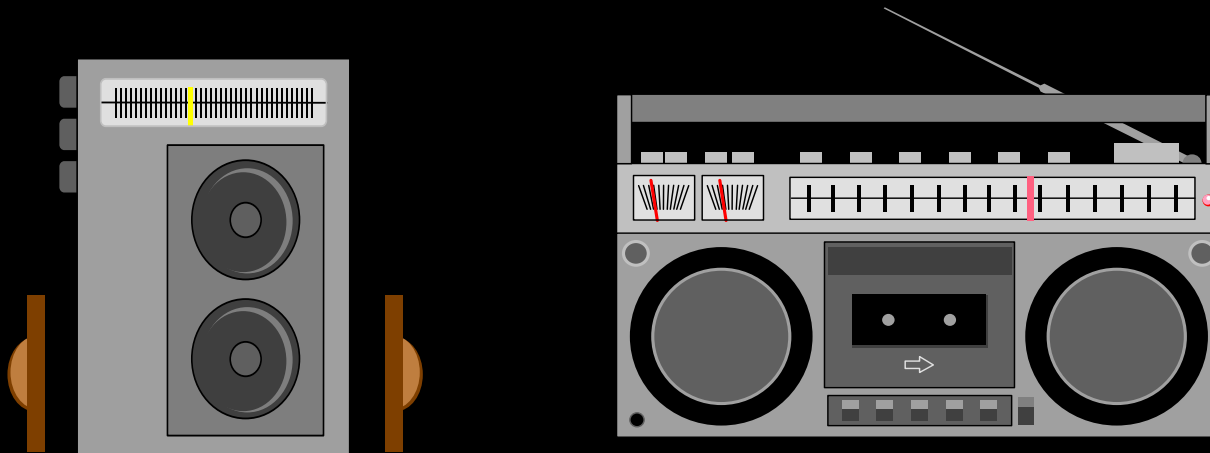
- Never write a sentence that you couldn't easily speak ...
- You ought to be able, without embarrassment, to say aloud any sentence you've written.
- Your writing ought to sound natural.
- If it does, it will read well, too.
 - Garner, *The Winning Brief* at 361-62.



- If you've written a paragraph that sounds heavy and tortured, put down your pencil and ask ...
- “If I were actually speaking these thoughts to a friend, how would I probably say them?” ...

Say it, Con't

- Try to get your speaking voice in your writing.
- You would never say, “This radio needed repair from the date of purchase”; you would say, “This radio hasn’t worked worked since I bought it.”



Say it, con't

- In talking, you tend to use short sentences, plain words, active voice, and specific details ... You don't use words like 'shall' or 'secondly'
 - McDonald, *The Language of Argument* 238 (5th ed. 1986).

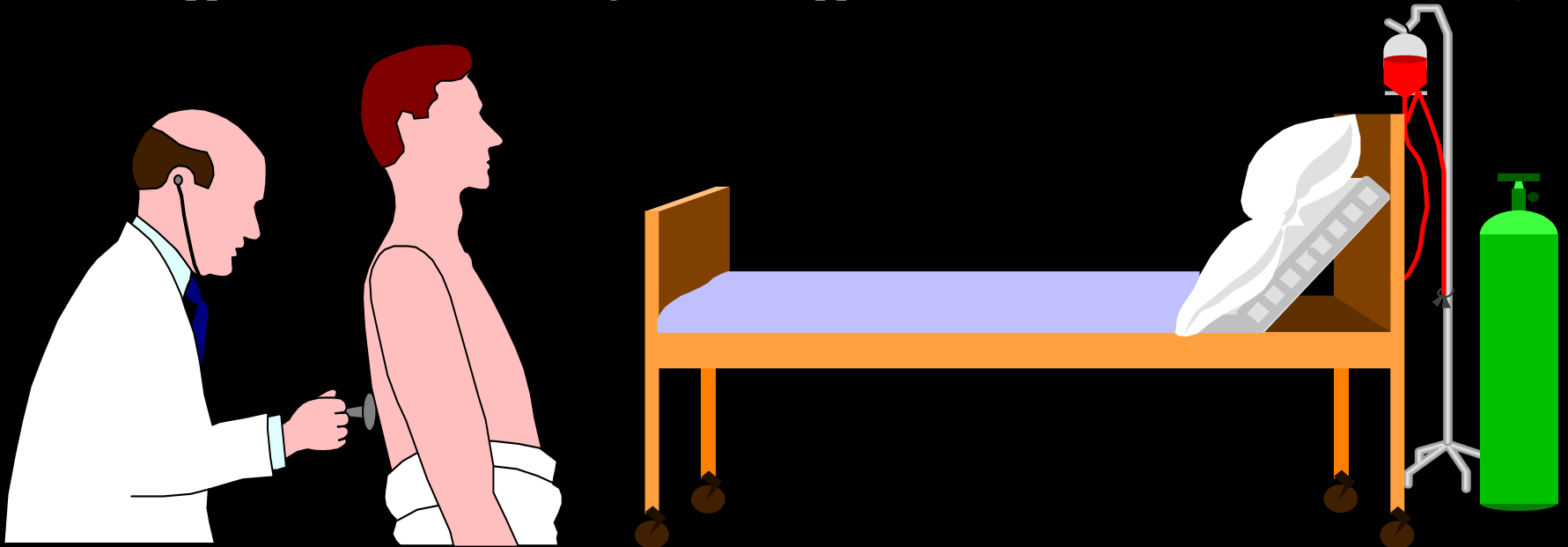
Revise



- Use a systematic editing method.
- *See, e.g.*, the “LawProse Editing Method.”
 - Source: Garner, *Legal Writing in Plain English* 138-39 (1st ed. 2001).

Proof

- We attorneys have no right to criticize physicians who leave sponges in the bellies of patients if lawyers are equally cavalier of [proofing].
 - Appleman, *The Written Argument on Appeal*, 41 Notre Dame Law. 40, 41 (1965).



Proof, con't


- I do not believe that the brief can be proofread too often or too carefully.
 - Wilkins, “The Argument of an Appeal,” in *Advocacy and the King’s English* 277, 281 (George Rossman ed. 1960).



Proof, con't

- If you've seen the page several times, you're likely to assume that things are as you expect them to be, not as they actually are.
- So enlist ... other lawyers in proofing.
 - Garner, *The Winning Brief* 40-41 (2d ed. 1999).

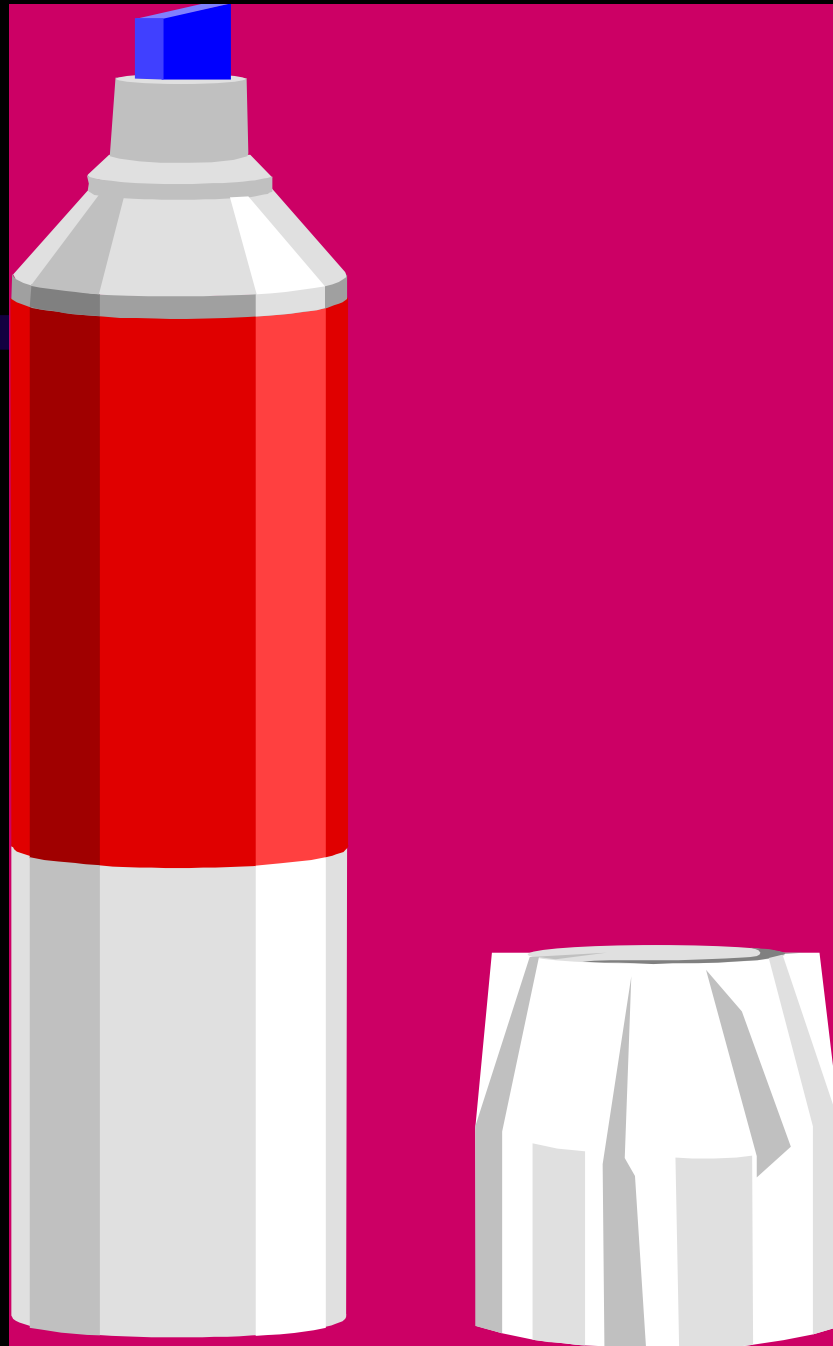
The Point?

- Readers are impatient to get the goods. And they resent having to work any harder than necessary to get them.
 - Trimble, *Editing Your Own Prose* (Unpublished).
- Let me sleep on it ... I'll give you an answer in the morning. 
 - Meatloaf, *Paradise by the Dashboard Light*, from *Bat Out of Hell* (Arista Records).

Get to the point, con't

- “[E]fficiency” does not mean the paper with the shortest length; rather, the paper that takes readers the shortest time to understand.
 - Alley, *The Craft of Scientific Writing* 15 (1987).
- You’d better sell the sizzle as soon as possible; the steak can wait.
 - Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 142 (1992).

Review





Review, con't

- [I]t is no sign of weakness or defeat that your manuscript ends up in need of major surgery.
- This is a common occurrence in all writing, and among the best writers.
 - Strunk & White, *The Elements of Style* 72 (3d ed. 1979).

Review, con't

- It is not an admission of weakness to ask for help in planning and preparing the presentation of material to other people.



Review, con't

- And it is not an affront to your professional integrity ...

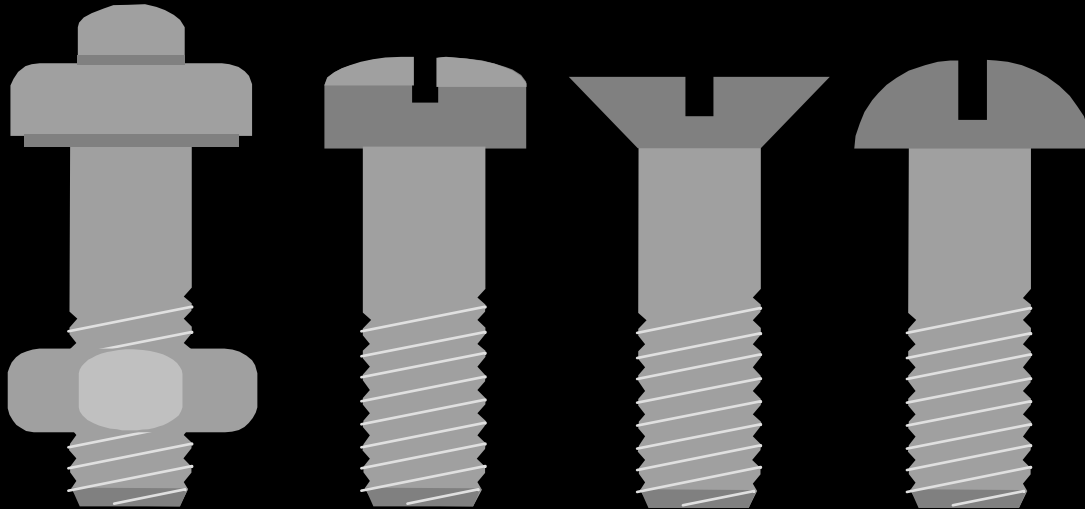


Review, con't

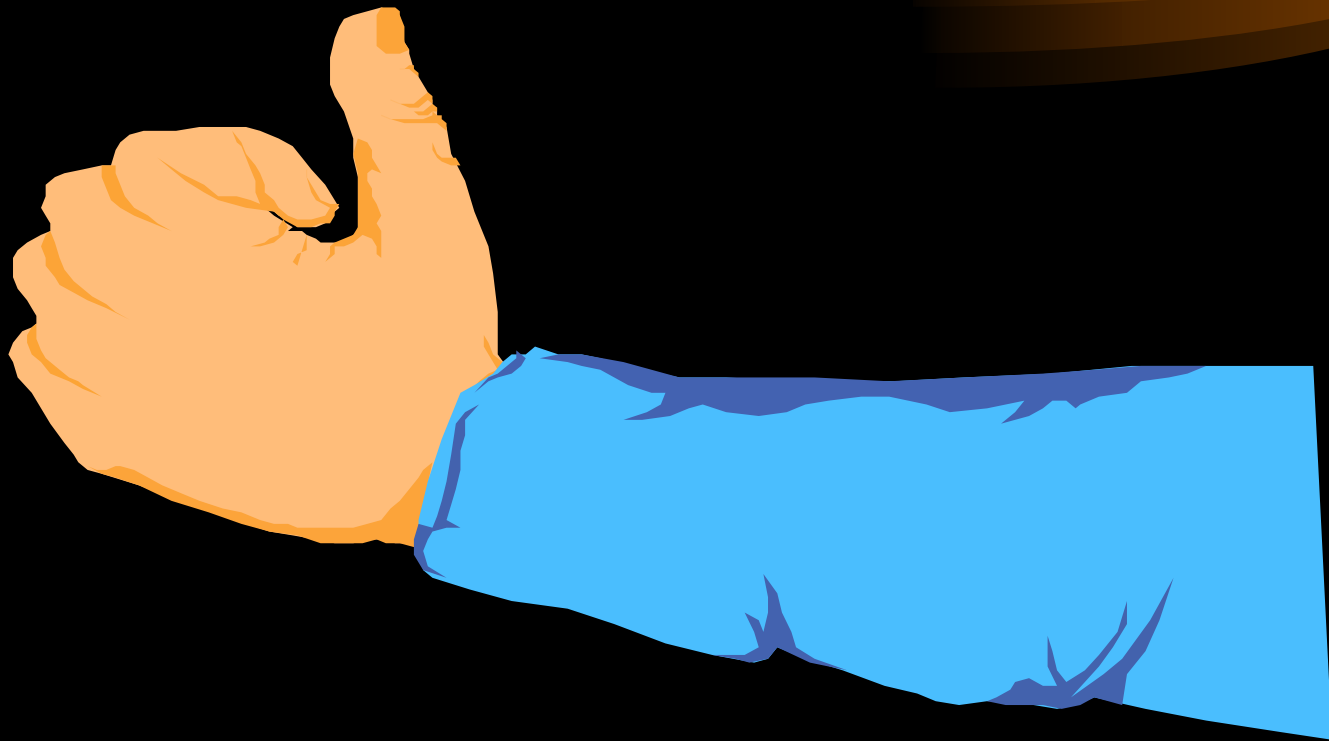
- to have someone say that he or she cannot grasp what you mean by ... a trial page of text.
 - Turk & Kirkman, *Effective Writing: Improving Scientific, Technical, and Business Communication* 38 (2d ed. 1989).



- A good edit must involve the kind of skeptical reading in which one imagines how one reader in ten might misread the sentence.
 - Garner, *A Dictionary of Modern Legal Usage* 564 (2d ed. 1995).



Finalize



Specific APA Documents

- **Drafting:**
 - **The APA Contract**
 - **Recommended Negotiating Position**
 - **Executive Summary and File Memoranda**
 - **Background and File Documentation**
 - **Letters and Correspondence**

The APA Contract



- Plain English
- Who is the taxpayer?
 - Parties to the contract
 - Third-party beneficiaries
- Boilerplate provisions
- TPM provisions
- Using definitions

Recommended Negotiating Position



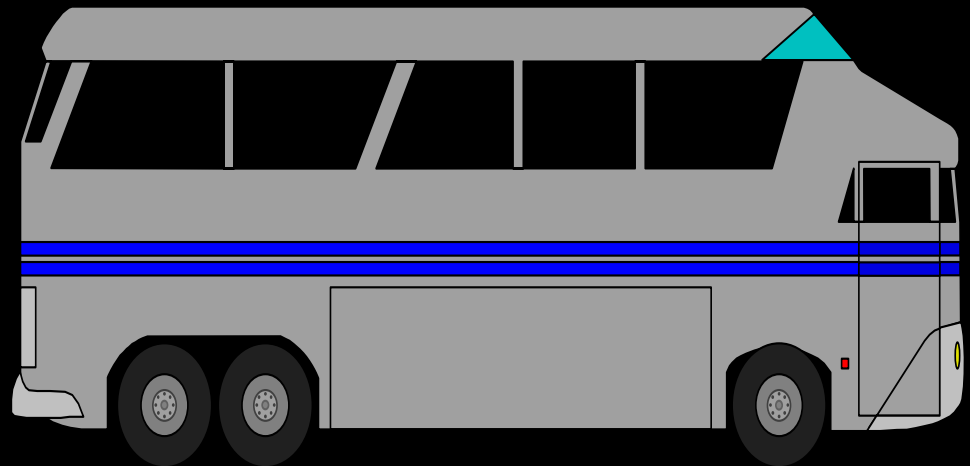
- Plain English
- Get to the point
- The parties' positions
- Throat clearing and “the wind up”
- Citations
- Comparables
- Numbers, numbers, numbers

Executive Summary and Long-Form Memorandum

- Getting to the point (30-second test)
 - Overparticularization
 - *versus*
 - Detailed analysis
- What is different or unique about this APA or recommendation?
- The executive summary does not merely rehash the long memo.

Background and file memoranda

- Create the paper trail
- Assist the successor team leader
- Assist the reviewer
- Sharpen the legal analysis
- Use plain English

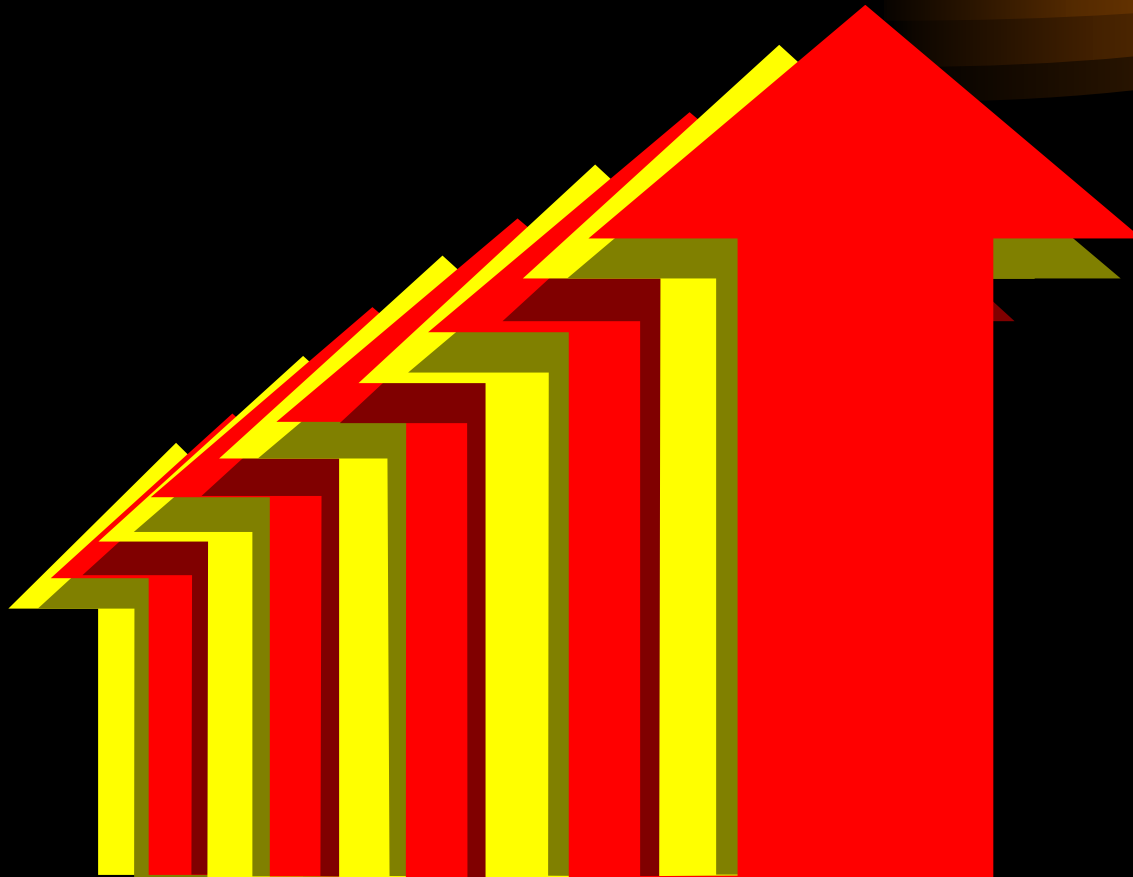


Letters and correspondence



- Short, direct, and to the point
- Leading versus open-ended questions
- Opinion?
- Scope

Strive for Continuing Improvement



Good luck!



Q&A...

Why can't I use scare quotes around "Special" Counsel?

