

American University Washington College of Law

## Digital Commons @ American University Washington College of Law

---

Articles in Law Reviews & Other Academic Journals

Scholarship & Research

---

2019

### Take Inventory Each Year

David Spratt

Follow this and additional works at: [https://digitalcommons.wcl.american.edu/facsch\\_lawrev](https://digitalcommons.wcl.american.edu/facsch_lawrev)



Part of the [Judges Commons](#), and the [Legal Writing and Research Commons](#)

---



**BY DAVID H. SPRATT**  
PROFESSOR, AMERICAN UNIVERSITY

# Take Inventory Each New Year

Is Now the Time to Polish or Replace the Tools in Your Legal Writing Toolbox?

**T**his season, my 12-year-old son is playing on a travel baseball team for the first time. For his entire baseball “career” until now, he has played as part of Little League on the same fields with the same core group of coaches, the same rules, and more or less the same kids. Fortunately, the adjustment to being on a travel team has been easy for him. His 11 seasons with Little League taught him the fundamental rules of baseball, gave him confidence, and helped him assemble a toolbox of skills into which he can reach adeptly and respond to most situations on the field. However, as part of the travel team, he has readily embraced seeing new places and fields, having new coaches as mentors, learning and applying new rules, and meeting and bonding with new teammates. He has added new “tools” to his toolbox. After all these seasons, it seems that some of the tools were not working as well as they could and needed to be polished; a few others had rusted and needed replacement.

How do these lessons relate to effective legal writing (the name of this column is Writer’s Block after all)? Unfortunately, some lawyers, both novice and skilled, have far less success

adapting to new situations. These lawyers, though armed with a similar arsenal of basic writing skills, fail to marshal those skills from their toolbox and apply them effectively to each individual client. These lawyers are trapped in a repetitive cycle of routine. This column offers some helpful pointers on how to use what has worked well before, but adapt to new situations, serve a new audience, and learn to polish and update your legal writing skills. As 2019 begins, ask yourself if it is time to polish or replace some of the tools in your legal writing toolbox.

Some baseball rules are the same on any field with any team: Watch the ball as it is coming toward you, run as fast as you can, three strikes and you are out. These rules are like trusted old hammers; they are built for life and do not change. However, even an old hammer benefits from a good cleaning. Fortunately, in legal writing, too, some rules also do not (or at least should not) change.

## **BE CONSISTENT IN YOUR REFERENCES**

In high school and college, most of us learned never to use the same word twice in a sentence. We strove to practice

“elegant variation,” the often strained and sometimes confusing practice of using synonyms to refer to the same thing. This practice, so our English teachers taught us, resulted in sentences that were more interesting to our readers. Here is an example of elegant variation:

Our client, Quinn Leisure, is a freelance writer who wanted to use her balcony to write during the warmer months. In May 2018, Leisure noticed that her downstairs neighbor, Mark Naga, regularly cooked hot sauces on a propane burner in his yard. When our client is on her balcony for more than two minutes, Quinn suffers watery eyes and a burning throat.

Elegant variation is not a tool that belongs in a legal writer’s toolbox. A law-trained reader expects consistent references. Once you pick a term to refer to a person, place, or thing, use that term consistently throughout the document. In the above example, after fully introducing Quinn Leisure as the client, choose to call her Leisure and do so consistently with no exceptions. Practicing elegant variation in legal writing confuses the reader; when a lawyer sees a new term or reference, she thinks you are talking about something or someone entirely different. If this tool has become rusty and you have been dabbling in elegant variation as a legal writer, polish it, because consistency in legal writing, like running fast in baseball, is a hard and fast rule that should never be replaced.

Other baseball rules are less strictly applied depending on the umpire, e.g., the strike zone. Some umpires have a very tight strike zone. Others may drift high or low. Similarly, legal writing rules might change depending on the audience or even the customs of the local practice area.

## **PRACTICE CORRECT SUBJECT/PRONOUN AGREEMENT**

For many years, scholars have debated whether writers should use gender-neutral pronouns, e.g., a *landlord* breaches the warranty of habitability if *they* deprive a tenant of an essential service. In nonlegal writing (ahem, “illegal” writing), this practice generally has become acceptable.

In most legal writing circles, however, specificity and precision take precedence over gender neutrality. Accordingly, most legal writers would write the following: “A landlord breaches the warranty of habitability if she deprives a tenant of an essential service.”

The prevailing rule in legal writing is that a writer should alternate the use of the masculine pronouns, *he* or *him*, and the feminine pronouns, *she* or *her*. Just be careful to practice consistency when referring to the same person. Some legal

writers use dual constructions, such as *he or she* and *his or her*. Others try to avoid using a pronoun by rephrasing the sentence to delete the pronoun, “A landlord breaches the warranty of habitability if a tenant is deprived of an essential service,” or pluralizing the sentence, “Landlords breach the warranty of habitability if they deprive a tenant of an essential service.”

In these situations, be ready to adapt your writing to your audience. There is more than one way to write an effective, grammatically correct document, and certain readers may expect and respond better to certain writing styles.

## **ADAPT TO NEW RULES**

In still other situations, rules can and do change. On the travel team, a runner can take a lead before the pitch is thrown; this is a new rule for my son, one that has resulted in lots of stealing, sliding, and filthy white baseball pants.

In legal writing, be willing to learn new rules or to apply different techniques to solve new problems. Resist the temptation to think that the same tool will always work for each new client. This semester, in my first-year legal writing class, my students were given a sample memo in which the applicable statute provided a landowner with immunity for injuries sustained on her property if certain delineated exceptions were met. Their first assignment, however, concerned a statute that set forth certain warranties that a landlord needed to provide to tenants once the preconditions to applying the statute were satisfied; the statute did not concern immunity and did not contain exceptions. Notwithstanding the differing structures of the statutes, the students copied the language from the sample and did not think through how the statute in their case worked in practice. In essence, they failed to adapt to a new situation and did not purchase a new tool for their legal writing toolbox. When faced with a new scenario, consider the skills you already have developed and successes that you have achieved; they might, in fact, help you achieve success again. A Phillips screwdriver will not work with a flathead screw; sometimes you have to add a new tool to the toolbox. Recognize that there is more than one way to write effectively. Lawyers are valued for their abilities to adapt and apply their knowledge to new situations and to research the law and local court rules when they need more knowledge to effectively serve their clients. A good lawyer should do more than paint by numbers, just like a good baseball player should do more than make the same play inning after inning if it does not always result in success. ■

---

**As always, your comments and suggestions are welcomed at [dspratt@wcl.american.edu](mailto:dspratt@wcl.american.edu).**