

BOOK REVIEW

THE CASE FOR A CASEBOOK ON LEGAL WRITING: A REVIEW OF *THE CASE FOR EFFECTIVE LEGAL WRITING*

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I've been teaching legal writing since 1989. I know that one can make grammar, punctuation, syntax, and the like only so interesting. I also know that when it comes to legal writing, two misconceptions abound. The first is that anyone who has earned a J.D. or LL.M. knows how to write well. The second is that good legal writing involves big words and convoluted phrases that haven't been used since the United States Constitution was drafted. These beliefs make people think that legal writing isn't a skill worth cultivating or improving,

The "ABCs of [good] legal writing are accuracy, brevity, and clarity."¹ *The Case for Effective Legal Writing: Court Opinions, Commentary, and Exercises* by Diana J. Simon and Mark Cooney makes these concepts intriguing.² Simon, author of one of my favorite legal-writing books, *The (Not Too Serious) Grammar*,

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1. *An Interview with Author and Legal Writing Professor Diana Simon*, WORDRAKE, www.wordrake.com/blog/an-interview-with-author-and-legal-writing-professor-diana-simon (last visited Sept. 24, 2024).

2. See generally DIANA J. SIMON & MARK COONEY, *THE CASE FOR EFFECTIVE LEGAL WRITING: COURT OPINIONS, COMMENTARY, AND EXERCISES* (2024).

Punctuation, and Style Guide to Legal Writing,³ is an Associate Clinical Professor of Law at the University of Arizona, James E. Rogers College of Law, and the managing editor of the *Journal of Appellate Practice and Process*.⁴ She worked in commercial litigation for 23 years before switching to teaching.⁵ Cooney, chair of Thomas M. Cooley Law School's Research and Writing Department as well as senior editor of *The Scribes Journal of Legal Writing*, has published more than 50 articles and books on legal writing.⁶ Courts throughout the country have cited and quoted him. Their combined 40 years' experience helping students and junior lawyers grow and improve their skills gives them unique insights on the best ways to relay the ideas discussed in their latest book.

Some legal-writing guidebooks look like an English teacher's first-week lesson plans. Simon and Cooney chose a different, unique approach. They decided to bring the courthouse to the classroom and write a casebook. The casebook formulation demonstrates what happens to lawyers who skip too many legal writing classes and workshops. First-year law students, still enamored by the dramatic trials featured in *Law and Order* and similar series, will find this formulation entertaining as well as familiar. And more experienced lawyers are likely to find the casebook formulation persuasive, too. *The Case for Effective Legal Writing* isn't just a cleverly titled book that plays on the word *case* as a synonym for both "argument" and "lawsuit." It's a way to "connect technique to real-world consequences."⁷ The book is filled with examples of cases that hinged on the quality and technical correctness of a written product—a strategy

3. See generally DIANA J. SIMON, *THE (NOT TOO SERIOUS) GRAMMAR, PUNCTUATION, AND STYLE GUIDE TO LEGAL WRITING* (2022).

4. See Diana Simon, THE UNIV. OF ARIZ. JAMES E. ROGERS COLL. OF L., <https://law.arizona.edu/person/diana-simon> (last visited Sept. 22, 2024).

5. See *id.*

6. See Mark Cooney, COOLEY L. SCH., www.cooley.edu/faculty/mark-cooney (last visited Sept. 22, 2024).

7. SIMON & COONEY, *supra* note 2, at xv.

that helps readers internalize grammatical, punctuation, stylistic, and syntactical rules.

The book begins with the bigger picture, with Chapter 1, “Effective Writing Is Effective Lawyering,” explaining, using *logos*, why readers should care about legal writing.⁸ Simon and Cooney cite *Henderson v. State*,⁹ one of the book’s oldest cases, to show how poor legal writing can jeopardize a criminal conviction.¹⁰ In *Henderson*, the defendant “argued that his indictment was legally deficient because, if read literally and grammatically, it charged inanimate objects—not him—with the crime.”¹¹ They also cite *Bradshaw v. Unity Marine Corp.*¹² to show that, in addition to potentially losing a case, judges can shame lawyers who turn in poor legal writing.¹³ In *Bradshaw*, the judge remarked that the lawyers were “extremely likeable” but that it seemed as if they had “draft[ed] their pleadings entirely in crayon on the back sides of gravy-stained paper place mats, in the hope that the Court would be so charmed by their child-like efforts that their utter dearth of legal authorities in their briefing would go unnoticed.”¹⁴ The rest of the chapter contains other examples of personal slights and professional judgments that would convince even the most arrogant lawyers to think twice about forgoing proofreading services.¹⁵

8. See *id.* at 3–15.

9. 445 So. 2d 1364 (Miss. 1984).

10. See SIMON & COONEY, *supra* note 2, at 6 (citing *Henderson*, 445 So. 2d 1364).

11. *Id.* (citing *Henderson*, 445 So. 2d at 1366).

12. 147 F. Supp. 2d 668 (S.D. Tex. 2001).

13. See SIMON & COONEY, *supra* note 2, at 12 (citing *Bradshaw*, 147 F. Supp. 2d 668).

14. *Id.* (quoting *Bradshaw*, 147 F. Supp. 2d at 670).

15. The judge who decided *Bradshaw*, was Samuel Kent, resigned from office and was imprisoned in 2009, following charges of making false and misleading statements, obstructing and impeding an official proceeding, and sexual assault. See S.A. Miller, *Impeached Judge Samuel B. Kent Tenders His Resignation*, WASH. TIMES (June 27, 2009), www.washingtontimes.com/news/2009/jun/27/impeached-judge-tenders-his-resignation/. Kent wrote many decisions full of personal embellishments and obscene statements that lawyers frequently laughed over (and shook their heads at). See, e.g., *Republic of Bolivia v. Philip Morris Cos.*, 39 F. Supp. 2d 1008 (S.D. Tex. 1999).

The authors expound on the bigger picture in Chapter 2, “Effective Writing Is Ethical Lawyering,” which explains, using *pathos*, why good legal writing is essential. Simon and Cooney, appealing to both the law’s bleeding hearts and purists alike, cite the Model Rules of Professional Conduct, specifically Rule 1.1.¹⁶ This rule demands that lawyers “provide competent representation.”¹⁷ Simon and Cooney ask their readers whether a lawyer whose writing is so bad that it makes inaccurate charges can provide “competent” representation.¹⁸ The questions the authors include at the end of this chapter are thought-provoking, forcing readers to absorb and engage meaningfully with the material.

After describing *why* readers should care about writing, Simon and Cooney dive into the actual material. They focus, at first, on the importance of plain language.¹⁹ The common perception is that the law is impenetrable: Lawyers are snakes, eager to trick innocent “normies” into agreeing to terms and conditions they normally wouldn’t. The examples of densely packed text that Simon and Cooney offer come from multiple judicial decisions spanning a variety of legal specialties, proving the authors’ point that the phenomenon exists wherever law exists. The juxtaposition of the main text and the redrafting exercises, which are scattered throughout the chapter and ask readers to rewrite some paragraphs from confounding legalese to plain language, highlight the differences between good writing and bad.

Chapter 3 contains the authors’ perspective on artificial intelligence (AI).²⁰ According to Simon and Cooney, lawyers have always relied on templates to “get the ball rolling” on the mountains of paperwork they

16. See SIMON & COONEY, *supra* note 2, at 17–18 (citing MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 1983)).

17. *Id.* at 18 (quoting MODEL RULES OF PRO. CONDUCT r. 1.1 (AM. BAR ASS’N 1983)).

18. See *id.* at 18–19.

19. See *id.* at 25–49.

20. See *id.* at 43–45.

must fill out.²¹ It's not bad or wrong, therefore, to use AI to create a jumping-off point.²² They credit AI for creating a more efficient pathway for lawyering. Implicitly, they acknowledge that AI is here to stay.²³ They entertain whether AI will make lawyers obsolete, but they come down on the "No" side.²⁴ They argue that it's important to acknowledge that students in the modern era have access to AI and will use it.²⁵ This isn't necessarily a concerning thing. AI, like Microsoft Word's spellcheck feature and websites like Grammarly, can help improve poorly written paragraphs.²⁶ But AI-edited drafts are far from perfect. They still benefit from a human editor.

In Chapter 4, "Verbosity Is Verboten," the authors cite Federal Rule of Civil Procedure 8, a "notable anti-verbosity rule" requiring the parties to give "a short and plain statement of the claim" and to state their defenses in "short and plain terms."²⁷ They describe how lawyers try to subvert that rule by moving text into footnotes, using extensive block quotations to single-space more text, and shrinking the font size and margins to squeeze more writing within imposed page limits.²⁸ They encourage readers to follow instructions rather than violate them, noting that writers' motives for making these kinds of typographic changes are obvious.²⁹ Legal-writing teachers whose students have done all these things (and more!) to skirt the rules will appreciate this section.

Chapter 5, "Ambiguity (Avoiding the Interpretive Coin Flip)," is the book's most interesting chapter.³⁰ Its

21. *Id.* at 43.

22. *See id.*

23. *See id.* at 43, 124.

24. *Cf. id.*

25. *Cf. id.*

26. *See id.*

27. *Id.* at 51–52 (quoting FED. R. CIV. P. 8(a)(2), 8(b)(1)(A)).

28. *Id.* at 64.

29. *See id.* at 52, 64.

30. *See id.* at 69–87.

featured case is *Lockhart v. United States*,³¹ in which the Supreme Court decided that Avondale Lockhart was subject to the 10-year mandatory minimum sentence for possessing child pornography.³² The case rested on 18 U.S.C. § 2252(b)(2), which provides that a mandatory minimum sentence applies if the accused had a prior state-law conviction for “aggravated sexual abuse, sexual abuse, or abusive sexual conduct involving a minor or ward.”³³ The Court found that the modifier “involving a minor or ward” applied only to the final item in the list (“abusive sexual conduct”).³⁴ It ruled that Lockhart, who had a prior conviction for sexually abusing his then-53-year-old girlfriend, was subject to the mandatory minimum sentence.³⁵ Justice Elena Kagan, in her dissent, argued that the Court’s “ordinary understanding of how English works, in speech and writing alike, should decide this case.”³⁶ She said that based on that “ordinary understanding,” the modifier modified all items in the series.³⁷ As a result, because Lockhart hadn’t sexually abused *a minor or ward*, he shouldn’t be subject to the mandatory minimum sentence.³⁸ She gave the example of someone asking to meet “an actor, director, or producer involved with the new Star Wars movie” and prompted her readers to think about how they would interpret that statement.³⁹ Would they think that the person in question would be happy meeting, say, *any* actor, or do they want to meet a *Star Wars* actor specifically?⁴⁰

31. 577 U.S. 347 (2016).

32. *See id.* at 361.

33. 18 U.S.C. § 2252(b)(2).

34. *Lockhart*, 577 U.S. at 350 (quoting § 2252(b)(2)).

35. *Id.* at 349, 361.

36. SIMON & COONEY, *supra* note 2, at 74–75 (quoting *Lockhart*, 577 U.S. at 362 (Kagan, J., dissenting)).

37. *Lockhart*, 577 U.S. at 362 (Kagan, J., dissenting).

38. *Id.* at 362–63 (Kagan, J., dissenting).

39. SIMON & COONEY, *supra* note 2, at 75 (quoting *Lockhart*, 577 U.S. at 362 (Kagan, J., dissenting)).

40. *Id.* (citing *Lockhart*, 577 U.S. at 362 (Kagan, J., dissenting)).

This chapter and the case it discusses conjure up a question: Does the letter of the law or the spirit of the law take precedence when the two conflict? In Chapter 3, Simon and Cooney call for all legal documents to be written in plain language to minimize confusion.⁴¹ We should all concur—er, agree—with that. As the adage goes, “if you can’t explain it simply, you don’t understand it well enough.”⁴² However, there isn’t a single “ordinary understanding of how English works.”⁴³ Multiple canons affect the application and interpretation of modifiers. That’s why Lockhart’s case was granted certiorari. So when the letter of the law and the spirit of the law conflict—or seem to conflict—which should be prioritized? There’s no definitive answer. In *Lockhart*, the Court favored the spirit of the law. But it was not a unanimous decision. Plenty of other cases featured in this casebook favored the letter of the law. One could argue that asking the Supreme Court to debate grammar and semantics wastes resources. Yet the fact that it does—and so often—shows how finicky the profession of law is. It’s good practice to draft legal documents in plain language, but the nature of the law and the stakes involved in most cases necessitate a level of precision typically unseen in casual, conversational English.

In addition to the bigger-picture aspects of good legal writing and a few smaller-scale grammatical topics (such as active voice and avoiding run-on sentences), Simon and Cooney discuss those little dots, lines, and squiggles we call punctuation marks. The first punctuation-focused chapter, Chapter 8, is on commas.⁴⁴ We’ve all heard the “Let’s eat, Grandma,” versus “Let’s eat Grandma” joke that English teachers use to demonstrate how the exclusion of a comma can change the meaning of

41. See *id.* at 27–29.

42. Albert Einstein: ‘If You Can’t Explain It Simply, You Don’t Understand It Well Enough,’ THE SOCRATIC METHOD, <https://www.socratic-method.com/quote-meanings/albert-einstein-if-you-cant-explain-it-simply-you-dont-understand-it-well-enough> (last visited Sept. 24, 2024).

43. See SIMON & COONEY, *supra* note 2, at 75 (quoting *Lockhart*, 577 U.S. at 362 (Kagan, J., dissenting)).

44. See *id.* at 127–46.

a sentence. Simon and Cooney give similar examples.⁴⁵ They also give a few examples of how comma misuse can be costly, e.g.: *O'Connor v. Oakhurst Dairy*.⁴⁶ This case gained notoriety in 2017 because of the perceived absurdity of deciding a multimillion-dollar case on the existence or nonexistence of a comma.⁴⁷ The law on which the case rested provided that Maine employees involved in the “canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of” a list of agricultural products were exempt from the state’s standard overtime laws.⁴⁸ The delivery drivers argued that because they distribute items but don’t *pack them for distribution*, they were entitled to overtime pay based on the law as written.⁴⁹ They won.⁵⁰

In Chapter 8, Simon and Cooney also give examples of words readers should look for when editing their writing.⁵¹ They advise readers to “[b]e on the lookout for the words *who* and *which*,” because those words “often (but not always) signal extra stuff that needs to be set off” by commas.⁵² They also suggest looking out for words like *although*, *because*, and *if*, all of which signal “a sentence-starting dependent clause” that needs a comma.⁵³ This part of the chapter will help those who want to improve their own writing. It’s hard to edit your

45. See, e.g., *id.* at 127–28 (citations omitted).

46. *Id.* at 130–32 (citing *O'Connor v. Oakhurst Dairy*, 851 F.3d 69 (1st Cir. 2017)).

47. See, e.g., AJ Willingham, *An Oxford Comma Changed This Court Case Completely*, CNN (Mar. 16, 2017), <https://www.cnn.com/2017/03/15/health/oxford-comma-maine-court-case-trnd/index.html>; *The Commas That Cost Companies Millions*, BBC (July 22, 2018), <https://www.bbc.com/worklife/article/20180723-the-commas-that-cost-companies-millions>; Foster Thorbjornsen, *Business Contracts and Costly Commas: Punctuation Matters!*, LINKEDIN (Nov. 27, 2017), https://www.linkedin.com/pulse/business-contracts-costly-commas-punctuation-matters-thorbjornsen?utm_source=share&utm_medium=member_android&utm_campaign=share_via.

48. *O'Connor*, 851 F.3d at 71 (quoting ME. STAT. tit. 26, § 664(3)(F) (2023)).

49. SIMON & COONEY, *supra* note 2, at 131 (citing *O'Connor*, 851 F.3d at 71).

50. *Id.* at 132 (citing *O'Connor*, 851 F.3d at 72–81).

51. See, e.g., *id.* at 145.

52. *Id.*

53. *Id.*

own work when you aren't familiar with grammatical and syntactical rules. These difficulties are compounded by lawyers' familiarity with the material. It's difficult to improve your writing when you're too emotionally invested in the content to be objective about what *needs* to be there versus what could (and ought to) be cut. As Simon has said elsewhere, "[F]amiliarity breeds blindness."⁵⁴ It makes it nearly impossible to notice where subjects or objects aren't clear. The keywords and phrases Simon and Cooney give in these chapters let their readers recognize where punctuation marks might be (or are) necessary, even if readers haven't yet fully internalized the reason for them.

The second punctuation-related chapter, Chapter 9, focuses on semicolons.⁵⁵ This chapter presents another interesting case study and thought experiment, similar to that raised in Chapter 5—Ambiguity (Avoiding the Interpretive Coin Flip)). In Chapter 9, Simon and Cooney discuss *Lee v. Mercury Insurance Co. of Georgia*,⁵⁶ where the issue was whether Lee “was entitled to coverage for property damage from a fire to a second home when the policy arguably only covered the policyholder’s primary residence.”⁵⁷ The policy defined “residence premises” as “the one, two, three or four family dwelling, condominium or rental unit, other than structures and grounds, used principally as a private residence; where you reside and which is shown in the Declarations.”⁵⁸ The court found that the semicolon functioned like the word *or* and ruled for Lee, even though he stayed at his second home only a few nights each week when he was in town for business and the house was principally occupied by his friend, not by him.⁵⁹ In a partial dissent, Chief Judge Stephen Dillard insisted that “the majority

54. *An Interview with Author and Legal Writing Professor Diana Simon*, *supra* note 1.

55. SIMON & COONEY, *supra* note 2, at 147–71.

56. 808 S.E.2d 116 (Ga. Ct. App. 2017).

57. SIMON & COONEY, *supra* note 2, at 162 (citing *Lee*, 808 S.E.2d at 122–23).

58. *Id.* at 163 (quoting *Lee*, 808 S.E.2d at 123).

59. *Id.* at 163–64 (citing *Lee*, 808 S.E.2d at 123–27).

has chosen to disregard the plain meaning of the policy and well-settled precedent in order to achieve a result to its liking,” namely, a decision for the “sympathetic” plaintiff, *Lee*.⁶⁰ Simon and Cooney, in one of the exercises at the end of the chapter, ask readers to consider Chief Judge Dillard’s viewpoint: “In your most cynical moments, do you believe that each judge develops a sense of what the ‘right’ outcome is and then finds some basis to interpret syntax and punctuation in a way that supports that view?”⁶¹ This prompt addresses the intersection of ambiguity and human subjectivity that readers will spend much time contemplating.

The third punctuation-related chapter, Chapter 10, focuses on apostrophes.⁶² How much can be said about apostrophes? A lot, say the authors. Apostrophe rules aren’t straightforward.⁶³ If they were, “possessive apostrophes” and “plural possessive apostrophes” wouldn’t be two separate sections of this chapter.⁶⁴ But they are. And in the chapter’s concluding exercises, Simon and Cooney ask their readers to determine whether the following sentence is correct: “Congress’ main role in government is to pass laws and declare war.”⁶⁵ This question seems silly at first glance—but is it? The Supreme Court can’t even decide whether, when a singular entity ends in an “S” (as is the case with the word “*Congress*”), one should add an “S” after the possessive apostrophe.⁶⁶ Chief Justice John Roberts and three other Justices say yes.⁶⁷ Five say no.⁶⁸

The final chapter, Chapter 11, “Ignoring Poor Grammar and Punctuation,” discusses the pitfalls of

60. *Id.* at 164 (quoting *Lee*, 808 S.E.2d at 135 (Dillard, C.J., concurring in part and dissenting in part)).

61. *Id.* at 169.

62. *See id.* at 173–90.

63. *Id.* at 173.

64. *See id.*

65. *Id.* at 189.

66. Jill Barton, *Supreme Court Splits . . . on Grammar and Writing Style*, 17 SCRIBES J. LEGAL WRITING 33, 41–43 (2016–2017).

67. *See id.* at 42.

68. *See id.*

being too pedantic.⁶⁹ In this chapter, Simon and Cooney address the counterargument to their book's premise. They acknowledge that constitutional scholars often argue that punctuation should be ignored when interpreting the United States Constitution, "because the Framers were careless about punctuation and used it in ways that are inconsistent with modern practice."⁷⁰ They also acknowledge that constitutional scholars "usually ignore proper grammar when the history and purpose of a clause or provision dictate otherwise."⁷¹ And they cite cases in which grammar and punctuation seem not to have mattered (albeit the cases they use in this chapter are old, in contrast to the vast majority used elsewhere in the book).⁷² But Simon and Cooney circle back quickly. They cite recent decisions and statements from the current United States Supreme Court and the D.C. Circuit to drive home the argument that although grammar and punctuation might not have been important before, they are today.⁷³ They "are key components of language. And lawyering is, in large part, about using language effectively."⁷⁴

The authors state their goals in the preface: "[T]he purpose of this casebook is two-fold: (1) to guide and instruct you on getting it right in your own writing; and (2) to demonstrate that writing style and mechanics should not be afterthoughts."⁷⁵ Simon and Cooney accomplished these goals. Some parts could've been fleshed out further—for example, transition words, as well as more substantive discussions of the thought-provoking questions raised in Chapters 5 and 9. Besides that, there's nothing to critique about this book. (That is, the biggest (and only) complaint) about their book is that

69. SIMON & COONEY, *supra* note 2, at 191–200.

70. *Id.* at 192.

71. *Id.* at 194.

72. *See, e.g., id.* at 196 (citing *Barrett v. Van Pelt*, 268 U.S. 85 (1925)).

73. *See, e.g., id.* at 200 (citing *NACS v. Bd. of Governors of Fed. Rsrv. Sys.*, 746 F.3d 474, 486 (D.C. Cir. 2014)).

74. *Id.*

75. *Id.* at xiv.

we want more. Although just 200 pages long, *The Case for Effective Legal Writing: Court Opinions, Commentary, and Exercises* is rife with digestible lessons, funny examples, revelatory insights, debate-worthy questions, and useful rewriting exercises. It should have a prominent spot in lawyers' bookshelves. And it should be mandatory reading in 1L legal-writing classes.