South Carolina Bar
Continuing Legal Education Division

Words Matter Even If They Are Not Yours

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presented by
The South Carolina Bar
Continuing Legal Education Division

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SC Supreme Court Commission on CLE Course No. 241637

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Video Replay-Words Matter Even If They Are Not Yours
Monday, April 15th, 2024

This program qualifies for 6.0 MCLE; 3.0 LEPR

8:30 a.m.
Registration

8:55 a.m.
Welcome and Opening Remarks

9:00 a.m.
Chat GPT, Siri, and Alexa are Out to Get You
Stuart Teicher

AI is coming for lawyers, and Chat GPT is leading the way. Alexa isn't too far behind…and so are deep fakes and the metaverse, too Join the "CLE Performer." Stuart Teicher, Esq., as he explores the never-ending problems with the hottest technologies out there. In this program, Mr. Teicher will…

- teach about the software itself — Chat GPT is a Large Language Model, and he'll explain what that means for lawyers (Competence, Rule 1.1)
- reveal the ethical hotspots like confidentiality, safeguarding client property, and supervision.
- explore the problems with the "reasonable expectation of privacy" standard.
- discuss the dangers with those other technologies as well.

11:00 a.m.
Break

11:15 a.m.
Chat GPT, Siri, and Alexa are Out to Get You (Continued)

12:15 p.m.
Lunch (Provided)

12:45 p.m.
Fluff is for Pillows, Not Legal Writing: Surgical Strike
Lawyers have been passing bad writing habits down from generation to generation. In this 3-hour legal writing program, Stuart Teicher (the "CLE Performer") teaches a new, more concise way of persuasive legal writing. Stuart Teicher, Esq., explains that the new paradigm for legal writing is what he calls the "Surgical Strike." He explains how lawyers can make their writings clear, concise, and direct by using Plain English.

1:45 p.m.
Fluff is for Pillow, Not Legal Writing: The anatomy of a persuasive writing.
In this hour Teicher explains the essential elements that every legal writing must contain. He sets forth the proper overall structure for a document, as well as a stop-by-step process for an effective persuasive paragraph.

2:45 p.m.
Break

3:00 p.m.
Fluff is for Pillows, Not Legal Writing: Get down with the details.

In this hour Stuart teaches about the technicalities of sentence structure, and his "Short writing" method for reducing long sentences. If time permits, you'll get the skinny on "the only punctuation you'll ever need to know."

4:00 p.m.
Adjourn

Words Matter Even If They Are Not Yours

SPEAKER BIOGRAPHY

Stuart Teicher
(course planner)

Stuart I. Teicher, Esq. is a professional legal educator who focuses on ethics law and writing instruction. A practicing lawyer for 30 years, Stuart's career is now dedicated to helping fellow lawyers survive the practice of law and thrive in the profession. Mr. Teicher teaches seminars, provides in-house training to law firms and legal departments, provides CLE instruction at law firm client events, and also gives keynote speeches at conventions and association meetings.

Stuart helps lawyers get better at what they do (and enjoy the process) through his entertaining and educational CLE "performances". He speaks, teaches, and writes— Thomson Reuters published his book entitled, Navigating the Legal Ethics of Social Media and Technology.

Mr. Teicher is a Supreme Court appointee to the New Jersey District Ethics Committee where he investigates and prosecutes grievances filed against attorneys. Mr. Teicher also served on the New Jersey Office of Attorney Ethics Fee Arbitration Committee. Mr. Teicher is an adjunct professor of law at Georgetown Law where he teaches Professional Responsibility, and he is an adjunct professor at Rutgers University in New Brunswick where he teaches undergraduate writing courses. He also taught legal writing at St. John's University School of Law in New York City.

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Chat GPT, Siri, and Alexa are Out to Get You

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The Ethics of Chat GPT and Other AI
Program Written Materials

So you've heard of this Chat GPT thing? I guess that means we should talk about it. Of course, this program isn't only about Chat GPT. To properly understand the ethics issues in that program, we actually have to go a little deeper. So in this program we'll be talking about the different ethics issues that impact both Chat GPT, artificial intelligence (generally), and a few other new technologies that are relevant to the discussion of generative AI.

1. The more things change, the more they stay the same.

a. Yesterday's standard.

There are a myriad of technologies being used in the practice of law today. Whether it's email, texting, cloud storage, software as a service (SaaS), or artificial intelligence in its many forms, there's one common concern. With each technology we are moving data. Whether we are moving data from one person to another or moving it into the cloud, moving it to a software system so that system can process the data, it doesn't matter. It's all about moving data. In each case, we are concerned about the channels upon which that data travels—the highways our information rides along to get from place to place. When we take that information and put it on the Internet to move it we use the proverbial information superhighway.

The key question we need to ask ourselves is whether that highway is secure. Can anyone jump onto it and intercept the data we're moving? What about getting onto that highway to begin with? Just like a car uses an onramp to access a highway, you plug a cable into your

computer and that carries your information onto the Internet. And what about the destination. Once you get there (the cloud, SaaS) is our data safe there?

Think about how this all started — using a wireless to move the information from your computer to the Internet. But if we use that type of a wireless onramp to the information superhighway, we have security issues. The data becomes vulnerable once we transmit it through the air. By connecting to a wireless router we essentially open up a door to our computer and invite other people to come in and see whatever we have loaded onto our computers. The whole question of wireless access is also raised when we talk about cell phones and tablets. Those devices access the Internet and transmit information using unsecured networks as well.

Not only do we have issues of moving data (transmission), but we also have issues about situations where you move information to another place and leave it there- to store it. Cloud storage companies/websites end up storing the data on their own servers (in the "cloud"). Similarly, programs known as Software as a Service (SaaS) invoke all of the problems discussed because you are sending data to another company that is used in their programs, thus creating transmission issues, wireless problems and storage concerns. Not sure what "the cloud" is all about? The Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility explained these technologies clearly when it stated:

> If an attorney uses a Smartphone or an iPhone, or uses web-based electronic mail (e-mail) such as Gmail, Yahoo!, Hotmail or AOL Mail, or uses products such as Google Docs, Microsoft Office 365 or Dropbox, the attorney is using "cloud computing." While there are many technical ways to describe cloud computing, perhaps the best description is that cloud computing is merely "a fancy way of saying stuff's not on your computer."[1] From a more technical perspective, "cloud computing" encompasses several similar types of services under different names and brands, including: web-

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[1] Pennsylvania Bar Association Committee on Legal Ethics and Professional Responsibility Formal Opinion 2011-200, at 1, citing, Quinn Norton, "Byte Rights," Maximum PC, September 2010, at 12.

based e-mail, online data storage, software-as-a-service ("SaaS"), platform-as-a-service ("PaaS"), infrastructure-as-a-service("IaaS"), Amazon Elastic Cloud Compute ("Amazon EC2"), and Google Docs."[2]

Fast forward now to generative AI like Chat GPT. It's the same concern. Chat GPT becomes valuable when you use it to process your client's information. You ask it questions about your case so you can find some sort of answers — research, novel legal ideas, whatever. In order to get valuable answers, you need to give it specific information. That specific information is going to be client information. And once you move that client information to anywhere — the cloud, Chat GPT, whatever — the vulnerabilities of all of those technologies implicate the same ethical issues: the potential release or disclosure of confidential information (Rule 1.6), the potential loss of client information/property (a failure to safeguard client property per Rule 1.15), and the duty to supervise the vendors (Rule 5.3).

b. Yesterday's standard, applicable today.

It has long been established that lawyers could send unencrypted email regarding client matters, but that wasn't always the case. When the technology was first developed, the powers that be were opposed to permitting such email communication. However, things changed in the late 90s.

The ABA issued a formal opinion in 1999 which stated that there is a reasonable expectation of privacy despite the risk of interception and disclosure. The key development was that legislation was enacted making the interception of email a crime. In its Opinion, the ABA stated:

> "The Committee believes that e-mail communications, including those sent unencrypted over the Internet, pose no greater risk of interception or disclosure than other modes of communication commonly relied upon as having a reasonable expectation of privacy. The level of legal protection accorded e-mail transmissions, like that accorded other

[2] Pa Opinion 2011-200 at 1

> modes of electronic communication, also supports the reasonableness of an expectation of privacy for unencrypted e-mail transmissions. The risk of unauthorized interception and disclosure exists in every medium of communication, including e-mail. It is not, however, reasonable to require that a mode of communicating information must be avoided simply because interception is technologically possible, especially when unauthorized interception or dissemination of the information is a violation of law. The Committee concludes, based upon current technology and law as we are informed of it, that a lawyer sending confidential client information by unencrypted e-mail does not violate Model Rule 1.6(a) in choosing that mode to communicate. This is principally because there is a reasonable expectation of privacy in its use."[3]

States, of course, followed suit and permitted the use of unencrypted email in the practice of law. What's key here is that we see the standard clearly— the reasonable expectation of privacy. It's important to understand the standard/rationale for permitting such email communications, because it continues to be relevant today. As new technologies are developed, the authorities apply the same reasoning. Consider the recent furor over gmail and other free email services.

In its Opinion 820, the New York State Bar Association opined about those free email systems.[4] The systems of yore were a concern because of the business model that the systems use to keep the service free. Here's how they worked: in return for providing the email service, "the provider's computers scan e-mails and send or display targeted advertising to the user of the service. The e-mail provider identifies the presumed interests of the service's user by scanning for keywords in e-mails opened by the user. The provider's computers then send advertising that reflects the keywords in the e-mail."[5] The obvious problem is that if a lawyer was using the email system for client work, then that lawyer was allowing the provider to scan confidential information.

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[3] ABA Commission on Ethics and Professional Responsibility Formal Opinion 99-413

[4] New York State Bar Association Committee on Professional Ethics Opinion 820 – 2/8/08

[5] NYSBA Op. 820 at 2

When considering whether these new email systems would be permitted, the NY authorities first considered the rationale for permitting email back in the 90s. Email was allowed because, "there is a reasonable expectation that e-mails will be as private as other forms of telecommunication and…therefore…a lawyer ordinarily may utilize unencrypted e-mail to transmit confidential information.[6] They applied that same reasoning to the question of free emails.

You'd think that the authorities would have banned the emails, given that their content was being read by the email system, right? Wrong. Even though the email messages in the system were scanned, the opinion noted that humans don't actually do the scanning. Rather, it's computers that take care of that task. Thus, they stated that "Merely scanning the content of e-mails by computer to generate computer advertising…does not pose a threat to client confidentiality, because the practice does not increase the risk of others obtaining knowledge of the e-mails or access to the e-mails' content."[7]

What the opinion is basically saying is that there continued to be a reasonable expectation of privacy in those email systems. Maybe the better way to phrase it is a reasonable expectation of "confidentiality," but the idea is the same (more on Rule 1.6, Confidentiality, later).

That ethical standard continued to be relevant and we saw it being applied later to a google product. On September 21, 2018 the Wall Street Journal reported that Google shares Gmail information with its app developers. But what's important is the type of information that's being shared and who viewed it. The WSJ article revealed that:

> Google Inc. told lawmakers it continues to allow other companies to scan and share data from Gmail accounts…the company allows app developers to scan Gmail accounts… outside app developers can access information about what products people buy, where

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[6] NYSBA Op. 820 at 1

[7] NYSBA Op, 820 at 2

> they travel and which friends and colleagues they interact with the most. In some cases, employees at these app companies have read people's actual emails in order to improve their software algorithms.[8]

Did you get that last part? There are real human beings who are reading the contents of Gmail messages. What we know from NY Opinion 780 is that if human beings are reading the lawyer emails, then lawyers no longer have a reasonable expectation of privacy in Gmail.

Sure, we lack some specific data about which emails were read, but that doesn't change the conclusion. We might not know if lawyers' messages in particular were included in the messages that were scanned. But that's sort of exactly the problem — we don't know. And we don't have any way to control or restrict the app developers from reading anyone's emails, including our practice-related emails. Because of that reality I don't think that lawyers have a reasonable expectation of privacy in using Gmail any more. Our duty to protect client confidences set forth in Rule 1.6 precludes us from using the service. I'll tell you the truth, it actually looks like no one — lawyer nor otherwise — has a reasonable expectation of privacy with the platform. That's why I think lawyers need to stop using Gmail for practice related matters immediately.

The same standard is relevant today. When lawyers use generative AI like Chat GPT, we put our client information into the system. Open source systems which are trained on the internet at large take the information that's fed into it and use it in it's processing going forward. The Enterprise DNA blog explained that, "Chat GPT logs every conversation, including any personal data you share, and will use it as training data. Open AI's privacy policy states that the company collects personal information included in 'input, file uploads, or feedback' users provide to Chat GPT and its other services. The company's FAQ explicitly states that it will use

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[8] https://www.wsj.com/articles/google-says-it-continues-to-allow-apps-to-scan-data-from-gmail-accounts-1537459989 last checked 7/3/2023.

your conversations to improve its AI language models and that your chats may be reviewed by human AI trainers."[9]

You can see how ye olde Email standard is still relevant. Lawyers do not have an expectation of privacy if we put our client information into generative AI programs alike Chat GPT. Similarly, we also happen to violate Rule 1.6…

c. Yesterday's standards, expanded and applicable in the future.

i. Confidentiality and the Cloud. The Reasonable Care Standard

The early decisions that addressed technology didn't always talk about "cloud computing" in particular, but they set the standard that would be followed when that technology arrived. Thus, the State of Nevada addressed the ability of lawyers to store confidential client information and/or communications in an electronic format on a server or other device that is not exclusively in the lawyer's control.[10] The Committee found that it was ethically permissible and stated that, "If the lawyer acts competently and reasonably to ensure the confidentiality of the information, then he or she does not violate [the rules] by simply contracting with a third parity to store the information…"[11]

The Committee said that the duty to save files on third party servers is the same as the duty to safeguard files that are put into third party warehouses, so contracting for such storage is not a per se confidentiality violation.[12] The lawyer wasn't strictly liable for an ethics violation

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[9] https://blog.enterprisedna.co/is-chat-gpt-safe/#:~:text=No%2C%20Chat%20GPT%20is%20not%20confidential.&text=The%20company%27s%20FAQ%20explicitly%20states,reviewed%20by%20human%20AI%20trainers last checked July 2, 2023.

[10] State Bar of Nevada, Standing Committee on Ethics and Professional Responsibility,Formal Opinion No. 33, February 9, 2006, at 1.

[11] Nevada Opinion No. 33, at 1.

[12] Nevada Opinion No. 33, at 1.

"even if an unauthorized or inadvertent disclosure should occur".[13] Instead, the question was whether they exercised proper care. They articulated a standard that would be repeated in many following opinions when they said, "The lawyer must act competently and reasonably to safeguard confidential client information and communications from inadvertent and unauthorized disclosure."[14]

Similarly, New Jersey evaluated a technologically related issue— whether a lawyer can scan client files to a PDF, then archive them electronically and store those documents on the web.[15] Just like in Nevada, the concern was that Rule 1.6 requires "that the attorney 'exercise reasonable care' against the possibility of unauthorized access to client information."[16] The New Jersey Committee echoed the Nevada findings and stated that,

> "Reasonable Care…does not mean that "the lawyer absolutely and strictly guarantees that the information will be utterly invulnerable against all unauthorized access…What the term 'reasonable care' means in a particular context is not capable of sweeping characterizations or broad pronouncements." at 3.

Given the changing nature of technology, the New Jersey Committee was reluctant to make a particularly bold decision but they did provide some elaboration of what constituted "reasonable care." They stated that,

> '"The Touchstone in using 'reasonable care' against unauthorized disclosure is that: (1) the lawyer has entrusted such documents to an outside provider in circumstances in which there is an enforceable obligation to preserve confidentiality and security, and (2) use is made of available technology to guard against reasonably foreseeable attempts to infiltrate the data. If the lawyer has come to the prudent professional judgment he has satisfied both these criteria, then 'reasonable care' will have been exercised." at 5

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[13] Nevada Opinion No. 33, at 1.

[14] Nevada Opinion No. 33, at 1.

[15] State Bar of New Jersey, Supreme Court Advisory Committee on Professional Ethics, Opinion 701, April 10, 2006, 15 N.J.L. 897 April 24, 2006, at 2

[16] NJ Opinion 701, at 3.

That phrase, “reasonably foreseeable” was an indication of things to come. In fact, the standard evolved in a decision out of Maine. Maine agreed that the lawyer needs to take reasonable steps to protect confidentiality but they went further and they stated that,

> “the lawyer would be well-advised to include a contract provision requiring the contractor to inform the lawyer in the event the contractor becomes aware of any inappropriate use or disclosure of the confidential information. *The lawyer can then take steps to mitigate the consequences and can determine whether the underlying arrangement can be continued safely.* (emphasis added). at 2

This is the first time we see an extended affirmative duty on the lawyer’s part. Maine set forth the idea that the lawyer’s duty is ongoing and that there may be a time where a lawyer needs to actually take some action to protect the client information.

Arizona reviewed a question that was analogous to cloud storage and added a further elaboration of what it meant to be exercising reasonable care. Arizona said that if you’re going to use online storage sites, Competence (Rule 1.1) demands that you understand them. Specifically they stated that “the competence requirements…apply not only to a lawyer’s legal skills, but also generally to ‘those matters reasonably necessary for the representation..’ Therefore, as a prerequisite to making a determination regarding the reasonableness of online file security precautions, the lawyer must have, or consult someone with, competence in the field of online computer security.”[17] In other words, in order to show that you’re exercising reasonable care, you need to understand the systems or associate yourself with someone who has that understanding.

And there’s something more— here we see a further expansion of the affirmative duty. Not only must we take reasonable precautions to protect confidentiality and security of client information, but, the committee acknowledged that as technology changes, certain protective

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[17] State Bar of Arizona, Opinion 09-04, 12/2009, at 1.

measures might become obsolete.[18] Thus, the Committee warned that "As technology advances occur, lawyers should periodically review security measures in place to ensure that they still reasonably protect the security and confidentiality of the clients' documents and information."[19] Thus, there is a continuing obligation to revisit the reasonability of the security that our vendors are utilizing. In other words, we can't take the "stick our heads in the sand approach".

A year later, the State of Alabama agreed and stated that,

> "Additionally, because technology is constantly evolving, the lawyer will have a continuing duty to stay abreast of appropriate security safeguards that should be employed by the lawyer and the third-party provider. If there is a breach of confidentiality, the focus of any inquiry will be whether the lawyer acted reasonably in selecting the method of storage and/or the third party provider."[20]

In the same year, the New York Bar Association elaborated on that idea. In Opinion 842 they evaluated whether a lawyer could use an online data storage system to store and back up client confidential information. Like the other states that opined on the topic, they answered in the affirmative, subject to the same confidentiality concerns. They also confirmed the ongoing nature of the lawyer's duty if one were to make use of these systems. They stated:

> "10. Technology and the security of stored data are changing rapidly. Even after taking some or all of these steps (or similar steps), therefore, the lawyer should periodically reconfirm that the provider's security measures remain effective in light of advances in technology. If the lawyer learns information suggesting that the security measures used by the online data storage provider are insufficient to adequately protect the confidentiality of client information, or if the lawyer learns of any breach of confidentiality by the online storage provider, then the lawyer must investigate whether there has been any breach of his or her own clients' confidential information, notify any affected clients, and discontinue use of the service unless the lawyer receives assurances that any security issues have been sufficiently remediated. See Rule 1.4 (mandating

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[18] Arizona Opinion 09-04 at 2.

[19] Arizona Opinion 09-04 at 1-2.

[20] Alabama Ethics Opinion 2010-02 at 16

communication with clients); see also N.Y. State 820 (2008) (addressing Web-based email services)."[21]

In the following, far less earth-shattering paragraph, the New York authorities also noted the need for lawyers to stay abreast of the law regarding technology. "Not only technology itself but also the law relating to technology and the protection of confidential communications is changing rapidly. Lawyers using online storage systems (and electronic means of communication generally) should monitor these legal developments, especially regarding instances when using technology may waive an otherwise applicable privilege. *[citation omitted]*."[22]

Do I even need to make the connection to Chat GPT? When you use that system, you give them your client information. It's the functional equivalent of storing it with them. Thus, all of the ethical standards that govern cloud computing apply to Chat GPT as well. That's why I say that not much has changed. The same holds true for Rule 1.15…

ii. Our Fiduciary Duty Under 1.15

In North Carolina we see an opinion that reveals the second of the two major ethical concerns with using cloud-based systems/software. That's the need to protect our client's information with the care required of a fiduciary as set forth in Rule 1.15.

Most people hear the Rule number "1.15" and think about trust accounts. It's true that the rule is most often invoked in our discussion about our client's money, but the rule actually has broader implications. Rule 1.15 governs our responsibilities with our client's property and money is just one type of client property that we might hold. Another type of property is the client's file.

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[21] New York State Bar Association Opinion 842 (9/10.10) at 4.

[22] New York State Bar Association Opinion 842 (9/10.10) at 4.

The hard copy of your client's file is the client's property and we also know that Rule 1.15 mandates that we take steps to safeguard that property. When you think about it, however, the digital version of your client's file is also their property—you're simply holding it in computerized form. Any information about your client matter is part of their "file." Thus, if we release that to another individual (like a cloud storage vendor, or a generative AI program) we need to make sure that we're taking steps to safeguard that client property appropriately. That invokes Rule 1.15, which is why the North Carolina opinion states, "Rule 1.15 requires a lawyer to preserve client property, including information in a client's file such as client documents and lawyer work product, from risk of loss due to destruction, degradation, or loss. See also RPC 209 (noting the "general fiduciary duty to safeguard the property of a client")."[23]

In the end, the North Carolina authorities didn't provide any new ethical ideas, rather they simply confirmed that using SaaS (cloud computing), in particular, was not a violation. Specifically, they stated, "Lawyers can use SaaS, "provided steps are taken effectively to minimize the risk of inadvertent or unauthorized disclosure of confidential client information and to protect client property, including the information in a client's file, form risk of loss." But when you apply that to programs like Chat GPT you have a problem. When you give client information to those types of programs you have no way to "minimize the risk of inadvertent or unauthorized disclosure of confidential client information." Zero. There is no way to minimize the risk. In fact, you have to assume that the information will be spit out somewhere else at some time because the system told you that's a possibility.

Let's address something here — there are some systems that purport to give you an option to "opt out" of sharing your client data. Some systems might give us the option to simply "disallow" the collection and/or dissemination of that data. If lawyers actually did opt out, then

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[23] The North Carolina State Bar, 2011 Formal Ethics Opinion 6, Issued in January 27, 2012.

that might change the calculation. But there are two problems with that. (1) trusting the tech companies to honor that pledge and (2) forgetting to end the collection/dissemination altogether.

Regarding the first, you'll have to forgive me for not trusting big tech, but consider the following excerpt from the website The Verge in their article, "Amazon confirms it holds on to Alexa data even if you delete audio files being used' by Makena Kelly and Nick Statt:

> Amazon has admitted that it doesn't always delete the stored data that it obtains through voice interactions with the company's Alexa and Echo devices — even after a user chooses to wipe the audio files from their account. The revelations, outlined explicitly by Amazon in a letter to Sen. Chris Coons (D-DE), which was published today and dated June 28th, sheds even more light on the company's privacy practices with regard to its digital voice assistant.[24]

Regarding the second — forgetting to deny/end the collection and dissemination of that information — it's really just a question of lawyers not having that heightened sense of awareness I'm always talking about.

We are inundated with requests to share information. Every device/program we use asks us if we can share data and we simply click "yes" oftentimes without even thinking. The constant barrage of such requests is likely desensitizing us to the dangers of granting those request. At some point we're going to end up sharing data for a device or system that is going to provide out client data to someone who shouldn't be seeing it.

iii. The Extension of our Duty to Supervise.

The day-to-day realities of the practice reveal that lawyers are not the only individuals in the office about whom we must be concerned when we decide to use technology. The commentary to Rule 1.6 confirms that: "[16]…A lawyer must act competently to safeguard information relating to the representation of a client against inadvertent or unauthorized disclosure by the lawyer or other persons who are participating in the representation of the client

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[24] https://www.theverge.com/2019/7/3/20681423/amazon-alexa-echo-chris-coons-data-transcripts-recording-privacy, last checked 1/14/2022.

or who are subject to the lawyer's supervision." Various states have expanded upon that concept and discussed our larger responsibility to train our non-lawyer staff.

In an opinion we discussed earlier, the Maine Committee confirmed that the primary responsibility for confidentiality remains with the lawyer, but they also noted that the Maine rule "implies that lawyers have the responsibility to train, monitor, and discipline their non-lawyer staff in such a manner as to guard effectively against breaches of confidentiality. Failure to take steps to provide adequate training, to monitor performance, and to apply discipline for the purposes of enforcing adherence to ethical standards is grounds for concluding that the lawyer has violated [the rule]."[25]

Plus, our duties extend beyond keeping an eye on our in-house nonlawyer staff. The foundation for that was laid before the technology era when the Oregon State Bar addressed whether a lawyer could use a recycling service to dispose of client documents. The issue was whether doing so violated the rule on confidentiality because you would be exposing confidential client information to the recycling vendor. The opinion held that, "as long as Law Firm makes reasonable efforts to ensure that the recycling company's conduct is compatible with Law Firm's obligation to protect client information," using the service is permissible.[26] They further stated that "reasonable efforts include, at least, instructing the recycling company about Law Firms duties pursuant to Oregon RPC 1.6 and obtaining its agreement to treat all materials appropriately."[27] This is exactly the sentiment set forth by other bars regarding cloud computing vendors.

The Maine Committee noted that the technology vendor needs to be supervised as well. While the lawyer doesn't directly train or monitor the service provider employees, "the lawyer

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[25] Maine Board of Overseers of the Bar, Opinion #194, Issued June 30, 2008, at 1-2.

[26] Oregon State Bar, Formal Opinion No. 2005-141, August 2005, at 386

[27] Oregon Opinion 2005-141 at 386.

retains the obligation to ensure that appropriate standards concerning client confidentiality are maintained by the contractor."[28]

The Oregon and Maine opinions marked the beginning of a trend, about which all lawyers must be aware. Over the past several decades we've seen states expand upon the duty for lawyers to be responsible for non-lawyers who are working for the firm, but not necessarily inside the firm's office. This was further exhibited in North Carolina's Formal Ethics Opinion 6, in which they stated,

> "Although a lawyer may use nonlawyers outside of the firm to assist in rendering legal services to clients, Rule 5.3(a) requires the lawyer to make reasonable efforts to ensure that the services are provided in a manner that is compatible with the professional obligations of the lawyer. The extent of this obligation when using a SaaS vendor to store and manipulate confidential client information will depend upon the experience, stability, and reputation of the vendor. Given the rapidity with which computer technology changes, law firms are encouraged to consult periodically with professionals competent in the area of online security."[29]

New Hampshire went a little further and let us know that we can't pass the buck when it comes to the tech vendors. They made is clear that the duties of confidentiality and competence are ongoing and not delegable:[30]

> "When engaging a cloud computing provider or an intermediary who engages such a provider, the responsibility rests with the lawyer to ensure that the work is performed in a manner consistent with the lawyer's professional duties. Rule 5.3 (a). Additionally, under Rule 2.1, a lawyer must exercise independent professional judgment in representing a client and cannot hide behind a hired intermediary and ignore how client information is stored in or transmitted through the cloud.[31]

A short while ago, the ABA chimed in on the topic. In a batch of amendments, the ABA made a change to two letters in the title of Rule 5.3-- that's right, I said two letters in the *title* --

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[28] Maine Board of Overseers of the Bar, Opinion #194, Issued June 30, 2008, at 2.

[29] North Carolina's 2011 Formal Ethics Opinion 6

[30] New Hampshire Opinion 2012-13/4, at 4.

[31] New Hampshire Opinion 2012-13/4, at 3.

and that change has profound implications. Rule 5.3 used to be called, "Responsibilities Regarding Nonlawyer Assistants." However, how it's called, "Responsibilities Regarding Nonlawyer Assistance." Did you catch that? The last two letters of the final word-- "Assistants" is now "Assistance." This is a big deal because it reflects a growing trend in the world of ethics. Yes, we are responsible for supervising our own staff, but today that duty extends to other parties like those that we would have once called "independent contractors." Anyone that we use in assistance, like vendors, are parties that we now have a duty to supervise. We get further guidance in this regard from new Comments [3] and [4] in Rule 5.3.

What we notice from those comments is that this change was brought about mostly because (a) lawyers now outsource many of the tasks that used to be completed in house and (b) there is an increased reliance on cloud storage and other technology-related vendors. Thus, the comments tell us that we must supervise nonlawyers outside the firm that we use for investigations, document management, cloud storage, etc., and the Comment also provides factors that should be considered when determining the extent of our obligations in these circumstances.

The new technologies that are powered by AI are no different from a supervision standpoint. We simply can not delegate our ability to supervise those technologies simply because we have vendors who assist us in utilizing them. All of the opinions regarding the lawyer's duty of supervision apply to these new technologies as well.

iv. The Emerging Affirmative Duty to Understand, Anticipate, and Act

I've tried to take the information that's been provided by the various state opinions and distill it down to some workable direction to attorneys. Here's how it looks to me:

All of these opinions make clear is that we need to be competent and protect client confidentiality. In order to do that we need to understand the technological systems, understand the security precautions that the vendors use, supervise the vendors appropriately, ensure that

the terms of service are adequate, and remember that the review of all of the foregoing is a continuing duty (plus some other stuff, but those are the biggies).

What's clear is that the opinions have created a significant affirmative duty for lawyers who choose to use cloud systems. *We have an ongoing obligation to understand, anticipate, and act.* We must understand the technology, the security, and the law. We must be able to anticipate security issues, problems presented by our nonlawyer staff, confidentiality concerns, and everything else. And if the situation requires it, we must act. We may be forced to change vendors, for instance, if we think our client's information is vulnerable. We may need to demand that vendor change some protocol. It could be anything.

The point is that we can't sit idly by. Ignorance is not bliss, it's an ethical violation. If we are going to utilize these systems we need to continually stay up to date on all relevant variables. It's an active, ongoing process.

2. Chatbots: the legal marketing device that could get you in trouble

Chatbots are used in legal marketing to help lawyers find valuable clients. The technology is basically a computer program that is powered by artificial intelligence and it simulates conversation with people. Potential clients who visit a firm's site can type questions and comments into a chatbox and, when doing so, they think they are speaking with a real person (or at least it's supposed to seem that way). Meanwhile, the bot collects contact info as well as other information about the potential client's case, analyzes it, and gives that info to the lawyer. The chatbot companies say that their AI allows them to sift out the tire kickers, identify the valuable prospects, and improve conversion rates from visitors to actual clients.

The chatbots are provided by tech vendors. A lawyer contracts with a vendor that offers the chatbot software, the vendor provides a bit of code that is inserted into the lawyer's website, and the chatbot becomes a part of the lawyer's site. Someone coming to the website

wouldn't know that another vendor is operating it— it simply looks like a chat box that is part of the lawyer's website.

Using a chatbot isn't necessarily a problem. What you need to be concerned about is the nature of the exchange between the bot and the potential client. Of course, it's a problem if a chat bot engages in conversation with a potential client and dispenses legal advice. But that's not likely to happen because that's not what the bots do. They are just supposed to be weeding out the garbage contacts from the good prospects. But in order to do that, the chatbot needs to ask the prospect some questions, and evaluate the data. That is where the problem could arise…

There is a conversation that goes on between the bot and the prospect. During that conversation the prospect will be providing information about their case. What we need to worry about is the potential that people who visit the lawyer's site and engage in a conversation with the chatbot end up being considered "prospective clients" under Rule 1.18. If they do attain that status, the lawyer could have conflict problems. To see what I mean, first understand how the rule works.

a. <u>How Rule 1.18 Works</u>

Rule 1.18 says that if a person "consults with a lawyer about the possibility of forming a client-lawyer relationship" they could be a prospective client. All they need to do is *consult* about the *possibility* of forming the lawyer client relationship. But what does that mean? Why should a lawyer care if someone is technically considered a "prospective client?"

First, you can't tell anyone about the information that the prospective client gave you. Rule 1.18(b) explains that "Even when no client-lawyer relationship ensues, a lawyer who has learned information from a prospective client shall not use or reveal that information…" Second, you might be conflicted out of representing people in the future. Even if you don't take the prospective client and never work on their matter, subsection (c) says that if you received information from the prospective client that could be significantly harmful to that person, and some time in the future a person approaches you to represent that new person against the

prospective client in the same matter, you might not be permitted to so so. You would be conflicted out of the representation.

That could be devastating. Think about it— if you have a consultation with someone about a lucrative matter and you decide not to take their case…but later you are approached by someone who wants you to represent them in that very case you can't take that other client. You could be forced to forego a lot of money in fees.

b. <u>The problem with chatbots</u>

So back to the bots and Rule 1.18. What's important is the trigger for becoming a prospective client, and as you saw from the rule above, the trigger is a consultation. The key question, of course, is, when does something rise to the level of a *consultation?* The answer is that it depends on the circumstances. But, in my opinion, the key circumstances to focus on are (1) what your website says and (2) the level of detail in the chatbot's communications.

If your website just lists your contact information you're going to be okay. If you simply put your information out there and someone sends you information about a case, that's not going create a prospective client relationship. Comment [2] confirms that: "…a consultation does not occur if a person provides information to a lawyer in response to advertising that merely describes the lawyer's education, experience, areas of practice, and contact information, or provides legal information of general interest." Basically, that comment is saying that if you simply tell someone that you exist and that you are qualified, it's not a "consultation." If someone replies in that situation, the person "communicates information unilaterally to a lawyer, without any reasonable expectation that the lawyer is willing to discuss the possibility of forming a client-lawyer relationship." That person, therefore, is not a prospective client.

However, you're going to have a problem if your website encourages people to offer information and your chatbot follows up by asking for information. The comment explains that "…a consultation is likely to have occurred if a lawyer…through the lawyer's advertising in any medium, specifically requests or invites the submission of information about a potential

representation without clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations, and a person provides information in response."

If your site specifically requests or invites a person to submit information about a potential representation, and your chat bot provides information in response, then you are risking the creation of a prospective client relationship. Obviously, the ethical danger is dependent upon the responsiveness of the chatbot because the rule says that you have to "provide information in response." Well, the more lengthy, intense, and detailed the chatbot's responses, the more likely there will be a problem.

Oh, and don't get hung up on the fact that your chatbot is not a "person" under the rules. Personally, if the bot provides information I think a tribunal will see the software as an extension of the lawyer. Plus, if the AI software is doing its job correctly, the potential client should believe that they are actually communicating with a real person. For those reasons, I wouldn't be surprised if a tribunal concluded that the AI in the chatbot is the functional equivalent of a "person" for the purposes of the rule.

Of course, there is a huge get-out-of-trouble card. All you have to do is include the disclaimers set forth in the rule. If your site has "clear and reasonably understandable warnings and cautionary statements that limit the lawyer's obligations" as stated in Comment [2], you're probably ok. This, however, is a situation where you can win the ethical battle, but lose the overall war. What I mean by that is…what if this issue isn't raised in an ethics grievance? What if it is, instead, raised in a disqualification motion?

c. <u>Win the ethical battle, but lost the disqualification war</u>

Let's say you're in a medium sized firm that handles a variety of different types of matters. Your firm represents Business X and you've been their counsel on various issues for years. Your firm has a website that utilizes a chatbot to evaluate the strength of clients. You have language on the website that properly disclaims Rule 1.18. Someone visits your site and explains that they have a workplace discrimination claim. They provide details of the case to the chatbot. The bot inquiries further and the prospect provides more information, in fact, the

client wants to make sure that the lawyer with whom they are chatting has a complete understanding of the case (maybe they don't know it isn't a computer) so they provide a lot of details.

The chatbot sends the info to the attorney at the firm responsible for reviewing the contacts made by the chatbot and that lawyer thinks that the prospect has a great case. After reviewing the information, the attorney contacts the prospect and learns that the adverse party is Business X. However, the lawyer figures that the firm will probably be representing Business X in that matter because the firm does all of their work. As a result the firm doesn't take the potential client.

The prospect finds another lawyer, and they file suit against Business X. As the lawyer anticipated, the firm is representing Business X. The prospect's lawyer files a motion to disqualify you as counsel and you oppose it. You claim that there is no violation of the rule— the prospect never became a "prospective client" under Rule 1.18 because you had the proper disclaimer. And you're probably right. But there is a good chance that a judge will disqualify you anyway.

Remember, the judge isn't deciding discipline — the judge is deciding whether you should be disqualified. They don't necessarily care about the technicalities of the rules, they care about two things — the two things that are at the core of *every* conflict— loyalty and confidential information.

The critical question that the judge will ask was, *during the interaction the firm had with the prospect, did you learn confidential information from the other party?* And when the judge realizes that your chatbot gathered information that would ordinarily be considered confidential information and it was passed on to the lawyer in your firm for review, they're going to say you have a conflict and kick you out of the case. You're not going to be saved by the disclaimers because those disclaimers only helped you avoid discipline under Rule 1.18. In the disqualification context the court cares about loyalty and confidential information. And when it

finds out that you were privy to a slew of details from the potential client's case, they will disqualify you.

d. How to make chatbots safer

All of this doesn't mean that chatbots can't be used, they just need to be used carefully. What can you do to make the chatbot safer? Here are 5 ideas:

(1) Use disclaimers
(2) Make sure the bot is just gathering information and not giving any information. And if it does give information, make sure it's super limited. Keep Comment [4] to Rule 1.18 in mind which states, "In order to avoid acquiring disqualifying information from a prospective client, a lawyer considering whether or not to undertake a new matter should limit the initial consultation to only such information as reasonably appears necessary for that purpose."
(3) Go over Rule 1.18 with the vendor supplying your chatbot. Make sure they understand it. also explain the disqualification issue. Remember, most tech vendors have no idea about the details rules like 1.18.
(4) Train the staff/lawyers in your office who are responsible for following up on the leads developed by the bot. Let them know about Rule 1.18 and the issue of disqualification.
(5) Create a process that limits the exposure the lawyers who review the information provided by the chatbots. It is possible to screen those attorneys per 1.18(d)(2). Here's what that section states, in part:

> (d) When the lawyer has received disqualifying information… representation is permissible if…(2) the lawyer who received the information took reasonable measures to avoid exposure to more disqualifying information than was reasonably necessary to determine whether to represent the prospective client; and (i) the disqualified lawyer is timely screened from any participation in the matter and is apportioned no part of the fee therefrom; and (ii) written notice is promptly given to the prospective client.

3. Attorney ethics in the meta verse.

The future is the metaverse. At least, that's what Facebook thinks. I mean, they changed their name to Meta in anticipation of the growth of that part of the internet. Since it appears to be a large part of life in the not-to-distant future, Rule 1.1 (Competence) demands that we understand what it is and the ethical implications that are posed to lawyers.

What is the metaverse? It's basically an alternate reality that exists on line. I gathered a few excerpts from some reputable online sources to explain the metaverse:

> *According to a Fast Company article, Dan Eckert, managing director, AI and emerging technology, PwC explained:*
>
> > An extended reality metaverse is still 3-5 years out: The metaverse—or should we say metaverses—has been around since the time of multiplayer computer games and even Second Life/AOL/Compuserve.
> > Yes, plural–there will not be just one–there will be many, each designed for focused communities, capabilities, and experiences. The Metaverse, as being shouted by everyone, is not shipping (yet), but we are starting to see the building blocks released every day.[32]
>
> *Bernard Marr explained in Forbes:*
>
> > Digitization, datafication and virtualization
> >
> > During 2020 and 2021, many of us experienced the virtualization of our offices and workplaces, as remote working arrangements were swiftly put in place. This was just a crisis-driven surge of a much longer-term trend. In 2022, we will become increasingly familiar with the concept of a "metaverse" – persistent digital worlds that exist in parallel with the physical world we live in. Inside these metaverses – such as the one proposed recently by Facebook founder Mark Zuckerberg – we will carry out many of the functions we're used to doing in the real world, including working, playing, and socializing. As the rate of digitization increases, these metaverses will model and simulate the real world with growing accuracy, allowing us to have more immersive, convincing, and ultimately valuable experiences within the digital realm. While many of us have experienced somewhat immersive virtual realities through headsets, a range of new devices coming to the market will soon greatly improve the experience offering tactile feedback and even smells. Ericsson, which provided VR headsets to employees working from home during the pandemic, and is developing what it calls an "internet of senses," has predicted that by 2030 virtual experiences will be available that will be indistinguishable from reality. That might be looking a little

[32] https://www.fastcompany.com/90704618/the-biggest-tech-trends-of-2022, last checked 1/12/2022.

> further ahead than we are interested in for this article. But, along with a new Matrix movie, 2022 will undoubtedly take us a step closer to entering the matrix for ourselves.[33]

Finally, from a CNBC article - "Investors are paying millions for virtual land in the metaverse" by Chris DiLella and Andrea Day:

> It's no secret the real estate market is skyrocketing, but the Covid pandemic is creating another little-known land rush. Indeed, some investors are paying millions for plots of land — not in New York or Beverly Hills. In fact, the plots do not physically exist here on Earth.
>
> Rather, the land is located online, in a set of virtual worlds that tech insiders have dubbed the metaverse. Prices for plots have soared as much as 500% in the last few months ever since Facebook announced it was going all-in on virtual reality, even changing its corporate name to Meta Platforms.
>
> "The metaverse is the next iteration of social media," said Andrew Kiguel, CEO of Toronto-based Tokens.com, which invests in metaverse real estate and non fungible token-related digital assets.[34]

The connection to attorney ethics goes beyond merely the need to be competent and understand the concept. It can also apply to our actions when we use the meta verse ourselves. Lawyers will surely participate, in a professional and personal capacity. I could envision lawyers having a virtual presence of some sort in the metaverse, I must admit that I don't know how that would look, but I'm sure it's going to happen. In addition, lawyers will participate in the metaverse in ways that were unrelated to the practice of law. The thing to remember is that no matter what type of presence we have in the metaverse, the ethics rules will still apply to your behavior.

Your behavior in the metaverse is going to be regulated by the disciplinary system in the real world. Any action you take as a practicing lawyer that occurs in the metaverse will be governed by the rules of attorney ethics. And it doesn't stop there. Even actions that are not related to the practice could be covered by the rules. If you steal something in the metaverse,

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[33] https://www.forbes.com/sites/bernardmarr/2021/09/27/the-5-biggest-technology-trends-in-2022/?sh=4bafc07c2414, last checked 1/12/2022.

[34] https://www.cnbc.com/2022/01/12/investors-are-paying-millions-for-virtual-land-in-the-metaverse.html, last checked 1/17/2022.

you'll need to answer to Rule 8.4(b): "It is professional misconduct for a lawyer to (b) commit a criminal act that reflects adversely on the lawyers honesty, trustworthiness, or fitness as a lawyer in other respects." This isn't an alien concept- we all know that our personal behavior is within the purview of the ethics authorities. This is simply another part of our personal life, and we need to be aware that the long arm of the disciplinary system reaches into alternate universes as well as the real world.

Here's an interesting quirk that might arise in the metaverse. What if you assume an alternate personality. I'm going to guess that a lot of people who participate in the metaverse will become a character that's different from their true persona. It's just speculation on my part, but I have to believe that there are a lot of people who are looking forward to the metaverse as a way to escape from the life that they currently lead. But lawyers need to beware. Taking on an alternate identity could end up somehow violating Rule 8.4(c) — "It is professional misconduct for a lawyer to: (c) engage in conduct involving dishonesty, fraud, deceit or misrepresentation…"

4. More controversial uses of AI technology and the role lawyers should (?) play.

Let's consider some of the more controversial uses of the technology: predictive policing,[35], biases in algorithms[36] and surveillance uses like facial recognition[37].

a. Predictive Policing

One hot use for AI technology is called, "predictive policing" Nature.com explained,

> …police agencies hope to 'do more with less' by outsourcing their evaluations of crime data to analytics and technology companies that produce 'predictive policing' systems. These use algorithms to forecast where crimes are likely to occur and who might commit them, and to make recommendations for allocating police resources. Despite wide adoption, predictive policing is still in its infancy, open to bias and hard to evaluate.
>
> Predictive models tie crimes to people or places. Offender-based modelling creates risk profiles for individuals in the criminal justice system on the basis of age, criminal record, employment history and social affiliations. Police departments, judges or parole boards use these profiles — such as estimates of how likely a person is to be involved in a shooting — to decide whether the individual should be incarcerated, referred to social services or put under surveillance. Geospatial modelling generates risk profiles for locations. Jurisdictions are divided into grid cells (each typically around 50 square metres), and algorithms that have been trained using crime and environmental data predict where and when officers should patrol to detect or deter crime.[38]

It doesn't take much to understand how this sort of programming could end up yielding discriminatory results. The very word "predictive" in the name of the technology gives an indication of the problem.

b. Biases in Algorithms

The final article from Nature.com that I'm going to quote today addresses the ethics issue with biases in algorithms. In an article entitled, "Bias detectives: the researchers striving to make algorithms fair", the website explained the concern that arises when AI algorithms are used to help…and how that could go awry.

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[35] https://www.nature.com/articles/541458a, last checked 6/19/2021.

[36] https://www.nature.com/articles/d41586-018-05469-3, last checked 6/19/2021.

[37] https://www.nature.com/articles/d41586-019-03775-y, last checked 6/19/2021.

[38] https://www.nature.com/articles/541458a, last checked 6/20/2021.

> In 2015, a worried father asked Rhema Vaithianathan a question that still weighs on her mind. A small crowd had gathered in a basement room in Pittsburgh, Pennsylvania, to hear her explain how software might tackle child abuse. Each day, the area's hotline receives dozens of calls from people who suspect that a child is in danger; some of these are then flagged by call-centre staff for investigation. But the system does not catch all cases of abuse. Vaithianathan and her colleagues had just won a half-million-dollar contract to build an algorithm to help.
>
> Vaithianathan, a health economist who co-directs the Centre for Social Data Analytics at the Auckland University of Technology in New Zealand, told the crowd how the algorithm might work. For example, a tool trained on reams of data — including family backgrounds and criminal records — could generate risk scores when calls come in. That could help call screeners to flag which families to investigate.
>
> After Vaithianathan invited questions from her audience, the father stood up to speak. He had struggled with drug addiction, he said, and social workers had removed a child from his home in the past. But he had been clean for some time. With a computer assessing his records, would the effort he'd made to turn his life around count for nothing? In other words: would algorithms judge him unfairly?

c. The dangerous rise of the surveillance state

If you're not aware of the ever-growing encroachment of the surveillance state, then you must live under a rock. But don't worry…no matter how well you're hidden under that boulder, they know where you are. Who are "they?"

QIUET — WE ASK THE QUESTIONS!!

All kidding aside, the concern about the surveillance state is no longer the thing of conspiracy theories. I'm not some aluminum-foil-hat-wearing eccentric. Rather, I'm a teacher who likes to watch how paradigms shift. And any review of credible news resources today reveals that we are in the midst of an important paradigm shift. The use of artificially intelligent surveillance technologies has expanded significantly, and those resources are becoming a primary part of the governmental toolkit across the globe. It's time for lawyers to start to consider all of this, and to think about what, if any, obligation we have as a practice.

A quick Google search reveals the extent to which people are being watched by the government these days. We saw surveillance technology employed during the COVID lockdowns. The Wall Street Journal reported about the experience of a man in Beijing: "Late one

night recently, he received an automated phone call from Beijing authorities saying he had been in proximity to someone with a confirmed Covid infection, which means he can't go to public places until the health code on his phone turns green. That could involve two PCR tests and several days' wait."[39]

The use of technology to monitor people is certainly not limited to our devices. In an article entitled, "Chinese 'gait recognition' tech IDs people by how they walk " Dake Kang of the Associated Press reported:

> Chinese authorities have begun deploying a new surveillance tool: "gait recognition" software that uses people's body shapes and how they walk to identify them, even when their faces are hidden from cameras.
>
> Already used by police on the streets of Beijing and Shanghai, "gait recognition" is part of a push across China to develop artificial-intelligence and data-driven surveillance that is raising concern about how far the technology will go.[40]

Facial recognition technology is apparently being used in relatively nefarious ways in society today. In Nature.com authors Richard Van Noorden & Davide Castelvecchi wrote an article in 2019 entitled. "Science publishers review ethics of research on Chinese minority groups":

> Two science publishers are reviewing the ethics of research papers in which scientists backed by China's government used DNA or facial-recognition technology to study minority groups in the country, such as the predominantly Muslim Uyghur population.
>
> Springer Nature (which publishes Nature) and Wiley want to check that the study participants gave informed consent, after researchers and journalists raised concerns that the papers were connected to China's heavy surveillance operations in the northwestern province of Xinjiang. China has attracted widespread international condemnation — and US sanctions — for mass detentions and other human-rights violations in the province. The Chinese government says that it is conducting a re-education campaign in the region to quell what it calls a terrorist movement.

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[39] China's Lockdowns Prompt a Rethinking of Life Plans Among the Young by Liyan Qi and Shen Lu, May 29, 2022, https://www.wsj.com/articles/chinas-lockdowns-prompt-a-rethinking-of-life-plans-among-the-young-11653822000 last checked 7/8/2022.

[40] https://apnews.com/article/china-technology-beijing-business-international-news-bf75dd1c26c947b7826d270a16e2658a last checked 7/7/2022.

> ‘We are very concerned about research which involves consent from vulnerable populations…’[41]

The use of this technology is by no means restricted to China. Quite the contrary, it’s already being put into use across the globe. The MIT Technology Review explained how France is making great efforts to disseminate monitoring technology:

> Since 2015, the year of the Bataclan terrorist attacks, the number of cameras in Paris has increased fourfold. The police have used such cameras to enforce pandemic lockdown measures and monitor protests like those of the Gilets Jaunes. And a new nationwide security law, adopted last year, allows for video surveillance by police drones during events like protests and marches.[42]

The technology has even expanded to the evaluation of DNA. NPR interviewed Yves Moreau, an engineer and professor at the Catholic University in Leuven, Belgium, and they discussed the use of DNA data in surveillance. They acknowledged that “DNA data has been used to track and identify alleged criminals for decades,”[43] But the concern is:

> [The technology] has been rolled out on a very large scale. And what we have seen is that this technology is being rolled out in particular in the west of China. And in 2016, 2017, blood samples from essentially the entire population, people 12 to 65 in Xinjiang, was collected and potentially put in that database. And it can be part of a broader system of what we call total surveillance.[44]

The use of technology in this way made the professor concerned about its relationship to historical acts of genocide:

> I’m extremely concerned about this because in history, actually, if you look back in the first half of the 20th century, German and then Belgian colonists in Rwanda and Burundi actually went there, and they were using pseudoscientific ideas about race and assigned

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[41] https://www.nature.com/articles/d41586-019-03775-y, last checked 1/17/2022.

[42] MIT Technology Review, “Marseille’s battle against the surveillance state” by Fleur Macdonald, June 13, 2022, https://www.technologyreview.com/2022/06/13/1053650/marseille-fight-surveillance-state/ last checked 7/8/2022.

[43] https://www.npr.org/2019/12/07/785804791/uighurs-and-genetic-surveillance-in-china last checked 7/8/2022.

[44] https://www.npr.org/2019/12/07/785804791/uighurs-and-genetic-surveillance-in-china last checked 7/8/2022.

people to a particular ethnicity. That actually was a significant factor in genocides. And the risk for this in the midterm is actually really worrying.[45]

The paradox is that there are good uses for the technology.

In Fortune magazine, author Jeremy Kahn evaluated whether Artificial Intelligence could be used to prevent future mass shootings. While the author was skeptical it could work, he could not rule the possible benefits of using AI in this context. He explained that one option is to "use computer vision algorithms to try to detect people attempting to carry weapons on to school grounds. There are already a number of A.I. software and CCTV camera vendors that claim to offer 'gun detection' algorithms."[46] Another possible use of AI technology is "to create "smart guns" that are fitted with cameras and A.I. software. Such a system could be set to detect whether the person being aimed at is a child and prevent the gun from being fired."[47] He also noted that "it is possible that this kind of A.I. could help flag troubled individuals who are at risk of committing violence."[48]

In the article, Mr Kahn acknowledges that there are serious questions about the practical effectiveness of these systems. But that's not really relevant for our discussion in this program. My purpose for bringing these ideas up is not to debate the efficacy of these systems, rather, it's to point out that the existence of AI motoring capabilities is not a problem, per se. There are certainly a huge number of potential societal benefits of the technology.

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[45] https://www.npr.org/2019/12/07/785804791/uighurs-and-genetic-surveillance-in-china last checked 7/8/2022.

[46] "After Uvalde: Could A.I. prevent another school shooting?" By Jeremy Kahn, May 31, 2022, https://fortune.com/2022/05/31/ai-prevent-uvalde-mass-school-shooting/ last checked 7/8/2022.

[47] "After Uvalde: Could A.I. prevent another school shooting?" By Jeremy Kahn, May 31, 2022, https://fortune.com/2022/05/31/ai-prevent-uvalde-mass-school-shooting/ last checked 7/8/2022.

[48] "After Uvalde: Could A.I. prevent another school shooting?" By Jeremy Kahn, May 31, 2022, https://fortune.com/2022/05/31/ai-prevent-uvalde-mass-school-shooting/ last checked 7/8/2022.

Using the AI powered technology for beneficial purposes — like tracking domestic terrorists, for example — is something few people would probably oppose. The problem is that once you give the government the authority to use the technology in tracking bad guys, you let them employ that technology whenever they thing they're going after bad guys. And they get to determine who the "bad guys" are. Wired magazine reported on research by the Surveillance Technology Oversight Project ("STOP"). Their conclusion: "A surveillance state built to track certain types of behavior can easily, and inevitably, be adapted to other ends."[49]

The potential for misuse of this technology is enormous. It's not just the generic, philosophical concern about the intrusion on civil liberties. The concern is that it will be used for improper political purposes: to stifle dissent, monitor people with views that question the current authorities, etc. And the concern isn't really about any particular side of the political spectrum. It's about whomever might be in power. You know the old adage — power corrupts, absolute power corrupts absolutely. Unfortunately, both sides of the political aisle have that potential.

d. Some people are taking action

1. Private Groups

Now you can see what makes this issue so difficult. If put in the right hands, this technology could help society. But if it's abused, it could be quite harmful. For that reason I'd never argue that the use of this technology should be eliminated, but that it should be monitored and controlled. And there are plenty of groups trying to address the situation. Take, for instance,

> Nano, a 39-year-old developer, wants to make residents of Marseille more aware that they are being watched. She is part of a group called Technopolice that has been organizing efforts to map the rise of video surveillance. With some 1,600 cameras in the city, there is plenty to find. Mixed in among them, Nano says, are 50 smart cameras

[49] "The Surveillance State Is Primed for Criminalized Abortion," by Lily May Newman, May, 2022. https://www.wired.com/story/surveillance-police-roe-v-wade-abortion/ last checked 7/8/2022.

> designed to detect and flag up suspicious behavior, though she is unsure where they are or how they are being used.[50]

2. Governments

It's become clear that there needs to be some larger restriction on this type of AI.

Bernard Marr explained in Forbes:

> Governments, too, clearly understand that there is a need for a regulatory framework, as evidenced by the existence of the EU's proposed Artificial Intelligence Act. The proposed act prohibits authorities from using AI to create social scoring systems, as well as from using facial recognition tools in public places.[51]

Various researchers have been raising their voices about the concerns with the technologies and it appears that, "governments are trying to make software more accountable."[52]

> Last December, the New York City Council passed a bill to set up a task force that will recommend how to publicly share information about algorithms and investigate them for bias. This year, France's president, Emmanuel Macron, has said that the country will make all algorithms used by its government open. And in guidance issued this month, the UK government called for those working with data in the public sector to be transparent and accountable. Europe's General Data Protection Regulation (GDPR), which came into force at the end of May, is also expected to promote algorithmic accountability.[53]

3. The Tech World

For their part, the AI world seems to be catching on. A recent article explained that, "Ethicists have long debated the impacts of AI and sought ways to use the technology for good, such as in health care. But researchers are now realizing that they need to embed ethics into the formulation of their research and understand the potential harms of algorithmic injustice…"[54]

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[50] MIT Technology Review, "Marseille's battle against the surveillance state" by Fleur Macdonald, June 13, 2022, https://www.technologyreview.com/2022/06/13/1053650/marseille-fight-surveillance-state/ last checked 7/8/2022.

[51] https://www.forbes.com/sites/bernardmarr/2021/09/27/the-5-biggest-technology-trends-in-2022/?sh=4bafc07c2414, last checked 1/12/2022.

[52] https://www.nature.com/articles/d41586-018-05469-3, last checked 6/20/2021.

[53] https://www.nature.com/articles/d41586-018-05469-3, last checked 6/20/2021.

[54] https://www.nature.com/articles/d41586-020-00160-y, last checked 6/19/2021.

4. Lawyers?

I believe there is a role for lawyers in this fight as well. And I think the ethics rules demand that we fill it.

i. Lawyers have always had a responsibility to larger societal issues. Consider Pro Bono Work.

The lawyer's duty to help the poor has been long established. Actually, it's not just the "poor" because the category also includes the "disadvantaged" and the "underserved." What the issue is really about is helping people obtain access to justice. The category thus includes those people who have a barrier to access to justice and usually that barrier is a financial one. This obligation has been accepted in the practice for some time now.

We see a reference to this duty as far back as 1965 in the now outdated disciplinary rules, the Model Code of Professional Responsibility (that *Code* was eventually scrapped in its entirety and our existing disciplinary rules are based on the Model *Rules* of Professional Responsibility which were promulgated by the ABA in 1983). The Code stated, "As a society increases in size, sophistication and technology, the body of laws which is required to control that society also increases in size, scope and complexity. With this growth, the law directly affects more and more facets of individual behavior, creating an expanding need for legal services on the part of the individual members of the society."[55] In other words, as society advances, the obstacles to access to justice increase. That only enhances the need for lawyers to help the disadvantaged. Over the years, scholars have expanded upon that idea.

Professor Deborah L. Rhode (now of Stanford Law School) set forth a variety of justifications for the pro bono duty in an article she wrote back in 1999 in the Fordham Law Review. She explained that, "Lawyers have a monopoly on legal services, thus creating the

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[55] See the Model Code footnote to EC 2-25, citing Comment, Providing Legal Services for the Middle Class in Civil Matters: The Problem, the Duty and a Solution, 26 U. PITT. L REV. 811, 811-12 (1965).

duty to help provide them for the poor."[56] Additionally, lawyers are a key guardian of justice and for that reason we have the obligation to provide legal services for those who can't afford them. Professor Rhode pointed to a more practical justification as well: "the benefit that such work confers upon the lawyers themselves," which includes the, "intrinsic satisfactions that accompany public service."[57] She continued, "The primary rationale for pro bono contributions rests on two premises: first, that access to legal services is a fundamental need, and second, that lawyers have some responsibility to help make those services available. The first claim is widely acknowledged."[58] Proof that it continues to be is widely acknowledged comes from the State of New York where recently Chief Judge Jonathan Lippman of the New York Court of Appeals acknowledged that "lawyers have a professional responsibility to promote greater access to justice."[59] He explained that, "as far back as judges and lawyers have existed, the pursuit of equal justice for all, rich and poor alike, has been the hallmark of our profession." And the responsibility doesn't stop with practicing attorneys. He continued, "each attorney has an obligation to foster the values of justice, equality, and the rule of law, and it is imperative that law students gain a recognition of this obligation as part of their legal training." [60]

The idea that lawyers should "give back" to society isn't so controversial. In fact, my gut tells me that the majority of people in the practice would agree with the need for lawyers to help

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[56] Deborah L. Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 Fordham L. Rev. 2415 (1999) at 2419.

[57] Deborah L. Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 Fordham L. Rev. 2415 (1999) at 2420.

[58] Deborah L. Rhode, Cultures of Commitment: Pro Bono for Lawyers and Law Students, 67 Fordham L. Rev. 2415 (1999) at 2418.

[59] http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf, last checked by the author on 12/27/2014.

[60] http://www.nycourts.gov/attorneys/probono/FAQsBarAdmission.pdf, last checked by the author on 12/27/2014.

the disadvantaged community. In theory, it seems to simply be an extension of our otherwise accepted societal wide notion of helping the needy.

ii. The Preamble as justification for lawyers taking action

Lawyers have a large role in society. We don't just owe a duty to our clients, rather the codes of professionalism in every state acknowledge that we also owe a duty to our communities and even society as a whole. That's why we champion things like Access to Justice, Diversity and Inclusion, and other similarly important ideals. It's because we know that our special role allows us to have an oversized impact in realizing those concepts. Plus, the privilege that we have to practice law demands that we take responsibility for making such important paradigms become a reality. I believe that the same obligation exists with AI powered facial recognition technology.

The ethics rules reflect the requirement for lawyers to pursue these larger goals. For instance, in the Preamble to the Rules, we find the following section:

> Preamble [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.

What does it mean to have a "special responsibility?" The very nature of the word "special" means that it's something out of the ordinary. When read in connection with the rest of the section, I believe that the special responsibility includes ensuring that the "quality of justice" is in step with societal advancements.

For instance, there was a time when our practice was made up of almost all white men. But as society advanced, we grew to appreciate the importance of diversity. In fact, the practice eventually made diversity a goal and today we have a significant emphasis on that — including, in some states, MCLE that's geared toward elimination of bias. That requirement is an example of how we took our "special responsibility for the quality of justice," made changes in the

practice and brought about a desired change. Today we have an opportunity to do that again, in an even bigger way. And example of the latest evolution in thinking is the idea of "access to justice."

As I mentioned earlier, the idea of ensuring that more people have access to justice is not a new concept. What is new, however, is the emphasis. It's only been the past several years that you've heard people talking about this concept in a more vocal manner. In fact, we see a reference in the rules:

> Preamble [6] …A lawyer should be mindful of deficiencies in the administration of justice and of the fact that the poor, and sometimes persons who are not poor, cannot afford adequate legal assistance. Therefore, all lawyers should devote professional time and resources and use civic influence to ensure equal access to our system of justice for all those who because of economic or social barriers cannot afford or secure adequate legal counsel. A lawyer should aid the legal profession in pursuing these objectives and should help the bar regulate itself in the public interest.

If lawyers actually pursue the mandate of the rules— if we devote time and resources to ensure equal access to our justice system for all, then we could make wide reaching societal change. That change affects people beyond the practice because it's a society-wide effort. By reducing these obstacles to justice, lawyers have a real chance to save the world.

It makes me wonder — should lawyers be talking a larger role in monitoring artificial intelligence throughout society? I mean, beyond considering the disciplinary implications. I'm talking about a larger role throughout society. It seems that our ethics rules mandate that we take a larger role. Look at the Preamble again, except now consider the issue of AI:

> [1] A lawyer, as a member of the legal profession, is a representative of clients, an officer of the legal system and a public citizen having special responsibility for the quality of justice.
>
> [5] A lawyer's conduct should conform to the requirements of the law, both in professional service to clients and in the lawyer's business and personal affairs. A lawyer should use the law's procedures only for legitimate purposes and not to harass or intimidate others. A lawyer should demonstrate respect for the legal system and for those who serve it, including judges, other lawyers and public officials. While it is a lawyer's duty, when necessary, to challenge the rectitude of official action, it is also a lawyer's duty to uphold legal process.

> [6] As a public citizen, a lawyer should seek improvement of the law, access to the legal system, the administration of justice and the quality of service rendered by the legal profession. As a member of a learned profession, a lawyer should cultivate knowledge of the law beyond its use for clients, employ that knowledge in reform of the law and work to strengthen legal education.

It appears that AI powered surveillance like facial recognition technology is being used to take advantage of vulnerable people. When one combines the other dangerous uses of artificial intelligence, then very serious concern for society as a whole. Maybe it's time for lawyers to add this issue to the roster of societal issues that we, as a profession confront. The need to do so seems to stem quite clearly from the obligations set forth above from the Preamble.

South Carolina Bar

Continuing Legal Education Division

Fluff is for Pillows, Not Legal Writing

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Fluff is for Pillows, Not Legal Writing

Written Materials

Part 1 — The Anatomy of a Persuasive Writing

As lawyers, we think and we communicate. It's all we do. We don't sell bonds, we don't build houses. We write, we speak and we think—that's our output. Take a look at all the roles we have, none of them say that we have to throw a football or paint a house. We're an advisor, a mediator, and an advocate and those roles are all about writing, speaking and thinking.

When we write, we are expected to be captivating and persuasive. We must draw our audience in—we must get, and keep their attention. The key element for legal writing, however, is that we must persuade them to believe in our position, whether it's because we want them to rule in our client's favor or otherwise. It's a principle that applies to writing in all areas of the practice, whether it's in a trial brief or in correspondence. Our need to captivate and persuade is a constant. I call it being *Captisuading*.

Understanding the Obstacles

To truly grow, it's necessary to understand the obstacles to being a captivating and persuasive lawyer. It's a set of concerns that are applicable to all forms of legal communication in one way or another — fear and distraction. The world of legal writing provides unique fears and distractions that are particularly intimidating. For example, missing a critical factual element

in a pleading could be disastrous, as could omitting a crucial argument in a brief. Failing to preserve an issue for appeal could mean a malpractice suit and maybe even disciplinary actions. These are real consequences that arise in the legal writing context and some of them can't be fixed after-the-fact.

Develop a Strong Process

One way to eliminate the fears that are inherent to legal writing is to employ a good writing process. Here's the process that I think works best. Before you read this- remember something. Legal writing is like disco dancing (the 70s were awesome). Yes, there are accepted steps, but once you learn them, you make the dance your own. A little improvisation, a little tweaking of the steps….that sort of thing. Toward that end, don't think that the following process has been etched into any tablet. Learn it, understand the critical steps, then make it your own.

Writing Process & Outlining
WRITING IS ABOUT: THINKING, ORGANIZING, EXECUTING
MAKE THESE STEPS YOUR OWN

THINKING:

Do a "ROMA" Analysis. Identify your:

- Role
- Objectives
- Medium
- Audience

These are important foundational elements to consider at the outset of your writing—Understand your role. Are you an advocate for a client, an analyzer for a judge, an evaluator for a superior?

What's your objective? What are you trying to achieve in this writing.

Determine the type of writing you're engaging in. An appellate brief is different from a trial memo. Correspondence is not the same as an opinion.

Identify your audience so that the content can speak to them in particular. Is it a third-party decision maker like an arbitrator or a judge, a partner or colleague, a client? Your content will need to be tailored to each differently so you can connect with each. They all have different motivations and your content needs to speak to those individuals motivations. Define your objective—what do you want to receive or convey? Are you seeking victory in a motion or a settlement perhaps?

Idea Statement and Brain Dump

"OWN" the Matter. Become familiar with the file by communicating the details to your client:

- Organize the facts and outline the case briefly
- Write out a short summary: What you know and intend to do.
- Notify the client

Mind Map

Research

ORGANIZING

Here's a helpful tip to keep in mind throughout: Make it Manageable. The mass of facts and issues that are thrown at a lawyer can be overwhelming. One way to make it all easier to digest, and ultimately easier to communicate in writing, is to break it all down into manageable points, then string them together with transitions. That's how we structure the client's message effectively.

Write your initial thesis (You'll us this in the CONCLUSION section below)

Remember that this is an advocacy document. You are convincing the judge to adopt your position. Which means….you need to make your position clear.

Develop an Annotated Source List- Your notes and annotations. Not a case brief- a statement of how it fits into your argument (this is for the RULE section of CREAC)

Determine the key facts of this case. Also determine the rule that each case establishes. Write it out.

If there are several cases that work together, then synthesize the rule that the cases present. These are important because the will form the basis for the "Rule" section in the CREAC section below.

Determine your "Critical Client Points"- gather your critical facts (these next few points are for the ANALYZE/APPLY Section of CREAC)

Then, separately, group your critical facts with the law/source they relate to. You need to do this separately, because you will have a statement of facts that will have all of the facts together. But then, you will address some of those facts at different times in the body of your legal analysis. You will use this information in the "Analysis and Application" section of CREAC below.

Put each source and the critical facts on its own page. I call each page is a "source grouping"

Re-read your thesis and determine the issues you'll address in your ANALYSIS.

List those issues

Make sure each issue relates back to your thesis. If it doesn't, you need to tweak something. It could be the issue, or it could be the thesis. Think.

Match the sources/source groupings to your issues. You might want to print out your source groupings and arrange them physically. Doing it physically might help you get it in better order.

Start organizing/arranging your Analysis/Argument

Determine the presentation approach: How do these issues make your argument? Is this a chronological approach? Are they alternative theories of recovery? If so, is it based on strength of argument? Or are they issues of substance vs. procedure?

Identify the theme of your Argument

Once you determine the approach you're pursuing, put the issues in order. Which comes first. second, last, etc., will be dictated by the approach you're pursuing. This order is the beginning of your outline

If applicable, pare down. Identify your best arguments. Maybe weak arguments are distractions and should be discarded

Outline your side of the Argument

Continue putting the issues in order

Make sure you have the source groupings (the sources and the critical facts that relate to each source) listed under each issue

Break down each issue into sub parts. What logical steps to you need to take in order to present these issues. Let the sources guide you. Make sure that these subparts flow coherently

After this is broken down, check the order of your issues. Are the issues presented in a coherent manner? Does the order make sense? Consider whether you need to rearrange the presentation of your issues.

After you check the order, revisit the thesis. Do your issues relate back to the thesis? Does each issue prove the thesis?

Determine potential sections/points. Will each issue be it's own section/point? Do some issues need to be grouped together into a larger point/section?

Outline the other side- Evaluate your adversary's case

What are their best facts? What are their best issues? Determine which you need to address

Fit these items that you feel you need to address into your larger outline

Revisit your thesis to make sure it still makes sense

EXECUTING:

STATEMENT OF FACTS (the Statement of the Case)— Build your narrative. Build your story

Revisit your Critical Client Points. Do you have all of the critical facts you'll need? What other facts are necessary to develop your narrative and tell your story.

Consider how you'll arrange the facts. Chronological? Are there several story lines that you need to develop? Will you develop them independently, or will you go back and forth.

Outline the presentation of your facts

Use the outline you've developed and tell your client's story. Write the narrative

After you have the basics down, refine the facts. Make them persuasive
Humanize the client
Demonize the opposition
Distinguish problem facts
Add the passion

THE ARGUMENT -- CREAC

CONCLUSION— Set forth your thesis. Start by stating your claim, or what you're trying to prove in the section. Each of your issues below, in the Argument/Analysis section should all prove this thesis

RULE- take the rules that you gleaned from the cases above and set them forth here.
Introduce the source, state the critical facts and the rule, explain the rule
Remember that your paragraphs should have topic sentences, each of which relate back to the thesis
Transitions, transitions, transitions!

ANALYSIS- write the argument based on the outline above

You know the order of your issues
You have the critical facts attached to each source. Now present each issue by connecting the facts and the rule.
Consider the actors that appear in the support and consider their relationship to your clients position.
Make sure that the connection between the facts and the rule support your theme

CONCLUSION
Ask for what you want

Dissect your Rough Draft with the “Word-o-holic’s Anonymous” 12 Step Program

1. If your writing has become unmanageable, use less words

2. Eliminate Empty phrases

3. Avoid Circumlocution

4. Avoid “the usual suspects”

5. Shorter…

6. …Stronger…

7. …but still Stylish

8. ...and yet remaining Sophisticated and Appropriate

9. Don’t overdo it

10. No clichés;

11. No legalese;

12. Speak in Plain English

Part 2 — The Importance of Punctuation in Legal Writing

1. Introduction:

a. This is not about the rules, this is about the reason for the rules.

Semicolon are stupid. At least, that's what I thought. I want it to be clear that in "thought" I am referring to the past tense. As in, "I used to thing that," or "in the past I believed," or "before I knew any better I thought…" That sort of thing. In fact, when I started to write this program I still held the belief that semi-colons were stupid. But I have since reconsidered.

The details of a legal writing are critical elements in being persuasive. If we truly want to take our legal writing to the next level lawyers must master those details. Small elements like punctuation (and, yes, semicolons) are actually very important elements of advanced legal writing, and that's what this program is all about.

This program is not about teaching the rules. You can go on any writing website and learn the rules for using punctuation. Many of our major universities have wonderful, easy to understand resources in that regard. But learning the rules doesn't help the legal writer.

Wait, that didn't come out right.

Learning the rules surely helps, but learning the rules *alone* is not helpful. To be truly effective the lawyer must also understand the reason that the rule exists. Only then can the particular grammar detail or punctuation element be wielded as a tool of persuasion. And that's really the goal here. To figure out a way to use the finer details of legal writing to improve our persuasiveness.

b. The main reason for learning the rules: To avoid "distractions" in legal writing

I have long warned lawyers about the evil trilogy in the practice of law: Procrastination, Distraction, and Neglect. The part of that trilogy which is most relevant in legal writing is "Distraction." Much of our legal writing is ineffective because (1) we are distracted as writers,

which causes us to devote less time to working on the finer parts of our writing, (2) we use distracting content, and (3) our audience is distracted by other things which impair their ability to focus on the text.

I can't help you fix the first item today. That is more of a time management issue and it's just not what this program is about.

I can help you with the second issue, but it's not the focus of today's program. However, even though I'm not going to focus on that, permit me to give you two short tips about how to decrease the distracting content. To improve your focus you need to accept that we are too wordy, and we beat around the bush. To fix those issues: (a) Be concise. Eliminate "circumlocution." Merriam Webster dictionary defines circumlocution as, "the use of an unnecessarily large number of words to express an idea."[1] Put simply, use less words. Lawyers need to focus on making our writing concise, so reduce the actual number of words you write. (b) Be direct. Get to the point quicker. Focus on the structural writing basics to help get you there— thesis statements, topic sentences, and transitions.

On to that third issue — about our audience being distracted — that's what we're going to tackle today. We can help decrease the amount of distraction that plagues our audience by by providing better direction to the reader. One of the ways we provide better direction is to provide better signals. That's how I see punctuation, it's basically a series of signals.

If someone raises their hand, palm up, with all fingers together…that means "stop." If someone puts their index finger in front of their lips, it means "sshhhh." We know how to react when we get these signals, and we often comply. The same holds true when we are driving. You see a yield sign and you know to pause. You slow down and look for oncoming traffic. If

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[1] https://www.merriam-webster.com/dictionary/circumlocution, last checked by the author on 6/16/2020.

you see a “Children Playing” sign you immediately become more attentive and cautious. That’s the same way we should be using punctuation and grammar.

Our punctuation operates as signals that tell our reader how to react. Proper punctuation can provide a pause, increase emphasis, engage in a more methodical analysis, and more. So let’s review some writing rules and peruse some punctuation points that can help improve the persuasiveness of our legal writing.

2. Semicolons make a mouthful manageable.

If you use punctuation properly you make your ideas easier for the reader to digest. That helps decrease distraction because it decreases the amount of effort your reader needs to expend. You want the reading experience to be effortless. When it’s effortless your reader is more relaxed, they are happier, and they are less likely to indulge themselves in any distraction. It’s true— think about any time you’re doing something that causes you to expend an inordinate amount of energy. When you’re walking up a steep hill, for instance. You are laboring. You’re panting. You just want to be over so you can end the pain. Is that the time you want to be working on a trigonometry equation? No. You are far too distracted by the pain to give proper attention to the math. It’s the same thing with legal writing. If your reader is working too hard, they are not going to be able to give your content the attention it deserves. They will be distracted with the burden of trudging through your confusing content. Make the reading experience effortless. Do that by making your mouthfuls manageable.

One of the “mouthfuls” we deal with a lot in legal writing is the run-on sentence. Technically, a run on sentence are two independent clauses smushed together without any punctuation. Independent clauses are sections of a sentence which could stand alone. Take a look at this example:

> EXAMPLE: This part of the sentence is an independent clause this part of the sentence is also an independent clause.

I'm sure you can see how those two parts of the sentence are independent clauses. And….I bet you had to read that sentence twice. That's because it's a run on sentence. The lack of punctuation makes it confusing.

The practical problem with run on sentences is that they are a mouthful. Run on sentences are basically a lot of information stuffed together and it feels as if your ideas, well… run on. They objective, then is to get the sentences to NOT run on. You want the information to be presented in a way that is easily digestible. Less than a mouthful. You do that by fixing a run on sentence (as you'll now see, semicolons can be used to break up run on sentences that need to be broken up). Look at how our earlier example is easier to understand once you add punctuation:

> EXAMPLE: This part of the sentence is an independent clause; this part of the sentence is also an independent clause.

When you're first learning about run in sentences it's tough to pick them out. That's actually the hardest part about run on sentences — being able to see them. But if you force yourself to look for them, then I guarantee something amazing will happen. You won't be able to UN-see them. I'm telling you…if happened to me. I was never able to understand what a run on sentence was, but after about a month of forcing myself to look at them, something changed in my head. Now, they pop out like a sore thumb. And in this context, that's a good thing.

Once you see the run on sentence you need to fix them, of course. There are 4 ways to fix a run on sentence. I call them "The Fab Four Fixes."

> <u>(1) Separate with a period</u>
> EXAMPLE: Stuart loved visiting Australia he thought New Jersey was too rough and tumble.
> THE FIX: Write the two independent clauses as separate sentences using a period.
> THE REWRITE: Stuart loved visiting Australia. He thought New Jersey was too rough and tumble.
>
> <u>(2) Separate with a semi-colon</u>

EXAMPLE: Stuart loved visiting Australia he thought New Jersey was too rough and tumble.
THE FIX: Use a semi-colon to separate two independent clauses.
THE REWRITE: Stuart loved visiting Australia; he thought New Jersey was too rough and tumble.

(3) Separate with a comma & a conjunction
EXAMPLE: Stuart loved visiting Australia he thought New Jersey was too rough and tumble.
THE FIX: Use a comma and a connecting conjunction (FANBOYS- for, and, nor, but, or, yet, so)
THE REWRITE: Stuart loved visiting Australia, for he thought New Jersey was too rough and tumble.

** See below for some elaboration on this item.

(4) Separate with a semi-colon and a marker word
EXAMPLE: Stuart loved visiting Australia he thought New Jersey was too rough and tumble.
THE FIX: Use a semi-colon with an independent marker word like furthermore, also, nevertheless, therefore, thus, however, consequently.
THE REWRITE: Stuart loved visiting Australia; also he thought New Jersey was too rough and tumble.

3. Semicolons put in a purposeful pause.

There are times where it is helpful to get your reader to stop for a moment. You don't want them to stop reading, because that will give them a chance to look up from the page and get distracted by some other matter. But you might want to get them to slow down *ever so briefly* so that they contemplate what you're saying. You just want them to pause. That's where a semicolon can help.

Semicolons can provide a pause for emphasis in the reader's mind. Let's work off the previous section to see how this works in practice. The first sentence below has a period, and the second has a semi-colon. Pay close attention to how you read these two examples.

Stuart loved visiting Australia. He thought New Jersey was too rough and tumble.
Stuart loved visiting Australia; he thought New Jersey was too rough and tumble.

Did you notice that you paused more with the first example? It was written properly…you *could* use a period. But that period is a hard stop. In the second instance it's more likely that

you just took a breath and continued with the sentence because the entire part of the sentence is written so that it's consumed as one.

I realize that this is a minute detail. But this is exactly the level of detail that advanced legal writers need to consider. This is how we go from good to great.

4. Why comma splices stink. I think.

You know that some people are sticklers for the rules, right? And there are some rules that just set off those rule lovers. One such rule is the "comma splice." To see what I mean, let's consider something we discussed above— the third way to break up a run on sentence. It's with a comma and a conjunction. Here is the rule again:

> (3) Separate with a comma & a conjunction
> EXAMPLE: Stuart loved visiting Australia he thought New Jersey was too rough and tumble.
> THE FIX: Use a comma and a connecting conjunction (FANBOYS- for, and, nor, but, or, yet, so)
> THE REWRITE: Stuart loved visiting Australia, for he thought New Jersey was too rough and tumble.

If you don't follow this rule and you only use a comma you are creating a "comma splice." Maybe I should say you are "committing" a comma splice, because the grammar police consider this to be a major no-no. Why? That's a good question.

Some say, "They're just wrong!" Others think that using the comma splice opens the doors to all sorts of problems. They fret that, "It temps you to use too many commas in a sentence and that could make the sentences look like a list." It seems like editors get more bent out of shape about comma splices than anything else. Personally, I think they need to get over it. It's not that big of a deal. In fact, the most common reason for arguing against comma splices is the easiest one to dispel.

Mostly people hate comma splices because they are informal. But we live in an era where people use text acronyms. Heck most times we don't even use letters — we use *emojis*. So isn't it time that we dispense with the (dare I say) archaic rule against comma splices?

The answer is yes…if you are okay with being mediocre. But if you want to be great you need to continue to stay away from the comma splice. That's because writing correctly (and omitting a comma splice) adds a detail that hones the signal you're giving your reader. The resulting language is more precise.

- When people see a comma, they continue to see a flow.
- When people see a semi-colon; they see a break in the flow.

Let's put it into driving terms. A comma is a left turn around a race track. A semicolon is a left turn at an intersection.

A comma is a left turn around a race track. You've entered a turn and you're turning left. But you're in the flow. You're slowing down somewhat and turning the wheel, but you're just continuing around the curve.

A semicolon is a left turn at an intersection. If you reach an intersection you slow down and maybe even stop. You look both ways, then you proceed. There is a contemplation.

When a reader sees a comma, they slow down but keep moving. When a reader sees a semi-colon they pause and contemplate. Does that matter for informal writing? No. Does it matter if you want to develop a writing that is good enough? No. But if you want to be great, it matters. If you want a level of polish that takes the writing from being run-of-the-mill to outstanding, then it matters. The choice of whether to use it or avoid it is yours. But I say you should lose it and make your writing outstanding, not just really good.

To a certain extent this similar to the "purposeful pause" section above. In that section I argued that the pause in the semi-colon is preferred to the stop of the comma. Here I'm arguing that the pause of the comma is preferred to the slow down of the comma. Maybe this section is

the photo negative of the period section? Sometimes using a period to separate the ideas is too **much** of a hard stop. Sometimes using a comma is too **little** of a stop. The semicolon is the writing equivalent of the perfect-temperature-porridge.

5. Semicolons make lists are easier to understand.

A lot of writing in the practice of law consists of analyzing statutes, regulations, or cases which contain multiple elements. Oftentimes lawyers will end up with a list of items that need to be evaluated as a result. That's where a semi-colon can come in handy.

The Writing Center at the University of North Carolina provides a great explanation of the use of semicolons and commas in the context of lists. Take a look at what they said, and then review the example in the legal context that I created:[2]

> One reason to use a semicolon is to help separate items in a list, when some of those items already contain commas. Let's look at an example, as that is the easiest way to understand this use of the semicolon. Suppose I want to list three items that I bought at the grocery store:
>
> apples
> grapes
> pears
>
> In a sentence, I would separate these items with commas:
>
> I bought apples, grapes, and pears.
>
> Now suppose that the three items I want to list are described in phrases that already contain some commas:
>
> shiny, ripe apples
> small, sweet, juicy grapes
> firm pears
>
> If I use commas to separate these items, my sentence looks like this:
>
> I bought shiny, ripe apples, small, sweet, juicy grapes, and firm pears.

---

[2] https://writingcenter.unc.edu/tips-and-tools/semi-colons-colons-and-dashes/, last checked by the author on June 18., 2020.

That middle part is a bit confusing—it doesn't give the reader many visual cues about how many items are in the list, or about which words should be grouped together. Here is where the semicolon can help. The commas between items can be "bumped up" a notch and turned into semicolons, so that readers can easily tell how many items are in the list and which words go together:

> I bought shiny, ripe apples; small, sweet, juicy grapes; and firm pears.

Now let's take a look at this in a legal context.

Let's say you were wresting with whether to report someone's misconduct. You needed to write a brief on the topic as part of a disciplinary hearing. In your case you need to explain that the lawyer committed a violation, that there was damage to another party, and that the lawyer was negligent.

> violation
> damage
> negligence

In a sentence you would separate these with commas:

> There was a violation, damage, and negligence.

Now suppose that the elements are described in ways that already contain some commas:

> serious, continual violation
> substantial, material, long-lasting damage
> clear negligence

That middle part is a bit confusing. Here is where the semicolon can help. The commas between items can be "bumped up" a notch and turned into semicolons, so that readers can easily tell how many items are in the list and which words go together:

> There was a serious, continual violation; substantial, material, long-lasting damage; and clear negligence

6. How are hyphens different from dashes?

a. Hypens are heard in-between words

Hyphens are shorter lines. They are used within words, like "part-time" or "self-starter"

Other times they are used between words that are working together. You know, in run-of-the-mill situations (see what I did there?)

b. Dashes force the focus

Dashes were best described by the Grammarly blog: “The most common types of dashes are the en dash (–) and the em dash (—). A good way to remember the difference between these two dashes is to visualize the en dash as the length of the letter N and the em dash as the length of the letter M.”[3]

Personally, I don’t care about the N vs. M dash distinction. I just group all dashes together, and use them as follows:

> Dashes make a particular word stand out in the beginning or the end of a sentence. Take these two examples:
>
> > “Once she betrayed the loyalty owed to the client it was clear what existed—a conflict."
> > "Confidentiality—the bedrock principal violated by Mr. Jones.”
>
> Dashes are also good for directing your reader’s attention to a particular group of words. The UNC Writing Center put it perfectly: “Dashes add drama—parentheses whisper”[4] Example:
>
> > “Counsel lied to the tribunal several times—fourteen to be exact—and each successive misrepresentation was worse than the last.”

[3] https://www.grammarly.com/blog/dash/, last checked by the author on June 18, 2020.

[4] https://writingcenter.unc.edu/tips-and-tools/semi-colons-colons-and-dashes/, last checked by the author on June 18., 2020.

7. Eventually you'll exhibit an ellipsis

An ellipsis is a series of three dots. There are two times to use it, and I'm sure you already know these rules because we use this element a lot in the law. The first is when you are omitting some words:

ORIGINAL SENTENCE:
On four separate occasions, two of which were last year, the lawyer revealed confidential information.

ELLIPSIS-LADEN SENTENCE:
On four separate occasions…the lawyer revealed confidential information.

The second time to use an ellipsis is when language is trailing off. But, obviously, these techniques are more likely to be used in informal writing.

WHEN WORDS TRAIL OFF FOR GOOD: "You know, it's times like these…"
WHEN WORDS TRAIL OFF AND RETURN: "Yeah, so…whatever."

8. Common comma conundrums

Rule 1:
- **To separate a series.**
- Ex: "I have a syphilis, herpes, and a back ache."

Rule 2:
- **Between adjectives**
- Ex: "He is a hairy, ugly man."
- But not all…"I want some cold ice cream,"
  - Trick, if you can insert the word, "and" then it gets a comma

Rule 3:
- **Before Conjunctions**
  - FAN BOYS…For, And Nor, But Or Yet So
  - EX: "My wife went to the gym, and I went to Chipotle."
- But not always….There are two sentences—only place it when there are two sentences
  - "I thought of eating salad but ate pizza instead."
    - Not two sentences, so no comma
    - Must be a sentence on BOTH sides of the conjunction

Comma Rule #4

- **Separate the excess:** Comma off the "not needed" part of the sentence.
  - EX, "The Professor who is quite handsome always shows up on time."
  - Part of the sentence is not needed. Remove that clause....if the rest of the sentence can stand alone without changing the meaning, surround the clause with commas.
  - Thus, "The Professor, *who is quite handsome,* always shows up on time."
    - Opposite: "Everyone who is handsome should get a prize"

Comma Rule #5

- **Introductory words**

  - Use commas after words like "well, yes, no, why, oh" etc., when they begin a sentence
  - EX: "Yes, my professor is the most intelligent man I have ever met."

Comma Rule #6

- **Introductory Phrases** at the beginning of sentences

  - "Crying at the top of his lungs, the student handed in his paper late."
  - TIP: The first word has an -ing or -ed ending...
  - Put the comma before the person/thing the sentence describes

9. Colons are Jerry McGuire: "You complete me"

It's all about the ***complete sentence.***

- To introduce a list, after a complete sentence
  - CONFUSING (with a comma):
  - I took the necessary items with me to the CLE program, iPad, pillow, and coffee.
    - Seems like the "CLE Program" is part of the list.
  - CLEAR: I took the necessary items with me to the CLE program: iPad, pillow, and coffee.

- To introduce a second complete sentence, that is related to the first
  - "I never leave home before breakfast: I would consider leaving early for Stuart Teicher's program."

  - WHY? Because it emphasizes the second sentence. With a period you're starting the next sentence in a normal fashion. But with the colon you're serving up that next sentence. The colon feels like a platter you're holding out, and the reader waits to see what will be placed on it.
  - LEGAL EXAMPLE:
    - The purchaser knew the contingency expiration date was approaching. They waited until the last possible day to request an extension.
    - The purchaser knew the contingency expiration date was approaching: they waited until the last possible day to request an extension.
      - That colon, with the lower case letter in the first word following the colon provides the setup.

- To emphasize a name that follows a complete sentence
  - I saw the same old characters at the reunion: the Castaway Crew.
    - Now, you could have used a dash here too. That's a question of style. But I think the complete sentence is the key here.

- To introduce a long quote after a complete sentence
  - They described the situation perfectly in last month's magazine: "The woman from the Real Housewives of New Jersey made a fool of herself."

10. Italics.

There are 3 times to use italics. One, is where the particular style calls for it. The APA for instance, has certain times when they want to see italics in scientific papers. In the law, some Bluebook citation style guides say to cite with italics. But that's technical and obvious, so I'm not even counting it as a legit "time to use italics." There are two other times to use italics:

When you're using foreign words, and in the law that means Latin. However, I am a strong believer that Latin should be NEVER be used in the law. They don't speak Latin in Latin America so we don't need to speak it in North America. So that basically means that we are down to one time to use italics.

For *emphasis*.

But the APA says you don't need it.[5] "In general, avoid using italics for emphasis. Instead, rewrite your sentence to provide emphasis. For example, place important words or phrases at the beginning or end of a sentence instead of in the middle, or break long sentences into several shorter sentences."

So that basically means that there are no times to use italics, right? No, there is one time. As the APA says, "use italics if emphasis might otherwise be lost or the material might be misread." Example:

> A lawyer might be permitted to charge a premium fee if they told the client about the need to turn away other clients *before* the representation began.

It's possible that the word "before" might be looked over in that context (trust me on this one, I am familiar with the context), so it's important to emphasize that part of the sentence.

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[5] https://apastyle.apa.org/style-grammar-guidelines/italics-quotations/italics, last checked by the author on June 18 2020.

11. Stuart's Editing Checklist for Legal Writing

Edit and Revise

- What's the right MINDSET…Obstacles
    - 1- TIME:
        - *First…actually do it*
        - To get better you need to find the time to scrutinize. If you can't find the time, then forget it.
    - 2- LOVE
        - We must be able to look at our work objectively and avoid falling in love with our words

- CRITICAL CONTENT CONCEPTS
    - Writing is not just about writing…it's about Thinking, Organizing and Writing
    - Regarding writing…Remember: Short, strong, sophisticated and stylish

EDITING PROCESS:

I. REARRANGE—CHECK OUR ORGANIZATION

Some ORGANIZATION- Fundamentals

- Does your final product flow…does it match your outline?
    - You should have HAD an outline!
    - If you revised that organization while writing, does it make sense now?
    - The question is: Does your logic flow?
        - From paragraph to paragraph
            - One idea per paragraph
                - Holds true in every situation/scenario
                - New idea? Change paragraphs
                - New time period? Change paragraphs
                - New progression in your line of logic? Change paragraphs
        - The order of your paragraphs must make sense

ORGANIZATION- Check Your GPS—your **Direction, Navigation**

- WHAT IT'S ABOUT: Navigating through the structure…Keeping the reader going and in the right direction…take them by the hand.

- TOPIC SENTENCES:
    - Even in transactional drafting, every paragraph gets a topic sentence
        - Make your claim in that paragraph
        - The structure is all related: The sentences that follow expand, describe or prove the topic sentence.

- TRANSITIONS
    - ** This is how you get them not to think
    - The ideas from paragraph to paragraph should flow; The thoughts within a paragraph should be coherent
        - Transitions establish logical connections between sentences, paragraphs and sections of your papers

- ENSURE A SMOOTH RIDE through the structure by flattening out the other "Speed bumps" *(Eliminate Distractions)*
        - Confusing stats, figures
        - Contract clauses, Other Excerpts (document sections)
        - Crazy Punctuation

II. REVISE

Principle: START HIGH, END HIGH

I. Overall Review—CHECK THE FEEL

- THEME CHECK…style points. Even in transactional writing, these ideas apply:
  - Did you hit the theme/message?
  - Is your tone on display?
  - Characters fully developed?

- OBJECTIVE CHECK

II. Look at the Paragraphs

- STRUCTURE CHECK:
  - Have you made your one idea per paragraph
  - Topic sentences and Transitions check

- LOGIC CHECK: Within sentences- Logic must flow.

- ARE YOU A LEAN MEAN PARAGRAPH WRITING MACHINE?

III. Scan the Sentences. REVISE THE SENTENCES

- Check for garbled sentences

  - My Three Readings Rule,
    - One it's good; Twice repair; Thrice, rewrite

- GRAMMAR CHECK

IV. Scan the Words: REVISE THE WORDS

- Clear, Concise and Direct is about using plain English…it's about Short and Strong, but Sophisticated and Stylish

- Check for distracting words-Latin, Legalese, Correspondence Speak

- Get rid of subpar-stylings

  - Euthanize our Euphemisms.

  - Clip the Clichés

- Eliminate the Excess

- Eliminate Repetition

- CHECK YOUR USAGE:

  - Nouns and verbs must agree
    - in tense
    - in number
  - Pronouns- make sure they're not confusing. Make sure they're consistent.

V. RISE BACK UP

- You've made a bunch of changes—make sure you didn't lose logic, coherence, theme, etc.

VI. Mop up: Check your Appearance and Technicalities

- Widows and orphans
    - Check on Print Preview
- Page Numbering
- Spell check

VI. Review Tips:

- Read it out loud
- Attorney Peer review
- Get a non-lawyer to read it
    - My Grandmother rule
- Use the "Find and Replace" function to find things you know are a problem.


Fluff is for pillows,
not legal writing!
--Stuart Teicher, Esq.

Why don’t lawyers write so goodly?

The first step toward getting better is understanding why we struggle…

Reason #1: Technology has caused a progression of patience-less-ness

Reason #2: Bad habits passed down from generation to generation.

Witnesseth

A warped routine.

We consistently use “the usual suspects.”

- Thus, hence, as such…
- nine (9)
- on or about
- A review of “the pertinent part” of the agreement…

Reason #3: The Evil Trilogy

Reason #3: The Evil Trilogy

Procrastination, Distraction, Neglect

We are verbose, aren't we?

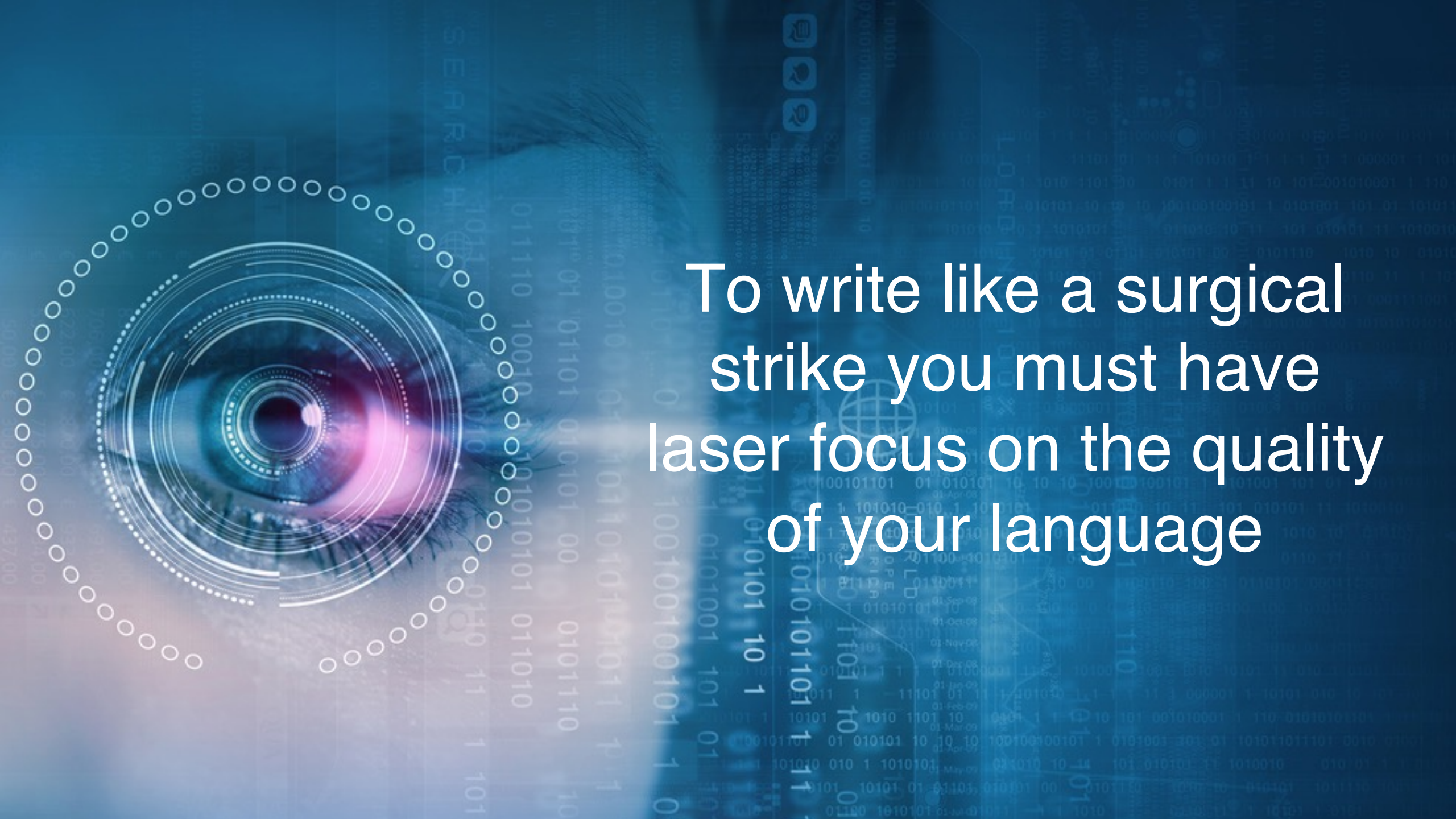
- Lawyers use too many words
- It must be observed that lawyers use too many words
- It must be observed that lawyers are people who use an excessive number of words when they write.

We are verbose, aren't we?

- Lawyers use too many words
- It must be observed that lawyers use too many words
- It must be observed that lawyers are people who use an excessive number of words when they write.
- Just because we could say it, doesn't mean we should say it.

Reason #4: We are stubborn

The New Paradigm is to
Write like a Surgical Strike


To write like a surgical strike you must have laser focus on the quality of your language


We need to make our writing
…effortless

How to write like a surgical strike

- Use plain English

Plain English:

When something is understood the first time you read it.

Clear

Concise

Direct


CLARITY

Stop using those convoluted words that add nothing to the substance of your writing.

Avoid the words that cause death!!

Because I will kill you if I find you using them.

Some good guidance

Casual

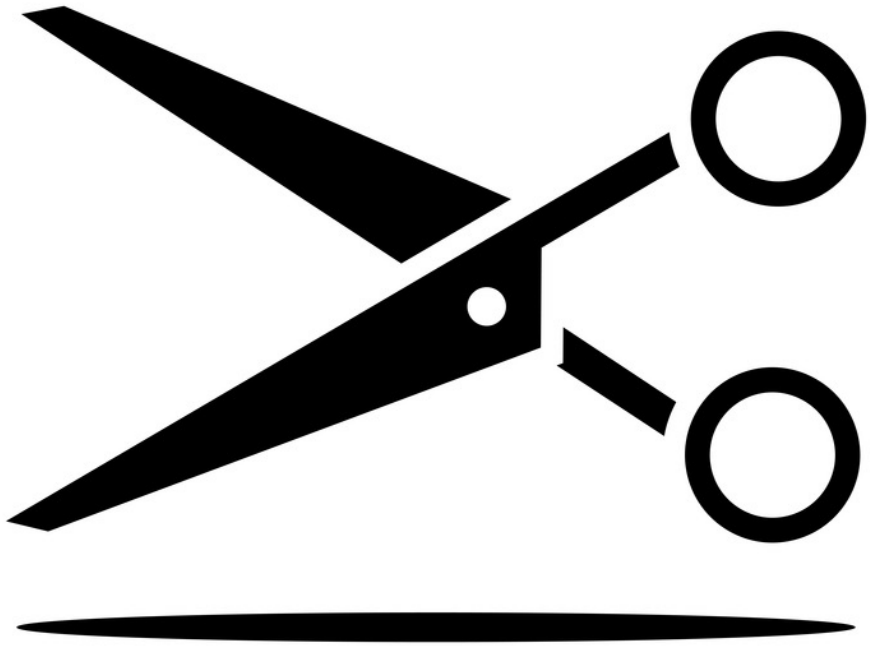
Some of you are worried..
What if I'm *too* casual?

Whereupon my son will be late today.

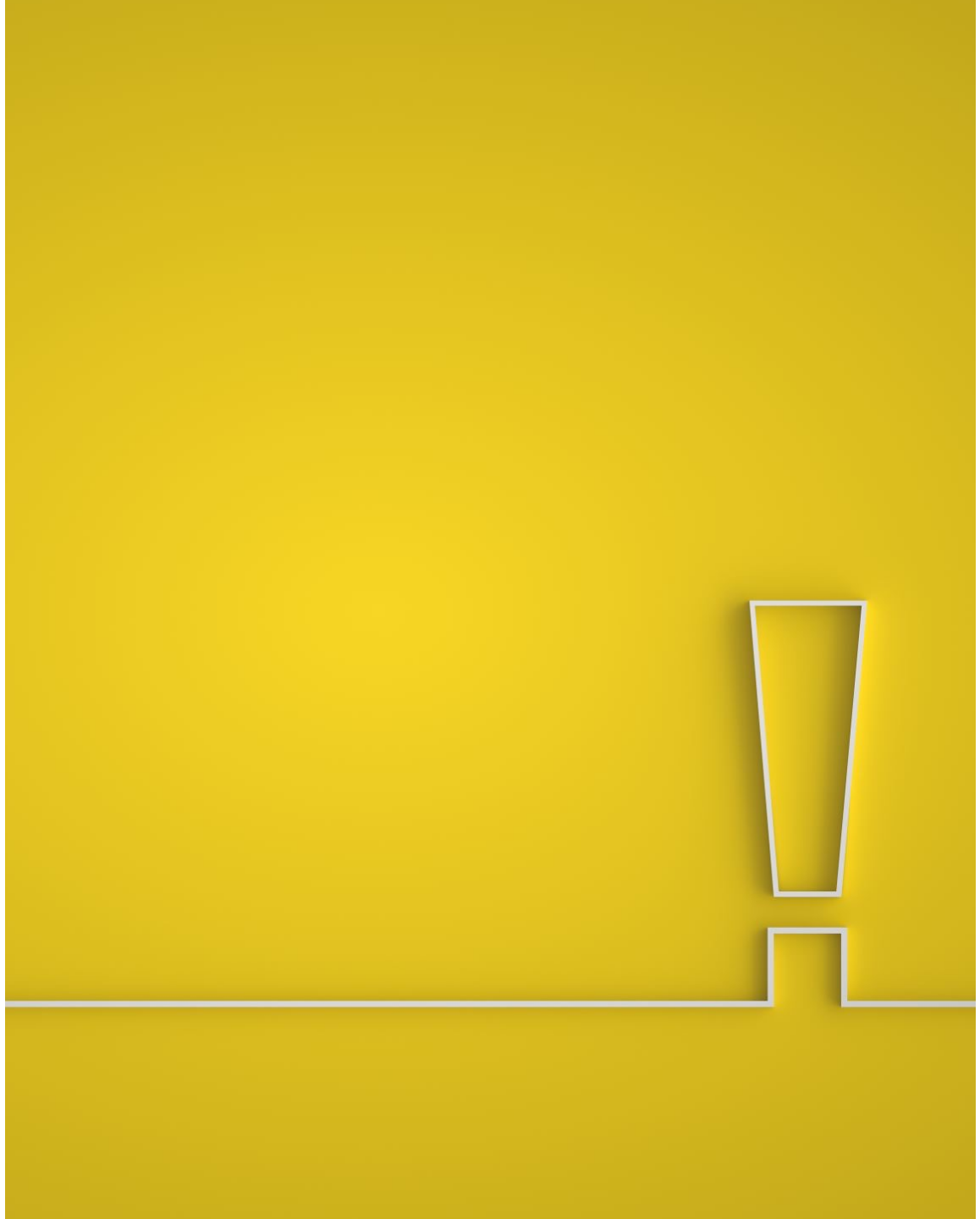
And whereas the time by which I am required to pick up said son will be too early,

Now therefore, we both agree that I shall be henceforth late.

Be concise



Use fewer syllables



Take

Unmistakably

Examples:

- Anticipate vs. Expect
- Approximate vs. About

DON'T SAY	SAY
construct, fabricate	make
initiate, commence	begin
utilize	use
substantial portion	large part
afforded an opportunity	allow


The sweet spot for our words is
short and strong

Significant

Important

Vital

Shout ‘em out!

Prior to

Subsequent to

In regard to

In conjunction

Due to the fact that

Terminate

At the present time

In the vicinity

Make your sentences shorter and stronger too.

Shortening Techniques

- FIRST: End circumlocution

“The only true victim in this case would have to be Mrs. Stafford.”

“The only ~~true~~ victim ~~in this case would have to be~~ is Mrs. Stafford.”

As far as plaintiff is concerned, that conclusion would be a travesty of justice.

~~As far as plaintiff is concerned, t~~That conclusion would be a travesty ~~of justice.~~

“Please process the complaint ~~accordingly.~~”

Shortening Techniques

- End circumlocution
- Watch the word strings

Word Strings

- A lawyer doesn't just sell
- A lawyer "sells, assigns, transfers, and conveys."

Ask yourself:

1- Does the additional word add meaning?

2- Does the document need the additional meaning to accomplish its purpose? Is it relevant?

There’s a difference!

Here it’s excess

I agree to sell and transfer the following items…

Here it’s needed

You must abide by all rules and regulations of the association.

Contractions are real words too

WATCH OUT!

- It’s

vs.

- Its

Shortening Techniques

- End circumlocution
- Watch the word strings
- Use contractions
- Eliminate run-on sentences


It's time to write a really long
Run-On
Sentence
Let's write a really long
run-on sentence


Don’t be afraid to break some rules!

Grammar is a concept that can help make a writing easier to understand.

That’s when proper grammar is helpful.

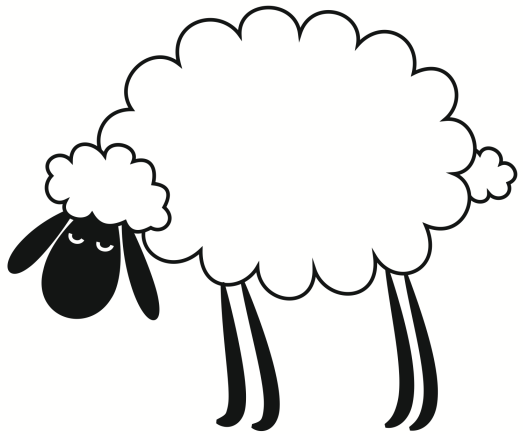
It’s the same thing with punctuation.

I saw a teacher who cares.

I saw a teacher. Who cares?

Grammar is an idea that can help make a writing easier to understand…until it doesn’t.

But don’t be a sheep



Grammar is an idea that can help make a writing easier to understand…until it doesn't.

Here are a few rules that *should* be broken

Opening conjunctions are like mini-transitions

And, but so…

My favorite grammar rule to break:

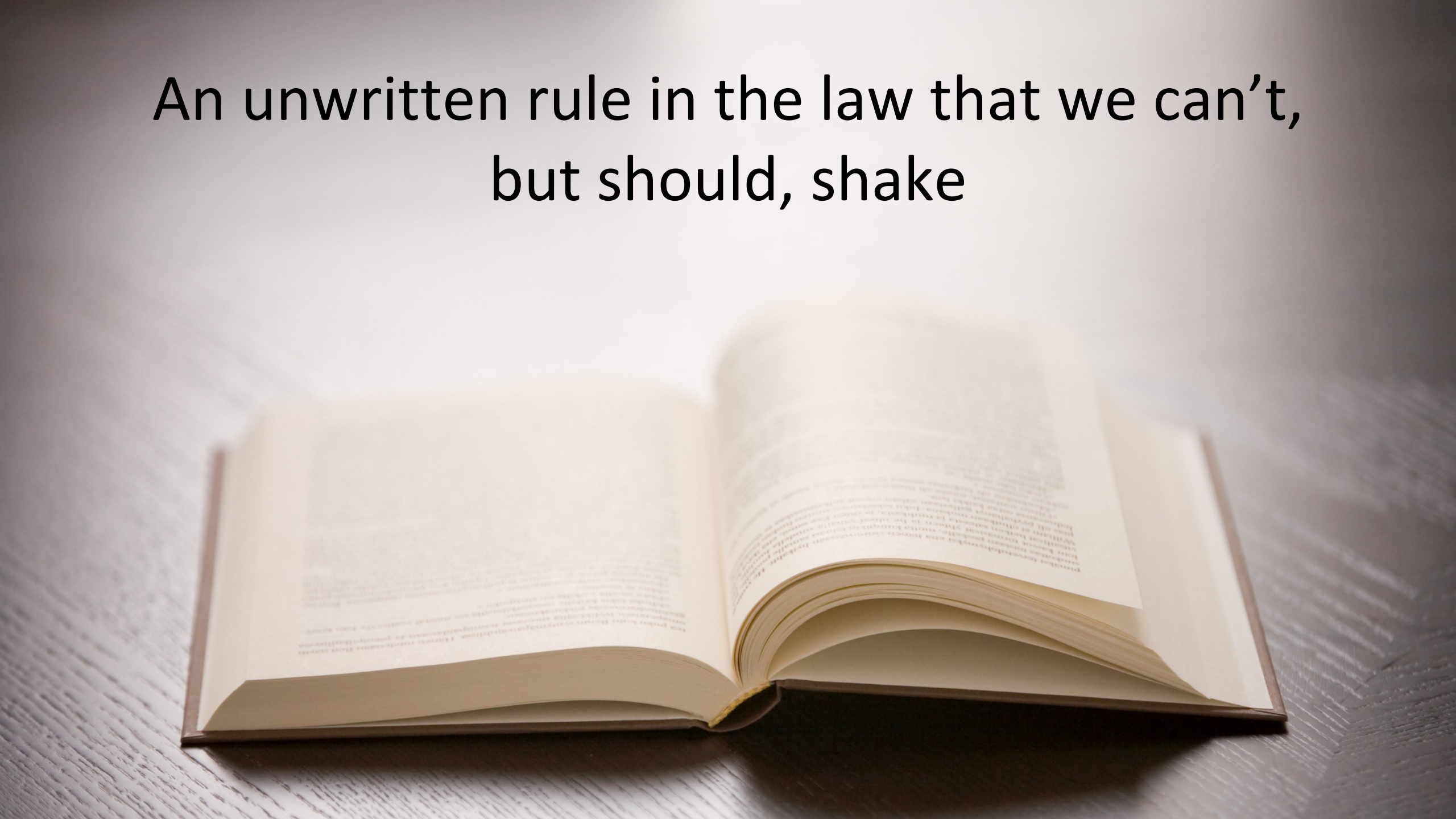
“Never end a sentence in a preposition"

Look what happens when you follow the rule:

Who did you leave the bar with?

With WHOM did you leave the bar?

An unwritten rule in the law that we can’t, but should, shake

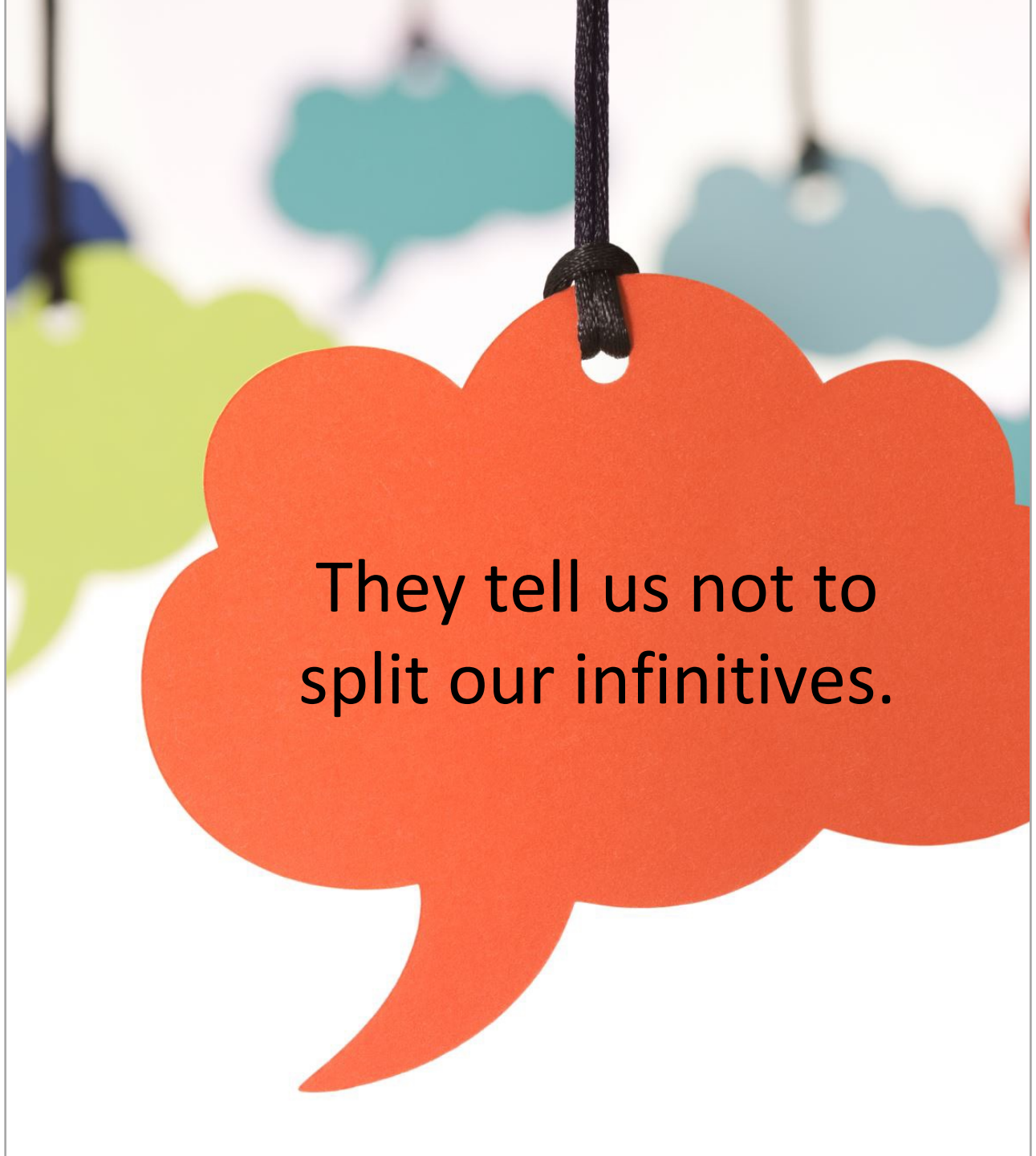


What does that mean?

…to punch is an infinitive

I want to punch Stuart because this CLE is so awful.

I want to really punch Stuart because this CLE is so awful.



Every Latin phrase has an easier English counterpart

Bona fide

In good faith

De minimus

Trivial or insignificant

Ab initio

From the beginning

Either use the English version, or eliminate it

Split those infinitives!

Northern Illinois University gave us an example to work with:

Nonstandard:

- It’s hard to completely follow his reasoning.

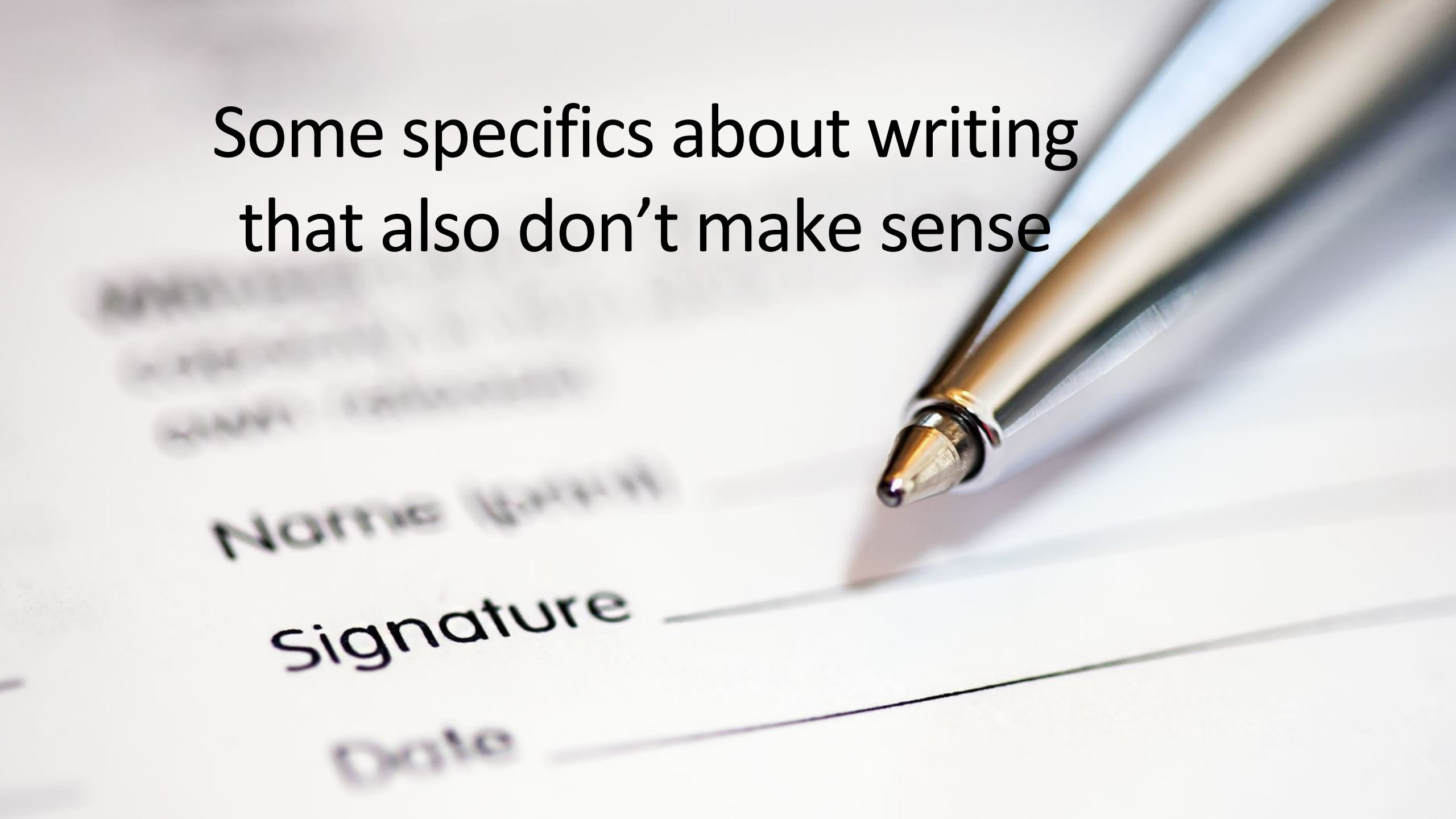
Fixing it:

- It’s hard to follow completely his reasoning.
- A better choice here would be to put the adverb completely at the very end of the sentence.
- It's hard to follow this reasoning completely.

But here’s my question — why do you need it at all?

- It's hard to follow his reasoning.

Some specifics about writing that also don’t make sense



Caps – the rule comes from 1980s office culture

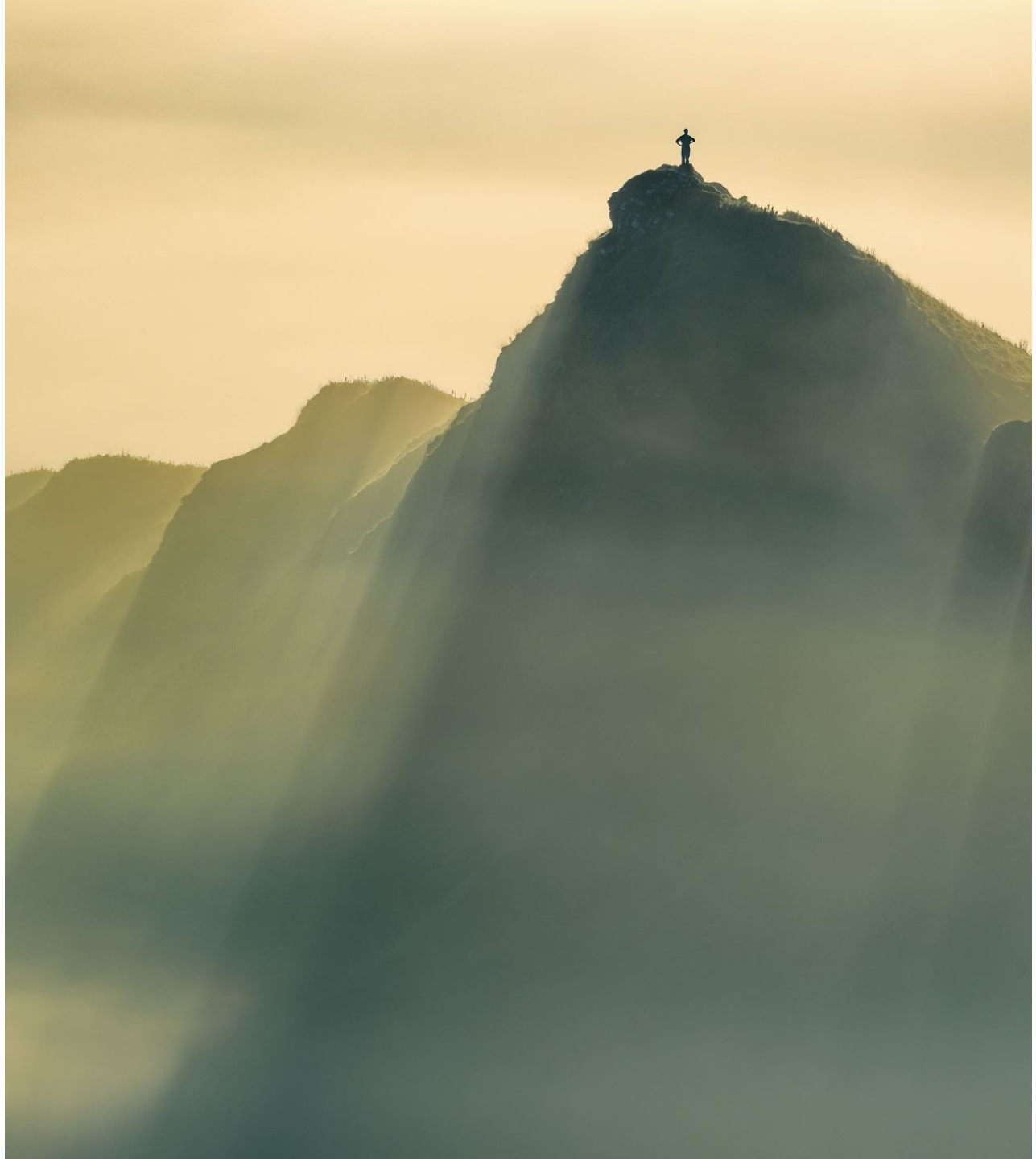
Parentheses…ugh

The respondent also argues that applying the tests in ***Davies***, (which have been applied by this Court in cases where extensions of time are required to take steps to perfect an appeal as well as, as in ***Davies***, on an application to dismiss an appeal as abandoned), the fourth and fifth tests cannot be met by the appellant. He says that the appeal has little or no chance of success.

One more fix…
Make your writing

“Capti-*suading"*

(I made that up)



Persuade with the Facts

Some tactics!

Persuade with the Facts

How would you rewrite:

"Defendant indicated there was a problem with the vehicle"

How about…

"He admitted the brakes were broken."

Humanize Your Client

You're representing Bob McCallister and you need to show that he actually appeared at his daughter's school on a particular day. His daughter, Maureen, is in Kindergarten.

This is how we are trained to write the sentence:

"My client saw his daughter at school."

Now you rewrite it, but *humanize* the client…

"Bob visited his 5 year old daughter, Maureen, at her Kindergarten class."

Humanize Your Client

Your client, Ms. Rosalinda Deacon, is a teacher. It's important for you to establish that she entered her classroom with a sense of urgency. It's important that she be seen as authoritative and decisive.

This is how we are trained to write the sentence:

"It was at that moment that my client walked through the door."

Now you rewrite it, but *humanize* the client…

"Then, Ms. Deacon burst into the room."

Demonize the opposition

You represent the plaintiff, Barbara O'Keefe, in a personal injury action. She was hit by a car driver by the Defendant, John Parkins. It was quite a bad accident. You need to state that the accident occurred.

This is how we are trained to write the sentence:

"John ran into the vehicle"

Now you rewrite it, *demonize* the oppsition…

"Defendant rammed Barbara's car violently."

Demonize the opposition

You represent the plaintiff in a divorce action, Kay Corleone. You need to show that her husband, Michael Corleone, was mad during a particular incident.

This is how we are trained to write the sentence:

"Michael was angry"

Now you rewrite it, *demonize* the oppsition…

"The defendant was enraged"

You made it to the end!!