

From PLI's Course Handbook

Securities Arbitration 2005: Telling Your Story

#6855

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PLAIN ENGLISH IN SECURITIES
ARBITRATION PLEADINGS

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Introduction

The theme of this securities arbitration program—telling your story effectively—relates to practitioners’ writing skills as well as oral advocacy. These two skills are distinct but related. Most arbitrators would probably agree that arbitration lawyers over-talk and over-try their cases. Likewise, in the arena of persuasive writing in arbitration—telling your story—most arbitration lawyers overwrite. They write like lawyers. This is not a compliment. But there is a cure.

A colleague tells the story of his first oral argument as an associate at a large New York law firm. The crusty senior partner whispered to him just before he stood to address the court: “Be good. If you can’t be good, be short.” “I’ll be both,” my colleague replied, with the confidence and aplomb of a future arbitration attorney.

In advancing arbitration claims or defenses, lawyers write in too lawyerly a fashion. Since most attorneys do not write well to begin with, this is a problem. It is more effective to write your claims, answers, memos and motions in plain English. But it takes the courage of convictions you may not yet have. Knowing how and when to keep your writing concise is as tough as knowing when to keep silent while your adversary is committing self-immolation before the arbitrators.

The panel will appreciate your efforts and directness. All the basic principles of good legal writing—credibility, persuasiveness and advocacy—apply even more in arbitration. Usually only one lawyer as an arbitrator serves per panel. As such, you are not arguing to make or maintain an appellate record. You are arguing to win the credibility war with your adversary.

You want the panel to conclude that *your* story—not your opponent’s—is the more compelling and credible one. If the panel only slightly leans your way because you have been the more direct and understood advocate, you have served your client well. Lawyers in arbitration do their clients a disservice by submitting overwritten and redundant pleadings.

Arbitrators are generally smart and busy people who are not swayed by overly legalistic tomes. And the applicable rules do not require verbosity. The NASD Code of Arbitration Procedure Rule 10314(a) provides: “The Statement of Claim shall specify the relevant facts and the remedies sought.” Likewise, the answer “shall specify all available defenses and relevant facts thereto that will be relied upon at the hearing. . . .”

Rule 10314(b). The New York Stock Exchange Department of Arbitration Rule 612 provides the same.

Having served on panels and as a party advocate, I firmly believe that using direct, plain English is the most effective way to tell your client's story. With that conviction, I propose the following points for you to consider in drafting a persuasive arbitration document. Dust off your Strunk & White, *The Elements of Style*.¹ If it's not in your office, read no further; buy it now. Otherwise, review these ten points and apply them to your next draft of an arbitration pleading.

The Ten Golden Rules for Persuasive Arbitration Pleadings

1. Omit Needless Words.²

The "plain English" movement, reviewed in countless books on writing,³ comes down largely to this basic rule. Justice Brandeis said it best: "There is no such thing as good writing. There is only good rewriting."⁴ When you edit drafts, omit surplus words.⁵ Search out compound constructions⁶ and the passive voice.⁷ "At that point in time" becomes "then." "For the reason that" becomes "because." "In order to" becomes "to." "I personally" becomes "I" and "in the instant proceeding"⁸ becomes "here." When you see these lawyer-like phrases, get rid of them. Simplify. Have no fear. The arbitrators will appreciate it.

Even our introductions could use trimming. Is there any doubt that the average arbitrator understands that your client is Lehman or Citibank? So why start with "Respondent Solomon Smith Barney ('SSB' or 'Respondent'), sued herein as Solomon Smith Barney Citibank, a wholly owned subsidiary of Parent Corporation, by its attorneys, Contra Strunk & White, respectfully submits as and for its Answer a response to the State-

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1. William Strunk Jr. & E.B. White, *The Elements of Style* (4th ed. 2000).
 2. *Id.* at 23-24; see also Richard C. Wydick, *Plain English for Lawyers* 9-24 (4th ed. 1998)
 3. See, e.g., Wydick, *supra* note 2.
 4. See Richard K. Neumann, Jr., *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 61 (4th ed. 2001).
 5. Wydick, *supra* note 2, at 9-24; Strunk & White, *supra* note 1, at 23-24.
 6. Wydick, *supra* note 2, at 13-14.
 7. Wydick, *supra* note 2, at 29-34; Strunk & White, *supra* note 1, at 18-19; see also Bryan A. Garner, *Legal Writing*, *Student Lawyer*, May 2003, at 10-11 (discussing both nominalizations and the passive voice).
 8. Or "in the case at bar" or "in the above-captioned case . . ."

ment of Claim of John and Mary Jones (collectively ‘Claimants’ or ‘the Joneses’) the following for consideration by the Panel . . .’?”

After this exhausting introduction, the arbitrator may not read much further. There is nothing wrong (and a lot right) with: “Respondent [name] answers the claim as follows.” No long windup. To the point. The panel knows this is your answer. It knows the party you represent. It knows your name. No other information is necessary. Omit needless words.

2. Avoid Redundant Legal Phrases or Couplets.⁹

Lawyers like to use a pair or string of words that mean the same thing: null and void; last will and testament; free and clear; good and sufficient; confesses and acknowledges; deposes and says. The use has ancient roots in legal writing; tradition dies slowly. Bottom line: these legal couplets are no longer necessary.¹⁰ Avoid redundant repetition (including phrases like that).

3. Use Base Verbs, Not Nouns (Avoid Nominalizations).¹¹

Lawyers for some reason like to “make statements” instead of “state”. Watch for forms of the verb “to make” or “to do” followed by nouns ending in “-ment”, “-tion”, “-al”, “-ence”, and “-ity”. These are nominalizations.¹² Have your cars collide, not enter into collisions. Assume, do not make assumptions, and ask panels to decide, not to make decisions. At the next hearing I will take care to “state why I object,” rather than “ask to be permitted to make a statement as to why I am interposing an objection to counsel’s question at this time.”¹³

In the same vein, use real words, not bureaucratese. A “detonation device” is a bomb. A “home surveillance protection system” is an alarm. “To communicate orally” is to talk.

4. Use Short Sentences And Short Paragraphs.¹⁴

I count words in my drafts. Sentences should be fewer than 25 words.¹⁵ Paragraphs should have an introduction, a middle and a con-

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9. Wydick, supra note 2, at 19-24.
 10. See id. (discussing the development of couplets and distinguishing between terms of art and mere redundancy).
 11. Id. at 25-27; see also Garner, supra note 7, at 10-11.
 12. See Wydick, supra note 2, at 25-27; see also Garner, supra note 7, at 10.
 13. Wydick, supra note 2, at 25.
 14. See id. at 35-41; see also Strunk & White, supra note 1, at 15-17.
 15. See Wydick, supra note 2, at 38.

clusion, and should be three to five or six sentences long. One thought per sentence;¹⁶ one argument per paragraph.¹⁷ Everything you do to help the reader helps you and your client. Attention will be paid if you pay attention to what you write.

5. Arrange Your Words With Care.¹⁸

Keep the subject of the sentence close to the verb.¹⁹ Be careful in the placement of clauses and phrases. “The defendant was arrested for fornicating under a little-used state statute.”²⁰ This may bring a smile to the reader, but vague antecedents will not advance your cause. “My client has discussed your proposal to fill the drainage ditch with his partners,” is another favorite.²¹ Arrange your words with care.

6. Use Concrete Words; Avoid Lawyerisms.²²

Choose your words with precision; make every word tell. We often lapse into lawyerisms out of bad habit, laziness or an ill-conceived attempt to impress.²³ Often plain English in writing is close to plain speaking in everyday conversation. You would not say at the dinner table, “Those are wonderful string beans; please pass said beans.”²⁴ Don’t write that way either. Henceforth, lose the aforesaid, heretofore and hereinafters from your writing.²⁵

Given the choice, use familiar words over the unfamiliar. Prefer English root words to the Latin bases words (e.g., explain for elucidate; see for observe; use for utilize; free for liberate).²⁶

16. Id.

17. See Strunk & White, supra note 1, at 15-17.

18. See Wydick, supra note 2, at 43-56.

19. See id. at 43-46.

20. Id. at 49.

21. Id.

22. See id. at 57-63; see also Strunk & White, supra note 1, at 21-23.

23. As the T-shirt reads, “Eschew obfuscation.”

24. Wydick, supra note 2, at 61.

25. Id. at 61-63; see also Gerald Lebovits, *On Terra Firma With English*, N.Y. St. B.J., Sept. 2001, at 64, 57 (“Legalese . . . adds nothing of substance, gives a false sense of precision, and obscures gaps in analysis.”).

26. See Wydick, supra note 2, at 60-61.

7. Use Strong Nouns And Verbs.²⁷

Legal writing should be declaratory and direct.²⁸ Don't dilute your points with vague, "purple-prosy" sentiments. "The witness intentionally testified untruthfully about the issue raised in paragraph 42 of the Claim." The witness lied. "The Claimant was very, very upset at the prognosis of the decline in value of her portfolio and her present budgetary circumstances." She was enraged. The losses were large and they hurt.

8. Avoid Long Quotes and Legal Treatises.

Submitting a claim or answer in arbitration is the first chance you have to "tell your story." The first three to five pages are critical; they create your first impression. Most panelists wait for the hearing to absorb the finer details. Your theme should be precise and succinct, colorful and credible. A claim is not a legal brief. The use of endless quotes from case law bores most arbitrators. If the panel wants a brief on a particular legal issue, it will ask for one. Long legal recitations also smack of form pleading with cookie-cutter claims or defenses.²⁹

The sooner you lose the reader, the sooner you lose the case. We all suffer from the tendency to believe that if words came from a published source they must be good. Be shrewd enough to delete and revise.³⁰

9. Punctuate Carefully.³¹

The rules are too numerous for review here. But remember that punctuation is a guide to meaning.³² Sloppy punctuation doesn't only affect the meaning of your sentence;³³ it implies, like sloppy citations, a sloppy approach to writing.

By inference, the grammarian panelist thinks, "Sloppy writing, sloppy research, sloppy reasoning." The result again is a bias against your client instead of for your client.³⁴ This may strike you as minor or picayune. But small mistakes add up to an impression that you do not care enough.

27. Id. at 77-78; see also Strunk & White, supra note 1, at 71-72.

28. Wydick, supra note 2, at 77.

29. It helps the defense cause greatly when plaintiff's counsel neglects to proofread the final product carefully. You cannot blame anyone else when an old Respondent's name turns up in your new Statement of Claim against a new Respondent. Likewise for defense counsel, stating as an affirmative defense that "Claimant ratified his trades," in response to the claim of Sally Jones does not impress.

30. See Strunk & White, supra note 1, at 72-73.

31. Wydick, supra note 2, at 85-115; see also Strunk & White, supra note 1, at 1-9.

32. Wydick, supra note 2, at 88.

Assume that everything in arbitration makes a difference because anything might.

10. Be Shrewd Enough To Revise.³⁵

There should be no cookie-cutter complaint or answer. Your client's story is always unique. Each arbitration is different. If you believe there is no such thing as good writing, only good rewriting, then editing is crucial.³⁶ Make it your story. Make every word tell.

Conclusion

If you follow this recipe, the finished product will be smooth and effortless to understand. It is through your labors that clear writing will emerge. You know you have succeeded when your thoughts are so clear that the reader does not notice your choice of words or the structure of your sentences.

Keep these suggestions in mind. They are useful guidelines. You will need your voice and your style to make your story sing in the most compelling way. As an example, I offer an old (if somewhat extreme) English tax court decision. In the early days of common law, courts included the parties' positions in publications.

Defendant: "With God as my judge, I do not owe this tax."

Court: "He's not. I am. You do."

Strive to write well and be concise. It will serve everyone's interest.

33. The importance of punctuation is stressed with great style and humor in the recent publication "Eats, Shoots and Leaves" by Lynn Truss (1st ed. 2004). Her thesis is that through sloppy usage and the informality of Internet writing, we have made proper punctuation an endangered species. The book title derives from the following story:

A panda walks in to a café. He orders a sandwich and eats it, then draws a gun and fires two shots in the air. "Why?" asks the confused waiter. As the panda exits, the panda produces a badly punctuated wildlife manual and tosses it over his shoulder. "I'm a panda," he says, at the door. "Look it up." The waiter turns to the relevant entry and, sure enough, finds an explanation. "PANDA. Large black-and-white bear-like mammal, native to China. Eats, shoots and leaves."

So, punctuation really does matter, the author notes, even if it is only occasionally a matter of life and death.

34. See Neumann, supra note 4, at 51-53.

35. See Strunk & White, supra note 1, at 72-73.

36. See id.; Neumann, supra note 4, at 61-63.