Common Grammar and Usage in Legal Writing

"We are all apprentices in a craft where no one ever becomes a master." – *Ernest Hemmingway*

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Disclaimers (the legal stuff)

Expertise:

- I am not an expert in grammar or usage in legal documents (or otherwise).
- The discussion here is not exhaustive on the topics.
- Our purpose today is to discuss concepts that you can use to improve your own writing.

Critic:

- Nothing I discuss today serves to critique the work of others in the judiciary or otherwise.
- I will not “grammar shame.”
- I ask the same courtesy, especially when you see grammar issues in this presentation.
- My views are purely that!

Substitute:

- I am not a substitute for the judge or team with whom you work.
- If any concepts we discuss here differ from the preferences of others—particularly if the “others” are judges—follow them and not me!

Where are we going?

Three Broad Topics (from my own notice over the years):

- Organization
- Punctuation Marks
- Concise Writing

Organizing the Work

"Easy reading is damn hard writing."

- *Nathaniel Hawthorne*

Tom's Basics for Writing

- **Goal:** In any writing, the number one goal is to keep the reader. We do this by making it easy for the reader to stay with us.

- **Audience:** Know who the audience is for your work. It will shape how the product is communicated.
  - A writing that is intended to communicate to a party only is much different than one intended to communicate to the supreme court or the General Assembly.

- **Purpose:** Know what the basic purpose of the writing is.
  - Is it simply to resolve a case?
  - Is it to educate the bench or bar about an issue?

Large-Scale Organization

- In the macro sense, similar documents coming out of chambers should have a consistent large-scale organization.
- Beyond this, the audience and the purpose of the document may govern how the document is further structured.
- **Statements of Facts:**
    - They may be organized chronologically, topically, or otherwise, depending on the purpose of the document.

Large-Scale Organization

- **Issue Discussion:**
  - Note that the writer is not bound by the order in which issues are presented to the court.
  - In some cases, the court may also choose to reframe issues where the reframing makes more sense organizationally.

- **Conclusions:**
  - Do not neglect the opportunity to use the conclusion.
  - It can restate essential holdings.
  - It can be used to communicate or reinforce important themes.

Use Headings

Purpose

Headings provide structure and highlight key sections.

They also break up long sections and keep the reader’s attention.

Formatting

Legal headings use a consistent format: Roman numerals (I, II, III) for major sections, capital letters (A, B, C) for subdivisions, and numbers (1, 2, 3) for further elaboration.

Example

Major components, such as “Factual Background," are often centered for emphasis.

Consistency

Consistent formatting ensures clarity and professional presentation.

Use Roadmaps

Roadmaps provide a clear overview of legal documents, acting as navigational aids. They enhance understanding and make it easier to follow the author's arguments.

1

Purpose

Roadmaps guide readers through the document, providing a preview of major sections. This helps them understand the structure and follow the author's argument.

2

Mini-Roadmaps

Offer specific guidance within subsections, improving readability.

Small-Scale Organization

What do we mean?

- Small-scale organization focuses on the flow of information within and between paragraphs and sentences.
- This ensures clarity and readability, making legal writing easier to understand. It involves structuring sentences effectively, crafting strong topic sentences, and creating mini-conclusions to summarize key points within each paragraph.

Effective Topic Sentences:

- Clearly convey the main point of each paragraph and ensure that each paragraph fits within the overall discussion.
- Effective topic sentences serve as signposts, guiding readers through the main arguments and concepts presented in the document.
- They should be concise, specific, and directly relevant to the overall theme of the paragraph.

Small-Scale Organization

Paragraph Length:

- Maintain a concise and focused paragraph structure to ensure readability and keep readers engaged.
- Long paragraphs can overwhelm readers and make it difficult to follow the argument.
- Aim for paragraphs that are 5-7 sentences long. The optimal length will vary depending on the complexity of the issue and the overall flow of the document.

Communicate Links Between Ideas

1

Transitions

Use transitions to signal shifts between ideas. This will help the reader follow your argument and understand the connections between different parts.

2

Signal Similarity

Terms like "similarly" and "accordingly" highlight how two ideas are related, establishing a logical flow.

3

Signal Contrast

Use terms like "however" and "nonetheless" to show how ideas differ or oppose, creating a clear understanding of divergences.

4

Conjunctive Adverbs

Conjunctive adverbs like "moreover," "furthermore," and "therefore" provide clarity and connections between ideas.

Avoid “Upside-Down” Paragraphs

In legal analysis, begin by stating the applicable legal rule.

- This structure establishes a clear framework before delving into specific facts.
- A well-structured legal paragraph prioritizes a topic sentence, summarizing the main point, followed by the relevant legal rule, its explanation, application to the case facts, consideration of counterarguments, and a concluding summary of the main point.

Avoid “Upside-Down” Paragraphs

For example, in a contract dispute, avoid starting with detailed interactions or contract terms.

- Instead, introduce the applicable contract law principle, such as mutual assent or consideration.
- Explain its elements and apply it to the case facts, demonstrating its relevance to the dispute.

Punctuation Basics

“Writing is easy: All you do is sit staring at a blank sheet of paper until drops of blood form on your forehead.”

– Gene Fowler

Semicolons

1

Usage

A semicolon joins two related independent clauses without a conjunction.

2

Clarity

Semicolons clarify relationships between clauses.
They add emphasis to the second clause as an important explanation of the first.

3

Separate Items in a Series

The elements of defamation include a defamatory statement concerning another; publication to a third party; and fault amounting to at least negligence.

4

When not to use

Don't use a semicolon with a coordinating conjunction.
But, you can use it after a conjunctive adverb, such as also, furthermore, nevertheless, thus, however.

5

Avoid Overuse

Use semicolons strategically for clarity.

Commas

Commas separate elements within a sentence, providing clarity and readability.

- They are used to set off introductory phrases, interrupting phrases, and before conjunctions that join **independent** clauses.
    - For example, “After a long day at work, I went for a walk in the park.”
    - “The light turned green, and she proceeded through the intersection.”
- Do not use between clauses if the next clause does not have a subject and verb.
    - “She drove through the green light and turned on the next street.”

Commas

- Commas are also used to separate items in a list, such as "I need to buy milk, eggs, bread, and cheese from the grocery store."
    - Consider the alternative: “I find inspiration in cooking my family and my cat.”
- To Oxford or Not to Oxford?
    - Final comma in a series, as in the above example.
    - Consider including it when it adds clarity: “I love my parents, Oprah and God.”
        - Without the Oxford Comma, the sentence could be read to say that you have amazing parents.

Commas

- Commas are also used after a dependent clause that comes before an independent clause: "Because it was raining, we stayed inside.“
- The “Pause Rule.”
  - This may work in most cases. Pay attention to how it sounds when proofreading your writing out loud.

Quotation Marks

- Quotation marks indicate direct speech or quotations from other sources.
  - Use a comma before a quote when a phrase introduces the quote, but do not use a comma if the quote is integrated into a larger sentence.
    - He replied, “I think the robber wore a white shirt.”
    - He replied that the robber’s shirt was “white with blue stripes.”

Quotation Marks

Punctuation and Quotation Marks:

- Commas and periods ***always*** go inside of the closing quotation mark.
  - All other marks go inside the closing quotation mark only if the mark is part of the quote.
  - He asked, “What time does the trial start?”

- All other marks go ***outside*** the closing quotation mark if the mark is part of the larger sentence.
  - Did he really call his colleague “a great lawyer”?
  - She said “next Sunday”; however, I think she meant tomorrow.

Ellipses

Ellipses are used to indicate the omission of one or more words from a sentence.

- **Spaces:** According to the Bluebook, include a space before and after each period in an ellipsis.
  - Note that some word processing autocorrect features automatically insert a special “ellipsis” character when you type three periods. This spacing is typographically more correct, but it does not conform to the Bluebook.
    - “Congress shall make no law . . . abridging the freedom of speech[.]”

- Do not use to show an omission at the ***beginning*** of a quotation.
  - Not: “The court wrote that “. . . the plaintiff was not entitled to relief.”
  - Instead: “The court wrote that “the plaintiff was not entitled to relief.”

Ellipses

- When an ellipsis ends a sentence, add **three dots** for the ellipsis and a **fourth dot** as the period. This fourth dot signals the end of the sentence.
  - The bailiff said, “The trial was scheduled to end at four. . . . However, it continued for another hour.”

- When a paragraph or more is omitted from a quotation, start a new line, *indent*, and then include four periods with spaces in between. The fourth period is the additional punctuation.

> The progress of our arms, upon which all else chiefly depends, is as well known to the public as to myself, and it is, I trust, reasonably satisfactory and encouraging to all. With high hope for the future, no prediction in regard to it is ventured.
>
> . . . .
>
> With malice toward none, with charity for all, with firmness in the right as God gives us to see the right, let us strive on to finish the work we are in . . . .

The Apostrophe

The apostrophe serves two main purposes: indicating missing letters in contractions and forming the possessive forms of nouns.

- **Joint Possession by Multiple People:**
  - When two or more people share possession, use an apostrophe only after the last noun.
    - “Alice and Tom’s house” (one house shared by Alice and Tom)

- **Individual Possession by Multiple People:**
  - When two or more people possess separate items, use an apostrophe with each noun.
    - “Alice’s and Tom’s houses” (each has their own house)

The Apostrophe

Possession with Plural Nouns Not Ending in "s":

- Add an apostrophe and "s.“
  - “The children’s playground“; "the men’s restroom“; “the people’s choice“

One exception: Use an apostrophe for numbers, letters, and symbols

- “Mind your p’s and q’s“; “Two 5’s“

Plural Words: Generally, do not use to make nouns plural.

- “Two DVDs“; “Several VIPs“
- “There were two Joneses at jury selection this morning.”

The Apostrophe

- **Possession with Compound Nouns:**
  - Place the apostrophe at the end of the entire compound noun.
    - “My brother-in-law’s car”; “The editor-in-chief’s decision”

The Hyphen

Usage: Hyphens connect words that create compound adjectives and have prefixes.

Compound Adjectives:

- Hyphenate a compound adjective when it appears *before* the word it modifies, but not when it appears *after*.
    - The lawyer's brief contained well-developed arguments.
    - The four-year-old child was smiling.

vs

    - The arguments in the lawyer's brief were well developed.
    - The smiling child is four years old.

The Hyphen

Usage: Hyphens connect words that create compound adjectives and have prefixes.

- **Compound Adverbs:**
  - Generally, do not hyphenate compound adverbs (or “ly” words).
    - The judge’s order contained previously used language.
    - Not: The judge’s order contained previously-used language.

The Hyphen

Usage: Hyphens connect words that create compound adjectives and have prefixes.

Prefixes:

- Use a hyphen when adding a prefix to a proper name: un-American.
- Use a hyphen when the prefix ends with the same vowel that begins the main word:
    - re-enter, semi-independent.
- Use a hyphen with self- when the word is used as a prefix:
    - self-employed, self-sufficient.

The Hyphen

Usage: Hyphens connect words that create compound adjectives and have prefixes.

Prefixes:

- Use a hyphen with ex- when the word means former:
  - ex-wife; ex-president.
- Use a hyphen whenever omitting it will confuse readers.
  - “He wanted to re-lease the apartment.”
  - Or reword the sentence: “He wanted to lease the apartment again.”
- Always hyphenate “cross-examine” in all of its forms.
- But do not hyphenate proper nouns: Supreme Court Building

The Colon

What is it? A colon is used to introduce, clarify, emphasize, or list information in writing. It helps signal that what follows will expand on or explain what came before.

- A colon can **introduce a list**, particularly after a full sentence.
    - “The picnic basket contained everything we needed: sandwiches, fruit, chips, and drinks.”

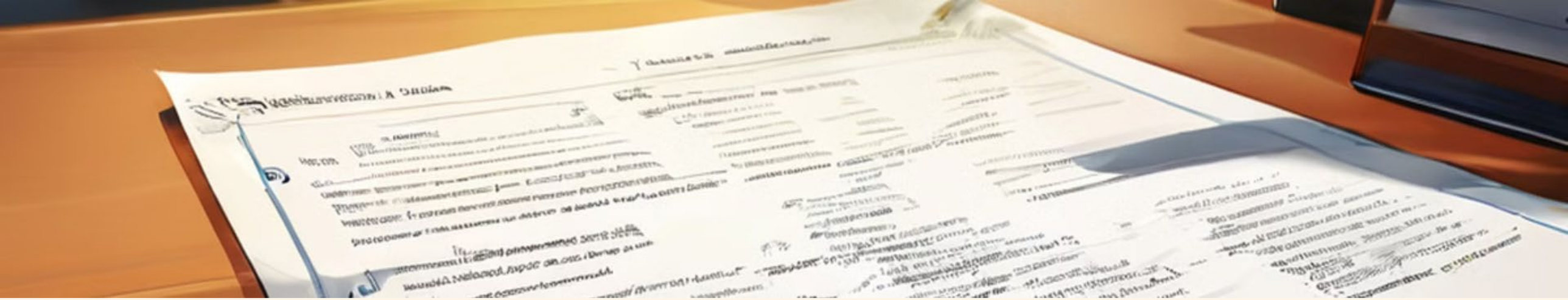
    - But do not use after “such as” or “including.”
        - “The picnic basket contained everything we needed, including sandwiches, fruit, chips, and drinks.”

- A colon can **introduce a statement** that explains, clarifies, or elaborates on the preceding clause.
    - “There is one thing every leader must remember: Actions speak louder than words.”

The Colon

Odds and Ends:

- Do not use a colon after a verb or preposition.
  - “Their names are: Tom, Tim, and Terry.”
- **Spacing:** Do not include a space before the colon, but include one space after it.
- **Capitalization:** Do not capitalize the first word after a colon, unless a complete sentence follows the colon.
  - “She famously said: ‘Knowledge is power.’”



The Dash

Dashes separate parenthetical elements or modifying phrases and add emphasis.

- They create a distinct pause or break in a sentence, adding drama and engagement.
- Dashes emphasize information, drawing attention to key details. This stylistic choice enhances reading by highlighting crucial information.
    - “Even if we agreed with the Defendant’s argument—and we do not—the trial court did not abuse its discretion.”
- A dash can also replace a colon for additional emphasis: “The lawyer had one goal—winning.”

Concise Writing

“Inside every fat book is a thin one trying to get out.”

- Unknown

Concise Writing

Concise writing uses clear and direct language, avoiding vague terms and focusing on specific statements. This promotes clarity and avoids misinterpretations.

Two initial Thoughts:

- **Quotations:** While quotations may be important in legal writing, excessive use can disrupt the flow. Paraphrasing key points from case quotations maintains a smooth narrative and demonstrates your understanding of the law.

- **Active Voice:** Active verbs are essential for concise writing. Using active voice eliminates unnecessary words, resulting in a more concise and impactful style.

Nominalizations

- Nominalizations are verbs turned into nouns, often ending in tion, -ment, -ance, -ence, and -ity.

- They can add variety and complexity to sentences, but overusing them can obscure meaning and reduce clarity.

- Too many nominalizations make sentences hard to understand:
  - “The implementation of the new program resulted in a reduction of costs.”
  - “The new program reduced costs.”

Nominalizations

Nominalizations Ending in “-ment”

- “Agreement” (agree)
- “Achievement” (achieve)
- “Development” (develop)
- “Improvement” (improve)
- “Requirement” (require)
- “Establishment” (establish)
- “Adjustment” (adjust)
- “Management” (manage)
- “Commitment” (commit)

Nominalizations Ending in “-ity”

- “Ability” (able)
- “Activity” (active)
- “Complexity” (complex)
- “Productivity” (productive)
- “Creativity” (creative)
- “Possibility” (possible)
- “Flexibility” (flexible)
- “Simplicity” (simple)
- “Responsibility” (responsible)

Nominalizations

Nominalizations Ending in “-ance” or “-ence”

- “Attendance” (attend)
- “Performance” (perform)
- “Assistance” (assist)
- “Acceptance” (accept)
- “Existence” (exist)
- “Persistence” (persist)
- “Resistance” (resist)
- “Dependence” (depend)

Nominalizations Ending in “-tion” or “-sion”

- “Application” (apply)
- “Explanation” (explain)
- “Implementation” (implement)
- “Consideration” (consider)
- “Discussion” (discuss)
- “Investigation” (investigate)
- “Presentation” (present)
- “Recommendation” (recommend)
- “Identification” (identify)

Delete Meaningless Words

- Use shorter, more precise language in legal writing to eliminate clutter, improve clarity, and strengthen arguments.
- Replace **compound constructions** like “the fact that,” “at this point in time,” and “in order to” with concise alternatives: “that,” “now,” and “to.”
- Avoid **redundant legalisms** like “null and void,” “due and owing,” “hereinabove,” “heretofore,” and “hereinbelow.” These add unnecessary bulk.
- Eliminate **redundant synonyms**. For example, simplify “null and void” to “void,” and “due and owing” to “due.”

“That” vs. “Which”

Use “that” for restrictive (essential) clauses and “which” for non-restrictive (non-essential) clauses.

Restrictive clauses are essential to understanding which noun is being discussed.

- “Cars that have electric engines are becoming popular.”
    - The clause “that have electric engines” is essential. Without it, the sentence is ambiguous.

Think of “that” as introducing information that **defines or restricts** the noun it follows.

Comma Use: Restrictive clauses are not set off by commas.

“That” vs. “Which”

Use “that” for restrictive (essential) clauses and “which” for non-restrictive (non-essential) clauses.

Non-restrictive clauses provide additional information but are not essential to understanding the sentence.

- "Cars, which have been around for over a century, are constantly evolving.“
    - The clause “which have been around for over a century,” is not essential; the clause simply provides extra information.

Use “which” to introduce information that adds detail about an already identified noun.

Comma Use: Non-restrictive clauses are *always* set off by commas.

Misused Modifiers

Misused modifiers can lead to confusion and make sentences unclear.

They fall into two categories:

- dangling modifiers; and
- misplaced modifiers.

Misused Modifiers

Dangling Modifiers occur when a modifier is not clearly connected to the word or phrase it modifies.

This often happens when the modifier is *at the beginning* of a sentence, but the subject of the sentence is not the intended target of the modifier.

- “Walking down the street, the red car zoomed past me.” The sentence should read, “As I was walking down the street, the red car zoomed past me.”

- “Having finished her questioning, the witness was excused by the lawyer.” This sentence implies that the witness finished the questioning.

    - “Having finished her questioning, the lawyer excused the witness.”

Misused Modifiers

Misplaced Modifiers modify the wrong word or phrase within a sentence.

This construction can happen when a modifier is *too far* from the word it should modify, or when its placement creates a misleading or awkward interpretation.

- “The chef prepared a dish for the customer that was delicious.” vs. “The chef prepared a delicious dish for the customer.”

- “She served ice cream to the kids in bowls.” vs. “She served ice cream in bowls to the kids.”

Tips for Avoiding Misplaced Modifiers

- **Place Modifiers Next to the Word They Modify**: Modifiers should be as close as possible to the words they describe.

- **Be Mindful with "Only," "Almost," and "Nearly"**: These words can significantly alter meaning depending on where they are placed.
  - “He almost ate the entire pizza.” Or, “He ate almost the entire pizza.”

- **Check for Dangling Modifiers:** Ensure every modifier clearly refers to a logical subject in the sentence.

- **Read Sentences Aloud:** Misplaced modifiers often become apparent when a sentence is read aloud, as awkward or unintended meanings may stand out.

“Who” vs. “Whom”

Use “who” for **subjects** and “whom” for **objects** of verbs, prepositions, or infinitives.

- Subjects perform the action of the verb, while objects receive the action of the verb.

Examples:

- “Who robbed the bank?” (“who” is the subject of the verb “robbed”).
- “With whom did Joe serve on the jury?” (“whom” is the object of the preposition “with”).
- “To whom is restitution owed?” (“whom” is the object of the preposition “to”).
- “Who was sentenced today?” (“who” is the subject of the verb “sentenced”).

- To remember when to use “who” or “whom,” try substituting “he/she” or “him/her.”
  - If “he/she” works, use “who.”
  - If “him/her” works, use “whom.”

The Unnecessary & Clarifying “That”

Issue: Some writers believe that it is necessary to eliminate the word “that” from the writing. But, not every “that” is created equal.

Consider the following sentence: “The judge held the hammer was a deadly weapon.”

- Because the verb “to hold” typically takes an object, a reader may initially understand the sentence to mean, “The judge held the hammer . . . .”

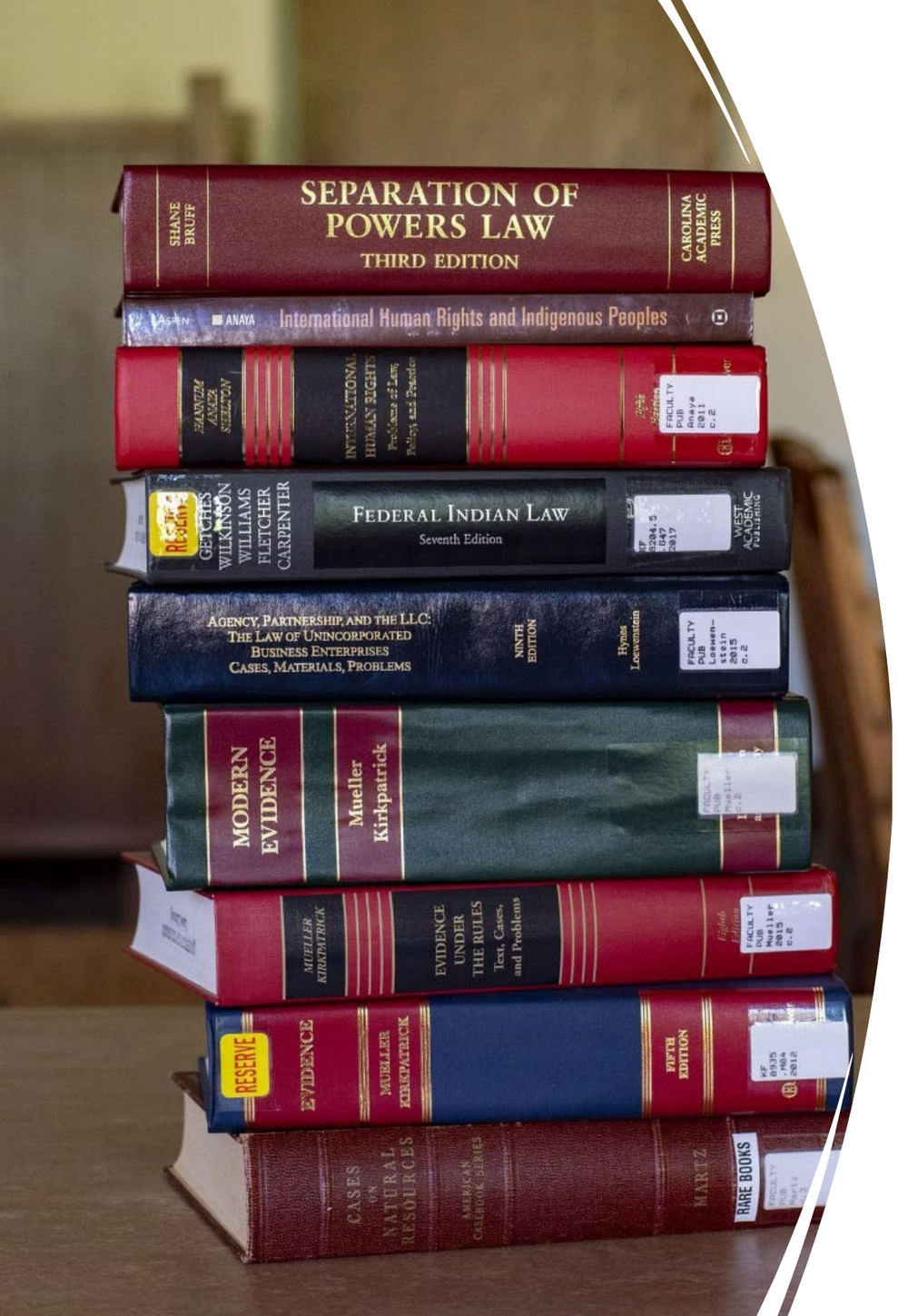
- A *clarifying* “that” can be used to assist the reader: “The judge held that the hammer was a deadly weapon.”

The Unnecessary & Clarifying “That”

However, the word “that” is unnecessary where you will not confuse the reader:

- The juror did not think [that] the witness was telling the truth.
- The judge believed [that] the evidence should be admitted.
- The defense lawyer said [that] the defendant was in custody.

No ambiguity is created by omitting “that” because you can neither think a witness, believe the evidence, nor say the defendant.



“Because” vs. “Since”

- “Since” focuses on the time frame, while “because” emphasizes the cause-and-effect relationship.
- Consider the different meanings:
  - “Since I moved back to the courtroom, I have been feeling more motivated.”
    - This sentence uses “since” for the time frame.
  - “Because I moved back to the courtroom, I have been feeling more motivated.”
    - This sentence uses “because” to show the cause of the motivation.

Split Infinitives (Finally)

What: A split infinitive occurs when an adverb is placed between "to" and the verb.

Why: Thought to be a left over from Latin, where you cannot split an infinitive.

Can you split an infinitive? Controversially, of course. Split infinitives to clarify and avoid awkward language.

Examples:

- “To boldly go”
- “She decided to quickly leave the room.” vs. “She decided to leave the room quickly.”

Rules of Thumb:

- In general, avoid split infinitives unless there is a compelling reason to use them.
- If unsure, err on the side of caution and rewrite the sentence to avoid them. For example, “to quietly read” may be better written as “to read quietly.”

Common Grammar and Usage in Legal Writing

Any Questions?