

Using Intensifiers Is Literally a Crime

By Wayne Schiess

As a legal writer, as a paid persuader, you might be tempted to use intensifiers to bolster your points—to persuade. What’s an intensifier? It’s a “linguistic element used to give emphasis or additional strength to another word or statement.”¹ Intensifiers can be various parts of speech: adverbs (*clearly*), adjectives (*blatant*), participles (*raving*), and more.

For legal writers generally and for brief writers particularly, the most commonly used intensifiers tend to be adverbs ending in *-ly*:

blatantly
certainly
clearly
completely
extremely
highly
obviously
undoubtedly
wholly

But if you consult writing experts, you’ll see that intensifiers get a lot of bad press, and *clearly* is king:

- [*Clearly*] is so overused in legal writing that one has to wonder if it has any meaning left.²

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- Doctrinaire adverbs such as *clearly* and *obviously* are perceived as signaling overcompensation for a weak argument.³
- [*Clearly*] lulls legal writers into a false sense that they’ve given substantive, persuasive reasons for a legal conclusion.⁴

Entire articles could be written on *clearly*—and have been, by Mark Cooney in this space in June 2011.⁵ Other intensifiers get fair criticism, too:

- When most readers read a sentence that begins with something like *obviously*, *undoubtedly*, . . . and so on, they reflexively think the opposite.⁶
- When you cut the intensifier, your phrasing usually gains intensity.⁷
- Perhaps it’s counterintuitive, but intensifiers . . . tend to weaken prose, not intensify it.⁸

In fact, a recent law-review article suggests that overusing intensifiers is bad—*very bad*. In a study of United States Supreme Court briefs, the authors found that increased intensifier use was correlated with losing, especially for appellants.⁹ The authors allege no causal connection—they couldn’t prove that the intensifiers had lost the cases—but the correlation is interesting.

What to do about intensifiers

Let’s explore the downsides of intensifiers as we consider what we should do instead. Here are six suggestions.

1. Drop them.

It may be counterintuitive, but intensifiers often weaken prose. A sentence usually gets stronger without the intensifier. Which of these is more forceful?

1a. Clearly, an attorney is not an expert on what a “Doberman” is, and there is no showing in the affidavit that Squires is an expert on Dobermans. It clearly is a fact issue for the trier of fact.

1b. An attorney is not an expert on what a “Doberman” is, and there is no showing in the affidavit that Squires is an expert on Dobermans. It is a fact issue for the trier of fact.

For me, 1b is stronger.

Dropping intensifiers doesn’t always work, and you can’t completely banish them. Some legal standards require them: *clearly erroneous*, *highly offensive*, *egregious harm*, *substantially outweigh*. Legal writing entails some qualifying, but good legal writers develop a sense for when

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2. Replace them.

With some thought, you can delete an intensifier-plus-verb or an intensifier-plus-noun and replace the phrase with a single forceful word. So—

very small	→ tiny
very sure	→ certain
extremely smart	→ brilliant
very large	→ massive, sizable
quickly went	→ hustled, sped, rushed
highly capable	→ accomplished, proficient
completely wrong	→ inaccurate, incorrect, mistaken, unsound

Again, develop an editorial sense. Replacements don't always work; sometimes a single-word option is loaded. If instead of *very bad* you write *terrible* or *dreadful*, you might interject undesired subjectivity or emotion.

3. Specify instead.

Intensifiers are often vague. Rather than rely on a vague intensifier, you might use details to emphasize. Here's a classic example:

3a. It was very hot.

3b. It was 103 degrees in the shade.

Here's another example. The original uses an intensifier, but the revised version specifies. It also uses two more persuasion techniques: a dash and a sentence that ends with key words:

3c. The transaction at issue obviously did not take place at Eason's residence.

3d. Lubbock detectives set up a controlled purchase with a cooperating defendant at Jay's Auto Body. It was there that Eason handed over a bag of methamphetamine—not at Eason's residence.

As you can see, specifying takes more words, and so, as with all writing, you must exercise editorial judgment. Weigh the longer, specific description against the shorter, vaguer, intensified one.

4. Use a dash.

As we saw in the last example, the dash can be an effective persuasive-writing aid. In *The Redbook*, Bryan Garner calls the dash "a forceful and conspicuous punctuation mark."¹⁰ The dash is flexible—it can replace a comma, a colon, or a semicolon, and a pair of dashes can replace a pair of commas or a pair of parentheses, like this:

4a. Calhoun's statement (which was false) sought to incriminate Scoville.

4b. Calhoun's statement, which was false, sought to incriminate Scoville.

4c. Calhoun's statement—which was false—sought to incriminate Scoville.

In these examples, the inserted text is downplayed with parentheses, is neutral with commas, and is emphasized with dashes. But the dash can emphasize text even when it doesn't replace other punctuation.

4d. Obviously, no living witness other than Appellant knows exactly what occurred on the occasion in question.

4e. No living witness—other than Appellant—knows exactly what occurred on the occasion in question.

You can also use a single dash to point, and that pointing is emphatic. In the following example, the second version not only replaces *traveling at a very high rate of speed* with *racing*, but also highlights *disregarding*, by pointing to it with a dash:

4f. Appellant is shown traveling at a very high rate of speed down a public highway for a considerable distance and completely disregarding a stoplight.

4g. Appellant is shown racing down a public highway for a considerable distance—disregarding a stoplight.

5. End strong.

Experts agree: "The chief stress in most sentences comes at the end."¹¹ And "the end of the sentence is the point of climax."¹² In the following example, I assert that the most important word is *reversal*. Yet in 5a, the writer tried to create emphasis with *clearly*, and ended up with a weak ending. In 5b, we create emphasis by ending strong with the key word.

5a. The exclusion of this evidence clearly warrants reversal under the court's test.

5b. Under the court's test, the exclusion of this evidence warrants reversal.

Sometimes ending strong means revising the text to take advantage of subordination. When you begin the sentence with a dependent, subordinated clause, the main clause that follows gets double emphasis: it's the main clause, and it's at the end. The original below ends weakly with *formal statement* and tries to manufacture emphasis with *extremely* and *significant*. The revision subordinates the statement and ends with force on the key point:

5c. It is extremely significant that Appellant had no opportunity to speak with counsel, or his family, in the 13 hours before he agreed to make a formal statement.

5d. In the 13 hours before he agreed to make a formal statement, Appellant had no opportunity to speak with his family or his lawyer.

[A]s legal writers, we ought to value precision and avoid hyperbole. We shouldn't embrace this lax but long-standing use of *literally*.

Recalling the earlier example about no living witness, we might use both the dash and a strong ending, like this:

5e. No living witness knows exactly what occurred on the occasion in question—no one other than Appellant.

6. Try bullets.

More and more brief writers are using bullets. They're not just a pretty design element: "[Bullets] add visual appeal while highlighting your key points."¹³ In the next example, we trade *undoubtedly* for a bulleted list. Rather than asserting that the evidence was "undoubtedly critical," and giving the reasons in an awkwardly structured 50-word sentence, we highlight the reasons with bullets.

6a. The evidence was undoubtedly critical to the defense because it concerned a third-party confession to the crime and an explanation as to why other witnesses might have testified that Appellant was the shooter, in addition to suggesting a motive for Garza to lie about Appellant's degree of involvement.

6b. This evidence was critical to the defense:

- It concerned a third-party confession to the crime.
- It explained why other witnesses might have testified that Appellant was the shooter.
- It suggested a motive for Garza to lie about Appellant's degree of involvement.

Two points to keep in mind: You wouldn't use bullets when order and hierarchy are important. For example, if you're providing instructions that must be done in a certain

order, numbers are better than bullets. And you wouldn't use bullets when you'll need to refer to the items in the list. For example, it's easier to refer to "2" than to "the second bullet."

Literally in particular

I've got some bad news about *literally*, but I've got some good news, too.

First, let's be clear: *literally* means *actually*, or *verbatim*. Yet linguists and others who study language agree: In speech, *literally* has become an all-purpose intensifier like *truly* or *completely*. No doubt you've heard expressions like these:

- The firm is literally printing money.
- We literally bombed them for 52 points.
- I was so scared, I literally died.

These statements flout the literal meaning of *literally*, and to some ears they sound comical—or absurd.

In writing, the trend is the same: *literally* can't be taken . . . literally. According to Bryan Garner, the figurative use of *literally* is "commonplace even among many well-educated people but is still avoided in careful usage."¹⁴ But this commonplace usage, even in writing, isn't recent. Charles Dickens used *literally* nonliterally in *Nicholas Nickleby* in 1839, and F. Scott Fitzgerald used it in *The Great Gatsby* in 1925. Neither use was in dialogue:

- Dickens: "Lift him out," said Squeers, after he had literally feasted his eyes, in silence, upon the culprit.¹⁵
- Fitzgerald: He literally glowed.¹⁶

So it isn't new. Or rare. *Merriam-Webster's Dictionary of English Usage* cites many examples from the 1800s and 1900s.¹⁷ In fact, *Merriam-Webster* suggests that using

literally in this way is no longer a mistake; rather, it's mere hyperbole—but careful writers should avoid it for that reason. Lawyers, as careful writers, should heed that advice.

That's the bad news, and there's not much we can do about it. Words change, language changes, and sometimes they change for the worse. Did you know that long ago, the frozen dairy dessert was called *iced cream*? Over time, incorrect spelling and pronunciation changed it to *ice cream*.¹⁸ It's happening with *iced tea*, too, right?

But again, as legal writers, we ought to value precision and avoid hyperbole. We shouldn't embrace this lax but long-standing use of *literally*. Even if you're willing to say, in casual conversation, "My boss is so impatient, I'm literally walking a tightrope," please don't use this figurative sense of *literally* in your professional writing. "The probation officer's behavior means that Rudman is literally walking on pins and needles."

Now the good news. I wanted to see how lawyers actually use *literally*, and I decided that my best route was to search in appellate briefs. I found that lawyers are holding the line, as far as I can tell, on *literally*. I did a search for the word *literally* in appellate briefs filed in cases before the Michigan Court of Appeals and the Supreme Court of Michigan. My search returned more than 1,000 hits, and I skimmed dozens of them, ignoring quotations from witnesses or other evidence.

I'm happy to report that I couldn't find any genuinely erroneous uses of *literally*. Brief writers are using *literally* when they mean . . . *literally*. So hurry for these:

- "In rejecting a plural use of the term 'employer,' the Court of Appeals interpreted the term literally, giving it a singular construction."
- "The Appellants freely admit that if the terms of the contract are interpreted literally, there is no coverage of any kind provided in this contract."
- "An individual need not literally possess an item at all times in order to be legally in possession of it."

Congratulations, and let's keep it that way. ■



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ENDNOTES

1. Merriam-Webster's Dictionary of English Usage (1994), pp 555–556.
2. Enquist & Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* (New York: Aspen Publishers, 3d ed, 2009), p 123.
3. Garner, *The Winning Brief* (New York, Oxford University Press, 3d ed, 2014), p 523.
4. Cooney, *The Mismatch*, 90 Mich B J 50, 50 (June 2011).
5. *Id.*
6. Williams, *Style: Lessons in Clarity and Grace* (London: Pearson Education, 9th ed, 2007), p 123.
7. Trimble, *Writing with Style: Conversations on the Art of Writing* (London: Pearson Education, 3d ed, 2011), p 70.
8. Schiess, *Writing for the Legal Audience* (Durham: Carolina Academic Press, 2d ed, 2015), p 8.
9. Long & Christensen, *Clearly, Using Intensifiers Is Very Bad—Or Is It?*, 45 Idaho L Rev 171, 180 (2008).
10. Garner, *The Redbook: A Manual on Legal Style* (St Paul: West Academic Publishing, 3d ed, 2013), § 1.51.
11. Glaser, *Understanding Style: Practical Ways to Improve Your Writing* (New York: Oxford University Press, 2d ed, 2010), p 144.
12. *Just Writing*, 88.
13. Guberman, *Point Made: How to Write like the Nation's Top Advocates* (New York: Oxford University Press, 2d ed, 2014), p 299.
14. Garner, *Garner's Modern English Usage* (New York: Oxford University Press, 4th ed, 2016), p 568.
15. Dickens, *Nicholas Nickleby* (1839), p 114.
16. Fitzgerald, *The Great Gatsby* (New York: Charles Scribner's Sons, 1925), p 95.
17. Merriam-Webster's Dictionary of English Usage (1994), p 607.
18. Garner's *Modern English Usage*, p 478.

The Old Contest

I asked readers to revise this sentence, with an eye to cutting unnecessary prepositional phrases:

Although the road traveled by Officer King was mostly rural in character, the county received the benefit of deterrence of traffic violations by virtue of the presence of the marked patrol vehicle.

I had in mind something like the following—with two prepositional phrases instead of seven (or six if you count by *virtue of* as one multiword preposition):

Although the road traveled by Officer King was mostly rural, his marked patrol vehicle benefitted the county by deterring traffic violations.

Some entries changed the meaning (arguably, at least) by omitting the part about benefiting the country.

The first two A entries I received were from Ross Guberman, a legal-writing consultant (and occasional contributor to this column), and James Smith, retired from Bodman PLC in Detroit. Each will receive a copy of *Lifting the Fog of Legalese* or *Writing for Dollars, Writing to Please*. Their entries (Guberman first, then Smith):

Although Officer King traveled on a mostly rural road, the marked patrol car helped the county deter traffic violations.

Officer King's marked patrol vehicle deterred traffic violations on the mostly rural road—a benefit to the county.

I received quite a few good entries. Keep them coming. Where can you have more fun?

—JK

A New Contest

The example below actually appears in an opinion written by Justice Scalia—*Barnhart v Thomas*, 540 US 20, 27–28 (2003). He asked readers to suppose that parents, before leaving for the weekend, warn their son:

You will be punished if you throw a party or engage in any other activity that damages the house.

The son throws a party, but it doesn't damage the house. Does he get punished?

Justice Scalia used the sentence to illustrate the so-called doctrine of the last antecedent, and he said there was no ambiguity. I think that the doctrine is weak and that the sentence is ambiguous.

The contest: rewrite the sentence—twice—to resolve the ambiguity. Resolve it according to one interpretation first, and then resolve it according to the other interpretation. You must (1) use one sentence only for each revision and (2) for an additional challenge, not use numbers (in contrast to what this sentence does).

Send an e-mail to kimblej@cooley.edu, with "Contest" in the subject line. The deadline is September 22. The first two people to send A answers will receive a book. Even if you think you're probably too late to win, try it to see how your revisions stack up.

A reminder: the online version of the column is usually posted before the print version is ready. To get the jump, Google "Plain Language column index." Or follow me on Twitter: @ProfJoeKimble. I always try to tweet when a new column is posted.