Lawyers are educated people. Lawyers are smart people. Lawyers write for a living. Why then is so much legal writing so unnecessarily hard to read? At least in part, it stems from a misconception of the nature of the writing task.

We learn to write in schoolrooms. For a great majority of professionals, even after they have long left those schoolrooms, writing remains an academic kind of task -- a burden to be dispensed with at the earliest moment possible. They receive an "assignment"; they talk with the appropriate people; they search through the library; they read whatever they need to read; they "organize their thoughts," perhaps in some sort of outline form; and then, when the thinking has mercifully come to an end, they "write it up." They "reduce it to words." Wrong from the start. Writing is not something that happens after the thinking process has ceased. It is a thinking process. The English teacher's one-liner makes good sense: "How do I know what I mean till I see what I say?"

Naturally, if a writer believes the thought process has been completed before the writing begins, then the writing process becomes sheer drudgery. But this misconception of the process of writing is based on a deeper misconception of the purpose of writing. This latter misconception can be described in a metaphor I call the Toll Booth Syndrome.

(The year is 1980.) Picture the following: You are well known in your field. You have been summoned for three weeks to New York to consult on an important case. Staying with friends in southwestern Connecticut, you commute by car into Manhattan at 5:30 A.M. in order to avoid the rush hour. On one particular day you have spent from 6:00 A.M. to 9:30 P.M. in the office, with nothing to show for it.
Everything that could go wrong did go wrong. At 9:30 you make your way down to the parking lot, through wind and rain. You fight your way through 90 minutes of cross-town traffic and finally find yourself battling the dark and the elements on Route 95 as you head towards Connecticut.

Just before you leave the State of New York, you see a sign: "Toll booth, one mile, 40 cents, exact change, left lane." You search in your pocket for change and find you have precisely three coins -- a dime, a nickel, and a quarter -- just the right amount. You enter the exact change lane. In front of you is a shining red light, but no barrier; to the left of you is the hopper. You are tired and irritable as you roll down the window, the wind and rain greeting you inhospitably. You heave the change at the hopper. The quarter drops in; the dime drops in; but the nickel hits the rim and bounces out. What do you do? Do you put the car in Park, get out, and grovel in the gravel for your nickel? No. Do you put the car in reverse and switch to another lane where a human being can make change for your dollar bill, after which you can return to your original lane? No. You go through the red light. It is raining; it is nearing midnight; there are no police in sight; and if you did get caught, you would be able to show the proof of your good intentions in the gravel. The alternatives are just too burdensome. You go through the red light.

If you do this, I would argue you do it because you have chosen to ignore the fundamental purpose of paying tolls. You do not think that in order for you to continue on that road you must transfer 40¢ of your accumulated wealth to the state government, with which it will keep the roads in good repair and pay toll booth operators. Instead you rationalize that in order for you to continue on the road you must be dispossessed of 40 cents -- and you have been. It is therefore moral, if perhaps a bit risky, for you to plunge further on into the Connecticut darkness.

The same holds true for the writing task. Most writers do not care primarily that the intended audience actually receive their 40 cents worth of communication; they care only that once they have digested
all that information and formed all those ideas that they now
dispossess themselves of it all onto the paper. That done, all is done.
If a reader complains of the lack of X later on, the writer can lead the
reader to the hidden spot in the gravel where some traces of X exist,
faintly gleaming through the grime in which it has become imbedded.

That works in school. There, the student is usually rewarded for
demonstrating that she has done a great deal of work, has found the
right facts, and has devised a way to get them down on the page.
Teacher will recognize the work has been done and will reward it with
an acceptable grade. Students tend to assume that the teacher already
knows what thoughts can and should be made out of the facts recorded
on the page. More often than not, they are right to assume this. Down
deept, students are convinced writing is all performance, a private
charade between student and teacher, with both in on the game.

In the professional world it matters not how much work the writer has
done; it matters only that the reader actually gets delivery of precisely
that which the writer intended to send. Communication in that
professional world requires that the 40 cents worth of thought actually
be received by the reader, and not just that is be jettisoned into the air
and onto the page by the writer. For legal writing especially, the
reader will often not be anything like a teacher, who gives the writer
credit for having done the job. The legal reader is often partially or
wholly a hostile reader: It might be a senior partner, who insists
“Nothing gets out of this firm until it is perfection itself; or it might be
a Judge, who has your brief in one hand and an opposing brief in the
other hand, balancing them to see what their strengths and
weaknesses might be; or it might be an adversary, who – perfectly
aware of what it is you were trying to say – will bend over backwards
to demonstrate that it does not or cannot say that. Legal writers must
write clearly and forcefully enough to control – insofar as that is
possible – the interpretational acts of all possible readers. The 40
cents worth of ideas must not be merely possible to perceive; it must
become the dominant interpretation that almost all readers will be led
to perceive. It is insufficient to produce a sentence that is merely
capable of being interpreted in the way you want; the sentence will be
sufficient only when it demands that most readers assent to the
interpretation the writer intended to convey.

That control of the interpretation process can be gained by knowing what most readers are likely to do with the prose you give them. Knowing what readers expect to find where in a sentence depends on understanding the Reader Expectations this series of articles has been exploring.

I have room here to explore one further issue. I have briefly mentioned the process of arranging your thoughts in an outline before writing. Many of us were taught to do this in grammar school and high school. After you get your information, you make a carefully lettered and numbered outline, from which you then generate your prose. Early in my consulting career, lawyers – especially lawyers in their 50s – would approach me in private to ask if it really is necessary to make such a carefully constructed outline before writing. There were two possible answers that the questioner might find distressing: One was “yes,” the other was “no.” “Yes” was painful to those who had not made a single outline since Grade 12; “No” was painful for those who had spent 9% of their career making such outlines and then disposing of them so no one would know they had been created. In both cases, the questioners were wondering if their careers might have blossomed a good deal more has they known “the truth” about outlining.

My answer to all such questioners: It is absolutely essential to make a carefully numbered and lettered outline of your writing if you cannot write without one. Otherwise, don’t bother. No one cares. No one is going to give you “credit” for having made the outline if the final product was not successful. Over-outlining can be really debilitating. The rest of the writing process might then be limited to filling in the missing parts for those outlined sentence fragments and then eradicating of all the numbers and letters. That is the process that produces all those mind-numbingly dull and pedestrian student papers. Teachers like outlines. Clients like results.