Below are two threads from Joe Regalia (@writedotlaw) on good legal writing. Both are worth a look. The first considers Justice Kagan's writing style. The second is a bit more advanced.

<u>Justice Kagan</u> (May 24, 2024)

Justice Elena Kagan penned a copyright opinion recently that largely went under the radar. But the writing tools are worth paying attention to! Let's learn six powerful writing moves from one of the best legal writers in the world.

1/

Create flow across sentences with short transitions that build connections. The best legal writers rarely use cumbersome "moreovers" and "furthermores." Instead, they use short words or phrases to link sentences together—and show readers how the sentences connect. 2/

"**This dispute** had its start in a decades-old, short-lived music venture. In 1983, Sherman Nealy and Tony Butler formed Music Specialist, Inc. **That company** recorded and released one album and several singles, including the works at issue. **But the collaboration** dissolved a few years later. **And Nealy soon afterward** went to prison for drug-related offenses. **He** served one prison term from 1989 to 2008, and another from 2012 to 2015. **Meanwhile**, Butler (unbeknownst to Nealy) entered into an agreement with Warner Chappell Music, Inc. to license works from the Music Specialist catalog."

2/

Connect paragraphs or sections by reinforcing favorable points. Subtly repeating key points to readers is a powerful persuasion device. And one of the easiest ways to connect your major points while doing some of this reinforcing is by transitioning smartly. 3/

Look at how Justice Kagan starts a new paragraph by reiterating the lack of textual support she just discussed in the prior section. She reminds you of where you came from by highlighting a persuasive takeaway, then uses that to launch into the next idea:

"**The Second Circuit's contrary view, on top of having no textual support,** is essentially self-defeating…"

3/ Quote the smallest part that will focus readers the most. Over-quoting can quickly drown out your own voice in a document. Instead, the best legal writers are surgical quoters. They know that the smaller the quote, the more readers will pay attention to the words. 4/

Justice Kagan is a master quoter, using her smooth sentence style to deliver most information and highlighting short quotes only when they convey key details she wants you to know comes from somewhere else, like a statute or case.

"For his claims to proceed, Nealy had to show they were timely. Under the Copyright Act, a plaintiff must file suit "**within three years after the claim accrued.**" §507(b). On one understanding of that limitations provision, a copyright claim "**accrue[s]**" when "**an infringing act occurs.**" Petrella v. Metro-Goldwyn-Mayer, Inc., 572 U. S. 663, 670 (2014)."

4/ Use parenthesis to deliver useful asides. Part of being a great legal writer is working with your marks—punctuation marks, that is. Parentheses, allow you to deliver some useful information without changing the focus of your sentence. 5/

The Justice shows us a great use of a parenthetical in this next sentence. The precise number of courts that disagree about the issue wasn't paramount, but it was helpful to give you a sense of the wide division. The parenthetical delivers this context without distracting you from the main point:

"And as noted above, a division exists among the many Courts of Appeals applying a copyright discovery rule **(11 at last count)** about whether to superimpose a three-year limit on damages."

Em dashes, on the other hand, emphasize. They ask to be noticed and should be used to deliver crucial points you want readers to remember.

Take this next em dash from Justice Kagan. It sets off a critical fact at the heart of this case about deadlines:

"Nealy urged that all his claims were timely under that rule because he did not learn of Warner Chappell's infringing conduct until 2016—**just after he got out of prison and less than three years before he sued.**"

7/ Active is great, but passive can be, too. Good legal writers use active verbs to move their writing forward. If you have no reason to go passive, stick to the active. But if you want to focus on something that an action happened to, then the passive voice is great. 6/

Justice Kagan uses the passive voice in these next two sentences because her focus was on the songs being used, not the people using them.

"**One Music Specialist work ("Jam the Box") was interpolated into** Flo Rida's hit song "In the Ayer," which sold millions of copies and reached No. 9 on the Billboard chart. **Use of that song was in turn licensed** to several popular television shows, including "So You Think You Can Dance."

6/ Diversify the glue connecting the important content in your sentences. You should usually refer to key concepts using the same language each time so readers don't get confused. But the same isn't true for the more mechanical words that glue this important content together.

Take attribution tags: Words that tell readers which statements or claims are attributed to which party. There's no need to repeat "allege" 20 times. Change up these references and move them around in sentences so the mechanics disappear into the background. Just like Justice Kagan does.

"Nealy **alleged** that he held the copyrights to Music Specialist's songs and that Warner Chappell's licensing activities infringed his rights. The infringing activity, Nealy **claimed**, dated back to 2008—so ten years before he brought suit. Nealy **sought** damages and profits for the alleged misconduct, as the Copyright Act authorizes....Warner Chappell **accepted** that the discovery rule governed the timeliness of Nealy's claims. But it **argued** that even if Nealy could sue under that rule for infringements going back ten years, he could recover damages or profits for only those occurring in the last three."

<u>Writing Tips</u>: January 27, 2023

1/ The best introductions are so simple they feel like common sense. Many legal writers dive straight into the details: weighing readers down with section numbers, clunky case names, and everything else readers have no context for yet. Instead, strive to tell a simple story.

In this snippet, the Kellogg team doesn't even mention dry case names or code sections. They deliver a simple pitch anyone can follow: Bankruptcy stays are to protect the debtor's cash. Here, everyone agrees these lawsuits won't affect the debtor's cash. So no stay.

"A bankruptcy stay protects the debtor's estate from being picked apart outside of bankruptcy. It also protects creditors as a whole by preventing one from seizing assets before others get their chance. The stay therefore preserves the value of the debtor's estate and ensures an equitable distribution to creditors. Here, staying the earplug litigation against nondebtor 3M will provide none of those benefits.As the bankruptcy court found, 3M, not Aearo, ultimately will bear all the costs of that litigation."

Plenty of bonus points here, too:

- Use evocative verbs, like "picked apart."
- Use familiar language, like "preventing one from seizing assets before others get their chance."
- Weave in credibility-boosters subtly, like "as the bankruptcy court found."

2/ Use details to make points—not subjective characterizations. For most lawyers, a party didn't just ignore a case—they "wholly mischaracterized it." The other side didn't just fail to meet a burden—it "fell far, far short" of it. Why be that person? Just show readers.

If cases were "as clearly wrong" or "clearly right" as the lawyers say, we wouldn't need litigation at all.

The easiest way to build credibility with readers? Cut the characterizations—which adding no value— and let details do the work. In this next snippet, most lawyers would write something that lazily characterizes, like "after extensive and thorough review and consideration the court denied the motion."

But these lawyers were smarter, choosing details that would show the court worked hard (and that we should thus trust the decision):

"After three days of evidence and argument, the bankruptcy court denied the motion."

3/ Explain the flipside to highlight why your case is different. instead of just hitting your readers on the head with why your facts clearly do or do not meet the standard, give them a sense of what both sides of the line look like.

"As for the second [legal doctrine], courts apply it to nondebtor lawsuits . . . **only when they involve fraudulent-conveyance actions seeking to "recover a claim" against the debtor by seeking the return of property the debtor unlawfully transferred.** The earplug cases do not fit that description..."

4/ Make it easy for courts to avoid harder questions. Legal writers often struggle with how to organize their points. One easy method is just to ask: What's the simplest, easiest way for the court to rule for my client? When you have the answer, start there.

The Kellogg lawyers know this truth well. After making a strong pitch for why a rule supports them, they make clear for the court that an alternative, more complicated path isn't needed:

"Because this case presents no 'unusual circumstances,' **the Court need not decide whether such circumstances might ever justify broadening § 362(a)(1) beyond its text.** But if the Court were to reach that question, it should answer it in the negative."