



## “Immortal” Forms

# The Vampires of Legal Writing

By Raymond P. Ward

**T**he world changes. We do not.” So says Armand in the movie version of Anne Rice’s *Interview with the Vampire*. His words are an apt description of forms, the model documents that many lawyers follow when writing anything. Forms are the vampires of legal writing. Law and court rules change. Institutions and language continually evolve. Meanwhile, forms remain unchanged while passed on from one generation of lawyers to the next. As a result, words and phrases from the world of the undead, such as “witnesseth” and “wherefore, premises considered,” are perpetuated into the twenty-first century, like Lestat sporting eighteenth century garb while stalking his modern-day victims.

The problem really isn’t with forms themselves. A good set of forms, properly used, can save time and serve as helpful guides. The problems arise with what contract-drafting guru Ken Adams calls “uncritical regurgitation”—the slavish adherence to poor or obsolete forms. Below are some tips for reaping the benefits of forms while avoiding the problems that uncritical reliance on them can cause.

### Start with Good Models

When I first started practicing law, I created my own form file by copying forms from a mid-level partner, who in turn had copied his forms from a senior partner. I had no idea who originally wrote these things or what rules they were intended to comply with. So I had no assurance that these forms were giving me proper guidance.

The solution to this problem is simple: use good, reliable forms. For pleadings, Bryan A. Garner recommends the appendix to the Federal Rules of Civil Procedure and *Federal Trial Forms* by Michol O’Connor. Bryan A. Garner, *The Redbook* §17.4(a) (2002). You may also want to look at the *DRI Defense Practice Form Book*, a recent addition to the DRI Defense Library Series. For appellate briefs, see whether the appellate-court clerk’s office has sample briefs that are recommended as models.

Ultimately, the best forms for your practice will be those you develop yourself. When you have created the form, you will have less temptation to follow it uncritically. You will know why every word is included and when a word should be altered or discarded.

### Assign an Expiration Date

The biggest problem with forms is their resistance to change; they tend to become vampires. Writer and editor Roy Jacobsen described the problem well: “All too often, [a boilerplate form] just gets passed along from year to year, and nobody asks whether it’s written well, whether it conveys the message well, or even whether it conveys the right message to begin with.” Roy Jacobsen, *Writing, Clear and Simple*, <http://rmjacobsen.squarespace.com/> (Oct. 2, 2007).

Jacobsen suggests a good solution for the vampire problem: “[P]ut an expiration date on all of your boilerplate. When it reaches that date, stop using it. Take a long hard look at it and ask yourself if it needs cleaning up or revising. And maybe you’ll decide that you should toss it in the dustbin and start fresh.” *Id.* In litigation practice, I recommend an expiration date of one year from creation. The expiration date should coincide with the usual effective date of new statutes or court rules in your jurisdiction.

### Question Every Word

Many lawyers mistakenly believe that the language in a form is sacrosanct. As Garner observes, they “are afraid to change the forms because they seem to enshrine an untouchable dialect.” Garner §20.3(f). But in fact, there are many reasons to question every word and phrase in a form. The form itself may be poorly written. Or the law the form was intended to comply with may have changed.

Garner has good advice for questioning form provisions in contracts: “If you don’t understand a form provision—or don’t understand why it should be included in your document—try diligently to gain that understanding. If you still can’t understand it, cut it.” Bryan A. Garner, *Legal Writing in Plain English* §40 (2001). That’s good advice for every word and phrase in any kind of form.

### Every Now and Then, Reinvent the Wheel

The surest way to avoid misusing forms is to not use them at all. This may be impractical advice for rote writing. But how much of a defense lawyer’s writing is truly rote?

Take something as simple as an answer in an automobile accident case. The defense lawyer may plead an affirmative defense only if the defense rests on a reasonable belief formed after reasonable inquiry. To throw in,

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say, a boilerplate allegation of contributory negligence or failure to mitigate damages without a reasonable basis for alleging those defenses is to invite a sanction. *See, e.g., Gargin v. Morrell*, 133 F.R.D. 504 (E.D. Mich. 1991). How less rote than an answer

in a fender-bender case are most of the things we write?

Starting a writing project from scratch may seem like an exercise in reinventing the wheel. But if you never reinvent the wheel every now and then, you'll never improve on

it. And if you never change the way you write things, you'll never grow as a writer.

So use forms if you must. But use them critically. Put an expiration date on each one. When an expiration date arrives, put a stake through the form's heart. 