The Worst Mistakes in Legal Writing—Part IV

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Is Domestic Abuse a Red Flag for Mass Shooters?
By Scott M. Karson
In the last issue of the Journal, the Legal Writer discussed mistakes involving commonly confused words and mistakes involving frequently misused words. This column covers common phrases and popular idioms and a variety of stylistic mistakes common in legal writing.

A. MISTAKES INVOLVING COMMON PHRASES AND POPULAR IDIOMS

The English language is full of phrases and idioms that, unfortunately, are often said and written incorrectly.

1. Couldn’t Care Less

“I couldn’t care less” is a popular expression that’s spoken and written incorrectly — usually as “I could care less” — far more often than it should be. If you’re apathetic toward the outcome of some decision, then you could not care less about what happens. When you say you “could care less,” you’re telling others that you care at least minimally. That’s the opposite of what you want to say. When writing legal documents, it’s crucial you say exactly what you mean and leave no room for misinterpretations.

Incorrect: I could care less what Jacqueline thinks of me.
Correct: I couldn’t care less what Jacqueline thinks of me.

2. Could’ve/Should’ve/Would’ve

These are all common and legitimate verb contractions, but too often people misspell them as “could of”/“should of”/“would of.” Of is not the same as have, which is the contraction’s second word. These misspellings don’t make sense.

Incorrect: I could of gotten a better grade on the final, but I didn’t study for it. Correct: I could’ve [could have] gotten a better grade on the final, but I didn’t study for it.
Incorrect: I should of gone to the carnival with my sister. Correct: I should’ve [should have] gone to the carnival with my sister.
Incorrect: I would of gone to the mall with you, but my mom wouldn’t let me go. Correct: I would’ve [would have] gone to the mall with you, but my mom wouldn’t let me go.

3. Due Diligence

Due diligence, a common phrase in the business and legal worlds, means that someone will investigate a business or individual before signing a contract with them. Take care that you don’t misspell this phrase as “do diligence.”

Correct: You should do your due diligence and investigate companies before committing to business deals.

4. For All Intents and Purposes

The phrase “for all intents and purposes” comes from a 1500s-era English law. It means “effectively.” This phrase is commonly written incorrectly as “for all intensive purposes,” which is what it sounds like when you say the correct phrase quickly.

5. Hit or Miss

While it’s popular to say “hit and miss,” the correct expression is “hit or miss.” After all, something cannot both hit and miss a target; it has to do one or the other.

Correct: Correcting a professor’s mistake is always a hit or miss decision. They’ll either be grateful you spoke up, or they’ll be angry at you for upstaging them.

6. Make Do

When something is due, it’s owed. The common misspelling of the phrase “make do” as “make due” doesn’t make much sense — at least not outside an academic setting. The phrase “to make do” means “to make something sufficient.”

Correct: I’m just going to have to make do this week with the $10 I have for food.


When you say that someone has “peace of mind,” you’re suggesting that the person is calm and tranquil. When you say you’re going to give someone a “piece of your mind,” you’re warning someone that you’re going to tell that person what you really think.

Correct: My client just wants to have some peace of mind. Correct: The defendant gave the judge a piece of his mind. He told the judge what he really thought about her ruling.

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8. Pique [My] Interest

This phrase is commonly misspelled as “peak [my] interest.” But the word *pique* means “to arouse.” The correct phrase is “pique [my] interest” — not “peak [my] interest,” which is a weird way of saying that your interest reached its maximum height at a certain point in time.

*Correct:* Hearing my name among the words being whispered in the next room *piqued my interest.*

B. GENERAL MISTAKES IN LEGAL WRITING

The other mistakes discussed in this article are mistakes that can be found in any piece of writing and which are especially egregious and embarrassing for legal writers to make. These mistakes have less to do with grammar and punctuation and more to do with appearance and style. The style and tone of your writing will affect your credibility and reputation.

1. Wordiness

When it comes to legal writing, the aspect that’s arguably the most appreciated is concision. Anyone who has even minimal experience with the law and the legal world is aware of just how much paperwork is involved with every motion, as well as how unnecessarily long legal documents can be. Get to your point quickly and then say what you have to in as few words as possible (while still being clear enough that there’s no room for ambiguity and misinterpretation). Concise language reduces confusion and encourages readers to look over your work. You have everything to gain by streamlining your writing.

Here are some tips to be more concise:

- Avoid lengthy, wordy idioms.
- Cut out flowery language, filler words, repeated sentences/thoughts, and the phrases “there is” and “there are.”
- Cut out metadiscourse (“This brief will illustrate all the ways in which. . . .”) Get to the point. Cut out your running starts. Forget about the wind-up, and just deliver the punch.
- Cut out nominalizations (definition: verbs converted into nouns).
- Delete the words *of* and *that* wherever possible. These words are often superfluous.
- Include the word “to.” It’ll save words later. (“I’m going to the store to buy milk” is better than “I’m going to the store and I will buy milk.”).
- Use a comma to substitute for *and* or *but*.
- Vary the length of your sentences and paragraphs. But shorter is better than longer.
- Write in the active voice instead of the passive.

2. Organizing Your Writing Poorly

One of the most appreciated and valued qualities in any piece of legal writing, aside from conciseness, is succinctness. Concision implies a brevity of sentences and paragraphs. Succinctness involves the general organization of the entire article or document. Few things are worse than poor organization. If your writing is poorly organized, it’ll be difficult to follow and understand. Your readers will be less likely to side with you.

Here are some tips to be more succinct:

- Keep track of the big picture. What’s the general topic of your document?
- Once you figure out your general topic, break it down into sections and, if necessary, subsections. Label each section and subsection with an appropriate heading.
- Include everything about a subject in the main section in which that subject is discussed. Avoid saying the same things in multiple places.
- When you’re done writing, read through your work out loud and see how it flows/sounds.

3. Using Too Much Legalese

Legal writers often use language dubbed “legalese” simply to sound more intelligent than the average person, whose vernacular doesn’t include words like *heretofore* or phrases like “mens rea.” In doing this, these writers are hurting themselves. The law was created to protect and serve everyday people. Our writing should do the same. Use plain English, unless the word you want to use has no English equivalent.

4. Adding Extraneous Information

Each case comes with its own set of facts. These facts are important. They’re what distinguish one case from another, and you can’t win in court if the facts go against you. It’s neither necessary nor judicious to reiterate every fact when drafting your argument. Don’t sacrifice conciseness for extraneous information, such as dates, places, and people. Some details are crucial to a case; most aren’t. If a specific fact isn’t helpful to understanding or reaching a decision about a case, leave it out. The more you include, the less significance each one will have and the more likely your readers will forget what happened when.

5. Writing from the Bottom

Consider using a writing strategy known as “writing from the top.” This involves stating your conclusion and, if applicable, your requested relief, and then supporting it in later sections. At heart, people are lazy. The less work they have to do, the happier they are. When you put your conclusion first and begin your argument with your
strongest piece of evidence, you ensure that others read the most important parts of your writing with a fresh mind. Start every section of your legal writing with a roadmap, or thesis, paragraph. (Definition: a paragraph that clearly states what you’ll be discussing in the section and what conclusion you’ll draw.) Your readers should be able to tell what’s being discussed and how important a section is to your overall argument by reading the first paragraph or two in your section. Roadmaps also enable readers to know where in your argument of discussion they can find the information they want or need.

6. Failing to Include Topic Sentences
At the start of each of your paragraphs should be a topic sentence. (Definition: a sentence that clearly states what you’ll be discussing in the paragraph and what conclusion you’ll draw.) Your readers should be able to tell how important a paragraph is to your overall argument just by reading the first sentence.

7. Sounding Opinionated
When writing, avoid stating your opinion — unless your opinion is supported by law. Your opinion is irrelevant if you can’t come up with a legally valid argument to support your beliefs. To avoid sounding too opinionated, avoid personal pronouns like I or we.

8. Using the Wrong Tone
One of the most important aspects of legal writing is tone. It’s your job to present facts clearly and to persuade others that the narrative you’ve spun for your client, or the prediction and recommendation you’re suggesting, is correct. You must decide when to be objective and when to be persuasive.

Incorrect: The police report states that on July 23, 2015, the reckless Mr. Roberts neglected the rules of the road and crashed his car into the victim’s, Mr. Kowalski’s, car.

Correct: The police report states that on July 23, 2015, Mr. Roberts crashed his car into Mr. Kowalski’s car.

9. Using Superlatives and Sweeping Statements
Superlatives have their place in the world: in a high-school yearbook. Avoid superlatives in your legal writing. The same goes for broad and sweeping statements. If an act is so bad or immoral it warrants being called “egregious,” then the judge and jurors will discern its iniquity and decide that it’s egregious. You shouldn’t state so outright; doing so unnecessarily lengthens your argument, and grandiose statements irritate readers.

10. Using Adverbial Excesses
Avoid adverbial excesses whenever possible. Legal writers often use words like certainly, clearly, and undoubtedly in place of other, better words or — and this is even worse — in place of a strong argument. Why is a statement clear? What makes a statement incontrovertible? If you have answers to these two questions, include them in your writing. Conciseness is key, but you should never use an adverbial excess to save words. If you don’t explain yourself thoroughly, your readers will begin to doubt the veracity of your claims and the strength of your argument.
11. Using Cowardly Qualifiers
Avoid using “cowardly qualifiers” like typically and usually. Your goal is to be exact and precise — and qualifiers like typically and usually are neither exact nor precise. How often is “usually?” Six times out of ten? Nine out of ten? We’ve no way of knowing. Report the exact figure, number, or statistic. If you don’t have an exact figure, rethink your decision to use the qualifier in the first place. Ambiguous or vague data is not useful in a court of law. When in doubt, understate. Never exaggerate.

Incorrect: Angina attacks are what usually bring Ms. Branson to the emergency room.
Correct: Of the eleven times Ms. Branson has visited the emergency room in the last year, eight of them were due to angina attacks.

12. Irreverence and Insincerity
Cut sarcasm or and other forms of insulting and insincere language. It’s not professional, and the people who read your arguments won’t appreciate your snide comments and passive-aggressiveness. Avoid attacking judges and opposing counsel. It’s a surefire way to lose credibility and make enemies. Better to convey your disbelief or displeasure with someone or something in a more professional and straightforward way.

13. Acting Like the Boss
Avoid aggressive language in your legal writing. When addressing a judge, refrain from using words like must. Using words like that causes you to come across as bossy, and I have yet to meet a judge who enjoys being told what to do.

Incorrect: You must grant summary judgment.
Correct: I request that the court grant summary judgment.

Incorrect: You should dismiss the plaintiff’s case because the plaintiff fails to state a cause of action.
Correct: I’m moving to dismiss the complaint because the plaintiff has failed to state a cause of action.

14. Covering Up Weaknesses in Your Argument
When you discover a hole or other weakness in your argument, it’s natural to hide it by twisting case law and the facts in your favor. But one of the worst things you can do as a legal writer is to misrepresent the facts by ignoring the ones that can potentially harm your case. Ambiguity and misrepresentation will fool no one. It will, rather, damage your credibility with the court and possibly cost you the entire case. When you discover a weakness in your argument, address it honestly and come up with a response to what opposing counsel might say.
about it. You’ll gain credibility with the court by being honest, and you’ll be ready to rebut the arguments posited by opposing counsel.

15. Inelegant Variation

If you abbreviate a name or tag an actor with an identifier at the beginning of your document, use that abbreviation or tag throughout the remainder of the document. (E.g.: “Federal Bureau of Investigation (F.B.I.)” should be referred to thereafter as “the F.B.I.”, and “Mr. Robert S. Parker (Plaintiff)” should be referred to thereafter as “the plaintiff” or simply as “Plaintiff”). If you refer to something with one word, continue using that word to reference that item. (I.e.: If you refer to an agreement as “the agreement,” don’t refer to it later on as “the contract.”)

16. Spacing Your Subjects and Verbs Too Far Apart

All good sentences have their subjects and verbs near — or, better, next to — each other. This is because a small or short distance, or no distance at all, between the subject of a sentence and the verb in the sentence helps with cohesion as well as with understanding. Occasionally this involves splitting one sentence into two, but it’s worth it. When your subjects and verbs are together, readers can identify the subject-verb unit quicker and understand the sentence more easily.

Incorrect: The trial, which involved testimony from dozens of witnesses, some of whom flew here from places as far as California, lasted for almost two months.

Correct: The trial lasted for almost two months because it involved lengthy testimony from dozens of witnesses, including some who had to fly to New York from places as far as California.

Incorrect: The brief, although it was written flawlessly, was submitted late, and therefore the court rejected it.

Correct: Although it was written flawlessly, the brief was submitted late, and therefore the court rejected it.

ERRATUM

It’s always great to get mail from readers, even when they correct me, as some did after reading the Legal Writer column in the May issue of the Journal, “The Worst Mistakes in Legal Writing — Part III.”

Readers Paul Roman and Robert Fryd pointed out that I got it backward on “less vs. fewer” and “amount vs. number.” They note, correctly, that “less” and “amount” are used when referring to something not quantifiable, while “fewer” and “number” are used when referring to something quantifiable. Mr. Fryd also points out that although I correctly noted that the word “effect” is a noun, it can also be used as a verb, as in “effecting change,” while Frank Helman adds that “except” can be a verb as well as a preposition. He also points out that the abbreviation “i.e.” isn’t for “in essence” but is Latin for “that is.”