



Failure to Communicate

BY: CAPTAIN ELIOT B. PEACE

Learning and fine-tuning effective legal writing techniques remain critical to **effective lawyering.**

“What we’ve got here is failure to communicate,”

says the Captain, leader of a Florida chain gang, right before hitting Luke Jackson with a leather sap in the 1967 film *Cool Hand Luke*.¹ In a spark of rebellion, Luke repeats the phrase at the end of the film—moments prior to getting shot.

As lawyers, we can’t afford communication failures. We need to communicate effectively. And to do so, we must write well. While poor legal writing will not, on most occasions, result in sap beatings or shootings, it could lead to client confusion or detrimental outcomes in court. Thus, learning and fine-tuning effective legal writing techniques remain critical to effective lawyering.

As judge advocates, we are incredibly busy. Our time is often divided among a variety of commitments: court-martial preparation; “chief of” jobs; demanding SJAs and commanders; meetings and training; the dreaded inspection lurking on the calendar. Peruse your average legal office shared drive and you can immediately spot which task became the lowest priority: the written legal product. While you can’t improve your writing overnight, the purpose of this article is to provide guidelines—eight broad principles, followed by eight rules or practical tips—to help you refine the process.

¹ COOL HAND LUKE (Jalem Productions, 1968). Strother Martin played the Captain, and Paul Newman played the role of Luke Jackson (earning an Academy Award nomination for Best Actor).

BROAD PRINCIPLES

Read good writing

The first step to developing effective legal writing is to expose yourself to good writing. Pick up opinions by Justices Antonin Scalia, Oliver Wendell Holmes, Jr., Benjamin Cardozo, Robert Jackson, or Elena Kagan—all widely regarded as the finest writers to serve on the Supreme Court. If your goal is to develop into an excellent legal writer, familiarize yourself with masters of the craft.

Don't limit yourself to legal writing; read good fiction and non-fiction as well. Read short and long form pieces by Ernest Hemingway, Shakespeare, Frederick Douglass, C.S. Lewis, J.R.R. Tolkien, William Faulkner, F. Scott Fitzgerald, Virginia Woolf, Jane Austen, George Orwell, and Flannery O'Connor. Read poetry by Robert Frost, Walt Whitman, William Wordsworth, T.S. Eliot, Lord Byron, Percy Bysshe Shelley, William Butler Yeats, John Keats, and Langston Hughes. Broaden your horizons: read political and social commentary by William F. Buckley, Jr., George Will, Jimmy Breslin, Truman Capote, Murray Kempton, and Norman Mailer. Lawyers have ingrained in themselves terrible writing habits. Exposing yourself to first-rate non-legal writing is one step toward breaking those habits. By intentionally seeking exceptional writing, you can learn how writers across a variety of disciplines effectively communicate through the written word. Which brings us to our second broad principle...

Strive for clarity

In the 1989 Academy Award-winning film *Dead Poets Society*, John Keating, played by Robin Williams, asks his class, "Language was developed for one endeavor...and that is..." Neil Perry responds, "To communicate?"² Twentieth-century columnist and grammarian James J. Kilpatrick takes that point further when he states, "The primary purpose of communication is to be understood."³

The key to being understood—and thus the key to effective communication—is clarity. Take Justice Scalia's word: he urges lawyers to "[v]alue clarity over all other elements of style."⁴ "Literary elegance, erudition, sophistication of expression[,] he states, "these and all other qualities must be sacrificed if they detract from clarity."⁵ While good practice, it is also Air Force policy, which "promotes the use of clear, concise, and well[-]organized language in documents to effectively communicate with intended audiences."⁶

² DEAD POETS SOCIETY (Touchstone Pictures, 1989). Robert Sean Leonard played Neil Perry; and Robin Williams earned a Best Actor nomination at the 62d Academy Awards for his portrayal of John Keating. *Dead Poets Society* won the Academy Award for Best Original Screenplay. Keating responds, tongue-in-cheek, "No. To woo women." Perry's larger point remains.

³ JAMES J. KILPATRICK, *THE WRITER'S ART* 10 (1984).

⁴ BRYAN A. GARNER & ANTONIN SCALIA, *MAKING YOUR CASE: THE ART OF PERSUADING JUDGES* 107 (2008).

⁵ *Id.*

⁶ U.S. DEP'T OF AIR FORCE, *HANDBOOK 33-337, THE TONGUE AND QUILL* 2 (27 May 2015) (CC 27 July 2016) [AFH 33-337] (quoting U.S. DEP'T OF DEFENSE INSTR. 5025.13, *PLAIN LANGUAGE PROGRAM* (June 9, 2014)).

While legal writing often involves dense legal concepts, you should strive to make your writing accessible to the average reader. Again, take the advice of Justice Scalia: "Pretend you're telling your story to some friends in your living room; that's how you should tell it to the court."⁷ Whether you are writing for a court or a commander, clarity is paramount to communicating effectively. On the other hand, don't fail to mention critical points or gloss over distinctions. Oversimplification can negatively affect clarity as well.

Avoid verbosity

Verbosity is the enemy of clarity—and lawyers have an almost primal urge for verbosity. Lawyers simply "do not write in plain English," as Richard Wydick says.⁸ Whether the reason for that is reading too many medieval English contract law opinions in law school or hiding a lack of confidence in multitudinous words, much legal writing is simply not easy to understand. To counteract the tendency to use words superfluously, lawyers should make a conscious effort to eliminate verbosity. Per Bryan Garner, lexicographer and legal writing cognoscente, "Three good things happen when you combat verbosity: your readers read faster, your own clarity is enhanced, and your writing has greater impact."⁹ Eliminate verbosity for the sake of increasing impact.

⁷ GARNER & SCALIA, *supra* note 4, at 113.

⁸ RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 3 (5th ed. 2005).

⁹ BRYAN A. GARNER, *LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES* 17 (2001).



As with most legal writing, removing the **unnecessary words** instantly improves clarity and makes the point easily understood.

Avoid unnecessary words

Think about it: if a judge has only a few moments to review your motion or a commander has only a few moments to read your legal memorandum, he should be able to identify your goal immediately. Compare the following two prayers for relief:

Comes now, the Government, by and through Counsel, pursuant to RCM XYZ and Article ABC, UCMJ, and hereby respectfully requests the Military Judge deny the Defense's Motion to Dismiss.

The United States requests the military judge deny the motion to dismiss.

Which is easier to understand? They say the same thing. As with most legal writing, removing the unnecessary words instantly improves clarity and makes the point easily understood.¹⁰

Avoid fancy words

"As writers," Kilpatrick writes, "we ought to take advantage of all of the glorious riches of the English tongue, and to use them the best we can, but always taking into account one thing: the audience we are writing for."¹¹ Courts and commanders, our usual audiences, will typically value clarity over complication or flowery language. Unfortunately, lawyers are inclined to use long, complicated words when less-elaborate ones will do. In Strunk and White's *Elements of Style*, the authors implore writers to "[a]void the elaborate, the pretentious, the coy, the cute."¹² They continue, "There is nothing wrong, really, with any word—all are good, but some are better than others."¹³ The better ones are typically the less-elaborate ones. Novelist Stephen King echoes this point: "One of the really bad things you can do to your writing is to dress up the vocabulary, looking for long words because you're maybe a little bit ashamed of your short ones."¹⁴

¹⁰ *Id.* at 34.

¹¹ KILPATRICK, *supra* note 3, at 4.

¹² WILLIAM STRUNK, JR., & E.B. WHITE, *ELEMENTS OF STYLE* 76 (4th ed. 2000). *ELEMENTS OF STYLE* is widely regarded as the preeminent short form style guide.

¹³ *Id.*

¹⁴ STEPHEN KING, *ON WRITING: A MEMOIR OF THE CRAFT* 110 (2000).

Legal writers, again, are particularly prone to this writing sin. Legal writing is full of legalisms or legal-ish terms that could be reduced to everyday English: think “herein” instead of “here”; “said” instead of “the” or “that”; “thereafter” instead of “later”; or “therein” instead of “inside.”¹⁵ The shorter word can be substituted without changing the meaning. Reject the elaborate and embrace clarity.

Avoid Latin phrases

Legal writers tend to overuse unnecessary Latin phrases. Examine any judicial opinion or brief before an appellate court and you will likely find a plethora of unnecessary Latin phrases. An anecdote: As a brand new law clerk to a state supreme court justice, I thought I would impress my boss by exhibiting my (supposed) mastery of opaque Latin terms. In my first draft opinion,¹⁶ I littered the text with six or seven Latin phrases. The justice, without comment, removed the offending phrases and returned the document, *mutatis mutandis*, to me.¹⁷ In pursuit of clarity, a legal writer should proceed with caution when using Latin phrases. That is, unless the Latin term has a distinct, common legal use, such as *res ipsa loquitur* or *habeas corpus*, the legal writer can largely avoid Latin phrases.¹⁸

¹⁵ WYDICK, *supra* note 8, at 58–60.

¹⁶ The case involved a plea for post-conviction relief for ineffective assistance of counsel, if I recall correctly. If you know anything about post-conviction relief actions, Latin terms are rarely relevant.

¹⁷ *Mutatis mutandis*: “All necessary changes having been made.” BLACK’S LAW DICTIONARY 1044 (8th ed. 2004).

¹⁸ WYDICK, *supra* note 8, at 58–60; GARNER &

Follow the rules

Rules of grammar and writing conventions are useful. They establish the common foundations, which contribute to clarity. We must differentiate, though, between rules of grammar and writing conventions. You should never break the rules of grammar.¹⁹ Subject-verb agreement, parallel construction, pronoun-antecedent agreement, and proper spelling are all rules. Do not break them: doing so reduces clarity and damages your credibility in the eyes of the reader.²⁰

But don’t always follow conventions

Conventions, on the other hand, are flexible. Think about the time your high school English teacher told you never to begin a sentence with a conjunction or end a sentence with a preposition. He was teaching you time-honored, basic conventions. But, as you mature as a writer, you learn to bend the conventions when you need to.²¹ Kilpatrick tells a story in *The Writer’s Art* of the time he visited a Picasso exhibit. Expecting to see Picasso’s trademark Cubism, he was stunned to see Picasso’s early work accorded with the rules of draftsmanship, anatomy, and portraiture. “It wasn’t until [Picasso] mastered the rules,” explains Kilpatrick, “he began

SCALIA, *supra* note 4, at 113–14.

¹⁹ KILPATRICK, *supra* note 3 at 79.

²⁰ See generally STRUNK & WHITE, *supra* note 12; WILLIAM ZINSSER, *ON WRITING WELL* (30th ed. 2006).

²¹ See, e.g., STRUNK & WHITE, *supra* note 12, at 77 (“Not only is the preposition acceptable at the end, sometimes it is more effective in that spot than anywhere else.”).

to break them.”²² The same concept applies to writing. Using wise judgment, you can bend conventions to suit your primary purpose: clarity for the reader. Follow conventions—but not to the detriment of your message.

PRACTICAL TIPS

Now that we have explored a few broad guidelines to frame the legal writing process, we can discuss some practical tips to improve legal writing.

Just the facts, ma’am.

And case law.

Use of templates in the JAG Corps is widespread and can be a valuable time saver. Why do your own legal research or figure out a proper format if someone did it already? But this practice is fraught with writer’s peril—templates tempt laziness. If you use a template, get your facts straight. Don’t forget to update the convening authority, preferring commander, or accused. Check citations yourself. Read every case—or, at minimum, every proposition—for every case cited. And don’t forget your pincites. Don’t just cite to the case in general; take the time to find the exact quote or proposition and provide the proper pincite.

Headings are the reader’s friend

Bryan Garner argues point headings, along with the table of contents, are “the most important part of the argument section in a brief.”²³ Major, substantive points at a

²² KILPATRICK, *supra* note 3, at 42.

²³ Bryan A. Garner, *Pointed Advice on Point Headings*, A.B.A. J., September 2015, at 24–25.

Passive voice

describes who was acted upon, as opposed to who is doing the acting—and it leads to ambiguity.

glance “promote tight, disciplined writing.”²⁴ While the Uniform Rules of Practice Before Air Force Courts Martial, Rule 3.6[E], requires certain headings (Specific Relief, Statement of Facts, Applicable Law, Argument, Conclusion), think of that list as a floor, not a ceiling. Substantive point headings will likely improve readability—particularly at quick glance by a busy judge. Developing point headings will have the added benefit of improving the remainder of the product: “Becoming a propositional writer—one who figures out the main points before beginning to write—is your key to efficiency and quality,” states Garner.²⁵

Punctuate punctiliously

Know the rules of punctuation and use them effectively. Don’t be cute but develop confidence in the nuances of various types of punctuation. For example, understand the difference between an em dash, an en dash, and a hyphen.²⁶ Misuse of those three types of punctuation is the most frequent punctuation error in legal writing.

Relearn the Oxford comma.²⁷ A set of three items joined by a conjunction

²⁴ *Id.* Garner urges practitioners to model their point headings after those found in briefs written by the Office of the Solicitor General; see also WYDICK, *supra* note 8, at 14.

²⁵ Garner, *supra* note 23.

²⁶ An em dash—similar to parentheses—is used to set apart a thought. An en dash is used to identify a range of numbers, e.g., pages 80–95. A hyphen is used to connect compound words, among other uses.

²⁷ STRUNK & WHITE, *supra* note 12, at 2; WYDICK, *supra* note 8, at 88; GARNER, *supra* note 9, at 148.

should include a comma before the final item. For example, “We were joined by the rappers, Kanye and Condoleezza Rice” has a different meaning than “We were joined by the rappers, Kanye, and Condoleezza Rice.” Secretary Rice, being a diplomat and not a rap artist, appreciates the proper use of the Oxford comma here. Failing to use the Oxford comma can alter the meaning—and therefore clarity—of your writing.

Re-learn The Rules of Capitalization (or re-learn the rules of capitalization)

Avoid overcapitalization. Appropriate capitalization allows for far fewer capital letters than appear in the average legal document. *The Tongue & Quill* contains specific examples of appropriate capitalization, which comport with other style guides.²⁸ In furtherance of the maxim “trust but verify,” note the samples contained in the appendices to the Uniform Rules of Practice Before Air Force Courts-Martial do not comply with capitalization rules found in *the Tongue & Quill* or other style guides.

Passive voice is eliminated in the best legal writing (or the best writers eliminate passive voice)

Lawyers tend to write in the passive voice. Don’t. Passive voice describes who was acted upon, as opposed to who is doing the acting—and it leads to ambiguity.²⁹ Don’t say, “The victim was assaulted” when you could say,

²⁸ AFH 33-337, *supra* note 6, at 341–54.

²⁹ WYDICK, *supra* note 8, at 27.



“The accused assaulted the victim.” In the first phrase, it isn’t clear to the reader who is doing the assaulting; in the second, it’s clear the accused committed the assault.

Never spot stop editing

Always “revise and rewrite” your legal writing.³⁰ Justice Scalia implores the writer to continue revising and editing “until the copy is wrested from the author’s grasp....”³¹ After writing a draft, set it aside and come back to review it later. You will often find corrections to make, particularly with wording or phrasing. Print your draft in hard copy and edit with a red pen; you will uncover mistakes in hard copy you missed on the computer screen. Provide a copy to a friend or spouse (keeping in mind your ethical responsibilities), or perhaps a paralegal for review. What sounds great to you may fall flat or be confusing to another reader. When you are comfortable with the written product, give it a short review, much like a judge would do, to see if any final clarifications are necessary.³²

Practice, practice, practice

The idea of practicing writing may sound odd, but mastering any craft requires practice. A common theme among Justice Scalia with a pen, Beethoven with a piano, and Tiger Woods with a putter—during their primes—is the amount of time spent

honing their skills. As Air Force JAGs, we may find ourselves before a court a few times a year, writing a handful of motions. That’s probably not enough to develop excellence, so write at every opportunity (legal and non-legal) and dedicate yourself to improving your writing every time you write.³³

Effective writers are effective lawyers

Stock your bookcase

Finally, every legal writer should have available, at a minimum, an English dictionary, *Black’s Law Dictionary*, the Bluebook, and a style guide. Beyond those basic tools of the trade, the following books on legal and non-legal writing are excellent guidebooks for improving your writing:

Bryan A. Garner & Antonin Scalia, *Making Your Case: The Art of Persuading Judges* (2008)

Bryan A. Garner, *Elements of Legal Style* (2d ed. 2002)

Bryan A. Garner, *Legal Writing in Plain English: A Text with Exercises* (2001)

Bryan A. Garner, *The Winning Brief* (1996)

Tom Goldstein & Jethro K. Lieberman, *The Lawyer’s Guide to Writing Well* (2d ed. 2002)

William Strunk, Jr., & E.B. White, *Elements of Style* 76 (4th ed. 2000)

Richard C. Wydick, *Plain English for Lawyers* (5th ed. 2005)

William K. Zinsser, *On Writing Well* (30th ed. 2006)

CLOSING

Effective writers are effective lawyers—and effective officers. Know your goal and your audience. If your goal is to persuade a judge to adopt your position or convince a busy commander to accept your legal advice, make it easier for him. Improve your legal writing skills and communicate effectively through writing. Don’t end up like Luke Jackson, facing an untimely demise caused by the failure to communicate. **R**



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³⁰ *Id.* at 72 (“Few writers are so expert that they can produce what they are after on the first try.”).

³¹ GARNER & SCALIA, *supra* note 4, at 80.

³² *Id.*

³³ Some legal writing guides, such as *Plain English for Lawyers* and *Legal Writing in Plain English*, go so far as to provide legal writing exercises.