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Legal Drafting Skills: Make it Clear, Concise, Compelling

These materials were prepared by David Goult of Bull, Housser & Tupper LLP, Vancouver, BC, for the Continuing Legal Education Society of British Columbia, September 2007.

LEGAL DRAFTING SKILLS: MAKE IT CLEAR, CONCISE, COMPELLING

I. Grammar Refresher: Know the Rules and Follow Them

English is a wonderfully diverse and rich language. It also has a lot of rules. Lawyers, whether they be solicitors or litigators, carefully choose the language they use in order to best advance the interests of their clients. In turn, clients pay lawyers a great deal of money. When they pay that money, they expect, and are entitled to expect, that they are getting top quality legal services.

Arriving at the right answer for a client means that the lawyer will not make mistakes. If a lawyer drafts documents, whether they be letters, pleadings or agreements, that contain grammatical errors, clients will naturally question whether the lawyer is not also making mistakes as to the legal issues. For this reason, and because each lawyer and their assistant should always strive to provide top quality work to their clients, it is important that close attention be paid to using proper grammar in every document that is produced.

It would not be possible within the scope of this paper to cover every rule of grammar in the English language. However, the following are some examples of grammatical errors or issues which commonly arise:

A. Subject-Verb Agreement

A verb must agree with its subject. Errors commonly arise in sentences such as, "A stack of files *were* on the assistant's desk." The subject of this sentence is "stack" not "files." For that reason, the sentence requires a singular verb, "was." A further example is, "The lawyer, as well as other members of the bar, *were* present." The subject of this sentence is "lawyer," which requires a singular verb, "was." On the other hand, it would be correct to say, "The lawyer and other members of the bar were present".

B. Its/It's

Despite the fact that all of us learn the distinction between these two forms of the word "it" in elementary school, it is not uncommon to see them misused by lawyers. "It's" is a contraction for the phrase "it is." "Its" is the possessive form of "it." The confusion arises because the possessive form of most words ends in "'s." There is no magical way to remember that the same is not true with respect to the word "it" other than simply committing it to memory.

C. Et al.

We often use "et al." in pleadings and other documents. It is important to note that this phrase is an abbreviation for the Latin phrase "et alii," meaning "and others." For that reason, a period should always come at the end of this phrase. It should not appear, as it often does, as simply "et al," with no period.

D. Practice/Practise

The word "practice" is a noun. The word "practise" is a verb. The easiest way to remember this is that "c" comes before "s" in the alphabet, and "n" for noun comes before "v" for verb in the alphabet.

E. Using Nouns as Verbs

It has become quite common recently to use nouns in sentences as though they were verbs. For example, someone might say, "I *tasked* my assistant to prepare a list of documents." The word "task" is a noun. It is not a verb. Accordingly, the proper sentence would either be, "I asked my assistant to prepare a list of documents," or, "I assigned my assistant the task of preparing a list of documents."

A further example of a noun which is often misused as a verb, particularly among members of the legal profession, is the word "reference." This word is a noun. It is not a verb. Thus, a proper use of this word is, "One of my references was Sopinka's text on evidence." It is wrong to say, "I *referenced* Sopinka's text on evidence." The appropriate verb to use in the latter sentence is "to refer," so that the sentence would be, "I referred to Sopinka's text on evidence."

F. Affect/Effect

These are two words that are often misused by lawyers. The word "affect" is a verb which means "to act upon" or "to influence." The word "effect" can be used as a verb (for example, "to effect change"), but it is almost exclusively used as a noun meaning "result," or "consequence." Thus, it is wrong to say, "The lawyer made a variety of arguments, but was not able to *effect* the outcome of the

application." The proper word to use is "affect" because the word in the sentence is a verb. Similarly, it is wrong to say "The *affect* of the lawyer's arguments was to put the judge to sleep." In this sentence, the word is a noun, and thus should be "effect."

G. In Regard to/With Respect to

Both of these expressions are correct. However, it is not correct to say "in regards to," or "with regards to."

H. Less/Fewer

"Fewer" should be used when referring to things that can be counted. "Less" should be used when comparing things or amounts that are not being counted or considered as units. For example, it is correct to say "There were fewer lawyers 10 years ago," not, "There were less lawyers 10 years ago." An appropriate use of the two words would be, "Even though there were fewer lawyers 10 years ago, there was not less litigation."

I. Whether (or not)

The phrase "whether or not" often appears in lawyers' written work. Generally speaking, the words "or not" are redundant because they are implicit in the sentence in which "whether" is being used. For example, it correct to say, "I don't know whether I will be able to make it for lunch today." It is unnecessary to say, "I don't know whether *or not* I will be able to make it for lunch today." While it is not grammatically incorrect to use the latter form, many people do not realize that is grammatically correct to dispense with the "or not" in most cases. Doing so means less clutter in written work, a subject discussed below.

As noted, the above are just a few examples, but they are examples that commonly arise in lawyers' practices. For the reasons stated, it is very important to pay close attention to every document that is produced to ensure that no errors appear.

II. Getting Started: Create a Plan, Create an Outline, the Rest Will Follow

All of us have experienced the feeling of being overwhelmed by a written task and thus unable to actually begin writing. The best way to overcome this sense of paralysis is to create a plan, or outline, for the document before you attempt to begin writing. The outline should include the general concepts which you hope to convey. They will represent the overall framework for the larger structure which you hope to build. For this reason, they should appear in the order which is most logical and effective. Ensuring that they do will in turn ensure that the document is written in the most logical and effective way that it can be.

For example, in a simple motor vehicle accident claim, the two main issues will be liability and damages. In coming to draft an argument at the end of a trial, those would be the two main sections of the argument. Within the section of liability, there would be a discussion on the law of negligence and the various elements necessary to establish that cause of action. Once those elements have been identified, they would then become the subheadings within that section.

Similarly, damages take various forms (general, pecuniary, non-pecuniary, special, punitive, etc.). Therefore, under the heading damages, these various different types of damages, whichever are applicable, will appear as subsections. Within those subsections there might be further subsections. For example, a plaintiff might be claiming several losses as special damages. Each of these different losses could come under a separate subheading.

Once these sections and subsections of your outline have been identified, it is much easier to insert the relevant references to law and evidence in the most appropriate and effective place within the argument. Working in this way will be far less time consuming than simply trying to put everything on paper and then organize it later.

That said, once you begin drafting the body of the document, it is often helpful to get your thoughts down on paper as quickly as possible and then worry about proper grammar, case references and so forth, later. This will generally result in a better flow to the document and will reduce the chances that something is left out.

III. Writing Overview: How to Organize and Construct Sentences

A. One Main Idea

As a general rule, the best sentences are short sentences. Each sentence should convey one main idea. It should not be interrupted by some other thought which is not related to that main idea. On the other hand, if there is a related idea that is subordinate to the main idea, then it is appropriate to subordinate a phrase conveying that idea within the main sentence. For example, it is appropriate to say something like, "The plaintiff, whose evidence was uncontested at trial, testified that the defendant did not stop at the stop-sign." It would not be good writing to say, "The plaintiff, who is still suffering from soft-tissue injuries, testified that the defendant did not stop at the stop-sign."

B. The Verb—The Action Word

The first and most important rule to remember is to avoid the use of the passive voice. For example, don't say, "be assured that unless you comply with our requests, appropriate action will be taken." Rather, say, "I assure you that if these requests are not met, I will act appropriately." Passive constructions are often indirect and imprecise and, for these reasons, less effective than active constructions. You should avoid them.

To the extent possible, you should also avoid using negatives. A thought that is expressed as a positive is much easier to comprehend than a thought that is expressed as a negative.

Finally, as noted above, avoid the practice of incorrectly using nouns as verbs. For each noun that offers this temptation, there is at least one appropriate verb that already exists in the English language. That is the word you should use.

C. The Words

All too often, lawyers fall victim to the idea that "more/bigger is better." In fact, it is usually the case that "less is more." The more simply you state an idea, the more compelling the idea will be. Ideas that are expressed in long and convoluted language will often be misunderstood or missed altogether. Ideas that are expressed clearly and concisely will usually not be.

You should avoid words that are vague or redundant. For example, the sentence "Upon the occurrence of the grantee's ceasing for any reason to be employed by the company, the option, to the extent not previously exercised, shall terminate and shall become null and void immediately," is better expressed as, "If the grantee's employment with the company is terminated, the option will immediately become null and void." Often, we see sentences such as, "The plaintiff's documents, *which documents* are numerous, disclose that the plaintiff was advised of the problem on many occasions over the years." The "which" is redundant. The sentence should read, "The plaintiff's documents, which are numerous, disclose that the plaintiff was advised of the problem on many occasions over the years." Another example we often see is, "The plaintiff's claim *as against* the defendant ABC Co. should be dismissed." The "as" is redundant. The sentence should read, "The plaintiff's claim against the defendant ABC Co. should be dismissed."

Obviously, to express ideas clearly and concisely, you should avoid excessive "legalese." While it is true that we operate using certain terms which cannot be avoided, not everything we write requires the use of legal terms or language. More often than not, plain and simple English will be best.

Finally, do not be tempted to use a big word when a small one will suffice. For example, the word "use" will almost always convey the same meaning as the word "utilize," yet the word "utilize" is one of the most overused words in everyday English.

IV. Persuasive Writing: Know Your Audience, Know Your Purpose, and Write Accordingly

Before you start writing a document, whatever it may be, it is important to consider both the audience which will be reviewing the document and your purpose writing it.

With respect to audience, the intended reader will determine the way that you write. For example, your reader's level of knowledge about the subject matter of your document will influence the level of detail that you put into the document. You may be aware that the reader has concerns about certain issues, but not about others. Your reader may be more sophisticated, in which case more sophisticated language can be used if it results in greater efficiency. On the other hand, sophisticated language is sometimes unnecessary and undesirable.

Often, when lawyers are drafting letters to opposing counsel, they forget that those letters will be also read by the other lawyer's client. Thus, while certain language might be better when a lawyer is attempting to persuade the other lawyer that their position is the correct one, it is possible that the other lawyer's client reading that letter might be confused or antagonized by that language and thus become more entrenched in their position. So, when drafting a document that you intend to be persuasive, always consider who it is that you are really trying to persuade.

With respect to purpose, generally lawyers and their assistants write documents that are either to inform, or to persuade, or to do both. For example, a reporting letter is drafted to inform. A settlement letter is generally drafted to persuade and, as discussed above, is often drafted with the idea that the audience is not the opposing lawyer, but rather their client. You draft an argument to both inform the judge and to persuade him or her that your client should prevail.

The purpose of the document will influence both its structure and the words you choose. Persuasive documents will make use of language that emphasizes the strength of your argument and minimizes the strength of those of your opponent. The language used in an argument will usually be more emotional and will often follow a different logical structure than a document drafted to inform. The language used in an informative document will generally be more neutral in tone than that used in a persuasive document. A document that is intended to inform will often simply lay out the information and allow the reader to use it as he or she sees fit. Thus, attention must be paid as to what information the reader requires and care must be taken to include all of that information and exclude information that is unnecessary or unwanted.

V. Drafting Better Pleadings: Principles and Pitfalls

A. Statements of Claim and Defence

The overriding principle to remember when drafting statements of claim and defence, consistent with the overriding theme of this paper, is to keep them simple. Correspondingly, the overriding pitfall to avoid is to make them overly complicated or lengthy.

Remember that statements of claim and defence are supposed to set out the *material* facts. So, before drafting a statement of claim or defence, you need to look at the relevant law, which will provide you with the elements of the cause of action or defence that are relevant to your case. Once you have determined the elements of the cause of action you intend to advance, you will know what facts you need to plead. Too often, lawyers neglect to look at the law before they begin drafting and plead all sorts of facts which are irrelevant to the cause of action or defence they are advancing, resulting in lengthy and confusing pleadings which do little to identify the issues for discovery and trial.

For example, if your case involves a breach of contract, you would need to establish that there was a contract, the parties to the contract, the date of the contract, the relevant term or terms, the fact that and manner in which the terms were breached, and the fact that your client has suffered damages as a result.

If you were drafting a defence to a defamation action, one of your defences might be qualified privilege. An occasion of qualified privilege is established when the person who publishes the statement has a legal, moral, or social duty to make it, and the person to whom the statement is made has a corresponding legal, moral, or social interest in receiving the communication. An example of this might be that you believe your neighbour has committed a criminal offence. You report your belief to the police. Your neighbour then sues you, alleging that the statement you made to the police was untrue and defamatory. The statement of defence should plead that, "The defendant was under a social or moral duty to make the statement to the police and the police had a legal or social duty to receive the statement, and therefore the statement was published on an occasion of qualified privilege."

B. Affidavits

Often lawyers pay too little attention to the content of the affidavits they file. Either the affidavits fail to address the issues relevant to the application they are intended to support, or they include information that is irrelevant and superfluous. Again, look at the rule and relevant law pursuant to which the application is being brought and draft your affidavit accordingly. To use a simple example, Rule 18(6) reads as follows:

> (6) SUMMARY JUDGMENT FOR DEFENDANT
>
> In an action in which an appearance has been entered, the defendant may, on the ground there is no merit in the whole or part of the claim, apply to the court for judgment on an affidavit setting out the facts verifying the defendant's contention that there is no merit in the whole or part of the claim and stating that the deponent knows of no facts which would substantiate the whole or part of the claim.

The affidavit in support of an application need only state that:

(a) the defendant does not believe that there is any merit to the plaintiff's claim; and

(b) the deponent knows of no facts which would substantiate the whole or part of the claim.

Yet, there are several cases in which the affidavit in support of an application under this rule was found to be deficient, usually because there was no statement that the deponent knew of no facts which would substantiate the whole or part of the claim. This would have been avoided had attention been paid to the wording of the rule.

It must always be remembered that, once an affidavit is filed, it can be relied on by all parties from that point in the litigation forward, not just with respect to the application it is intended to support. For this reason, care must be taken not to make statements which, while helpful on the immediate application, might not be at some point further on in the case. Care must also be taken to ensure that the statements made are entirely accurate and that the deponent, often your client, is not misstating or exaggerating his or her evidence in any way. Doing so will only lead to impeachment and credibility problems down the road.

One thing to remember is to always use your client's own language, to the extent possible, when drafting affidavits. This will assist in ensuring that the evidence is accurate and that it is consistent with your client's *viva voce* evidence at trial. Further, affidavits that are drafted by lawyers or their assistants using "lawyer language" appear to be just that to the judge or master reading them, and are thus less compelling.

VI. Summary

Using proper grammar, write as clearly and concisely as possible, remembering always the audience to which your writing is directed and the purpose for which you are drafting the document.

If the reader wishes to obtain more comprehensive instruction in any of the areas discussed above, there are some excellent publications, referred to in the bibliography which follows, which expand on each of these areas.

VII. Bibliography

1. Garner, Bryan A., *Legal Writing in Plain English* (2001), University of Chicago Press.
2. James, Peg and Goncalves, Raquel, *Modern Writing for Lawyers* (1994), The Continuing Legal Education Society of British Columbia.
3. Rooke, Constance, *A Grammar Booklet for Lawyers*, Bar Admission Course Edition, The Law Society of Upper Canada.