

Apt Phrasing in Legal Writing

BY GINETTE CHAPMAN



“Words are the building blocks of the law.”
—Chief Justice John G. Roberts Jr.

Choosing the right words and formulations is a key element of good legal writing. Yet many lawyers struggle with the nuances of phrasing, and even strong writers can further hone their diction. Though a misstep here or there is no great matter, a proliferation of inapt or antiquated wording choices undermines a lawyer’s credibility and detracts from the essential points a lawyer wants to convey.

This article identifies some of the most common phrasing pitfalls found in legal documents, shows how to avoid those missteps, and explains why doing so will strengthen one’s writing and reputation.

Misused Expressions

Outright phrasing mistakes are not only embarrassing but also detrimental to your advocacy. An error like using “on accident” rather than “by accident” will distract a careful reader from your analysis, at a minimum. Worse still, such mistakes may lead readers to assume

(consciously or subconsciously) that your arguments are as misinformed as your choice of language. Judges—many of whom learned the art of good writing as law review editors—tend to be particularly critical readers. The table below shows some commonly misused phrases.

Another frequent misstep among lawyers is using the expression “beg the question” to mean “raise the question” rather than “engage in circular reasoning.” This brings up an interesting issue: Many lawyers—notably, the late Justice Antonin Scalia—have an arguably inflexible view of language, eschewing the notion that a phrase’s meaning may evolve when enough people start using it in a nontraditional sense. Using “beg the question” in reference to raising a question has become so common that some language experts think it’s now acceptable. But your job as a lawyer is to be persuasive, so you shouldn’t risk putting off judges or other important readers who are traditionalists.

If you think you may be guilty of misusing some of the expressions noted in this section, perform a web search for “commonly misused expressions” and you’ll find plentiful additional guidance.

INCORRECT USAGE	CORRECT USAGE
hone in	home in
deep-seeded	deep-seated
by in large	by and large
flush out (as in details or analysis)	flesh out
forgoing (as in something that goes before)	foregoing

Legalese

“Legalese” refers to Latin terms, archaic words like “heretofore,” and redundant phrases like “null and void.” To borrow from Justice Potter Stewart, we know legalese when we see it (or at least we should). Legal documents are often rife with Latin or archaic phrases that could be simplified.

Litigators, in particular, should avoid using legalese in pleadings and briefs for several reasons. If you’re working within page limits, legalese may waste precious space on gratuitous wording. Top lawyers shun legalese, so writing in plain English will convey your credibility to a tribunal. Perhaps most important, you want a busy judge to focus on the meat of your argument, not be distracted by the fat.

Here are a few examples of legalese that could be trimmed from court filings:

- “further deponent saith/sayeth naught/not”
- “by and through the undersigned counsel”
- “comes now the plaintiff [or defendant]”
- “wherefore, premises considered, defendant prays that this answer be deemed good and sufficient, and that after all due proceedings are had herein”

Turning to transactional practice, contracts normally bristle with legalese. But legalese obscures key points and makes contracts impenetrable to nonlawyers—and even to attorneys.

LEGALESE	PLAIN ENGLISH
ab initio	from the start
inter alia	among other things
sui generis	one of a kind
to wit	namely
forthwith	at once
herein	in this [section]
bequeath	give
pursuant to	under

WORDY	CONCISE
in light of the fact that	because, given that
despite the fact that	although
the manner in which	how
at this point in time	now, currently
during the course of	during
not insignificant, not inappropriate	significant, appropriate
subsequent to, prior to	before
has a negative impact on	harms
has the ability to	can
in the event that	if

The modern trend is toward plain-language contract drafting (a subject for another day), so relying on antiquated formulations in a contract may mark you as out of step with the legal field.¹

In addition to the Latin and archaic terms noted in the table above, here are some examples of legalese to consider eliminating in contracts:

- “witnesseth”
- “know all men by these presents”
- “now therefore, for and in consideration of the mutual covenants and agreements contained herein, and for other good and valuable consideration, the receipt and sufficiency of which are hereby acknowledged”
- “said” (as in “said party”)
- “the same” (as in “applicable to the same”)

A final note on legalese: Some lawyers believe that generously peppering one’s writing with terms like *heretofore* and *case sub judice* impresses clients. To the contrary, most sophisticated clients now expect their counsel to use plain, direct language. A good lawyer demonstrates her value not through bombast but rather through clear diction and cogent analysis.

Wordiness

Wordiness, like legalese, weakens writing by adding unnecessary length and diluting analysis. Wordiness arises when writers use the passive voice, double negatives, needless adverbs, preposition-heavy formulations, and superfluous phrases.

In addition, lawyers can eliminate intensifiers such as “really,” “extremely,” and “manifestly” from their writing, along with the following sentence openers:

- “It should be noted that”
- “It is clear/obvious/apparent/beyond doubt that”
- “It goes without saying that”
- “The plaintiff [or defendant] would argue that”
- “For your information”

Phrases like these add no value.

Clichés

Finally, lawyers should eschew clichés. Though a phrase like “slippery slope” may have a ring of sophistication to a law student, seasoned lawyers are tired of trite expressions. Further, clichés often don’t precisely fit the circumstances in which they’re used. Cliché-heavy documents tend to read as rote, not as thoughtfully crafted analysis.

Granted, it’s hard to completely purge clichés from your writing. Just don’t overdo it. You can bet your bottom dollar a judge won’t think your brief is the best thing since sliced bread if you don’t take the time to think outside the box.

Conclusion

Careful attention to phrasing will make your writing clearer, crisper, and more persuasive.

If you find it difficult to appraise your diction, a simple web search will bring up many useful resources. A colleague’s or legal editor’s input on your work products can help you identify phrasing missteps. Also consider taking CLE courses on legal writing or subscribing to newsletters from a legal writing expert. Ultimately, dedicating ample time and effort to the editing process—including editing a hard copy of your document and reading the document to yourself aloud—is the best way to refine your diction. **CL**



Ginette Chapman is a legal editor offering services to lawyers through her website, www.legaledits.com. In her 15 years as a Colorado attorney, she has worked for the federal government, a law firm, and the courts, including as clerk to Justice Gregory J. Hobbs Jr. Most recently, she served the restaurant industry as in-house counsel—ginette.chapman@gmail.com, (303) 330-9251.

Coordinating Editor: John Campbell, jcampbell@law.du.edu

NOTE

1. Lawyers should tread with care in this area because arcane or complex terminology may have a precise and accepted meaning that is difficult to replicate with plain language. These terms of art are necessary in some legal writing and should be distinguished from legalese.