

Of Bards, Beguilers, and Barristers: Misused and Incorrect Words and Phrases in Legal Writings

by William F. Haggerty

Caveat: When interviewing potential associates, beware the recent law-school graduate who proclaims writing ability on the ground that "I was a journalism major in college!" Like Sheridan, the careful legal writer should "make it a rule never to look into a newspaper."¹ The journalist, mindful of the common denominator, too often resorts to the colloquial for expression. The legal writer cannot afford to do so. Shakespeare and contemporary Elizabethan writers could "[break] the rules and [make] the language sing."² The legal writer is in no position to take such liberties. The clarity and precision sought after in legal writings, at a minimum, require standard usage.

Many practitioners, however, beguiled by currency, incorporate in their briefs and memoranda the very worst of journalistic laxity. What follows is a collection, the "top ten" if you will, of words and phrases from the world

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"Plain Language" is a regular feature of the *Michigan Bar Journal*, edited by George H. Hathaway, Chairperson of the State Bar Plain English Committee. Through this column the Committee hopes to promote the use of plain English in the law. Want to contribute a Plain English article? Contact Mr. Hathaway at The Detroit Edison Co., Room 688 WCB, 2000 Second Ave., Detroit, MI 48226.

of contemporary speech that are consistently misused in formal legal writing, along with some suggestions for cure.

1. And/or. "A devise, or shortcut, that damages a sentence and often leads to confusion or ambiguity."³ "[A] legalistic term [that] should be avoided in ordinary writing."⁴ Use of "or" will suffice in most instances.

2. Based on/on the basis of. Use of these phrases is often confused. In the sentence:

The Michigan Rules of Evidence are based on the federal rules, "based" is a verb and "on" is a preposition. The sentence conveys that one set of rules provided the foundation for the other.

In the sentence:

On the basis of the evidence, the jury found the defendant guilty,

"On the basis" is a prepositional phrase in which "basis" is a noun and "of" is another preposition which begins another prepositional phrase. Here, the sentence indicates that the reasoning underlying the jury's finding was grounded on the evidence.

It is incorrect to say:

Based on the evidence, the jury... because when the sentence is analyzed it must be concluded that the jury, rather than its finding, is "based on" the evidence.

3. Center on/cluster around. It is possible to "center on" a particular thing or idea or to "cluster around" it. It is logically impossible to "center around" something.

4. Effect/impact. An incident of tremendous proportion can have a metaphoric "impact" on something

else, such as the "impact" of the Depression or the *Miranda* decision.⁵ Short of such magnitude, "effect" should be used. Reserve the use of "impact" for references to wisdom teeth and vehicular accidents!

Wrong: The decision impacted adversely....

5. Exit a vehicle/building. This is police report jargon and has no place in formal writing. Use: "got out of the vehicle" or "left the building."

6. He/she; he or she. Use of this combination is disapproved or suggested for use only as a last resort by leading formal and legal writing authorities.⁶ It derives from the "all purpose" form where it was intended to enable a user to cross out the gender that did not apply. The examples below indicate approaches to gender neutrality which comport with formal writing standards.

The sentence:

An attorney must file his or her response to a complaint within...;

can be rewritten:

An attorney must file a response...;

or

Attorneys must file responses...;

or

Responses to complaints must be filed...;

If all else fails, use of *he* as a pronoun "embracing both genders" "is never incorrect" and "has lost all suggestion of maleness in [such] circumstances."⁷

7. Infer/imply. Only the Legislature may *imply* (suggest) something (e.g., a remedy) in the words of a statute; a reader or interpreter of the

statute must *infer* (deduce) the existence of a remedy from the text of the statute.

Wrong: The Court will *imply* a remedy from the plain language of the statute.

Correct: The Court will *infer* a remedy. . .

Alternate: *Implicit* in the words of the statute is the remedy the plaintiff seeks.

8. Per se. This phrase means "by itself."⁸ It should not be used as an adjective. When in doubt, translate the phrase into English and insert it into a sentence to see if it works:

His arrest without probable cause was a violation of his Fourth Amendment rights *per se*;

or

...was a violation *per se* of his. . .;

not

...was a *per se* violation of his. . .

9. Reversible error. Although widely used, this is a logical impossibility. "Error" cannot be "reversed" *per se*, although its results can be remedied; it is the erroneous decision of a court that is reversed. Thus, a court cannot commit reversible error; rather, it renders a decision or ruling that is determined to be error on appeal, and it is the appellate court that reverses the decision. *Use:* error requiring reversal.

10. Singular/plural nouns. The following are examples of collective entities which are treated as singular nouns and require singular pronouns and verbs.

The Supreme Court issues its decision.

The Legislature indicates its intent.

The jury renders its verdict.

Do not use "issue their decision," "indicate their intent," or "render their verdict." ■

Footnotes

1. R. B. Sheridan, *The Critic*, act I, scene 1.
2. McCrum, Cran & MacNeil, *The Story of English* (New York: Viking, 1986), p 128.
3. Strunk & White, *The Elements of Style* (New York: Macmillan, 3d ed, 1979), p 40.
4. Sabin, *Gregg Reference Manual* (New York: McGraw Hill, 5th ed, 1977), p 213.
5. *Miranda v Arizona*, 384 US 436; 86 S Ct 1602; 16 L Ed 2d 694 (1966).
6. Strunk & White, n 3 *supra*, pp 60-61; Mellinkoff, *Legal Writing: Sense & Nonsense*, pp 47-51; Block, *Effective Legal Writing*, 3d ed, pp 19-20; Weihofen, *Legal Writing Style*, pp 19-20; Wydick, *Plain English for Lawyers*, pp 59-61; Sabin, n 4 *supra*, pp 155-156, 191-192.
7. Strunk & White, n 3 *supra*, pp 60-61.
8. Black's Law Dictionary (5th ed), p 1028.

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