

The 5 Biggest Legal Writing Gaffes And How To Avoid Them

By **Lisa Ryan**

Law360, New York (May 20, 2015, 3:39 PM ET) -- The stakes of bad legal writing are high — mischaracterizing a law or submitting an unreadable brief can end cases or lead to sanctions — so it's vital for attorneys to avoid making blunders while zealously representing their clients.

"Legal writing is a skill that lawyers constantly have to work on," said Carey Bertolet, managing partner for North America for international legal recruitment firm Laurence Simons. "Somebody who is continuously honing the craft of writing every time they put pen to paper or keystroke to computer — those are the folks who are really good writers."

Here are some ways to avoid making the most common legal writing mistakes.

Understand the Weaknesses of Your Case

One of the worst legal writing errors that lawyers can make is assuming their arguments are airtight, attorneys say.

"Because we are paid to be advocates, many lawyers struggle to get the psychological distance necessary to make an objective assessment of the challenges to their positions. That's a missed opportunity," said Michael W. Stocker, a partner at Labaton Sucharow LLP.

Even if attorneys are passionate about their case or confident they will win, it is important for them to attempt to poke holes in their arguments. By doing so, lawyers can ensure that their writing covers all the necessary bases and addresses possible objections.

The most persuasive briefs or motions are written after lawyers recognize the limitations of their cases, according to Stocker.

"Don't drink your own Kool-Aid," he said.

Do Your Research

If attorneys misstate a law or mischaracterize the underlying facts of the suit in their legal writing, they lose credibility with the court, experts say.

"The worst possible mistake that can be made in writing for a judicial audience is to do something that

undermines your credibility, and there are different ways in which lawyers can do that," Mayer Brown LLP partner Evan Tager said.

There's a temptation, particularly with less-experienced attorneys, to "shave the facts" or misrepresent a case in their writing, according to Tager.

"Sometimes litigation is thought of as no holds barred, but you're shooting yourself in the foot, especially if you're dealing with an appellate court that has three clerks to check everything," Tager said.

A successful outcome is unlikely when courts question the credibility of anything attorneys say on their clients' behalf.

Ask a Friend

When lawyers have been honing their writing for days or even months, trusting their own editing skills can be dangerous, experts point out.

"Sometimes, especially if you're on a time crunch, you can read something so many times that it's becoming rote. You know what you've written, and you're reading it, and you're not really seeing the words anymore," Bertolet said.

That's why it's vital that lawyers ask a colleague who is unfamiliar with the case to review their work. The document is new to them, and they're reading it without knowing what was already written, giving them a different perspective from the writer.

"If they don't understand the point you're making, a clerk or judge dealing with 15 other matters at the same time probably won't either," Stocker said.

Colleagues can also help lawyers spot typos and can raise key questions about arguments, helping to make the work as strong as possible.

"You have to look at edits that were made to your writing and appreciate and understand why they were made so you can integrate them into your own writing," Tager said.

Don't Bury the Lede

Lawyers who aren't skilled writers tend to bog down their briefs with a lot irrelevant facts and arguments that make it difficult for courts to follow, especially in appellate matters, attorneys say.

"The court can't easily understand what the case is about because you're trying to retell the entire story that you told to the jury, when the court doesn't really care about that," Tager said.

It's important for attorneys to unload their main arguments and the most important facts of the case right away, and avoid a ton of irrelevant details from the get-go.

"Make your strongest point clearly and concisely very early in the brief. If you wait to make that argument after three pages of background, you've likely already lost your reader," Stocker said.

Attorneys also tend to bury key language from cases on which they're relying their arguments, inside

parentheticals that follow the citation or in long block quotes, Tager noted. Doing this can cause readers to miss out on important details.

"It is human nature that readers tend to gloss over long block quotes or parentheticals," Tager said.

Avoid Harsh Language

Using snide language or letting their tempers get the best of them in legal writing is another common legal blunder, attorneys note.

"If you disparage the trial judge or you disparage opposing counsel, you turn off the court," Tager said.

Rather than making snarky comments, being glib or risking a hysterical tone in their writing, lawyers need to take a step back and ensure that their documents contain fair language that won't offend readers.

"If you think a judge did something absurd, let the ruling speak for itself. It's a lot more effective to lay out what the judge did, explain in a measured way what's wrong with it and let the court come to its own conclusion," Tager said.

The key to ensuring that briefs and motions don't contain harsh language is to understand the difference between aggressive writing and persuasive writing, according to Stocker.

"You want to carry your readers, not march them at gunpoint," he said. "While it can feel good to slip zingers and sarcastic asides into a brief, those kinds of remarks do nothing to move the ball with the court, and may even hurt your credibility."

--Editing by Katherine Rautenberg and Edrienne Su.