Chapter 2: The importance of effective legal writing for foreign legal practitioners

An idea is only as good as the words that convey it. Non-U.S. legal practitioners that engage in multinational practice, especially in the U.S., have mastered their own legal rules as well as those of at least one other jurisdiction. In their own language, they can effectively persuade and explain the most basic and exceedingly complex ideas to a range of audiences. Yet when they resort to English as their second language, they run a high risk that their ideas will get lost in translation.

For some, legal writing is like all other writing—a mechanism to communicate an idea to someone. Yet for effective legal writers, writing is much more than that. Depending on your audience, you may be writing to persuade someone to take a particular action that they otherwise would not take; you may be writing to recommend a strategy or decision that affects human lives or millions of dollars; or you may be writing to explain an opinion that someone will rely upon when arguing in front of a court. Your writing is not just communicating an idea—it is attempting to facilitate a certain outcome.

Ineffective legal writing will obscure your idea and may ultimately fail to facilitate the outcome that you anticipate. But more than that, it may lead to mistrust and misjudgment of your substantive legal skills. Failure to present an idea effectively can be read to mean failure to understand a legal issue. It can lead the reader to become confused by your writing, frustrating them and ultimately causing them to bypass your guidance and analysis.

Consider the following examples of what can happen as a result of ineffective legal writing:

1. On the issue of ineffective legal writing, one of the Supreme Court Justices has stated that “[i]f someone uses improper grammar, you begin to think, well, maybe the person isn’t as careful about his work, or his or her work, as he or she should be if he doesn’t speak carefully.”

2. “Poor writing by an attorney can result in any or all of the following: the court sanctioning the attorney; the client losing his or her legal claim; or the client becoming involved in unnecessary litigation.”

3. Courts have indicated their displeasure with wordiness and lack of clarity in briefs and pleadings. Courts have dismissed complaints with grammatical errors, and denied motions with misplaced punctuation marks.

4. For example, in *Laitram Corporation v. Cambridge Wire Cloth Company*, the court ordered a $1000 fine to be paid by the lawyers for both parties, because the briefs lacked references to the record, relied on attorney argument as evidence, and cited inapplicable authority. The court

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7 *See Gordon v. Green*, 602 F.2d 743, 744–45 (5th Cir. 1979).
11 919 F.2d 1579 (Fed. Cir. 1990).
stated that “counsel have in this case wasted this court’s resources by playing in the rarified atmosphere of a debating society.”

5. In Julien v. Zeringue, the court imposed financial sanctions, equal to the defendant’s attorney’s fees, against the plaintiff’s counsel. "Julien's counsel concedes that his unprofessional management over the preparation of this appeal resulted in 'burdening the appellate court with 'ragtag' and 'rough edge' performances with hurried work products.' We agree and sanction him personally under 28 U.S.C. § 1927 (1982)." Julien v. Zeringue, 864 F.2d 1572, 1575 (Fed. Cir. 1989). "The judicial process has been badly abused by Julien's counsel. For example, he continually missed deadlines, requested at least 10 extensions of time to file his briefs, and submitted a joint appendix 11 months after he was given extensive and explicit instructions on how to prepare and file a joint appendix. After being warned that no further time extensions would be granted, he missed the deadline for filing Julien's reply brief and joint appendix." Id. at 1575-1576.

6. In a similar case, Feliciano v. Rhode Island, the plaintiff’s claim under the Americans with Disabilities Act was dismissed because the complaint was too vague. The court found that the complaint did not describe the claim in sufficient detail, nor did it allege facts to support the claim of denial of constitutional rights. The complaint also alleged that there were differences in interpretation in the two applicable federal laws, but did not articulate those differences, and therefore the court did not consider this allegation.

7. In the case of Hernandez v. N.Y. City Law Dept. Corp. Counsel, the court found that the lawyer's trial brief was extremely sloppy, intentionally misleading, and “dead wrong,” and thus ordered the lawyer to show cause why he should not be sanctioned. The judge also ordered the lawyer to bring a supervisor to court “to discuss the overall poor quality of [the] brief in terms of content, organization, and issues not included that should have been.”

8. In Ky. B. Assn. v. Brow, a lawyer filed a one-and- a-half page brief that the court found to be “virtually incomprehensible.” The court characterized it as “little more than fifteen unclear and ungrammatical sentences, slapped together as two pages of unedited text with an unintelligible message.” The state bar charged the lawyer with incompetence, and he was suspended from the practice of law for sixty days and ordered to pay the costs of the bar action.

Given the amount of time and additional effort a non-native English speaker puts into preparing a legal document in English, having the guidance in that document ignored is an unacceptable outcome—yet it happens all too frequently. Developing effective legal writing skills in English takes practice, but that practice can only follow from clear instructions on process, which this book provides.

What are the risks of ineffective legal writing?

The written word is everlasting. This can be a good thing if you are Shakespeare and you intend for your words to live on for generations. But when you are writing documents that provide legal advice or even that assert your opinion on a matter, everlasting documents mean long-term potential liability.

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12 Id. at 1584.
13 864 F.2d 1572 (Fed. Cir. 1989).
14 160 F.3d 780 (1st Cir. 1998).
16 14 S.W.3d 916, 917 (Ky. 2000).
Everything that you write, whether in an email, memorandum, formal letter, or court document, creates a record of your words that can be used by others. Your harmless email to a colleague sharing your friendly advice on a case may ultimately be viewed by a document review attorney during a lawsuit related to that case, and your name will suddenly be in the spotlight if they decide that your email is pertinent to the case. The same could be said about subpoenas and other court orders directing you or the recipient of your messages to divulge all written communiqués.

Nothing that you write is safe from third party review. Encrypted emails and hard drives have been breached by hackers and via court orders; shredded letters have been reconstructed; and locked files have been burglarized. In one instance, I recall a high-level official walking to work with a file in her hand that was taken when she was mugged, along with her purse and phone. It is unlikely the file was the target of the attack, but it is a clear reminder that written records can fall out of your control easily.

The point of saying all of this is that your words matter. Especially as a legal professional, your words carry a great deal of authority and are often interpreted and misinterpreted to suit the needs of the reader. Accordingly, it is essential that your words be carefully crafted, concisely written, and fully reviewed before they are released from your control. In the next section, we will consider how this goal manifests in American legal writing.

**What Makes American Legal Writing Unique?**

American legal writing is different from legal writing in many other parts of the world. For one thing, excessive litigation has led many lawyers to draft correspondence and contracts very conservatively, carefully avoiding any language that might lead to a lawsuit or an unwanted obligation. This, in turn, leads many American lawyers to draft short, concise statements rather than expansive explanations. Rather than making sure everything is included, we make sure only what is necessary is present.

This style of legal writing is new to many foreign legal practitioners and takes some getting used to. Here are some of the key elements of American legal writing that we will focus on in this book:

- Demand for brevity
- Plain Legal English
- Clear issue identification
- Succinct conclusions

**Demand for Brevity**

"When you wish to instruct, be brief; that men's minds take in quickly what you say, learn its lesson, and retain it faithfully. Every word that is unnecessary only pours over the side of a brimming mind." -- Cicero

The previous section explained how valuable your words are and how important it is that those words be carefully crafted. This also means that your writing should be as concise as possible without losing meaning. In some cultures, flowery language and extensive explanations are considered a sign of
knowledge and experience in an area. The more ways you have to explain something, the more scholarly you are. This is not the case in American legal writing.

If you can think of ten ways to define a particular term, you have a decision to make—how is it being defined for use in this context. If there are several ways to describe an event, what is the description most effective for your client. Rather than using superfluous or flowery language, American legal writing is generally succinct and often curt. Sentences are short and every word within those sentences was chosen intentionally, as the drafter recognizes the legal effect that each word creates.

Don’t confuse brevity with oversimplification. Your goal should be to turn a five-page memorandum into a one-page email message without sacrificing meaning and without creating unwanted liability. But if doing so requires you to ignore necessary explanations or exclude essential references, err on the side of inclusion rather than exclusion. Clear language is dependent not only upon concise statements, but also on complete information.

“[Too] many lawyers approach a brief as if they are a waiter a cocktail party: "Here are five arguments your honor. Take one." That's wrong. A lawyer's job is to tell the judge which one to take; that's what advocacy means. Any good advocate is selective. That doesn't mean you can't make your six arguments; it means that your best two better make up 90 percent of the brief.”

Writing concisely takes time and practice. It is much more difficult to write a concise letter than to write an extensive memorandum. As Blaise Pascal said, "I have made this [letter] longer, because I have not had the time to make it shorter." Take the time to edit your drafts extensively and choose your words appropriately—your reader will appreciate the clarity, and you will appreciate the security in knowing that your intent is clear and your meaning unmistakable.

*Plain Legal English*

"Genius is the ability to reduce the complicated to the simple." -- C.W. Ceram

The law is an exclusive domain in which to practice. But our guidance as legal professionals should be capable of being understood by all. *Legalese* has penetrated the legal writing profession to such an extent that legal documents have become exclusively within the purview of legal professionals. The law is meant to serve the public and should be accessible by all interested parties, regardless of knowledge of legalese. Writing in plain English is often one of the hardest skills for lawyers to develop, even though it should be a natural process.

“Plain English” is a concept that is meant to encourage simplified writing of technical concepts, including medicine, law, economics, and so forth. It is quite easy, especially for a professional in one of these fields, to choose words and methods of expression that hide true meaning from the reader and that ultimately protect the professional from criticism. This practice is archaic and weakens the ability of professionals to provide meaningful advice. In the law, there are still many cases in which legalese, the

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18 *Lettres provincials*, letter 16, 1657
word used to define overcomplication of concepts through the use of uncommon legal words, are prominent.

Write so that you’re understood. English is a hard language to learn, but it’s an easy language to communicate in. There’s no reason to put Latin in your brief. - Hon. Craig T. Enoch, Fifth Court of Appeals, Dallas

Writing in Plain Legal English means choosing words that convey the appropriate legal meaning but that do so without confusing the reader. This often means using shorter sentences or defining necessary legal terms. Here are a few tips to help you write in Plain Legal English:

- Keep sentences to a reasonable length (20 words on average);
- Use shorter words, where appropriate;
- Avoid double and triple negatives;
- Prefer the active voice;
- Keep related words together;
- Break up the text with headings;
- Avoid extensive cross-references;
- Avoid overdefining;
- Use recitals and purposes clauses.

Clear Issue Identification

a. “The most important thing is to be accurate and intellectually honest in your arguments and state them clearly.”19 Furthermore, “[t]he law demands precision of its practitioners and penalizes those whose work is rush and sloppy.”20 For example, the Wisconsin Court of Appeals declared an appeal frivolous because the lawyer did not clearly identify the legal issue, lied about the facts, and tried to deceive the court regarding the client’s actions and the court’s prior rulings. As a result, the judge awarded the opposing party costs, fees, and reasonable attorney fees, and ordered the amount to be paid solely by the dishonest lawyer.21 Additionally, the United States District Court for the Southern District of New York granted a motion to dismiss because the plaintiff’s issues, and complaint in general, were so poorly drafted that it failed to state a claim for relief. The court further noted that “the court’s responsibilities do not include cryptography, especially when the plaintiff is represented by counsel.”22

b. Only through early and clear reflection will the lawyer be able to effectively ascertain the case’s basic contentions and respective remedies. Lawyers who do not pinpoint the exact legal issues of their case, due to a lack time spent on understanding the facts or thoroughly researching applicable laws, run the risk of obfuscating their claim and minimizing the chances of obtaining a favorable outcome.

c. Legal issues arise from reasonable disagreements on how precedence should be applied to a particular set of facts. Issues constitute the focal point of a legal controversy, and are critical for a lawyer to identify in arguing the merits of the case. The first step to carving out the legal issues is to understand the factual premise and context of the argument presented in your case. Once you have established this construct, it is imperative to organize your facts into an outline so as to prevent confusion over the sequence of events. The next task is to research and examine the relevant rules and case law that will comprise your framework for analysis. Lastly, you must apply the facts to your research to determine the outcome of the rules’ application. By exercising your legal reasoning, you will then be able to state your conclusions with conviction and effectively litigate your cause of action.

Succinct Conclusions

The conclusion of a legal document serves two purposes. First, it reminds the reader of the key issue and the logical outcome that follows from your analysis. Second, it reiterates what is being asked of the reader.

The conclusion of a legal document is not:

1. An opportunity to raise arguments that did not conform to any of the section headings in the main text.
2. A platform from which the writer can attack or criticize the other party or a particular precedent.
3. A reiteration of the arguments already made in the main text.

Rather, the conclusion is your opportunity to “seal the deal” by highlighting the logic of the conclusion that you wish the reader to draw from your analysis. By this point in the document, the reader should already have a conclusion in mind. So your role here is to solidify their assumption and validate their decision.

Your arguments should already have led the reader to your conclusion without explicitly stating it. Accordingly, when you state the conclusion, do so in concise, strong language. Some examples of strong conclusions follow below.

The second crucial element to a conclusion in a legal document is the recommended course of action. This will differ depending on the type of document you are drafting.

- Internal legal memoranda: a legal memo that you plan to submit to a senior associate or partner at a law firm, for instance, should recommend a course of action to take based upon the analysis of precedent in the document. The language should be clear and unequivocal. The reader should know exactly what action is being recommended.

- Correspondence to a client or colleague: the legal letter may be recommending a particular action for the client or colleague to take, or it may be informative only. If action is being recommended, provide enough detail to avoid the need for the reader to contact you for clarification. Whether or not action is being requested, be sure to include proper contact information so that the reader can reach out to you if necessary.
• Court briefs: there is no room for error in a court brief. You will likely have a limit on the number of words you can include, making it even more important to provide a succinct analysis and concise conclusion. In this type of document, your conclusion will include a prayer for relief—that is, a brief reiteration of what you would like the court to do (e.g., grant the motion to dismiss).

To many writers, the conclusion is an afterthought. Bear in mind that this is the last piece of information that a reader will have in mind when they put down your letter, brief, or memorandum. It will stand out in their minds and may be the only part of the document that the reader paid much attention to (unfortunately). This makes it essential that your conclusion is powerful and concise enough to form an accurate picture of the essence of your document. Below are several examples of effective conclusions.