

Effective writing for lawyers

Introduction

[E.101] The need to write well

As a lawyer, you spend much of your time writing – so why not do it well. You may think you are an excellent lawyer, but you will not be a successful practitioner unless you can communicate the law effectively in writing to the person who must read and act on your letter or document. If you use these guidelines, your writing will be clearer and more effective. Good lawyers use plain English and avoid jargon and legalese. Good writing is effective communication and a sign of professionalism that enhances your reputation.

There is no one formula for writing well. However here are two that might help:

(A) KISS: “Keep It Short and Simple”, ie where possible, use short words, short sentences, short paragraphs, active voice and avoid repetition.

(B) APLE: Consider the Audience, the Purpose, the Language and Effectiveness as you write.

Context is always important. What works for one letter or document or type of reader or purpose may not work for another. You need to decide when and how to apply the guidelines outlined in this chapter. The guidelines aim to help you think about what you are doing, including why you are writing your document and to remind you of things to look out for as you write. If this is new to you, aim to apply each guideline one at a time rather than all at once. However, keep in mind the best way to learn to write well is to read a lot, and write often.

The advent of email has changed the way many lawyers communicate. It has led to informal styles and heightened risk of inaccuracies and ill-considered comments or replies sent without pause for review. Other risks of email involve the ease of forwarding messages to others not intended by the writer, and permanent storage for future use. On the other hand, the speed of email can enable quick resolution of disputes if handled carefully in appropriate situations. Good lawyers need to decide when and how to use email rather than letters for professional communications.

Consider your reader

[E.201] Write for the reader

Law schools usually train lawyers to write for examiners. However, the most important audience for legal documents is the reader, whoever that is. It could be your client, a witness, another lawyer or party, a court registrar or a judge. Having a clear idea of your audience is the first principle of good legal writing. For example, if one family lawyer writes to another lawyer that “the judge gave a section # certificate”, the meaning is clear to the other lawyer. But if you tell your client this, the client is unlikely to understand fully. It is more likely that they will ask you for an explanation, or worse, they may retreat, or feel too foolish to ask. It is far easier for you to

write – “the judge decided that the arrangements for the care of your children are satisfactory”. Even better, add a reason, “the judge needed to do this before making your divorce final”.

Try to know your reader before writing so you can better pitch your style. Writing to another lawyer often means you can be more direct and use more legal expressions than when writing to your client or another person. Be careful to remain respectful at all times to all readers. Never show anger, be condescending or patronize the reader, and if responding to a patronizing letter use the opportunity to demonstrate your professional integrity by being as helpful and considerate as possible.

You may need to consider cultural and language issues of your likely readers. For example, the ability to understand English, the role of silence, the reaction to direct addressing, their experience of law and police, the need to agree, and specific politeness rituals or expectations.

[E.202] When not to write at all

Lawyers generally like to put things in writing, but it may not be always in the client's interest. For example, it may be quicker and more efficient to telephone the lawyer acting for your client's spouse to find out why child support has not been paid. You could then call your client and relay the reason, before writing a brief file note for both calls.

Similarly, you could find out available court dates simply by a telephone call to the court registry. You could then confirm a date in writing by email to the court, with a copy to your client.

Emails have taken over from communication by letters in much of legal practice. The main advantages of email are rapid communication, low cost and permanent records. Conventions of email legal writing are changing however there is growing acceptance of less formality and fewer traditional formalities or courtesies. For example, using “Dear...” at the start and “Yours faithfully” or “Regards” at the end of an email is no longer required.

[E.203] Write for a Purpose

The second principle of good writing is to have a clear idea of your purpose, or why you are writing to your reader. The purpose of your writing as a lawyer will determine the style you use. Emails are usually direct. Letters are more formal and therefore are often longer and take more time to draft. Court documents like forms and affidavits are the most formal and need great care. Clarity is essential regardless of the purpose. Avoid ambiguity and complexity. Be direct: not circuitous or vague. Say what needs to be said and no more.

It was crucial you cited authorities and referenced correctly in your writing to avoid allegations of plagiarism. As a lawyer, precedents for forms and letters are commonly used as guides for writing and there is no need to always cite the source when using other references. However, context is always important and you still have a duty to respect the intellectual property of another.

[E.204] Tone

The tone is in the style and feeling of writing. Take care with any hidden “message” you may send your reader by your tone. It is important to imagine the reader's circumstances and likely response so that you can choose your style of writing for that reader and use the appropriate level of formality, tone and respect. Avoid jargon like “the writer” when referring to yourself. Be clear with pronouns as appropriate such as “I” and “you”.

Tone in emails is usually more direct and informal than letters. However it is important not to forget that your emails may be stored for future use, be copied or forwarded to other people, and used for any purpose by people you never intended to see them. For that reason your tone in emails, as in letters, should always be respectful.

[E.205] Questions to ask

It is easy to start writing as soon as you sit down to write a letter, email or document. But wait a moment. Think before you write. First ask some quick questions:

- who will read and use this document? Who is the reader?
- why are you writing this document? What is its purpose?
- what do you want to say? What do you need to cover in its content?
- what do you want your reader to do? Sign something? Agree to your request? Send you some documents? Pay money?
- what does the reader want to know and need to know? Re-focus your content back to your particular reader and their likely attitude, reading ability, interests and needs.

Your writing as a lawyer sculpts your reputation, so it needs to be considered and done with care.

[E.206] Ensure your writing is legally accurate

This chapter focuses on writing skills. However, your responsibility as a lawyer is to make sure that what you advise your reader is legally accurate, sufficiently comprehensive and precise. So called “time honoured” expressions are no longer acceptable in legal practice unless they contribute to clear communication of your intended meaning. For more reading about these issues, see particularly Macdonald and Clarke-Dickson (2010).

Organise and structure the information

[E.301] Planning

When you need to write an important document, use your answers to the questions in [E.205], and jot down a quick plan *before* you write. Alternatively, use a precedent to see *how* the ideas are structured. If you prefer to think as you write, then make time after you've written to draw back and look at the big picture. There are many different methods of planning, and different ones work for different writers. Perrin (1990) outlines a number of effective methods.

[E.302] Give a context first

Introducing the information with an overview or synopsis gives the reader a context in which to interpret the information. It is then easier for the reader to understand the rest of your document. In deeds, recitals are often used by default for this purpose. Other legal documents open with a list of definitions, or a letter begins “We refer to your letter dated #”? Why not open the legal document with a summary or with the major clause – and move the definitions to the end? It is more helpful to the reader to open the letter with, “you wrote to us on [date] asking about the sale of your property”, than “I refer to your letter of [date]” which sends the reader back to their original letter.

[E.303] Ideas and organisation

Organise ideas in the way the reader will want them. For example, if you are writing a letter of advice about a litigation case, the reader is probably most interested in the merit of their case, that is whether they will win if it goes to court and how much money they will get – and then how much in costs they may have to pay. The reader is less likely to be impressed by first being given your extensive research on the tort of negligence. Keep this research as an annexure to a brief letter of advice.

Group relevant information together. Avoid using the structure of the relevant legislation unless it is useful to do so – especially when different statutes overlap. It may be easier for you but could be confusing for your reader who may want to know why there are three clauses about the same area. An alternative is to order the document by subject or by chronology, if relevant.

If you need to quote the legislation, an explanation or example may be useful.

Useful guidelines for organisation are:

- put the most important ideas first (these may be your advice or conclusions);
- put qualifications and exceptions second;
- add procedures and administrative issues, such as time-lines and costs; and

- annex research and supporting information.

[E.304] Show structure of your logic

Show the structure of your logic and the relative importance of the ideas – and how they relate to each other. Ways of doing this include:

- use of numbering systems;
- use of headings and sub-headings; and
- use of design principles such as layout, font, positioning of sub-headings and points.

[E.305] Use alternatives to words

Graphs, tables, diagrams, symbols and pictures translate ideas into visual images. Often this helps readers grasp the concept faster. For example, this table makes lists of information easy to find. Compare:

Office opening hours

Our office is open on weekdays 8 am to 6 pm except on Wednesday afternoons to 3 pm only and the 1st and 3rd Saturday of the month when it is open from 9 am to 2 pm

Office opening hours

Mon 8 am–6 pm
Tues 8 am–6 pm
Wed 8 am–3 pm
Thur 8 am–6 pm
Fri 8 am–6 pm
Sat* 9 am–2 pm
* 1st and 3rd Saturdays of the month

Think about the content of each sentence and paragraph

[E.401] Chunk your information

When you do begin to write, you need to make sure the information is divided into “chunks” that are easy to use for the reader. “Chunking” reflects the way our thinking is structured and helps readers to absorb, understand and remember the information. Most people can only remember between five and nine chunks of information in one attempt – the best communicators use this to assist readers.

[E.402] Keep your words, sentences and paragraphs short

Avoid large words where possible. They are often unnecessary, consist of jargon and suggest arrogance which can confuse or alienate some readers.

As an average, aim for 15 to 25 words per sentence and five to six sentences per paragraph. According to linguists, these are equivalent to five to nine “chunks” of information. You can vary this from time to time with short “sit up and take note” sentences or longer, more complex ones to suit the purpose and context.

[E.403] One idea per sentence

Keep to one overall idea per sentence – and one theme per paragraph.

[E.404] Only include necessary information

Legal precision requires that you make sure the document is accurate and complete. However, be careful not to repeat yourself in the aim to be precise or to emphasise a point. Try to state your point once – perhaps with an example or a reason – then move on.

Think about the language you use

[E.501] Use the active form of verbs

In the past lawyers tended to over-use the passive voice, making their writing heavy, dull and indirect, as well as adding unnecessary words. Contemporary use of plain English in legal writing relies on the active form of verbs which speeds reading and assists understanding. The active verb speaks directly to the reader – and ensures the person who must do the action is included. For example, it is better to write, “the judge decided the case” than, “the case was decided by the judge”.

[E.502] Use verbs not nominalisations

Another guideline is to combine active voice with “powerful verbs” – that is, make sure you have not changed your verbs into static nouns.

Avoid	Use
made the decision	decided
take into consideration	consider
come to the conclusion	conclude
for the simplifying of	to simplify

[E.503] Emphasise the positive

Lawyers often need to identify risk and so legal documents frequently focus on what people cannot do. However, readers are more likely to accept and remember something if it is positive or conceptualised from a positive point of view. More people obey “keep left unless overtaking” than “slow vehicles use left lane”. Avoid, “you must not drive a car unless you are 18 years or older”. Aim for, “you may only drive a car if you are 18 years or older”.

Similarly, double-negatives no longer have a place in legal writing. Where does “not unreasonable” fall on the scale of unreasonable to reasonable?

[E.504] Keep subject-action-object close together

At times legal writers, if they are not thinking, but then perhaps even if they are, may, but more commonly do, separate out not only the verb but also leave, until the very end of the sentence or paragraph, the point. In contrast, clear sentences identify the subject who must do the action, then state the action required, and then identify the object or consequences. You can use another sentence for qualifications or examples, or to clarify further if the point is complex.

[E.505] Draft in the singular

Often ignored, drafting in the singular is a fundamental principle of good legal drafting. It makes drafting easier and clearer and speaks directly to the reader. Also, Interpretation Acts provide that the singular includes the plural.

The word “none” is formally singular as in “none of the parties is bankrupt”. However, common usage now allows for it to be plural, especially after following a plural noun as in “none of the parties are bankrupt”.

“Each” and “every” are also singular, however usage now allows for them to be plural as in “every party must file their documents”.

[E.506] Use gender inclusive language

Using gender inclusive language is now obligatory in legal writing. Some guidelines to avoid sexist writing are:

Guideline	Example
use “he or she”	The tenant must show a concession card before he or she qualifies for a discount. An alternative here is to use the plural: “...before they qualify for a discount.”
repeat the noun	The tenant must show a concession card before the tenant qualifies for a discount.
use the plural	Tenants must show a concession card before they qualify for a discount.

use “you”	You must show a concession card before you qualify for a discount.
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It is also important to write in ways that are not discriminatory and are inclusive of diversity regarding ethnicity, age, disability, sexual preference, religion or disability. A good guide to this area is Pauwels (1997).

Think about your choice of words

[E.601] Use ordinary everyday words as far as possible

The best legal writing relies on simple and familiar concepts and words. If complex or technical words are not necessary, do not use them. Watch out for words that you may know but a non-lawyer may not, eg “search”, “service”, “discharge”, “encumber”, “damages”. Avoid words that are used in a different sense in the law such as “discovery”, “demise” or “execute”. There are lists of preferred words in books (see under “Resources”) such as Macdonald and Clark-Dickson (2010) and Asprey (2010). Use names of parties rather than abstract concepts (eg replace “Releasor” and “Releasee” in a deed of release with names).

Do not rattle off jargon. Think about your reader before you use standard phrases and remember that legal writing is about clear communication – it is not prose, poetry or mere convention.

[E.602] Use terms consistently and clearly

It is important to be consistent in your writing. Use one term for the same concept – and do not change or switch to another word halfway (like I just did). Readers, and courts, will try to work out whether you intended the new word to have a different meaning. Never change your language unless you want to change your meaning.

It may help to think about the everyday words you do use. For example, when you use the expression “the court”, do you mean the physical courthouse, the judge or magistrate making the decision, or the more abstract concept of the circumstances of the decision? And do you use the word in the same sense throughout your document or letter?

[E.603] If you use a technical word

At times you do need to use a technical legal word. This is a word that is common in legal practice but has a complex or multi-faceted meaning. Examples are indemnity, mortgage, and guarantee. To help your reader understand the word, think about including a clear definition, explaining its meaning in a particular context, or giving an example of its effect.

[E.604] Do not use shall

Shall has at least three meanings – and sometimes all are used in the one legal document with

often ambiguous and misleading results. It can also be difficult to work out the real intention. For example, what is the meaning of “the director shall be one of the governors of the hospital”?

Instead of “shall”, use “must” for an obligation and “may” for a permission. At times “shall” can be replaced by the verb to be. For example, “this Act is governed by the law of Australia”.

[E.605] Omit unnecessary words and phrases

It can be difficult to write plainly, but it is important to pare down your writing by avoiding verbiage. Aim to be concise.

Unless they serve an intended purpose in correspondence, avoid throat clearing phrases such as, “as you know” or, “it is important to note that”. At the end of a letter it may be good to ask the reader to contact you if they do not understand something, but there is no need to add “We of course continue to value our important relationship”.

In legal documents, phrases such as “unless the context otherwise permits” or “notwithstanding any other clause to the contrary in this deed” suggest jargon and signal careless thought. If the context otherwise permits, then show this in the other context. If it is truly a “notwithstanding” clause, it should be moved to the beginning of the document so it qualifies all other clauses.

Instead of Latin terms such as “ab initio” or “circa” use their plain meanings: “from the beginning” and “around”.

[E.606] Take care with doublets and triplets

Many lawyers use the magic incantations such as “signed, sealed and delivered”, “give, devise and bequeath”, “null and void” or “due and proper” without questioning their legal meaning. Often the phrase can be replaced by a single ordinary word.

At times the phrase is misleading. For example, in the phrase “null and void”, courts have read “void” to mean “voidable” on the basis that the writer used two words to show two different meanings. As well as dictionaries, an excellent reference is Greenberg (ed) (2012).

[E.607] Avoid overusing the thesaurus

Lawyers often try to be precise and cover all possible circumstances by using all the synonyms they can find to cover a situation. For example, “the tenant must maintain, replace, repair, and keep the property in good and substantial repair, working order and condition”. This encourages other lawyers to seek out loopholes. It is better to clearly state your intention – begin with a broad policy statement, followed by any extra detail. For example, “the tenant must keep the property in good condition. This includes repairing any damage caused to the walls or floors”.

[E.608] Be aware of interpretation principles

By using good effective and plain writing, you aim to keep your documents out of court. If your document does end up in court, the courts will not interfere if the meaning and intention is clear.

A guide to interpretation principles is found in Asprey (2010). Four main principles apply to understanding private documents:

- words are given their literal, “popular”, ordinary or natural meaning, except technical words;
- words are given their grammatical and ordinary sense, unless this leads to absurdity or inconsistency with the rest of the document;
- the document is read as a whole; and
- the intention of the parties is respected.

Other principles apply, but these may be inconsistent or contradictory. For example, in a list of objects, the *ejusdem generis* rule (restricting general words to the same category as specific words) may conflict with the *expressio unius* rule (a list of examples is treated as the entire category, despite any general words). By knowing these principles, you can write clearly to avoid having to deal with them.

Definitions

[E.701] Principles

Do not overuse definitions. Although a definition may help *you* conceptualise an idea, the reader must understand the new concept and then remember it throughout the document. Using too many definitions means the reader needs to flip back and forth to the definition section.

Similarly if you do use a definition, aim to keep its common meaning. If you change the meaning, readers forget and may misunderstand. For example, in Victoria the old *Dog Act* covered cats as well – which was misleading. Try to find a better term or spell it out, eg *Dog and Cat Act*.

A definition should only cover the meaning of a word, and should include the work “means”. Avoid including additional information, however interesting, such as exceptions, examples, context or substantive legal points unless they are specifically relevant to the reader. If you need to include examples, use “includes” and cite the most common or simple examples only.

[E.702] Legislative definitions

Some Acts prescribe definitions and interpretations of commonly used terms and you do not need to repeat them in your documents. For example “month” means calendar month. Look at the *Interpretation Act 1987* (NSW), and also – for all instruments in writing – the *Real Property*

Act 1900 (NSW) and the *Conveyancing Act 1919* (NSW).

Design your document to help your reader

[E.801] Why is design important?

Good writing may not be read if the layout of your document is confusing or uninviting. Good design can help readers find their way around information, signal important areas, and ensure it is a pleasure to read: see [E.804].

[E.802] Develop a style guide

Setting standards with a “style guide” in your workplace or organisation helps professionals to be consistent and efficient in their work. It is important to standardise areas such as commonly used clauses, execution clauses, methods of signature, spelling conventions, use of open or closed punctuation, and numbering conventions. It is also important to cover layout standards for letters and documents, including openings, references, heading styles, typeface, font, margins, use of tables and so on – with examples readily available. A style guide can include model documents and letters for quick reference. Adherence to the style guide means that all writers send a coordinated, consistent and professional image to the readers.

[E.803] Aid access

For easier access to documents, create a table of contents. Also, for longer documents, use an index based on the relevant concepts, and consider grouping information using subtitles, naming sections and numbering paragraphs. You can improve the accessibility of dense prose by including lists, tables, graphs and other images that reduce the sense of crowding.

[E.804] Practical guidelines

- Use typefaces that are easy to read. As a guide use one font style and two font sizes – more than three sizes is distracting.
- Check that the font size is large enough. For most fonts, 12 point is the best size for the majority of readers.
- When printing check that the colours of paper and ink contrast adequately.
- Ensure lines are the right length for easy reading.
- Consider leaving a margin space for binding – and for making notes.
- Maximise white space to assist readability.

- Consider including any detailed information as a schedule or attachment.

[E.805] Email is different

Email Do's	Email Don'ts
- Proof-read before send	- Shouting (ALL CAPITALS)
- Remember anyone might see this email	- Sloppy drafting
- Include greeting and sign-off	- Reply all, without checking
- Set time aside in a day for emails	- When a phone call would be better
- Choose subject carefully	- When a letter would be better
- Include CC and BC carefully	- Allow email alerts to distract you from other work (turn it off!)
- Follow up meetings with short email	- Delay responding without reason
- Housekeeping to maintain Inbox	- Ever use unfriendly tone

[E.806] How to improve your writing

Here are some tips on how to improve your writing:

- Read a lot, including books and journals inside and outside your profession. Even if you are busy, create a reading habit and put some time aside every day for reading.
- Be mindful when you write and review your drafts before finalising by focusing on three things:
 - the purpose of your writing;
 - the person who will read it; and
 - the style you want to present.

How do you know if your reader understands?

[E.901] Test

The best way to know if your readers will understand your document or letters is to test the

documents by showing them to a few readers. This is especially important if your document will be read and used by many different people. If starting a new job, asking your supervisor to read your first few letters or documents before sending can avoid problems caused by other people assuming you know the office style, conventions or rules.

Asking for feedback shows you respect your reader's opinion and demonstrates you are willing to improve. Often lawyers do not test their documents because they think testing is too complicated or expensive, they do not know how, or they fear others expect them to know the correct way. If you have already invested time and money in developing a document you believe communicates well, it is false economy not to find out if your document really does communicate to its readers. Testing is a good way to find out where mistakes lie and to avoid costly errors. (Be prepared to accept criticism.)

[E.902] When to test

If possible, it is best to test throughout the process of developing your document, especially for large writing projects,

If your document is an initiative, try to be clear with the purpose of it to the readers.

If you are basing your writing on a previous document, find out where the document failed the first time. If you are re-writing a standard document used in your office, ask the other lawyers what questions their clients raised and ask your staff where the misunderstandings arise.. While you are drafting, test drafts to make sure you are on the right track. Final draft testing needs to be more thorough. You need to test the document with a sample of people who represent your typical readers.

[E.903] How to test

Here are some quick methods. Try to leave your writing overnight or for at least a few hours – then revisit it with a fresh mind. Ask someone else to read your draft, preferably a non-lawyer, then ask what they would do or understand after reading your letter or document. Run it through a software grammar application – remembering this is only a basic guide.

More thorough testing methods look at readers' behaviour and thinking as they use or respond to the document. For large projects, consider using a questionnaire that requires problem-solving or re-phrasing of legal ideas – with open-ended questions. Try not to ask Yes/No questions such as “do you understand?” Instead, ask, “what would you do in this situation?” After the testing has been carried out, you need to analyse the readers' comments and make any necessary changes to the draft or design.

An excellent introduction to this topic is in Eagleson, Jones and Hassal (1990). More detail can be found in Dumas and Redish (1999).