

Crafting Contract Communication Clarity

*A guide to writing excellence, persuading your audience, and
demonstrating reasonableness in your decision-making as a
Contracting Professional*

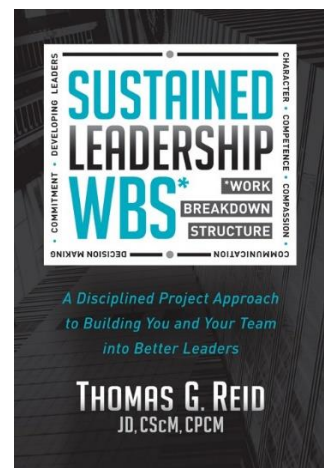
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Chapter Two

Understanding audience and message alignment

Audience Analysis

Message Clarity

Tone, Voice, and Word Choice

Feedback Incorporation

Proofreading Techniques

Word Choice

The goal and purpose of communication is to transmit thoughts and ideas from one brain to another. This is never as easy as it seems since everyone brings their entire life experience to the conversation – their training, experience, education, or the lack thereof. Thus, the burden falls to the originator to craft the message to be understood by the broadest range of listeners. When you study your audience (see above) you can better focus your message for its understanding.

Contracts are no different.

“Many contract disputes arise because different people attach different meanings to the same words and conduct.”

Restatement (Second) of Contracts, §2 (1981), comment b, Manifestation of Intention

Grammar or Dialect?

Just as there are differences among languages, there are differences within a common language. In English there is both American English and British English. In most cases it is in spelling or pronunciation. It can also be in meaning. For example, Inquiry and enquiry both mean “a request for information.” Inquiry is the standard American English spelling. Enquiry is the British spelling. Other words that carry a distinct spelling include:

Colour

Behaviour

Judgement

Note as well, that Canadian English more closely follows British English, and further has stronger French influences than even British English.

In addition to people assigning different meanings to words, some words are very prone to confusion and misuse. Here is a list of some of the more commonly confused words and an explanation of the proper use for each.

Word Confusion

Accept/Except Accept means to receive or approve. Except refers to exclusion. (*I **accept** your proposal, **except** for the last clause.*)

Advice/Advise Advice is a noun. Advise is a verb (to advise). When your mentor advises you, you trust them to give you good advice.

Affect/Effect Affect is usually a verb meaning to alter or change or have some impact upon the subject. Effect is usually a noun and often applied to the results of the action which affected the outcome.

Among/Amongst These words mean the same thing and affect the tone and voice of your writing. Amongst is more commonly spoken by the British and can raise the formality (or pomposity) of your writing. Use it cautiously.

Among/Between Among is used when the comparison is with three or more components. Between is for use in comparing only two components. This is a matter *between* you and me. I will consider which to use from *among* the other members of the team.

Anxious/Eager

Anxious suggests apprehension. (*She was **anxious** about her upcoming performance review.*) *Eager* suggests excitement, joyful expectation. (*The boy was **eager** to get to the park.*)

Bimonthly/Semimonthly

Bimonthly is tricky since it has two accepted meanings that are very different. Its most common meaning is every other month, but is also accepted to mean twice a month. Semimonthly always means twice a month.

Breath/Breathe

Breath is a noun; it's the air that goes in and out of your lungs. *Breathe* is a verb; it means to exhale or inhale.

Capital/Capitol

Capital has several meanings. It can refer to an uppercase letter, money, or a city where a seat of government is located. *Capitol* means the building where a legislature meets. Most people remember the difference by noting that the "o" on capitol resembles the dome of such a building.

Complement/Compliment

A *complement* is something that completes something else. It's often used to describe things that go well together. A *compliment* is a nice thing to say. One way to remember is that if someone says something nice to you it is about you personally, or "I".

Comprise/Compose

A whole is *composed* of parts; parts *comprise* the whole. *The book is **composed** of three chapters. Three chapters **comprise** the book.* Compose also means to write or create in some fashion such as music.

Connote/Denote

Connote means to imply or suggest. (*Good eye contact **connotes** active listening.*) Denote means to represent precisely. (*The symbol '§' **denotes** a section, usually followed by a number.*)

Continual/Continuous

Continual means ongoing or frequently recurring. (*The dog's barking was a **continual** interruption.*) Continuous means without interruption. (When a baby cries **continuously** it usually indicates a problem.)

Discreet/Discrete

Discreet means prudent, diplomatic. (*Ethics investigations must be handled in a **discreet** manner.*) Discrete means separate and distinct. (*Each negotiation stands on its own and is conducted in a **discrete** way.*)

Disinterested/Uninterested

Disinterested means impartial: A panel of disinterested judges who had never met the contestants before judged the singing contest. *Uninterested* means bored or not wanting to be involved with something: John found himself uninterested in attending the writing class.

Defence/Defense

Defense is standard in American English. *Defence* is found mainly in British English.

Dessert/Desert/Desert

Dessert, (noun, emphasis on second syllable) is a sweet treat, usually served at the end of a multi-course meal.

Desert (noun; emphasis on first syllable) an arid region capable of supporting minimal life

Desert (verb; emphasis on second syllable) to leave without intention to return e.g. to desert a duty station.

Emigrate/Immigrate

Emigrate means to move away from a city or country to live somewhere else. *Immigrate* means to move into a country from somewhere else. Immigrating people have emigrated from a large variety of countries.

E.g./I.e.

These abbreviations, derived from Latin, are often confused. **E.g.** means "for example;" **i.e.** means "that is." Use e.g. when you follow it with specific named examples; use i.e. when you restate or paraphrase the material immediately preceding its use.

Empathy/Sympathy

Empathy is the ability to understand another person's perspective or feelings. *Sympathy* is a feeling of sorrow for someone else's suffering.

Farther/Further

Farther refers to physical measurable distance. *Further* refers to metaphorical or unmeasurable distance.

Fewer/Less

Use fewer when referring to a specific number. (*Our sales department has **fewer** team members than it did two years ago.*) Use less when referring to an abstract or immeasurable amount. (*His home has **less** storage than mine.*) **EVERY EXPRESS CHECKOUT IS WRONG!**

Fiscal/ Physical

Fiscal pertains to money matters as in an accounting year (Fiscal Year). Physical pertains to the existence in a measureable manner. His physical presence was foreboding. Fiscal is a less common word and often people will say “physical” because of its familiarity. To speak of a physical year has no universal meaning, but might best describe a calendar year.

Flaunt/Flout

Flaunt means to show off such as a skill or knowledge. *Flout* means to defy, especially in a way that shows scorn or criminality.

Gaff/Gaffe

A *gaff* is a type of spear or hook with a long handle often used in fishing. A *gaffe* is a faux pas or social misstep. The local politician made a *gaffe* when he mispronounced the name of the town he was visiting.

Gray/Grey

Gray is the standard American English spelling. *Grey* is the standard British English spelling. There is no grammatical basis to treat one as masculine and one as feminine, although that is sometimes seen.

Hearty/ Hardy

Hearty is an adjective that indicates warm-hearted or cordial. It is also used to indicate sincerity, exuberant, forceful, and nourishing.

Hardy is also an adjective that means capable of enduring fatigue or hardship. Robust, vigorous, bold, and courageous are considered synonyms.

Historic/Historical

Historic means famous, important, and influential. Something worth recording in the history books. *Historical* means related to history or being a reminder of a specific era in the past.

Imply/Infer

Imply means to hint at something without saying it directly. It is an action of the speaker.

Infer means to deduce something that hasn't been stated directly. It is an action of the listener or observer.

Inquiry/Enquiry

Inquiry and *enquiry* both mean “a request for information.” *Inquiry* is the standard American English spelling. *Enquiry* is the British spelling.

Insure/ Ensure/ Assure

These terms all relate to similar things (the action of making certain or guaranteeing) yet have distinct meanings as among them. They have also been subject to somewhat recent redefinition due to their use. *Insure* means to guarantee against loss or harm. *Ensure* means to assert a specific outcome to an action or situation. As in “How can we ensure we will win this competition?” *Assure* means to declare earnestly, to inform or tell positively, state with confidence or otherwise provide comfort. Interestingly, *reassure* is now considered a synonym for *assure*.

It's/Its

It's is a contraction of “it is” *Its* is a possessive pronoun that means “belonging to it”. To test a specific application, change it to say “it is” and see if that was the original intent.

Lay/Lie

To lay means to put or to place. One way to remember this is that there is an “a” in both *to lay* and *to place*. *To lie* means to recline. One way to remember this is that there is an e in both *to lie* and *to recline*. **Be careful, though. The past tense of *to lay* is *laid*. The past tense of *to lie* is *lay*.** Confusion and misuse of these words is common, but not excusable.

Lead/Led

Lead, (rhymes with “bed,”) refers to a type of metal often used as a radiation barrier. *Led* (also rhymes with “bed,”) is the past tense of the verb *to lead* (long “ee” sound), which means to guide and is the root of the noun *leadership*.

Learned/Learnt

Both serve as the past tense of “to learn”. *Learned* is standard in American English. *Learnt* is standard in British English. It is curious, to the American ear, that a regular verb’s past tense that ends in “-ed” should be turned into an irregular verb that rhymes with “burnt.”

Loose/Lose

Loose is usually an adjective meaning to be free of constraint, to be let loose. *Lose* is always a verb. It means to misplace something or to be unvictorious in a game or contest.

Precede/Proceed

Precede means to come before. *Proceed* means to move forward. Love *precedes* marriage, whereupon the happy couple *proceeds* to the altar.

Principal/Principle

Principal can be a noun or adjective. As a noun, it refers to the person in charge of a school or organization. As an adjective, it means most important: The principal reason for this meeting is to brainstorm ideas. A *principle* (always a noun) is a firmly held belief or ideal.

Seen/ Saw

Seen is the past participle of the verb to see. It must be used with the verbs has, have, or had. *By listening carefully I **had seen** enough to know the truth.*

Saw is the past tense of the verb to see, as in *I saw the documents needing my approval.*

Sensual/ Sensuous

"Sensual" typically refers to experiences that appeal directly to the physical senses and may involve indulgence or gratification, while "sensuous" focuses more on the aesthetic or artistic appreciation of sensory qualities and beauty. From a "deadly sin" perspective, sensual is lust; sensuous is envy.

Site/ Sight/ Cite

Site is a noun meaning location, as in "We visited the site of the Liberty Bell." Sight pertains to vision. "Those fireworks were quite a sight to see." Cite is a verb that means to quote as an authority or example. (*He **cited** several sources in his report.*)

Stationary/Stationery

Stationary means not moving; remaining in one place. *Stationery* refers to letter writing materials and especially to high quality paper.

Than/Then

Than is used for comparisons. This book is *longer* than the other one. *Then* is used to indicate time or sequence. We went to the store *then* we went home for dinner.

Their/There/They're

Their is the possessive form of "they". IT always relates to ownership. *There* indicates a location or place. *They're* is a contraction of "they are". Test each use by changing it to "they are" and see if that was what you intended.

To/Too/Two

To is a preposition usually used to designate movement, direction, or connection. "To" also indicates the infinitive of a verb, e.g. to swim, to hike, to ride (a bicycle). *Too* is an adverb used to indicate intensity, also, or an excess. *Two* a noun indicating a quantity. We went *to* the *two* stores, *too*. That was *too* long for a simple shopping trip.

Toward/Towards

Toward is standard in American English. *Towards* is standard in British English.

Who/That

Use *who* when referring to people; use *that* when referring to anything else. (*The man **who** won the lottery had a mountain of bills **that** needed to be paid.*)

Who's/Whose

Who's is a contraction of "who is". *Whose* is a possessive pronoun that means "belonging to [someone]".

Portions of the above were derived from:

<https://www.carew.com/choose-words-carefully-20-commonly-confused-misused-words-can-hinder-sales-effectiveness/>

And

<https://www.grammarly.com/blog/commonly-confused-words/>

Words to Omit

Teaching students to write a certain quantity of words for an essay creates two negative habits. The first is to add unnecessary words. The second is to diminish the importance of clear thinking. [Ref. section on Thinking] Scout out and delete these words to make your writing more powerful and meaningful:

- Really – Just – So – Often – That – Sometimes
- Better – It – Well – Probably – Usually
- And, and, and – Much – Like – This

As a classes of words, adverbs are the most likely culprits that should be deleted. Mark Twain observed that it is best to "Substitute 'damn' every time you're inclined to write 'very;' your editor will delete it and the writing will be just as it should be." It is possible that he used a stronger word in his original statement.

Hemingway's writing is especially sparse with its use of adverbs. He is also known to have said that he "distrusts" adjectives.

So avoid using the word 'very' because it's lazy. A man is not very tired, he is exhausted. Don't use very sad, use morose. Language was invented for one reason, boys - to woo women - and, in that endeavor, laziness will not do. It also won't do in your essays. What you do today is important, because you are sacrificing a day of your life for it. Anger is an acid that can do more harm to the vessel in which it is stored than to anything on which it is poured.

Spoken by Professor Keating, the character played by Robin Williams, in *Dead Poet's Society*. Weir, Peter. *Dead Poets Society*. Buena Vista Pictures Distribution, 1989.

Lawyers are known for being “wordy” – using more words than are necessary and including redundancies, and archaic terms. It is sometimes joked that lawyers get paid by the word, thus contributing to their verbosity.

Avoid

In the event that

In spite of the fact that

Owing to the fact that

At this moment in time

In the absence of

Made good their escape

Leaves much to be desired

Was of the opinion that

Put in an appearance

Use

If

Although

Because

Now

Without

Escaped

Poor/weak/insufficient

Thought

Appeared

Additional archaic legalese that should be avoided in contract drafting includes the words and phrases:

Aforementioned

Hereinafter

Whatsoever

Therein

Herein

Now Witnesseth

Use of Foreign Words

Many words used in English, and especially in contracting and law generally, are of foreign origin. Law, in particular, uses a number of Latin words to express legal concepts and principles. We also see a strong French influence in the English language, and again, in law and contracting.

This derives from the Norman Conquest in 1066. The number of Normans who settled in England was sufficiently predominant to continue to use their own French language. It was natural at first, because they knew no English. For 200 years after the Norman Conquest, French remained the language of ordinary exchanges among the upper classes in England. Plus, Latin was used by the clergy. Bearing in mind that the “commoners” in England were mostly illiterate, their language remained more a spoken than a written language. Cf. *1066 and Before all That: a very brief history of England*. [cite]

The Norman Conquest, a defining event in the development of the English language, is not mentioned in the article. As every school child used to learn, William, Duke of Normandy, defeated Harold, King of the Anglo-Saxons, at the

battle of Hastings in 1066. When William had himself crowned King of England, Norman French became the language of court and castle, and English was left to the lesser folk to speak.

In the long run, the gain was immense. English speakers, however grudgingly at first, began to borrow—and reshape—the French words they needed, not only for their commerce with Europe but also for dealings among themselves. In this way, English began to develop the flexibility that has helped take it to its present position among the languages of the world.

Anglo-Norman was never the main administrative language of England: Latin was the major language of record in legal and other official documents for most of the medieval period. However, from the late 12th century to the early 15th century, Anglo-Norman French and Anglo-French were much used in law reports, charters, ordinances, official correspondence, and trade at all levels; they were the language of the King, his court and the upper class. There is evidence, too, that foreign words (Latin, Greek, Italian, Arabic, Spanish) often entered English via Anglo-Norman.

The language of later documents adopted some of the changes ongoing in continental French and lost many of its original dialectal characteristics, so *Anglo-French* remained (in at least some respects and at least at some social levels) part of the dialect continuum of modern French, often with distinctive spellings. Over time, the use of Anglo-French expanded into the fields of law, administration, commerce, and science, in all of which a rich documentary legacy survives, indicative of the vitality and importance of the language. [Op. Cit.]

Latin words that remain in common use in legal (and thus contract) writing include:

Assuming arguendo – for the sake of argument (in the sense of the Greek forum)

A fortiori - for a still stronger reason; even more certain; all the more.

A priori –adjective from a general law to a particular instance; valid independently of observation. Compare a posteriori (def. 1). Or existing in the mind prior to and independent of experience, as a faculty or character trait. Compare a posteriori (def. 2). Additionally meaning not based on prior study or examination; nonanalytic: an a priori judgment.

Ab initio – from the beginning

De facto - in fact; in reality: Although his title was prime minister, he was de facto president of the country. They are forbidden from leaving the camp, thereby being de facto in a state of detention. Also, actually existing, especially when without lawful authority (distinguished from de jure):

Etc. (?) – and others [compare to ejusdem generis]

I.e. - that is (to say)

Inter alia – among others

Res ipsa loquitur – the thing speak for itself

We see a similar influence from the French where many words have become standard use in English as well. Among the ones that we use in American law and commerce are:

Bailiff
Chattel
Escheats
Estoppel
Force majeure
Grand jury ("large jury")
Laches
Larceny
Mortgage

Spelling

In addition to selecting the proper word, and notwithstanding the various spellings as among the finer granularity of languages, there exists continued confusion over spelling generally. It has been thought that poor spelling reflected weak intelligence. That has been disproved. Drawing from *Sustained Leadership WBS* we find the following research:

Marilyn Vos Savant, reportedly the smartest person on earth based on IQ test scores, has a fascinating book on proper spelling. She reports that there is actually no correlation between those who spell well and the person's intelligence. Smart people can spell poorly and less equipped people can spell fabulously. But here is her point—when people include misspellings in their work, the reader **perceives** them as being less intelligent and will be reflected in the way they treat the person. Bad spellers, regardless of absolute IQ, will often be denied advancement opportunities and leadership positions due to these erroneous perceptions. Sustained leaders learn how to spell, make use of spellcheck on their computers, and watch very carefully for the traps that can be laid by autocorrect systems. The same is true regarding the use of good grammar. The writing should be your thoughts, not what the computer substitutes for your words. Learn to write well.

Citing Vos Savant, Marilyn. The Art of Spelling: The Madness and the Method. (W.W. Norton & Company, New York, 2000), as cited in Sustained Leadership WBS, p. 488-89.