Legal Drafting: An Exercise in Language-Shaping

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A legal drafter's constant challenge is choosing language that captures the parties' or legislative body's intended meaning without being over precise or too vague. The drafter must shape language, striving for that elusive "perfect" word or phrase that will allow the contract or law to remain effective and reasonably flexible into the future. This technique takes practice.

My favorite language-shaping example appears in Federal Rule of Criminal Procedure 4(d), which was amended in 2011 to allow magistrates to issue warrants based on information communicated by telephone "or other reliable electronic means."[1] The reference to "other reliable electronic means" is somewhat vague—and ingeniously so. *Other means* would have been too vague. *Other reliable means* would have been

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[1] Fed. R. Crim. P. 4(d) and advisory committee's note to 2011 amendment.

narrower, but still too broad. The addition of *electronic* narrowed the meaning to its intended scope yet still allowed for technological advances not yet imagined, invented, or available. Anything more precise might have backfired given how quickly technologies evolve.

When it appeared in 2011, "other reliable electronic means" encompassed the then-ubiquitous BlackBerry smartphone, with its revolutionary email capabilities. The phrase also encompassed newer advances, such as FaceTime communication on an iPhone 4. And it remained effective years later with the advent of still newer technologies, such as Zoom videoconferencing. Such is the value of carefully shaped language.

Drafting professors can use a simple exercise to help students learn to narrow or expand concepts in this fashion. The exercise takes no time to prepare and can take up a lot or a little time in class. And even if the exercise is brief, it can produce learning that's both meaningful and lasting.

Here's how it works:

Step 1: Choose a base term.

I begin by typing a single word on a blank Word document (displayed on the classroom's big screen or a shared online screen). *Court* is my go-to choice. *Court* is simple, and students are familiar with its meaning. Plus, it doesn't carry the intimidation factor that a term of art from an unfamiliar area of law or industry might.

Step 2: Ask students to narrow the base term's meaning by adding a single word.

I next ask students to narrow the word *court*'s meaning by adding a single word to it. I have them work independently so that every student has a chance to choose a modifier without being influenced by enthusiastic classmates. (When my class is online, I ask students to refrain from posting their ideas in the Chat window until I give the go-ahead.)

After a minute or two, I let students share their word choices with the class. Here are some typical suggestions:

- *federal* court (*court* has been narrowed to exclude state courts)
- *state* court (*court* has been narrowed to exclude federal courts)
- *trial* court (*court* has been narrowed to exclude appellate courts)
- *appellate* court (*court* has been narrowed to exclude trial courts)

- *bankruptcy* court (*court* has been narrowed to just courts hearing bankruptcy cases)
- *probate* court (*court* has been narrowed to just courts hearing probate matters)
- *tax* court (*court* has been narrowed to just courts hearing tax cases)

Invariably, at least one student chooses *tennis* or *basketball*. I welcome these playful detours because they keep the class lively but also generate positive discussion about context, reader assumptions, and the like.

I also see interesting and thoughtful answers such as *drug* court, *tribal* court, *veterans'* court, *teen* court, and *peer* court. And despite my "just one word" instruction, I relax and accept students' thoughtful use of compound modifiers such as *problem-solving* court, *family-reunification* court, *drug-treatment* court, and so on. All are welcome and contribute to the discussion.

Step 3: Ask students to further narrow the base term's meaning by adding another word.

After discussing possible choices for the first narrowing modifier, I ask students to further narrow *court*'s scope by adding one more word. I again ask students to work independently and to refrain from sharing their ideas until called on.

You've correctly sensed that I see value in stringing this process along a bit, going one step—one word—at a time. This helps students appreciate gradations in meaning. And that appreciation will help them later, when they try to narrow sophisticated concepts without going too far.

With the second modifier, you can expect to see student answers such as these:

- federal *appellate* court (excludes all state courts and all federal trial courts)
- state *appellate* court (excludes all federal courts and all state trial courts)
- *federal* trial court (excludes all state courts and all federal appellate courts)
- *state* tax court (now *tax court* means only courts deciding cases about state and local taxes)
- *state* drug-treatment court (excludes any federal version)

These examples may not seem earth-shattering. They're common in law-school texts. And yet how many times have our students stopped to consider—to thoughtfully assess—how adding words to other words narrows meaning? Starting with familiar words makes it easier for students to later tackle more complicated or nuanced terms.

Step 4: About-face: Ask students to start over and *expand* the original term's meaning.

After spending the entire exercise narrowing *court*'s meaning with modifiers, I start over and have students do the opposite: expand the word's meaning.

It's sometimes possible to expand meaning by adding modifiers. For example, a law that requires *substantial* compliance has expanded the concept of *compliance* beyond the ordinary lexical or presumed notion of strict compliance.[2] But examples of expanding through modifiers are relatively scarce, so I allow and encourage students to replace *court* with a broader word or phrase. I usually see answers such as these:

- tribunal
- adjudicative body
- adjudicating entity

I also see students sticking with the modifier approach: *any* court. This leads to conversation about how a judge might interpret *any*. Would a literal interpretation prevail? (Reenter student suggestions of a tennis, basketball, or squash court.) Would context shape a judge's interpretation? Would a judge view *any*—or the broad *tribunal*—as encompassing courts outside the state or federal system? Would those terms encompass tribal or foreign courts? International courts?[3]

If *court* doesn't strike your fancy, other familiar words, such as *vehicle* or *property*, would work equally well for this exercise. *Property* might be narrowed to *real* property, *personal* property, *intellectual* property, *joint* property, and more. Or it might be expressed broadly as *all* property or *any* property. A *vehicle* might be a *motor* vehicle, an *electric* vehicle, a *driver-propelled* vehicle, a *submersible* vehicle, and so on.

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[2] *See generally Stennis v. City of Santa Fe*, 244 P.3d 787, 792 (N.M. App. 2010) (acknowledging the explicit use of "substantially" in some statutes and noting that the word's absence, while "not alone determinative," supports a finding that strict compliance is necessary).

[3] Students might search for and discuss cases addressing these questions. *See, e.g., Small v. United States.*, 544 U.S. 385, 387 (2005) (holding that the phrase *convicted in any court* "encompasses only domestic, not foreign, convictions"); *Telespectrum, Inc. v. Pub. Serv. Comm'n. of Kentucky*, 227 F.3d 414, 421 (6th Cir. 2000) (holding that the phrase *any court of competent jurisdiction* encompasses "both state and federal courts"); *Republic of Kazakhstan v. Biedermann Int'l.*, 168 F.3d 880, 881–82 (5th Cir. 1999) (observing that Congress's substitution of *tribunal* for *court* evidenced its intention to reach beyond conventional courts and include foreign administrative and quasi-judicial agencies—yet also noting that *tribunal* "has been held not to include" certain fact-finding proceedings conducted under the auspices of foreign governments).

Conclusion

For this language-shaping exercise, the victory is not in finding some "correct" answer. Rather, the victory is in helping students to better appreciate how language works and how they can make it work to fulfill client needs or goals. When writing, students are now keenly aware of how word choices and modifiers affect scope and meaning. And students become better readers and advocates, too. Previously unremarkable modifiers now leap off the page at them, triggering thoughts about possible meanings or arguments.

In short, this seemingly simple exercise can help students learn to tackle drafting and interpretive challenges that are anything but simple.