

The Scrivener: Modern Legal Writing

When Flyspecks Matter—Part II

by K. K. DuVivier

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DO YOU HAVE QUESTIONS ABOUT LEGAL WRITING?

K.K. DuVivier will be happy to address them through the Scrivener column. Send your questions to: kkduvivier@law.du.edu or call her at (303) 871-6281.

Most of my columns advise legal *writers*; this one also aims to change the perspective of a legal *reader*. The September 2004 column addressed some of the issues raised by a British bestseller on punctuation called *Eats, Shoots & Leaves*.¹ The author, Lynne Truss, attempts to make a case for "sticklers" who "refuse to patronize any shop with checkouts for 'eight items or less'"² or who have urges to "shin up ladders at dead of night with an apostrophe-shaped stencil and a tin of paint" to correct advertisements.³ To her, punctuation errors are "signs of ignorance and indifference."⁴

Different is Not the Same as Ignorant

While visiting friends and family in Britain this summer, I was able to ask locals what they thought of Truss's book. Acclaimed by some, Truss also had many critics. Some attacked Truss's intelligence because of punctuation choices she made in the book: sticklers denouncing one of their own. I have to confess that her placement of periods and commas outside of quotation marks,⁵ while the custom in Britain, was about as disconcerting for me as driving on the left-hand side of the road. Other critics touched on what I see as the more legitimate concern: while it is helpful to expound on the origins and significance of punctuation, it also is important to recognize punctuation as an evolving tool and not to label those who differ from you as ignorant or indifferent.

As I begin my fifteenth year as a teacher of writing, I can certify that few writers omit or misuse punctuation because of indifference. Unlike a spelling error, which they might correct by proofreading or by using spell-check, writers cannot so readily verify correct punctuation. Some of the computerized programs make punctuation suggestions, but I frequently have found those suggestions are not appropriate for the context. Furthermore, unlike legal citation form, which has been largely standardized by recognized authorities,⁶ legal writing style has no uniform reference.

The Bluebook lists two sources for style issues, but both are general manuals published more than ten years ago.⁷ Furthermore, by listing both manuals, *The Bluebook* provides no mechanism for reconciling inconsistencies between the two. In contrast to these general style manuals, *The Redbook*, a recent manual, specifically addresses style for legal writers,⁸ yet this style manual has not yet gained *The Bluebook's* imprimatur. To further confuse the issue, much of what we see in print varies significantly from these manuals because it follows alternative style conventions established by publishers.

Thus, ignorance of proper punctuation may not reflect indifference to rules, but rather lack of a consistent body of rules to learn or apply. Here are a few illustrations. One source says, "Apostrophes are NEVER ever used to denote plurals!"⁹ Another source advises using "an apostrophe (followed by an s) to form the plural of letters, single-digit numbers, symbols, and some abbreviations."¹⁰ Comma rules are likewise inconsistent. Publishers prefer "open punctuation," or no comma before the conjunction in a series;¹¹ most legal writing authorities mandate this serial comma.¹² Some authorities suggest the standard rule requiring a comma at the end of a date applies when the date is used as an adjective;¹³ others urge omission of this comma.¹⁴ Some authorities require a comma after all introductory clauses before the subject of the sentence;¹⁵ others suggest this comma is necessary only after "long" introductory clauses.¹⁶

Using Punctuation to Judge Other Writers

Most of the advice I provide in these columns is pragmatic: for example, I advise writers to avoid metaphors when they distract from the main message; I suggest the use of gender-neutral language to avoid offending any contingent of the audience. From a pragmatic standpoint, Truss provides little support for her argument that punctuation significantly changes meaning in most situations. In more than 200 pages about punctuation, Truss provides only a handful of examples.¹⁷ Furthermore, the trend in e-mail to eliminate punctuation conventions created by publishers indicates parties can communicate effectively in writing without many of these conventions.

Consequently, I urge you as a legal reader to avoid judging other writers on their punctuation. Have you judged others by how they pronounce words, assuming they are ignorant if their pronunciation varies from yours? If so, you may have discovered that frequently these variations have nothing to do with intelligence or education, but instead reflect a different place of origin or native tongue. Similarly, punctuation variations may reflect different origins or different training. Do not be quick to suffer the sins of zealous composition teachers on the legal writers who have had an alternative rule hammered into their heads from the rule that was hammered into yours.

Am I saying that using correct punctuation doesn't matter? Of course not! As Truss suggests, "The analogy with good manners [is] perfect."¹⁸ Legal writing is more formal than many other forms of writing, so you must still wear your formal clothes. You have an obligation to make an effort to meet standard conventions and to fit smoothly into the culture in which you are working. All legal writers should study common punctuation rules and learn to use them to avoid drawing negative attention to themselves.

However, the best hostesses know that etiquette is more about consideration of others than about taking note whether a guest raised a pinky when drinking from a cup or used the proper fork to eat the salad course. Similarly, I urge you as a reader to avoid making assumptions that a writer is ignorant or indolent when the punctuation you see does not seem to fit with the customs you may have learned.

Conclusion

About ten years ago, I participated in a panel discussion about legal writing with Colorado Supreme Court Chief Justice Mary Mullarkey and Colorado Court of Appeals Judge Sandra Rothenberg. I think these judges may have best summed up the punctuation dilemma by saying, "When we at the court read a brief, we keep a bucket of commas by our sides. If we see a comma is needed, we just pull one out of the bucket and insert it. If we see any extras, we just toss them into the bucket for the next use." It's a relief to know that when justice is parceled out in Colorado, our judges can look beyond the flyspecks.

NOTES

1. Truss, *Eats, Shoots & Leaves* (New York, NY: Gotham Books, 2003).

2. *Id.* at 4. The sign should say "eight items or fewer."
3. *Id.* at 6. Truss notes there is an Apostrophe Protection Society that posts egregious examples on its website: <http://www.apostrophe.fsnet.co.uk>.
4. *Id.* at 2.
5. *Id.* at 153.
6. See, e.g., Association of Legal Writing Directors and Dickerson, *ALWD Citation Manual* (Gaithersburg, NY: Aspen Law & Business, 2000); The Harvard Law Review Association, *The Bluebook, A Uniform System of Citation*, 17th ed. (Cambridge, MA: Gannett House, 2000) (known as "*The Bluebook*").
7. *The Bluebook*, *supra*, note 6 at I.2 (citing *U.S. Government Printing Office Style Manual* (1984) and *The Chicago Manual of Style* (13th rev. ed. 1982)).
8. Garner, *The Redbook, A Manual on Legal Style* (St Paul, MN: West Group, 2002) (*hereafter*, "*The Redbook*").
9. Apostrophe Protection Society website, *supra*, note 3.
10. *The Redbook*, *supra*, note 8 at § 1.79.
11. DuVivier, "The Common Comma: Part II," 24 *The Colorado Lawyer* 2545, 2546 (Nov. 1995).
12. DuVivier, "The Common Comma: Part I," 24 *The Colorado Lawyer* 2251, 2552 n.9 (Sept. 1995).
13. Enquist and Oates, *Just Writing* 229-30 (Gaithersburg, NY: Aspen Law & Business, 2001) (Although the authors suggest rewriting to avoid this construction because it is "awkward," the sample says, "the June 21, 1998, meeting.>").
14. *Supra*, note 7 at § 10.36 ("your July 23, 2001 letter").
15. Ray and Ramsfield, *Getting It Right and Getting It Written* 79-80 (St. Paul, MN: West Group, 2000). The authors note this comma may be omitted if the phrase is very short, but the illustrations show it after two- and three-word introductions.
16. *Supra*, note 9 at 215-16. The authors spend the first part of this rule describing the types of long clauses, but they also acknowledge, "There is no specific rule for what constitutes a 'long' phrase or clause." Some of their illustrations set off one word with a comma.
17. Furthermore, a number of these examples seem contrived because, despite the punctuation, the context makes the meaning clear, as in the panda illustration used for the title of Truss's book. See DuVivier, "When Fliespecks Matter—Part I," 33 *The Colorado Lawyer* 69 (Sept. 2004).
18. Truss notes: "The word 'punctilious' ('attentive to formality or etiquette') comes from the same original root word as punctuation." *Supra*, note 1 at 7.