

Volume 20

2021–2022

The Scribes Journal of Legal Writing

Articles by

Robert E. Bacharach
John G. Browning
Joseph Kimble
Patrick Barry
Alex MacDonald
Daniel R. Karon
Adam Eakman
Raymond P. Ward
John Hightower
Yakov Malkiel

Book Reviews by

Linda M. Ryan
Alex MacDonald
Julie A. Oseid
Shavonnie Carthens

SJLW

Contents

From the Editor..... iii

Articles

Robert E. Bacharach	Emphasis	1
John G. Browning	Should Legal Writing Be Woke?	25
Joseph Kimble	<i>Nielsen v. Preap</i> , the Futility of Strict Textualism, and the Case for Universalism in Judging.....	51
Patrick Barry	Investigative Advocacy: The Mechanics of Muckraking.....	69
Alex MacDonald	Shall We Proceed? Ebbs, Flows, and Futility in the Debate over Words of Authority	81
Daniel R. Karon	A Letter to New (and Old) Lawyers: Why You Need to Write Well and How to Do It.....	93
Adam Eakman	Six Usage Mistakes Common in Legal Writing and Why They Matter	109
Raymond P. Ward	Will I Ever See the Day When Lawyers Write Without Clichés?	119
John Hightower	No More Gappy Typesetting, Please	131
Yakov Malkiel	Efficient Advocacy in a Skeptical World	137
Patrick Barry	Elephant in the Room	145

Book Reviews

Linda M. Ryan.....	157
Alex MacDonald.....	167
Julie A. Oseid.....	175
Shavonnie Carthens.....	181
Notes on Contributors.....	185

Will I Ever See the Day When Lawyers Write Without Clichés?

Raymond P. Ward

Clichés abound in legal writing and particularly in brief-writing. Our opponents up the ante by doubling down, even after the die is cast. They play fast and loose, use smoke and mirrors, muddy the waters, and try to make the court chase a red herring down a rabbit hole. They cherry-pick their facts and compare apples with oranges to get two bites at the apple. Their arguments ring hollow, fall flat, miss the mark, fly in the face of the law, and turn the law on its head. In desperation, they grasp at straws and make a last-ditch effort at a Hail Mary pass. In futility, they flog a dead horse after the horse has left the barn, the writing is on the wall, and the ship has sailed. Their conduct adds insult to injury, creating a situation that cries out for relief. We pray that the court not stand mute or turn a blind eye, lest our pleas fall on deaf ears.¹

What’s wrong with using clichés? Most of us probably think of it as a style problem. By definition, any expression that is a cliché has been overused. Using an already overused expression makes our writing dull and unimaginative.

If bad style were the only problem with clichés, that would be reason enough to minimize their use. But that isn’t the only problem. Clichéd writing is both an effect and a cause of clichéd thinking. Most clichés are metaphors — see, for instance, all the clichés in the opening paragraph above. Metaphor both expresses and shapes thought, either for better or for worse. When our metaphors are clichés, it’s usually for the worse.

¹ See The Who, *Tommy* (Decca 1969).

Writing authorities don't recommend that you banish clichés entirely, but rather advise that you avoid using them thoughtlessly: use one if you must, but only after carefully considering whether there's a better way to express the thought.² To follow this advice, you need an awareness of clichés, which requires an awareness of metaphor.

Metaphor is pervasive.

We usually think of metaphor as a figure of speech comparing two things of an unlike nature having some quality in common.³ A classic example: “All the world's a stage / And all the men and women merely players”⁴ But metaphor is more pervasive than that. According to George Lakoff and Mark Johnson, human thought processes are largely metaphorical; our conceptual system is metaphorically structured and defined.⁵ Thus, metaphor affects how we perceive the world and act on our perceptions.⁶ Professor Michael R. Smith refers to this species of metaphor as “inherent metaphor.”⁷

Take, for example, the metaphor *good is up; bad is down*. This metaphor is so pervasive that most of us never think of its existence. But we use it all the time. When we feel optimistic, we say that “things are looking up.” When we experience euphoria, we are “high” or “on cloud nine.” Someone doing well is “flying” or

² See, e.g., Bryan A. Garner, *Garner's Dictionary of Legal Usage* 165 (3d ed. 2011).

³ See, e.g., Edward P.J. Corbett & Robert J. Connors, *Classical Rhetoric for the Modern Student* 396 (4th ed. 1999); Bryan A. Garner, *The Elements of Legal Style* § 6.1, at 150 (2d ed. 2002).

⁴ William Shakespeare, *As You Like It* act 2, sc. 7, l. 145.

⁵ George Lakoff & Mark Johnson, *Metaphors We Live By* 6 (2003).

⁶ *Id.* at 145–46.

⁷ Michael R. Smith, *Levels of Metaphor in Persuasive Legal Writing*, 58 *Mercer L. Rev.* 919, 942 (2007); Michael R. Smith, *Advanced Legal Writing* 216 (2d ed. 2008).

“soaring.” We describe a person we admire as being “high class” and having “high moral standards.”

Conversely, when we feel bad, we say that we are “depressed” or “in the pits.” Someone who has abjectly failed has “hit bottom,” and things only get worse when “the bottom falls out.” We describe an unethical person as having “low moral standards” and being “lower than a snake’s belly.” When the Beatles sang “I’m Down,” we knew that the song was not about spatial relations.⁸ There’s nothing inherently “up” about *good* or “down” about *bad*. The notion *good is up; bad is down* is a metaphor that structures our thinking about *good* and *bad*.

Another example is the metaphor *life is a journey*. As we grow from childhood, we “go through” puberty and adolescence to “reach” adulthood. Similarly, in our education we “go through” elementary school, high school, college, and (for present company) law school. We then “embark” on a career, during which we may “move on” from one job to another, or may enjoy a multiyear “run” at one position. We don’t want to get stuck in a “dead-end” job; we want to “get ahead” and “keep moving forward.” Life isn’t really a journey, but we think of it that way. That’s a metaphor.

Lawyers’ thoughts are shaped by their own metaphors. A good example is the metaphor *an argument is a building*. A good argument “has a solid foundation,” is “structurally sound,” and “holds up against attack.” A bad argument is “flimsy,” is “built on sand,” is “shaky,” “lacks support,” and “collapses” under attack. Bryan Garner describes the outlining and drafting stages of brief-writing as the “architect” and “carpenter” stages: the architect plans the brief’s “structure,” and then gives way to the

⁸ John Lennon & Paul McCartney, *I’m Down* (Capitol 1965).

carpenter, who “starts building the draft.”⁹ All these phrases express the metaphor of an argument as a building.

Sometimes metaphors make their way into legal doctrine and become law. Professor Smith refers to this species as “doctrinal metaphor.”¹⁰ A classic example is the metaphor *a corporation is a person*. This metaphor has become so pervasive that it is now codified in statutory law. The Model Business Corporations Act defines “person” to include “an individual and an entity,” i.e., a corporation or unincorporated entity.¹¹ This metaphor has given rise to U.S. Supreme Court decisions according First Amendment rights to corporations, an idea that likely would have surprised our nation’s founders.¹²

These inherent and doctrinal metaphors show the importance of metaphor to human thought generally and legal thought particularly. Our brains are hardwired to think metaphorically. As humans, we learn new things by comparing them to things we already know. And as lawyers, we think of and talk about abstract concepts by comparing them to something concrete. This is how metaphor shapes thought.

⁹ Bryan A. Garner, *The Winning Brief* 13 (3d ed. 2014) (adopting Professor Betty S. Flowers’s “Madman, Architect, Carpenter, Judge” strategy).

¹⁰ Smith, 58 Mercer L. Rev. at 921; Smith, *Advanced Legal Writing* at 207.

¹¹ Model Bus. Corp. Act § 1.40.

¹² A recent (and controversial) example is *Citizens United v. Federal Election Commission*, 558 U.S. 310 (2010). See also Linda L. Berger, *What Is the Sound of a Corporation Speaking? How Cognitive Theory of Metaphor Can Help Lawyers Shape the Law*, 2 J. ALWD 169, 180–90 (2004) (examining the history of this metaphor in First Amendment law); Daniel J.H. Greenwood, *Essential Speech: Why Corporate Speech Is Not Free*, 83 Iowa L. Rev. 995 (1998) (criticizing this metaphor’s use to extend First Amendment rights to corporations).

Metaphors are persuasive.

Clichés are a subset of another type of metaphor: what Professor Smith calls “stylistic metaphors.”¹³ This is what most of us think of when we hear the word *metaphor*. When rhetoricians and writing instructors talk about metaphor, this is what they are referring to. A stylistic metaphor is a figure of speech in which one thing is compared to another thing by saying that it is that other thing.¹⁴ An excellent example comes from James Stewart’s character in the movie *Anatomy of a Murder* (metaphors italicized):

Your Honor, how can the jury accurately estimate the testimony being given here unless they first know the reason behind this whole trial — why Lieutenant Manion shot Quill? The prosecution would like to separate the motive from the act. That’s like trying to take the core from an apple without breaking the skin. Well, the *core* of our defense is that the defendant’s temporary insanity was triggered by this so-called “trouble” with Quill. I beg the Court to let me *cut into the apple*.¹⁵

Once we understand how inherent metaphor and doctrinal metaphor shape thought, we understand the persuasive force of a good stylistic metaphor. Because our readers naturally think metaphorically, their minds latch onto a good metaphor as a way of understanding something new being presented to them. This tendency is even stronger when the topic is law and the ideas being presented are abstract: the reader will naturally search for a concrete metaphor to understand the abstract idea. When we give the readers these metaphors, we influence them to see the case through

¹³ Smith, 58 Mercer L. Rev. at 932; Smith, *Advanced Legal Writing* at 214.

¹⁴ See, e.g., Bryan A. Garner, *The Elements of Legal Style* § 6.1, at 150 (2d ed. 2002); *Garner’s Modern English Usage* 590 (4th ed. 2016).

¹⁵ Wendell Mayes, *Anatomy of a Murder* 117 (1959) (metaphors italicized) (screenplay adapted from Robert Traver’s novel of the same name).

the lens of those metaphors. When the reader accepts our metaphor, we are shaping the reader's thoughts.

Coming up with a good, fresh metaphor requires imagination and mental effort — there is no “magic formula for the magic metaphor.”¹⁶ Professor Smith offers a four-step process for finding a metaphor:

1. Identify the point that you want to express through metaphor.
2. Back away from a narrow, specific conception of the point and think of it in broad, generalized terms.
3. Think of a concrete, tangible image that also meets the broad conception of the point.
4. Draft a metaphor that expresses this figurative analogy.¹⁷

Ross Guberman offers similar advice: “[C]halleng[e] yourself to look at a legal problem from a faraway prism, whether it be sociological, anthropological, corporeal, scientific, economic, astronomical, or even architectural.”¹⁸ And think of something with “real-world physicality.”¹⁹

That's a lot of mental effort. But the payoff makes the effort worthwhile. For a brief-writer, the payoff is persuading judges to see the case as the writer wants them to see it. And if the metaphor makes its way into the court's opinion and catches on, it may evolve into doctrinal metaphor — it may become law.

¹⁶ Ross Guberman, *Point Taken: How to Write Like the World's Best Judges* 242 (2015).

¹⁷ Smith, *Advanced Legal Writing* at 244.

¹⁸ Guberman, *Point Taken* at 242.

¹⁹ *Id.*

Clichés are perverse.

Rather than making the effort to come up with a good, fresh metaphor, writers too often use whatever metaphor pops into their mind. Any ready-made metaphor, one that the writer has frequently seen before, will usually be a cliché. Using a cliché has the advantages of saving time and avoiding effort. But thoughtless use of clichés comes at a dear cost.

For starters, thoughtless use of clichés enables the writer to avoid thinking about what she or he is trying to say. George Orwell put this problem well: “By using stale metaphors, similes and idioms, you save yourself much mental effort, at the cost of leaving your meaning vague, not only for your reader but for yourself.”²⁰ More recently, James Geary expressed the same thought: “[L]anguage that saves people the trouble of inventing phrases for themselves also saves people the trouble of thinking for themselves.”²¹

A writer who uses clichés without thinking about them is likely to be unaware that those clichés are metaphors. The result can be mixed or inconsistent metaphors: metaphors that evoke clashing visual images. Here’s an example from a real-world brief, with clashing clichéd metaphors italicized:

To permit the plaintiff *another bite at the apple* would defeat the very purpose of *res judicata* and *eviscerate* the settlement agreement.

If the readers are paying attention, they have a mental image of an apple being disemboweled.

A metaphor can also clash with literal language, as when one brief-writer wrote that a court’s “three statements [could not] be

²⁰ George Orwell, *Politics and the English Language*, in *Why I Write* 102, 112 (Penguin Books 2005).

²¹ James Geary, *I Is an Other* 136 (2011).

squared.” This metaphor invited readers to think geometrically, in which case they may have reacted by thinking “cannot be tri-angled?”

When metaphors clash with each other or with the literal language, the readers may conclude that “the writer is not seeing a mental image of the objects he is naming; in other words, he is not really thinking.”²² When the clash results from thoughtless use of clichés, the readers would be right.

Habitual use of clichés is not only an effect of lazy thinking but also a cause. Orwell said that “if thought corrupts language, language can corrupt thought.”²³ Like any other metaphor, a cliché shapes thought; it fosters clichéd thinking. When we argue that someone is trying to get “two bites at the apple,” we obscure from both ourselves and our readers the real issue whether a situation is governed by *res judicata* or law of the case.

Besides having these bad effects, a thoughtlessly used cliché can represent a missed opportunity to persuade with a good, fresh metaphor. To be sure, not every thought requires expression through a metaphor. Like any other rhetorical device, metaphors work best when used sparingly and judiciously — save them for when you really need them. But if a well-placed and well-thought-out metaphor would convey the thought vividly, concisely, and memorably, then resorting to a cliché results in a missed opportunity to persuade.

The experts’ advice on clichés is universal: when you find yourself about to use one, stop and think. Garner, for instance, advises, “If one finds oneself writing or talking in ready-made

²² Orwell, *Politics and the English Language* at 112; see also *id.* at 106 (“[I]ncompatible metaphors are frequently mixed, a sure sign that the writer is not interested in what he is saying.”).

²³ *Id.* at 116.

phrases, it is time to draw back and frame the thought anew.”²⁴ Orwell suggested that writers ask themselves these six questions:

- What am I trying to say?
- What words will express it?
- What image or idiom will make it clearer?
- Is the image fresh enough to have an effect?
- Could I put it more shortly?
- Have I said anything that is avoidably ugly?²⁵

After examining the problem, you may find that a cliché works better than anything else you can think of. If so, use it. If your point is that your opponent has drawn an inapt comparison, feel free to say (as one brief-writer did) that it’s “the idiomatic comparison of apples to oranges — the two are simply incomparable.” The only absolute rule is to think before you write — always. If you do, most clichés will disappear from your writing.

Appendix of Clichés

If you ever find yourself using any of these phrases, stop, back up, and rewrite.

Enough already

- and so it begins
- at the end of the day
- perfect storm
- smoking gun
- inextricably intertwined

²⁴ See, e.g., *Garner’s Dictionary of Legal Usage* at 165.

²⁵ Orwell, *Politics and the English Language* at 113.

Dog-and-pony show

- best in breed
- that dog won't hunt
- every dog has its day
- let sleeping dogs lie
- tail wagging the dog
- can't teach an old dog new tricks
- flogging a dead horse
- close the barn door after the horse gets out
- put the cart before the horse
- can lead a horse to water but can't make him drink

Gone fishing

- fishing expedition
- muddy the waters
- red herring

Outlandish

- flies in the face of
- turns *X* on its head

Deception

- wolf in sheep's clothing
- painting with a broad brush
- smoke and mirrors
- playing fast and loose
- "manufacturing" something intangible (e.g., an argument, a conflict, a waiver, an issue)

Don't go there!

- slippery slope
- open the floodgates

- can of worms
- Pandora's box

Tutti-frutti

- two bites at the apple
- comparing apples with oranges
- apple doesn't fall far from the tree
- cherry-picking

Bells will be ringing

- rings hollow
- can't unring the bell
- shots rang out

Tommy

- turn a blind eye
- blind leading the blind
- fall on deaf ears
- stand mute

Desperation

- grasping at straws
- last-ditch effort
- Hail Mary pass

Ooh, baby, baby

- split the baby²⁶
- throw the baby out with the bathwater

²⁶ This is a lousy metaphor for a compromise. See 1 Kings 3:16–27.

Gambling

- all in (means the same as all out?)
- double down
- bet-the-company case
- on a roll
- die is cast

Game's afoot

- game-changer
- game plan
- end run
- in the ballpark
- out in left field
- struck out

Oh, the horror

- cries out
- adds insult to injury
- eviscerates