Checklists: Not Just for Pilots Anymore

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Checklists: Not Just for Pilots Anymore

by Diane B. Kraft
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Pilots do it, surgeons do it, even David Lee Roth does it. Legal writers should do it, too.

Do what?
Use checklists.

You’ve probably heard horror stories about what can happen when a pilot fails to check that he’s cleared for take-off, or a surgeon neglects to be sure all the sponges have been removed from a patient before closing an incision. People can die from such mistakes – mistakes that the use of a checklist would likely have prevented. However, the stakes don’t have to be life and death for a checklist to be a good idea.

The idea behind checklists is simple: to produce the result you want, whether it’s to fly a plane safely, successfully operate on a patient, or write a brief that will help you win a case, you go through a series of steps. If you miss a step, or perform it badly, you’ve made a mistake that could mean you won’t get the result you want. On the other hand, if you use a checklist to ensure you’ve completed each step, you can avoid making mistakes that can lead to failure. In other words, we fail not because we don’t know how to do something, but because we neglect to do every step correctly. As Atul Gawande puts it in his bestselling book, The Checklist Manifesto, “What do you do when expertise is not enough? What do you do when even the super-specialists fail?” You make a checklist.

Checklists aren’t just a tool for the inexperienced to be sure they’re doing a task correctly. Checklists are for experts, too, because they “remind us of the necessary steps and make them explicit. They not only offer the possibility of verification but also instill a kind of discipline of higher performance.”

Gawande cites an experienced investor who uses checklists as a methodical way to evaluate potential investments. Did his investment team read the footnotes on cash flow statements? Check. Did they review the statement of key management risks? Check. Did they see whether cash flow and costs match reported revenue growth? Check. The checklists force his investment team to look at the details in a financial statement that can reveal a company in trouble. Speaking about Enron, the investor notes that “[p]eople could have figured out it was a disaster entirely from the financial statements.” If only they had used a checklist.

If a checklist can work for pilots, surgeons, and investors, it can work for lawyers, too. Some lawyers swear by checklists. My civil procedure II professor, who was a partner in a civil litigation firm, told us he had a checklist on the wall in his office to remind him of every step he needed to take in a case, from filing or answering the complaint to filing post-trial motions. This despite his many years of experience as a litigator. He encouraged us to do the same when we became practicing attorneys.

But what about legal writing? Writing memos and briefs is just one part of the litigation process, and while it’s by no means easy, it’s not brain surgery. Still, using a checklist can “instill a kind of discipline of higher performance” in the legal writer by forcing her to confirm that she has not only Shepardized all the cases and checked citations, but has formatted the document correctly, anticipated or responded to counterarguments, used effective techniques of persuasion, avoided clichés, used passive voice only where appropriate, proofread carefully, and so on.

Recognizing the usefulness of checklists, especially (but not solely) for novice writers, the authors of many legal writing textbooks include checklists in their texts. For example, The Legal Writing Handbook has checklists for the discussion section in memos, the argument section in briefs, argumentative headings in briefs, issue statements and brief answers in memos and briefs, the statement of facts in memos and briefs, revision, opinion letters, and oral argument. The Basics of Legal Writing includes checklists for legal research, techniques for enhancing clarity, receiving and presenting information orally, writing a persuasive statement of facts, choosing an argument’s content, organizing the argument, unifying the brief, preparing for oral argument, writing a client letter, identifying causes of action, writing complaints, drafting legislation, and drafting jury instructions. In A Lawyer Writes, the authors provide a sample comprehensive checklist for editing and polishing a legal document, but recommend that each writer create her own checklists that focus on “the particular problems [she] routinely face[s]” and that will help the individual writer create legal documents that are “complete, understandable, and professional.” Sound advice, to be sure.

But back to David Lee Roth. Perhaps you remember hearing the story some years ago about the “brown M&M” clause the rock group Van Halen had in their contracts with concert promoters. The contracts required that a bowl of M&M’s – with all the brown M&M’s removed – be provided
backstage at each concert. Turns out this bizarre requirement was part of a checklist. In addition to the M&M clause, the contract included detailed instructions for setting up the complex gear required for the concerts. If any steps in the instructions were skipped, the result could be anything from a lighting glitch to a collapsed stage. Roth knew if the instructions in the contract had been followed to the letter by checking for brown M&M’s in the bowl. If you’re human, at some point you’ll be inclined to skip a step here

Shop Talk
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use of social media. As Bill Sharp of the Kentucky ACLU has noted, Kentucky takes the measured approach to the social media speech and associational rights of the judiciary. A Kentucky judge using FaceBook to “friend” an attorney who appears before him does not solely by that violate judicial ethics nor create the appearance of bias. This contrasts with other state disciplinary bodies that forbid such social media interaction by judges and lawyers.

To one judge it seemed that urban judges have always seen: that the people appearing before you, whether as counsel or litigant, will say hello at the courthouse, at the high school games and in the Wal-Mart. And it’s reasonable to respond and talk about the game. Yet another jurist noted a concern with parties themselves sending “friend” requests, requiring a delicate handling of such interactions. These are not new issues, as for a long time some litigants have sent ex parte letters to the courts that judges have dealt with. And it’s not like a judge texting one counsel or a juror “tweeting” during trial, as has happened elsewhere. But the ease and wide use of social media may have an impact.

and there just to keep the in-box from overflowing. Checklists can help you resist that urge, and keep you focused on the task of being the best legal writer you can, and therefore doing your best for your clients. And after all, there’s nothing like the satisfaction of checking off that box on the checklist and saying “Done!”

ENDNOTES
2. Id. at 36.
3. Id. at 167.

Important issues, as it may not be a good thing to isolate judicial officers and lawyers from the community as to new social media. Finding the appropriate accommodation may be the challenge we face.

Perhaps we can discuss how we can best address this. If you have thoughts on this and wish to share them for discussion, please post them at Stuart Adam’s Social Media Practice and Forensics site at LinkedIn.com or email them in. We will continue this discussion as these issues evolve.

Please send your comments to Michael Losavio at michael.losavio@louisville.edu.