Criminal Law Consulting
Writer's Guide

Top 7 Mistakes Made by Writers of Crime, Mystery and Legal Drama

www.CriminalLawConsulting.com
By: Blythe J. Leszkay

Criminal Law Consulting Writer's Guide:
Top 7 Mistakes Made by Writers of Crime, Mystery and Legal Drama

By: Blythe J. Leszkay

www.CriminalLawConsulting.com

INTRODUCTION

As a criminal lawyer and a lover of crime and legal drama, I see mistakes in fictional legal stories all the time. Some are obviously done for a purpose and do not take away from the story. Others, however, are clearly made out of ignorance and can seriously damage the credibility of a piece.

First, let me be clear, when I say "mistakes," I mean it in the sense of, "that wouldn't happen in real life." These "mistakes" may be made intentionally for dramatic effect. That's fine if the writer consciously chooses to do that, of course.

There may be many reasons a writer would want to break the rules. Poetic license allows writers to ignore all real-life rules if they so choose.

However, creating characters or scenes that are not credible or true-to-life should be a deliberate choice. It should never be done out of ignorance.

In other words, if a writer knows the rules and chooses to disobey them for the sake of his or her story, that is a competent and respectable decision. If, however, a writer creates a scene without knowing the rules and without caring enough to learn them, his or her writing will likely come across as sloppy and inauthentic.

If you want to attract and keep readers and viewers for the long haul, your work needs to be authentic and true to your subject matter.

With that in mind, here are the top seven mistakes made by writers of crime, mystery and legal drama:

MISTAKE #1: Attorneys Are Not Investigators

One mistake I see all the time is an attorney investigating evidence: Out at the crime scene, hunting down witnesses, and often finding the key that will win the case.

Now, attorneys do those things to some extent, but not even close to how they are depicted. Most prosecutors and public defenders don't have time to investigate their cases. They also have police and investigators who work with them and do the bulk of the necessary investigative work.

In the real world, prosecutors and public defenders often interview their witnesses in the courtroom hallway before walking into court. To prepare, they generally rely on police and investigator reports.

Private defense attorneys charge too much money for their time to spend it investigating. They usually hire private investigators to go out and interview witnesses, take pictures, and investigate the crime scene. The investigator may take note of lighting, measurements, drive times, and visibility. The investigator then reports any findings to the attorney.

A private attorney will often choose to re-interview key witnesses, especially if he or she plans to call that witness to the stand. The attorney can get a better idea of how the witness will come across in court by talking to him or her in person.

However, a very important side note is that when attorneys do interview witnesses, they always, always should have a third person present. That third person is usually a detective or investigator. Sometimes another attorney (usually someone junior) will be the third person.

The reason to always have a third person present is in case the witness changes his or her testimony on the witness stand. Witnesses who change their stories can be impeached by prior inconsistent statements. Usually when this happens, the attorney will call the detective or investigator who took the prior statement to testify to what the witness told him or her.

For example, once on the stand, an eyewitness may testify that he did not see the shooter because it was too dark and the shooting happened too fast. The attorney would question the witness about his prior statement to the detective:

"You remember talking to Detective Bryce on February 12, 2010?"

"Yes."

"Do you remember telling the detective the defendant was the shooter?"

"No, I don't remember that."

"Do you remember telling him you looked the shooter in the eye, and you would never forget his face?"

"No."

Because the witness testified inconsistently with his prior statement, the detective could take the stand and relay the witness's prior statements:

"Detective Bryce, when you interviewed Mr. Smith in February, did he identify the defendant as the shooter?"

"Yes, he did."

"What else did he say?"

"He said he looked the defendant in the eye just before the gun went off, and he would never forget his face."

However, if the trial attorney was the only one to hear the prior statement, there would be no one to testify to that statement. (Although it is sometimes possible for a trial attorney to testify, that is highly inadvisable and to be avoided at all costs.) You can see from the above example how devastating it could be if the attorney could not get in the prior statement.

In short, leave the investigating to the investigators.

MISTAKE #2: Lawyers Giving Speeches in Court

Trials generally follow strict rules. One of those rules is that, when a witness is testifying, the attorney asks questions and the witness answers them. Only the witness's answer may be considered as evidence.

In books and movies, lawyers in trial give long speeches during witness testimony, often summarizing their case or blatantly making an argument. Sometimes they turn to talk directly to the jury, even asking the jury questions.

These kinds of speeches are legally improper for at least three reasons. First, they violate the question and answer format of the trial. Where is the question, and what answer could the witness possibly give?

Second, such speeches are argumentative. Even when made in question form, argumentative questions are improper. The opposing attorney will generally object that the question was argumentative, and the question will not be answered.

Of course, argumentative questions may be a normal part of any trial. Attorneys will sometimes use such questions to get an idea before the jury, to show the jury their take on the evidence, even if the question is never answered by the witness or is stricken by the court. However, it is a highly objectionable practice (and often ineffective).

Finally, even if the speech was put into a question form, it would be an improper compound question. Compound questions are those that ask multiple questions at once. Each question during testimony should contain one idea and one question for the witness to answer.

For example, if the question is asked, "Did you see where the shooter came from or where he went?" The witness could answer "yes," and it would be unclear whether the witness saw where the shooter came from, where the shooter went, or both. Such questions are therefore objectionable as compound.

Also, as a practical matter, there are much more clever and effective ways for a questioning lawyer to make points during a witness's testimony. For example, a lawyer who wants to show a witness is lying, can set up a witness's testimony to contrast with a stronger piece of evidence. If a witness denies being in a particular place, and the lawyer shows a fingerprint or DNA or videotape of the person from that place, the jury (and readers and viewers) will put the puzzle together for themselves.

When a reader or viewer is allowed to draw his or her own conclusions from the evidence, it is far more powerful than hearing a lawyer grandstand and shove it down their throats.

Most trial lawyers would love to be able to give speeches like those seen on TV. Generally, however, they must wait until closing argument to bring the evidence together, put it in context, and tell the jury how to interpret it. That's what closing arguments are about (and why they are often the most interesting part of a trial to watch). Such speeches during the testimonial part of trial are against the rules, and are often ineffective.

MISTAKE #3: No Objection to Obviously Objectionable Questions

This is related to Mistake #2. Just as lawyers are not permitted to give speeches at trial, if a lawyer did violate the rules in such a flagrant manner, the other side would undoubtedly object.

Objecting is a kind of art form, so it is difficult to say a lawyer should or shouldn't object to any particular question. Each individual lawyer must decide what questions to object to, and there are different theories of objecting.

Some lawyers will object at every possible opportunity. The idea behind this is generally that objecting disrupts the flow of the questioning lawyer. Because the testimony gets broken up, such objecting may also give the witness's answers less impact on the jury.

Other lawyers won't object except to the most egregious questions or only if their objections are likely to be sustained, and the witness's testimony excluded. The idea is that they do not want the jury to think they are trying to hide something. Objecting can make the objecting lawyer look deceitful, even if the questioning lawyer is asking improper questions.

Sometimes the decision of whether and to what to object will depend on the witness. For example, a competent expert witness will likely be able to handle him or herself under cross-examination, and the presenting lawyer may decide to withhold all but the most necessary objections. A child witness or a particularly vulnerable victim may require more diligence. The attorney presenting such a witness may be more inclined to object to even slightly improper questions to protect the witness.

That said, no lawyer would sit by and allow the other side to improperly argue their case during questioning. If you decide a speech is the best way to present an idea, you should consider at least having the opposing lawyer object at the end of the speech. Or, better yet, save it for closing argument.

MISTAKE #4: Lawyers Arguing with or Disrespecting Judges

Judges are in charge of the courtroom. It's the judge's courtroom. Judges of course have different personalities. Some judges are more formal than others. Some are more laid back. Some are temperamental or impatient or grumpy. But no judge I have ever seen will tolerate a lawyer disrespecting them in their courtroom.

I once saw a television show where a lawyer was arguing his legal position in court. The lawyer was very passionate about his case, and his argument crossed the line of what was proper. The judge threatened the lawyer with contempt of court. The lawyer responded by pointing at the judge and shouting, "I hold *you* in contempt!"

That kind of dialogue is just absurd. It's even more so when the judge's response is to quietly sit back and listen to the lawyer's monologue following such an outburst. No judge would tolerate that kind of behavior.

Just remember, passion is one thing, disrespect is another.

MISTAKE #5: Walking Through "The Well"

This is a small mistake, but it happens so frequently, and usually for no apparent reason, that it is worth mentioning.

There is an area in the courtroom called "the well." It is the open space directly in front of the judge's bench up to the lawyers' tables or lectern. That area is generally off-limits to anyone walking through the courtroom.

When lawyers or witnesses need to walk from one side of the courtroom to the other, they must go around the back of the lawyers' tables. If someone must pass through the well, they should ask the judge's permission. "Your honor, may I approach the bench?"

Someone who walks through the well without permission will find generally themselves on the wrong end of a judge's tirade or snide remark.

MISTAKE #6: The Defense Needs a Reasonable Basis to Accuse a Third Party

It is common in both real world trials and fictional ones for the defense to try to place blame for the crime on a third party. This is called third party culpability. It is also sometimes called the SODDI defense (Some Other Dude Did It).

In the real world, there are rules about when the defense can try to divert blame to a third party. A third party with motive to commit the crime, without more, is not sufficient. Similarly, opportunity to commit the crime is not enough.

Before the defense can introduce evidence of third party culpability, there must be some evidence connecting the third party to the crime. That evidence may be either direct or circumstantial. The key is that it must be strong enough evidence that it could raise a reasonable doubt about whether the defendant committed the crime.

For example, maybe someone saw the third party in the area of the crime. Maybe a witness overheard the third party confess to the crime or make some statements suggesting his or her involvement. A third party's unexplained fingerprint or blood found at the crime scene might also suffice.

Just remember, before your defendant (or defense attorney) can accuse a third party of committing the crime, he has to have some credible evidence pointing to that person.

MISTAKE #7: A Criminal Defense Attorney Sitting by as Their Client Confesses

This is one of the most common mistakes I see, and it looks something like this: The suspect gets a lawyer. The lawyer and client go to the police station to talk about the evidence the police have so far. At some point, the client decides he wants to tell all. He may confer with his lawyer first or he may just start talking. The lawyer may put up a weak protest or may sit by quietly doing nothing.

Any criminal defense attorney who's been practicing for at least five minutes knows the client is his own worst enemy. Someone suspected of criminal activity should almost always keep their mouth shut.

Now, suspects talk to the police all the time. When a suspect is taken into custody, he is warned, "Anything you say can and will be used against you in a court of law." Despite this clear warning, many suspects still talk to the police. And that is almost always a big mistake.

If a suspect is smart enough to hire a lawyer before talking to the police, that lawyer will almost surely tell her client not to say a word – to the police or anyone else. That's because criminal defense attorneys know that the police warning I mentioned above is absolutely true. Whatever a suspect says can and *will* be used *against* him. And, generally, the most powerful evidence that can be used against someone is his own words.

Knowing that, an attorney will almost never allow her client to talk to the police. This is so widespread and well-understood that the police almost never even ask to talk to someone once they have a lawyer.

That said, this does occasionally happen in real life, although it is generally to the suspect's detriment. The exceptions prove the rule that this should almost never be done.

A prime example is Michael Jackson's doctor, Conrad Murray. Dr. Murray was discussed, at least in the media, as having some involvement in Michael Jackson's death from the get-go. He was the last person to see him alive. He was not available to the police in the hours and days after Jackson's death.

After a few days of wild speculation and rumors in the media, Dr. Murray finally decided to talk to the police. He did so with his lawyers by his side. He answered all their questions, told his version of events, and was never prevented from talking by his lawyers. And he was charged with involuntary manslaughter for killing Michael Jackson.

When the case went to trial, the prosecution used Dr. Murray's words against him at the first available opportunity. The prosecutor played portions of the police interview for the jury

during opening statements. It displayed quotes of Dr. Murray's statements in its PowerPoint presentation.

True to the warning, his own words were used against him in a court of law.

The lesson here is that it is almost never advisable for a suspect to talk to the police, and most defense attorneys would never allow that to happen. For good reason. As a writer, you can almost always find another way.

CONCLUSION

Often the difference between *good* legal fiction and *great*, is the work's authenticity. Authenticity comes from knowing how things happen in real life and making informed decisions about whether to do it that way or not. Whether and when you follow the rules is up to you, it's your work. But you should at least know what the rules are before deciding.

My goal is to help you achieve authenticity with any criminal law matters in your work. Avoiding these 7 Mistakes is a good start.

For free resources on criminal law, check out the blog and resources sections of my website at www.criminallawconsulting.com. For a free initial consultation on your project, contact me at criminallawconsulting@gmail.com or (213) 258-7706.

Happy Writing!

~Blythe