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On Legal Writing

Albert P. Blaustein*

VIRTUALLY ALL LEGAL WRITING is atrocious!¹ This is true about (a) statutes and administrative regulations;² (b) judicial opinions³ and agency rulings; (c) trial papers and appellate briefs;⁴ (d) office memoranda and opinion letters; (e) annotations and digest paragraphs; and (f) law treatises and legal articles.⁵ It is even true (especially true?) about articles on legal writing.⁶

This is a serious matter. For the ramifications of bad legal writing are very costly—in time, in money and, indeed, in the very quality of life.⁷ Working to improve legal writing is no frivolous exercise.

Legal writing is important

BECAUSE . . .

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¹ "No sooner does one contemplate the law and literature of the law than he plunges head-first into a viscous sea of verbiage which all but drowns him." Chase, *The Tyranny of Words* (New York, Harcourt, Brace, 1938) p. 322.

"The written and spoken English used before our court is far below the standard which should be used by graduates of institutions of higher education in America. . . . [T]he grammatical errors are quite noticeable. The construction of sentences seems to have been forgotten entirely. . . ." Quoted in Jordan, *The Existing Need for the Improved Training of College and University Graduates (As Undergraduates) in the Use of Basic English Accuracy*, address, American Assn. for the Advancement of Science (Dec. 29, 1955) p. 38.

² "[T]he language of statutes seems to justify Edmund Burke's lament that lawyers had 'bewildered the world and themselves in organizing forms and ceremonies' and had 'perplexed the plainest matters with metaphysical jargon.'" Rogers, *Notes on the Language of Politics*, 64 *Pol. Sci. Quart.* 481, 501 (1949).

³ Let's not beat dead horses.

⁴ *Ibid.*

⁵ This enumeration is for illustrative purposes only. These various types of legal writing are mere examples. The list does not pretend to be exhaustive. The rule of *expressio unius est exclusio alterius* does not apply. "Go to jail. Move directly to jail. Do not pass 'Go'. Do not collect \$200."

⁶ And there are so many of them! It is not surprising that so many lawyers have written articles about legal writing. After all, everybody likes to talk shop. On the other hand (in the law there is always some "other hand"), many lawyers are reluctant to write about legal writing. This is especially true of teachers of legal writing, including the author of this article. Here's why: Articles about legal writing *should* be especially well written. And who wants to try to meet that challenge! There comes a time, however, when the teacher of legal writing wants to say something on the subject. And if it's not well written, well, to hell with it.

What is needed in the literature of the law is an article on how to write articles on legal writing. There already is one on how to write them for sale (for money) for publication: Oleck, *Research and Writing for the Professional Market: The Financial Aspects*, 19 *J. Legal Ed.* 325 (1967).

⁷ Don't minimize the contribution of bad legal writing to the ills of society. Bad legal writing results in needless litigation; and it sometimes happens that bad legal writing results in having the wrong parties lose some of that litigation. Bad legal writing also adds to the sum total of aggravation and boredom. And there is enough of both of these already.

- A) Legal writing is essentially what the lawyer does;⁸
- B) Legal writing is the primary vehicle used by lawyers to inform and guide decision-makers and those who seek legal advice;⁹
- C) The consequences of legal writing are so important;¹⁰
- D) Good legal writing is essential to clear legal thinking.¹¹

Daniel Webster taught that "the power of clear statement is the great power of the bar."¹² Yet all are agreed that today's legal writing product falls far short of "clear statement"¹³ and far short of what is expected of members of the bar.¹⁴

⁸ "[M]ost of you [lawyers] will spend three-fourths of your professional life with a notebook and a pencil in hand trying to put down in writing a rule of conduct to be followed for a particular case. No other profession, unless it be that of a professional writer, devotes a like amount of effort and energy to writing." Beise, *Ability in Professional Crafts and in the Use of the English Language*, 23 Rocky Mt. L. Rev. 46 (1950).

"[M]easured in terms of bulk or quantity, . . . by far the greatest proportion of the lawyer's product, the commodity in which he deals, the thing which he sells, if you please, is the written word." Pickering, *On Learning to Write: Suggestions For Study and Practice*, 41 A. B. A. J. 1121, 1122 (1955).

⁹ "For how can a judge be instructed, if there be wanting lucid explanation, statement, offer of proofs, definition of the point in question, distinction, exposition of the speaker's own opinion, just conclusion from arguments, anticipation of objections, comparisons, examples, digestion and distribution of matter, occasional interruption of our opponent, restraint on him when he interrupts ourselves, assertion, justification, destructive attacks?" Quintilian, *Institutes of Oratory*, Bk. IX, ch. II § 2 (90 A.D.).

"Lawyers are students of language by profession. . . . [T]he language they use is the principal means by which they achieve their successes, . . . They exercise their power in court by manipulating the thoughts and opinions of others, . . ." Philbrick, *Language and the Law* (New York, Macmillan, 1949) p. v.

¹⁰ "I am not belittling my own trade, or the trade of artist-at-large, when I say that lawyers and judges have a more immediate stake than has the professional writer in what is set down on paper. . . . But for all your written theory, for your rules of law, for the precedents you may make either before the judge's bench or on it, there is a direct clinical application. Somebody goes to jail, somebody pays a fine, or forfeits his money, or his reputation. Somebody hangs, or is saved from hanging." Bowen, *The Lawyer and the King's English*, address before the Brandeis Lawyers Society, Philadelphia (Nov. 21, 1950) private print, p. 7.

"[A]bout 25 per cent of litigated cases covered by the [contracts] study and reaching appellate courts revolved about problems of interpretation of language. A good part of the difficulty, we concluded, was traceable directly to incomplete negotiation by the parties and poor draftsmanship either by the parties or their counsel. In many of the cases the courts bluntly said so." Shepherd, *Review of Basic Contract Law* by Lon L. Fuller, 1 J. Legal Ed. 151, 154 (1948).

¹¹ "Modern English, especially written English, is full of bad habits which spread by imitation and which can be avoided if one is willing to take the necessary trouble. If one gets rid of these habits one can think more clearly, and to think clearly is a necessary first step toward political regeneration: so that the fight against bad English is not frivolous . . . , if thought corrupts language, language can also corrupt thought." Orwell, *Politics and the English Language*, from, *Shooting An Elephant* (New York, Harcourt, Brace, 1945) pp. 77, 89.

¹² Harvey, *Reminiscences and Anecdotes of Daniel Webster* (Boston, Little, Brown, 1877) p. 118.

¹³ This may be the only thing about which all lawyers and all clients do agree. "[T]hroughout the long history of the legal profession the people have always com-

(Continued on next page)

The law schools have long been aware of this deficiency.¹⁵ Quite rightly, they have put the major blame on the failure of high school and college English composition teachers to send a better trained writer on to the graduate schools.¹⁶ But, to their credit, the law schools do more than assign blame. By now, practically every law school has some kind of legal writing program designed to produce better lawyer-writers.¹⁷ Yet no one is satisfied. Now, where do we go from here?

The Law School Charge

Here are three things which the law schools can (and should) do to improve legal writing:

A) Bring legal writing into the *undergraduate* classroom. Enter into working arrangements with the teachers of English composition to have students (at least *prelaw* students) write papers on the law. Cooperate by conducting discussions on legal topics leading to the preparation of such papers. Undertake critiques, grading, etc., of these papers. (As a starter, have the college student write a "lawyer letter" explaining a statutory provision or an administrative regulation to a person with less than a high school education.) In addition to the obvious value of such exercises, a program of this type will make potential law students more conscious of the importance of acquiring writing skills.

B) Make legal writing an integral part of all continuing legal education programs. Members of the bar need this type of training too. They must be given an opportunity to prepare memoranda of law, opinion letters, pleadings, trial memoranda, etc., under the direction of teach-

(Continued from preceding page)

plained about the way lawyers write. At least I can trace this history as far back as Cicero, . . ." Littler, *Legal Writing in Law Practice*, 31 Calif. S. B. J. 28, 29 (1956).

¹⁴ "There is general agreement . . . throughout the English-speaking world . . . that most young men coming to the bar recently have not had adequate skill in writing." Abel, *Introduction to Legal Writing*, 12 Toronto L. J. 81 (1957).

¹⁵ "The *English* of the law school student is subject to the constant criticism of the law school faculty; in like manner the English of law school graduates is scored by practicing lawyers." Vanderbilt, *A Report on Prelegal Education*, 25 N.Y.U. L. Rev. 199, 245 (1950).

¹⁶ "[T]wenty percent [of a Columbia Law School class surveyed] admitted to no college courses in English composition. Any encouragement one might derive from the robust percentage of those who had received training in writing is shattered when one actually encounters in mass the written work of law students. Even the most tolerant of critics will concede that whatever be the arts of which the students are bachelors, writing is not one of them." Warren, Report of the Dean of the School of Law, Columbia University (June 30, 1955). *Columbia University Bulletin of Information*, 55th Series, No. 47 (Nov. 26, 1955) p. 9.

¹⁷ And they should. "Learning draftsmanship in the school of experience exclusively is costly to clients; it is costly to the public, and it is costly to the lawyer. It is like learning surgery by experience—it is possible, but it is tough on the patient and tough on the reputation of the surgeon." Beardsley, *Beware of, Eschew and Avoid Pompous Prolixity and Platitudinous Epistles!*, 16 Calif. S. B. J. 65 (1941).

ers of legal writing, as well as under subject specialists. And there is no better way of learning a course or being tested on proficiency in the subject matter of a course. Sure it takes more time and effort; but it's worth it.

C) Appoint legal-writing-expert teachers to teach legal writing courses. This is stated with due appreciation of the advantages of teaching some legal writing as a *part of every* law school course. (Students in a criminal law course might well be assigned to redraft a homicide statute and explain why; students in a decedents' estates course might well be given will drafting assignments; and there is required legal writing in seminars, etc.) But this type of legal writing program cannot overcome the obstacle of so many teachers who do not care about legal writing.

Legal writing instruction cannot be effective unless the teacher and the student go over the student's work together on an individual basis—pointing up and discussing ways in which each writing (and each draft) can be improved. This requires a teacher who is interested in teaching legal writing and *who knows something about it*. This is *not* a job for third-year students or graduate fellows. Nor is it a task for a junior professor who is required to assume the chore until someone even more junior is added to the faculty and he, in turn, gets stuck with it.

On the other hand, it can be said—and well said—that legal writing is too important a matter to be left to legal writing teachers. This is faculty business of a high order.

Some Legal Writing Guidance

Here is the Blaustein decalogue of legal writing principles, maxims, concepts and ideas—all of which are in a constant state of revision:

1. The ABC's of good legal writing are not *accuracy*, *brevity* and *clarity*. Use only that degree of accuracy, brevity and clarity which is appropriate to the given situation.¹⁸

2. The ABC's of good legal writing are the *applications* of *broad* principles of law to *concrete* situations. Never cite a case or state a principle of law without setting forth the applicable facts of that case or the facts behind that principle. And then show the specific application of those facts to the facts of the legal problem involved in the writing.

3. Legal writing is legal thinking communicated. Legal writing can be no better than the thoughts behind it. Lack of clarity in writing is usually the direct result of fuzzy thinking. The main reason why so

¹⁸ "The golden rule is that there are no golden rules." "Do not do unto others as you would they should do unto you. Their tastes may not be the same." Bernard Shaw, *Maxims for Revolutionists*.

much legal writing is bad is because the writers do not know what they are writing about.

4. Do better legal writing by writing less. This is more than a reminder to write shorter paragraphs, composed of shorter sentences, filled with shorter words. It is a recommendation to make more skillful and imaginative use of headings, subheadings, punctuation, numbers and letters, diagrams, tables, charts, variations in type faces, etc.

5. Sentences composed of English words should be read, not translated.

6. In case of doubt as to the relative clarity of a legal writing, the reader, not the writer, must be right. To some degree, the writer is always beset by the forest-trees dichotomy or "hang-up."

7. Brevity in legal writing is not determined by counting pages, lines or words. Brevity is determined by measuring time—the time it takes to effect communication between the writing and the reader.

8. Innovate. Experiment. So what, if all the new ideas don't work out! Some will.

In the Rutgers • Camden legal writing courses next year, this teacher is going to try some experiments with dictating equipment. The lawyer-writer must learn how to use such equipment for general correspondence. How can he use this mechanical aid in outlining legal writing ideas, preparing first drafts, etc.?

The most familiar legal document to both the law student and the legal practitioner is the judicial opinion. Law students spend far more time reading cases than any other type of legal writing. Thus they know more about them. Practicing lawyers also know more about judicial opinions than about memoranda, briefs, opinion letters, etc. Why not make better use of this knowledge?

I have long planned to write an article recommending the inclusion of a draft opinion as part of every appellate brief. In the alternative, I have long planned to include a draft opinion in the next *amicus* brief which I was asked to co-author. But somehow the press of immediate business has delayed that article and somehow there has not been enough time for outside-the-class brief writing. So, for the present, we will experiment with this idea in Rutgers • Camden legal writing courses.

9. Be prepared to break every rule about good legal writing where it is appropriate to do so. Infinitives can be split to achieve emphasis. Brevity should be disregarded where it makes writing dull. Foreign words, long words and words with roots in Latin and Greek may sometimes be used in preference to short Anglo-Saxon words. (There are even situations where four-letter Anglo-Saxon words are

completely inappropriate.) "It is unjust, sir," Samuel Johnson said, "to censure lawyers for multiplying words . . . ; it is often necessary for them to multiply words."¹⁹ But be aware of what you are doing and why you are doing it.

10. When you finish a piece of legal writing, stop. Of course there are legal concepts which have not been discussed and of course there are cases still unresearched. Of course you can always make the product better by rewriting it one more time. Of course there is an "i" left undotted and a "t" left uncrossed. But so be it. The end.

¹⁹ Boswell, *Life of Dr. Johnson* (1791).