Good Writing as a Professional Responsibility

Thomas Haggard

Under Rule 1.1 of the ABA Model Rules of Professional Conduct, "A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation." This applies to everything a lawyer does, including writing.

At a minimum, writing-related *competent representation* requires a lawyer to follow court rules concerning the format, content, and page length of a brief. Failing to do so can have disastrous consequences for the client. In *Henning v. Kaye*,[1] the supreme court suggested that it would be completely justified in dismissing the appeal because of appellant's numerous violations of the South Carolina Appellate Court Rules.

Procedural rules often go beyond content and format, and address the required style of some pleadings. Both the federal and South Carolina rules require that a complaint contain "a short and plain statement" of the claim or the facts,[2] and both require that "each averment of a pleading shall be simple, concise, and direct."[3] A New York federal district court recognized that inadequately pleaded factual allegations could take two forms:

> First, a complaint may be so poorly composed as to be functionally illegible. This is not to say that a complaint need resemble a winning entry in an essay contest. "[A] short and plain statement of the claim," rather than clarity and precision for their own sake, is the benchmark of proper pleading. . . . However, the court's responsibilities do not

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[1] 415 S.E.2d 794 (S.C. 1992).

[2] FED. R. CIV. P. 8(a); S.C. R. CIV. P. 8(a)(2).

[3] FED. R. CIV. P. 8(e)(1); S.C. R. CIV. P. 8(e)(1).

> include cryptography, especially when the plaintiff is represented by counsel.[4]

Another court described a complaint as "gobbledygook" and "gibberish" and noted in particular a one-sentence paragraph that filled the length of a legal-sized, single-spaced page.[5] Still another court noted that the plaintiff's third amended complaint was still too "wordy [and] repetitive," and that it went on for "sixty-four pages before reaching the first claim for relief."[6]

Other forms of bad writing can also get the lawyer into difficulty. Take wordiness, for example. Merely because the rules allow a brief of a certain length does not mean that the writer must fill all those pages with words. As one judge noted, "An attorney should not prejudice his case by being prolix. . . . Conciseness creates a favorable context and mood for the appellate judges."[7] Oliver Wendell Holmes condemned wordiness in these terms: "I abhor, loathe and despise these long discourses, and agree with Carducci the Italian poet . . . that a man who takes half a page to say what can be said in a sentence will be damned."[8] Some lawyers, however, stubbornly refuse to accept the instruction or heed the warning. In one case, the defendant sought Rule 11 sanctions because the plaintiff's counsel submitted "voluminous briefs" and "large, tedious affidavits" in support of baseless claims. Apparently not getting the point, the plaintiff responded with a 158-page brief justifying the original prolixity! The Seventh Circuit faulted this "windy, excessive

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[4] Duncan v. AT & T Communications, Inc., 668 F. Supp. 232, 234 (S.D.N.Y. 1987).

[5] Gordon v. Green, 602 F.2d 743, 744, 745 & n.7 (5th Cir. 1979) (requiring dismissal of the complaint, albeit without prejudice).

[6] Arena Land & Investment Co. v. Petty, No. 94-4196, 1995 WL 645678, at *1 (10th Cir. Nov. 3, 1995) (dismissing the complaint with prejudice).

[7] Commonwealth v. Angiulo, 615 N.E.2d 155, 168 n.17 (Mass. 1993) (quoting J.R. NOLAN, APPELLATE PROCEDURE 11, § 24 (1991)).

[8] Letter from Oliver Wendell Holmes to Frederick Pollock (June 1, 1917), *in* 1 HOLMES-POLLOCK LETTERS 245 (Mark DeWolfe Howe ed., 1941).

and voluminous style of practice" and imposed sanctions.[9] Another court noted that "[t]he briefs of both sides are prolix, verbose, and full of inaccuracies, misstatements and contradictions. The lawyering on behalf of both parties falls woefully short of the standards to which attorneys practicing before this court have been traditionally held . . . ."[10]

On the other hand, some lawyers do not write enough. As the First Circuit has noted, "It is not enough merely to mention a possible argument in the most skeletal way, leaving the court to do counsel's work, create the ossature for the argument, and put flesh on its bones."[11]

Clarity is one of the benchmarks of good brief-writing. Lawyers who fail to achieve it have been subjected to a variety of sanctions. A Vermont lawyer filed briefs that the court said were "generally incomprehensible."[12] To avoid sanctions, he agreed to a stipulation with the Vermont Professional Conduct Board that he would obtain instruction to cure his writing problems. Otherwise, he would be suspended until he could demonstrate his fitness to practice law.[13] A Minnesota lawyer who wrote "unintelligible" documents that showed a "lack of writing skill" was publicly reprimanded and ordered to take a course in legal writing.[14] Another court noted that the writing of several lawyers was "far below the quality of work that this Court is accustomed to seeing," with the court thus suggesting that they "give serious consideration to not practicing in

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[9] Brandt v. Schal Assocs., 960 F.2d 640, 646 (7th Cir. 1992).

[10] Allen v. G.H. Bass & Co., 176 B.R. 91, 95 (D. Me. 1994).

[11] United States v. Zannino, 895 F.2d 1, 17 (1st Cir. 1990) (dismissing appellant's claim of trial-court error).

[12] *In re* Shepperson, 674 A.2d 1273, 1274 (Vt. 1996).

[13] *Id.* at 1275.

[14] *In re* Hawkins, 502 N.W.2d 770 (Minn. 1993).

the United States District Court until such time as they have demonstrably enhanced their practice skills."[15]

Obscure writing can also cost lawyers and their clients money. One court assessed costs against an appellant because his lawyer filed a "poorly written" brief in which the "argument wander[ed] aimlessly through myriad irrelevant matters," creating an "unwarranted burden" on the court.[16] Likewise, the husband-lawyer in a divorce case was ordered to pay his wife's attorney fees because the "slap-dash quality" of his briefs made them "almost impenetrable."[17]

Although some lawyers still maintain that terms like *hereinafter*, *said*, and *aforementioned* are precise, traditional, and thus appropriate in legal writing, few courts agree. One court spoke disapprovingly of a litigant's habitual use of "legalese instead of English."[18] That court also said that the indictment was "grammatically atrocious" and, paraphrasing Shakespeare, added, "It cannot be gainsaid that all the perfumes of Arabia would not eviscerate the grammatical stench emanating from this indictment."[19]

In a similar vein, some lawyers still maintain that *and/or* is a precise term of art. Apart from being potentially ambiguous in some contexts, the term has also been the object of so much judicial invective as to cause the prudent lawyer to eschew its use totally. For example, consider the biting words of the Wisconsin Supreme Court on this subject:

> It is manifest that we are confronted with the task of first construing "and/or," that befuddling, nameless thing, that Janus-faced verbal monstrosity, neither word nor phrase, the child of a brain of someone too lazy or too dull to express his precise meaning, or too dull to know what he did mean, now commonly used by lawyers in drafting legal

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[15] Vandeventer v. Wabash Nat'l Corp., 893 F. Supp. 827, 859 n.43 (N.D. Ind. 1995).

[16] Slater v. Gallman, 339 N.E.2d 863, 864-65 (N.Y. 1975).

[17] Green v. Green, 261 Cal. Rptr. 294, 302 (Ct. App. 1989).

[18] Henderson v. State, 445 So. 2d 1364, 1367 (Miss. 1984).

[19] *Id.* at 1367 n.1.

> documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with [a] view to furthering the interest of their clients.[20]

A government lawyer's writing was found to be so bad as to violate the Due Process Clause in *David v. Heckler*.[21] Referring to the medicare notices that had been sent to the plaintiffs, the court said: "The language used is bureaucratic gobbledegook, jargon, double talk, a form of officialese, federalese and insurancese, and doublespeak. It does not qualify as English."[22]

Sloppy writing, in the form of a misplaced comma, created an ambiguity that led one court to deny a motion to convert a criminal complaint into an information.[23] Similarly, a missing serial comma in a statute created an ambiguity that led to expensive and unnecessary litigation in *Rowe v. Hyatt*.[24]

Missing apostrophes incurred the wrath of the court in *P.M.F. Services, Inc. v. Grady*: "[C]ounsel uses possessives without apostrophes, leaving the reader to guess whether he intends a singular or plural possessive . . . . Such sloppy pleading and briefing are inexcusable as a matter of courtesy as well as because of their impact on defendants' ability to respond."[25]

Another court lectured one of its former clerks for his writing derelictions, noting that the offending brief was "replete with over fifty examples of mistakes in punctuation, citation and spelling." The court encouraged him "to do credit to his former position by

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[20] Employers' Mut. Liab. Ins. Co. v. Tollefsen, 263 N.W. 376, 377 (Wis. 1935).

[21] 591 F. Supp. 1033 (E.D.N.Y. 1984).

[22] *Id.* at 1043.

[23] People v. Vasquez, 520 N.Y.S.2d 99, 102 (Crim. Ct. 1987).

[24] 452 S.E.2d 356, 358 (S.C. Ct. App. 1994).

[25] 681 F. Supp. 549, 550 n.1 (N.D. Ill. 1988).

applying greater attention to detail in his brief writing and proofreading efforts before the Bench."[26]

Judges are not immune from bad writing either. Consider this unpublished monstrosity from a Florida court:

> This cause coming on for hearing, on the Motion to Set Aside Default, the Court hearing arguments, finds that this is a very unique case involving issues of first impression concerning the validity of the Will, the nine charities who are asking the default to be set aside, assumed the Personal Representative would be protecting their interest under the Will, this is not the case and in order to protect any interest the nine charities may have under the Will, the default entered against these nine charities only will be set aside, it is therefore
>
> Ordered and Adjudged that the Motion to Set Aside Default is hereby Granted.

But judicial writing is another story — and another article.

[26] State v. Bridget, No. 70053, 1997 WL 25518, at *3 n.3 (Ohio Ct. App. Jan. 23, 1997).

Definitions

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Below are the accepted conventions for creating definitions.

Means

Use *means* to stipulate the complete and exclusive meaning of the term. This type of definition, sometimes called a restricting definition, is necessary when you are creating a new term without any existing referents, when a conventional term is excessively vague, and when you want to give a conventional term a particular meaning. Restricting definitions are custom-tailored to the unique needs of the document in which they appear.

> "Oceanside condominium property" means . . . [whatever the referents are going to be].
>
> "Indigent" means a person whose gross annual income is less than $5,000 [clarifying a vague term].
>
> "Building" means the structure located at 950 Taylor Street, Columbia, SC 29201 [giving the term a particular meaning].

Since a definition using *means* is both complete and exclusive, it must be drafted with all the possibilities in mind. Nothing can be added or deleted by interpretation.

> "Vehicle" means an automobile, bus, trolley, tram, or electrically driven cart.

Under this definition, a horse-drawn carriage would not be included. This might be a significant omission if one were attempting to draft an ordinance dealing with traffic congestion in Charleston, South Carolina.

Do not create a restricting definition if the term already has a commonly understood dictionary meaning. Consider, for example, the silly and totally unnecessary definition found in a certain federal regulation:

> ["Form" means] a piece of paper containing blank spaces, boxes, or lines for the entry of dates, names, descriptive details or other items.[1]

The reverse of defining the obvious is defining a term in a way that is totally at odds with its commonly accepted or dictionary definition. This kind of definition is sometimes labeled as a Humpty Dumpty definition, after the Lewis Carroll character who claimed that he was the absolute master of all the words he used. Consider the following definition taken from a federal statute:

> "September 16, 1940" means June 27, 1950.[2]

Many drafters erroneously use the term *shall mean* in definitions. The term *shall* is a term of command. Its use in a definition creates a false imperative. You are creating a definition, not commanding that it be created.

Includes

Use *includes* either to ensure that a particular referent is included within the meaning of a term with a conventional dictionary definition or to add to that definition something the term would not otherwise encompass. In both instances, this type of definition takes the core dictionary definition as its base point.

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[1] An Atomic Energy Commission regulation of years ago, *quoted in* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 149 (2d ed. 1986).

[2] H.R. 353, 474, 1624, 1882, 2335, 4171, 6391, 6757, 82d Cong. (1952), *quoted in* REED DICKERSON, THE FUNDAMENTALS OF LEGAL DRAFTING 141 (2d ed. 1986).

> "Employee" includes persons working on a part-time or temporary basis [ensuring inclusion].
>
> "Apartment" includes the hallway, stairways, and other common areas [adding something].

The drafter of enlarging definitions must also take care not to be guilty of Humpty Dumptyism. Consider the definition contained in an old English statute:

> "Cows" includes horses, mules, asses, sheep, and goats.[3]

The following South Carolina statute is not much better:

> "Tangible personal property" means . . . [and] includes services and intangibles . . . .[4]

Some drafters use the phrase *includes but is not limited to*. This is probably unnecessary but may be wise as a precautionary measure.

Does Not Include

This phrase is used in what are called confining definitions. They take the core dictionary or commonly understood meaning of a term as a base point and ensure that certain things are excluded.

> "Automobile" does not include taxicabs.

By giving careful thought to the type and the wording of definitions — and to which ones are really necessary — the drafter can greatly improve the substantive quality and usefulness of the document being drafted.

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[3] *Quoted in* FRANK COOPER, WRITING IN LAW PRACTICE 7 (1963).

[4] S.C. CODE ANN. § 12-36-60 (Law. Co-op. 2000).

The Ambiguous *And* and *Or*

Thomas Haggard

These simple and commonly used words are capable of enormous ambiguity. The legal writer must use them with caution, especially in drafted documents.

And

The word *and* may be construed as meaning either "jointly" or "severally." For example, if a will provides that *Bill and Mary receive $1,000*, does this mean that Bill and Mary share $1,000 jointly? Or does it mean that Bill and Mary each get $1,000? The will should either say, *Bill and Mary receive $1,000, to be shared jointly*, or say, *Bill and Mary each receive $1,000.*

Ambiguity may also arise when the reader cannot determine from context whether *and* is intended to identify several different entities or to identify the traits of a single entity. This is especially true when modifiers are used in an *and* phrase. A document, for example, might refer to *charitable and educational institutions.* Does this refer to institutions that are both charitable and educational? Or does it refer to two entities, charitable institutions and educational institutions? If the drafter intends to refer to a single entity, this intent can usually be expressed by drafting in the singular. *A charitable and educational institution* clearly refers to an institution that has both those traits. If two types of institutions are contemplated, this could be expressed as *charitable institutions and educational institutions.*

Similarly, an ordinance might provide that *every owner and operator of a taxicab must report annually.* Does the ordinance apply to a single entity, someone possessing the traits of being both an owner and an operator? Or does it apply to two entities, persons

who are owners and persons who are operators? Or does it possibly apply to all three entities?

Once aware of the ambiguity, the drafter can use a number of devices to avoid it. For example, identifying the entity or entities with a word that is different from the words used to describe the traits will often make the intent clear. This sentence identifies a single entity possessing multiple traits:

> A person who [entity] is both the owner and the operator of a taxicab [traits] must report annually.

In contrast, the following sentence identifies multiple entities, each possessing one or more traits:

> The following persons must report annually: a person who [entity #1] is the owner of a taxicab [trait], who [entity #2] is the operator of a taxicab [trait], or who [entity #3] is both the owner and operator of a taxicab [traits].

These two examples also illustrate the rule that *and* is used to enumerate the traits of a single entity, while *or* is used to enumerate multiple entities. Many times, the same concept can be expressed either way. *The list includes entities A, B, and C* enumerates three classes of included entities. And *the list includes each entity that is A, B, or C* enumerates a single class of entities possessing alternative qualifications.

Or

The word *or* may be used in the inclusive sense, meaning *A or B, and possibly both*. Or it may be used in the exclusive sense, meaning *A or B, but not both*. *Or* is usually construed in its inclusive sense. In drafted documents, however, use *A or B, or both* to express inclusiveness, and use *either A or B, but not both* to express exclusiveness — if there is any real risk of ambiguity.

A related ambiguity exists when *or* is used to connect classes of entities from which a selection is to be made. For example, a contract might provide, *Seller must ship 1,000 red or blue widgets.* If it is important to the buyer that all the widgets come from the same color class, then the contract should make that express by requiring the seller to ship *either 1,000 red or 1,000 blue widgets.* Otherwise, the seller might feel free to ship 500 of each color.

In Defense of the Lowly Footnote*

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The most common type of intrusion that one finds in legal writing involves in-text citations. Consider the following (from the South Carolina Court of Appeals):

> The primary focus of punitive damages is on the defendant's wrongdoing. F. Patrick Hubbard & Robert L. Felix, *Comparative Negligence in South Carolina: Implementing Nelson v. Concrete Supply Co.*, 43 S.C. L. Rev. 273, 314 (1992). By contrast, compensatory damages depend on the plaintiff's injury, not the defendant's behavior, and involve a different standard of proof. *Id.* at 314.
>
> Comparative negligence is the law in South Carolina. *Nelson v. Concrete Supply Co.*, 303 S.C. 243, 244-45, 399 S.E.2d 783, 784 (1991). While this Court has recently re-examined several traditional tort doctrines in light of *Nelson*, not every tort concept is affected by the adoption of comparative negligence. *Compare Fernanders v. Marks Constr. of S.C., Inc.*, 330 S.C. 470, 499 S.E.2d 509 (Ct. App. 1998) (joint and several liability survives adoption of comparative negligence) *with Davenport v. Cotton Hope Plantation Horizontal Property Regime*, 325 S.C. 507, 516, 482 S.E.2d 569, 574 (Ct. App. 1997) (7-2 decision), *cert. granted in part* (Aug. 8, 1997), *and Spahn v. Town of Port Royal*, 326 S.C. 632, 638-41, 486 S.E.2d 507, 510-12 (Ct. App. 1997), *aff'd as modified*, 330 S.C. 168, 499 S.E.2d 205, 208 (1998) (holding assumption of risk and last clear chance are merely factors for the jury to consider in apportioning negligence). We decline to impose a comparative negligence calculus on punitive damages because of the conflicting functions these legal concepts serve.

Consider now how that text could be enormously improved through the use of citation footnotes (the footnotes themselves are omitted):

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* *Editors' note:* For the same argument made in this article, see Bryan A. Garner, *The Citational Footnote*, 7 SCRIBES J. LEGAL WRITING 97 (1998–2000).

> The primary focus of punitive damages is on the defendant's wrongdoing.[1] By contrast, compensatory damages depend on the plaintiff's injury, not the defendant's behavior, and involve a different standard of proof.[2]
>
> Since the Supreme Court's 1991 decision in *Nelson v. Concrete Supply Co.*,[3] comparative negligence has been the law in South Carolina. While this Court has recently reexamined several traditional tort doctrines in light of *Nelson*, these cases show that not every tort concept is affected by the adoption of comparative negligence.[4] [Perhaps some brief discussion of these cases would be appropriate here.] Similarly, this Court declines to impose a comparative-negligence calculus on punitive damages because of the conflicting functions these legal concepts serve.

The content and reasoning of the footnoted version is vastly easier to follow than that of the unfootnoted version. And as the footnoted version demonstrates, if the court, date, or name of the case is important, it can easily be incorporated into the text — leaving the jumble of abbreviations, numbers, and parentheticals to the footnote.

Admittedly, footnotes have a bad name among brief and memorandum writers. Footnotes are said to be "too academic" and "disliked by judges." There is some truth in both claims. One does not have to look far to find law-review pages containing four or five lines of text, with the rest of the page filled with densely packed footnotes — tracing, perhaps, the history of the referenced legal doctrine back to the Norman Conquest or giving a full etymological treatment of a simple and commonly understood word like *is*. Busy judges and lawyers have no need for or patience with such pretensions. The conventional wisdom about the prevailing judicial attitude is reflected in a line from a famous judge who is purported to have said that if something is worth saying, say it in the text; otherwise, omit it.

On closer reflection, however, the objection is not to footnotes as such. The objection is to lengthy *textual* footnotes. And the objection is well founded. Upon encountering a footnote, the reader will do one of two things — neither of them good from an advocacy perspective. First, the reader might not read the footnote at all. If the

footnote contains important or even merely relevant information, it is lost on this reader. Second, if the reader does peruse the contents of the footnote and finds it to be irrelevant to the flow of the argument, then the reader will be both distracted and annoyed at being led down this blind alley. And even if the content is relevant, the constant necessity of jumping from text to footnote and back to text to get the full gist of the argument will quickly exhaust the reader's patience.

What footnotes should be used for are citations. If the reader knows this is all they contain, the reader is not even apt to glance at them unless a specific need for verification arises. Think of the discussion section of a brief or memorandum as a river, down which your argument will float like a barge containing goods. It should flow smoothly and efficiently from loading-port premises to the destination-port conclusion, going up major argument-tributaries only as absolutely necessary to off-load or on-load additional goods. Think of legal citations as rapids or dams, around which the barge must be portaged. Expensive and slow, these obstacles obstruct the flow of the goods, the ideas, that the barge is carrying. In less prosaic terms, legal citations only create annoying gaps that the reader must jump over while trying to follow the gist of your argument. This is not what you want to do as an advocate.