Notes & Queries

Exaggeration Is No Virtue, Moderation No Vice

The best advice I ever received about writing — advice that applies especially to legal writing — came from my freshman English professor at Duke University. I had always considered myself a skilled writer, having achieved small-pond success in high school. So I was taken aback when one of my early college essays was returned with numerous red marks. The most significant comment, and one I have never forgotten, concerned my use of the phrase *in the face of real danger*. The professor had circled the word *real* and written in the margin, "What other kind of danger is there?" That comment made me aware of unnecessary adjectives and adverbs and needless exaggeration, and have since deleted those embellishments from each essay, term paper, law-review note, legal brief, and now legal opinion. When I talk to law students, judge moot courts, instruct law clerks, and speak to even experienced lawyers, I often relate this story and suggest that they edit their briefs and arguments in a similar way.

Today we hear complaints about ineffective writing, prolixity, and poor grammar. But a greater problem is the exaggerated content and accusatory tone often found in court filings. Unquestionably, political and legal discourse has grown more shrill in recent years, and many litigators cannot resist joining in the cacophony. But such tactics degrade the legal profession. And they typically fail because they cause readers, especially judges, to view the entire argument with skepticism. When I read a brief in which the writer uses such phrases as *deliberately trying to mislead the court*, *create a straw man*, and *obfuscate the issues*, and makes other derogatory comments about the opposing lawyer, I usually point out that these accusations have no place in legal writing. Further, if the writer means what is written and it has some basis in fact, then the opponent should be reported to the state bar association or the appropriate ethics committee.

Another often-observed failing in legal writing, especially in briefs, is the use of such phrases as *clearly wrong*, *incontestable*, *patently absurd*, *clear to any first-year law student*, and the like. Issues are rarely so clear-cut. What those phrases do, of course, is insult in advance any judge who fails to adopt the writer's position, thus labeling the judge (before whom the writer may have to appear again) as someone who fails to recognize an argument that would be clear to any first-year law student and who

adopts a position that is patently absurd.

All lawyers should simply follow the advice of my freshman English teacher and, before filing any legal documents, delete unnecessary adjectives and exaggerated arguments. Although the writer may genuinely believe that an opponent's position is *patently absurd* and that any judge who does not agree knows less than a first-year law student, phrasing it that way may not be beneficial. The point can be made by characterizing an opponent's argument as, for example, *unsupported by the facts* or *against the weight of authority*. Likewise, an opponent should not be characterized as a charlatan or worse unless the writer is prepared to back up those statements. Issues will always exist about which reasonable minds can disagree, and disagree strongly, but following these suggestions not only enhances a litigant's prospects with the court, but also shows respect for the legal profession.

—Frank W. Bullock, Jr.
U.S. District Judge
Greensboro, North Carolina

Wolves in Sheep's Clothing

The functional definition of a politician is a public official who is too busy, besieged with issues on myriad topics, skeptical of new ideas, tired of old ones, fearful of error, but driven by the need to act responsively to challenges, and egocentric enough to believe that he or she can solve almost any problem. Let's assume that, functionally, judges are merely politicians in black robes.

Thirty years ago, beginning my first job as an advocate, I was lucky enough not only to get on with the state attorney general's office, but also to secure a rather high-profile assignment. The attorney general is an elected official in Washington, and he made it clear that if any issue with political ramifications arose, he wanted to be kept informed. I quickly learned what this meant: you had five minutes to convince him that he needed to take ten minutes for the problem. In short, you first had to get his attention. To do so, you had to use those five minutes to tell him both what the issue was and why he needed to listen. And if you failed to keep him informed — because you could not see the need or you could not be brief, simple, focused, and functional — you would soon see your high-profile assignment

evaporate. Mine did not. And these skills served me well.

Fifteen years later, preparing for my last appellate argument before going on the bench, I worked up a 30-minute oral argument, the time allowed by the court rules. I arrived for the argument, learned that I was second on the calendar, and discovered that the time allotted was 10 minutes — not 30. Thus, in a case involving the right of contribution among coguarantors (not a matter with which any member of the three-judge panel often dealt), I had 20 minutes to revise my argument from 30 to 10 minutes. Fortunately, despite a hideous factual puzzle about who paid what to whom and when, the legal problem could be stated simply: there was an exception to the blackletter rule, and the trial court had failed to apply it. I next told the appellate court that it did not need to sort out the factual mess, but simply to tell the trial court that the exception existed and to apply it. Short, simple, focused, and functional. It worked.

While in private practice, I represented two tenured college faculty whose positions had been eliminated in a "reduction in force." They were the only professors fired. They taught in subject areas essential to the college's mission, so their termination might seem odd. But they also happened to be the president and vice president of the local faculty bargaining unit.

A third-party hearing examiner had ordered reinstatement, the board of trustees had rewritten his findings of fact and ratified the dismissals, and the trial court had ruled that the board had that authority under the applicable statute. I had to petition the state supreme court for relief.

Here, the problem was more factual than legal. The appeal's essence was the absurdity of the school's factual position that this reduction in force had anything to do with money, as opposed to retaliation. We faced a conservative court that had not been inclined to look behind the face of the record in such cases. But I knew most of the justices, and I knew that if I could get two (both former legislators) of the three most conservative judges to look at it, then I had a fighting chance. The first hurdle was getting the court to grant review. The second was to explain the complexity of state funding for higher education — and overcoming the legal standard requiring deference to the board's decision.

Fortunately, I did not have time to write this brief. I had to hire help, and that help was an attorney who was a successful author of cloak-and-dagger fiction, but not so successful that he wasn't looking for part-time legal work. Working

from an outline of our arguments and our facts, he crafted a piece that was guaranteed to get the court's attention. Among other things, he described one of the college's principal arguments as a "rabbit punch to the kidneys." The brief, a joy to read, led the reader to the inescapable conclusion that the school's position was a subterfuge, and that given a second chance before the board with the proper standard of review, the professors would surely be reinstated. It worked.

Review was granted, and at oral argument it was clear that a majority of the court had not only read the briefs, but done so with great interest. The resulting give-and-take in the court's questions and my answers allowed me to focus its attention on our major point: that on these facts, remanding and limiting the board to the record before the hearing examiner was not only the fair thing to do, but legally correct as well.

It is also unfair to categorize all judges as merely enrobed politicians all the time in all their cases. But what is the harm in assuming that the shoe fits? Too often, appellate advocates seem to be primarily in search of a good grade for their briefs rather than trying to submit a winning one. Too often, even the most experienced blindly follow the appellate rules on form, allowing that form to shroud the substance of their argument. Too often, appellate advocates blindly follow the path of that shrouded brief in their oral argument. I tell practitioners that they have a choice: I can read it at 300 words a minute or at 3000, and they have the final five minutes of that reading time to convince me to pick the slower pace. I confess that the shoe fits me.

To get my attention, you have to give me a short, concise summary of your principal point at your earliest opportunity. That summary should also give enough essential factual information to understand the nature of the case. I need to know what solution you propose to the problem you present and that your proposal is finely enough crafted to minimize the risks of accepting it and compelling enough to overcome the risk of not adopting it.

This can be done — and done in such a way to ensure that the rest of the brief is anchored to that summary. One way is to begin your brief with a carefully crafted section entitled "Summary of Argument." If in writing that section you assume that judges are merely politicians and you design it to get their attention — keeping it short, simple, focused, and functional — then you will not be wasting precious pages, but rather engaging my interest. And if the other side doesn't use the

same approach, you may just have submitted the winning brief.

—C. Kenneth Grosse
Washington Court of Appeals
Seattle, Washington

The Litigation Writer: An Emerging Specialist

Good legal writing, like all writing, is a craft. And like the deft cross-examination or voir dire, it is a skill honed through years of practice, study, and commitment to excellence. But unlike the art of cross-examination and voir dire, most seasoned trial lawyers have spent little time developing the art of writing. Given that reality, and the importance of clear, crisp, persuasive prose in winning cases, trial lawyers should, in appropriate circumstances, hire a writing specialist.

Few litigators would dispute that clear and compelling briefs, memoranda, and affidavits are crucial in determining the outcome of cases. Why then is so much of this important work assigned to associates recently out of law school? Perhaps the custom makes sense where the stakes are small. But where there is a lot on the line, trial lawyers — who pay dearly for every other imaginable kind of expert — should not hesitate to hire a writing specialist. Typically, however, they do not. That can be a big mistake.

The mistake is the result of two factors. The first is a failure to see legal writing as a bona fide specialization. No one — let alone a self-confident and competitive trial lawyer — likes to hear that he or she needs help writing. "We're lawyers; we know how to write," they are likely to think to themselves. Should all lawyers be good writers? Ideally, yes. But realistically, as noted, good writing is a developed expertise, nurtured over the course of a career devoted to mastering the craft. It doesn't happen naturally or inevitably, just because one reaches a certain level of education. Indeed, many of the worst writers are Ph.D.'s. If the legal profession came to recognize legal writing as the specialty that it is, those who have studied and practiced the skill would be recognized for what they are — specialists. And they would be used and paid accordingly. It is time for that to happen. No need for trial lawyers to be defensive. The legal stylist, for instance, might not be expert at conducting depositions, managing discovery, picking juries, cross-examining witnesses, or making opening and closing statements.

The second factor that prevents trial lawyers from hiring a legal-writing specialist is, of course, money. Is hiring such a person a wise expenditure? The answer: It depends. In all cases, lawyers must spend money to get money. But in a case where *a lot of money* is at stake, refusing to spend a little extra for an accomplished legal writer may be dumb. If, on a posttrial motion or appeal, one risks losing a verdict worth several million or even several hundred thousand dollars, it doesn't make sense to refuse to spend a few extra dollars to file the most compelling, readable, persuasive papers.

Moreover, an independent, experienced litigation writer is much more than a wordsmith. Such a person brings a fresh perspective to bear — a perspective not unlike that of the judge. And because of his independence, the veteran litigation writer may be willing to tell trial counsel what an associate or fellow partner won't — where the trial counsel is most vulnerable, the line of argument unclear, weak, or downright illogical. So in big cases or in big moments in cases, where it is important to assemble lawyers with complementary skills, a veteran legal writer should be a part of the team.

—Stephen C. Halpern
Buffalo, New York

Prior Convictions and Tuna Fish

Cross-examining attorneys often ask a witness whether he or she has been convicted of any crimes bearing on veracity. In what has become universal legal custom, this classic form of impeachment is always said to entail evidence of the witness's *prior* convictions.[1] Indeed, the phrase is so established that courtroom insiders routinely refer to convictions as "priors."

William H. Rehnquist, Chief Justice of the United States, recently wrote an opinion for the Court about when a defendant may complain on appeal about a decision "to admit evidence of her *prior* felony conviction as impeachment evidence."[2] In that opinion, the Chief Justice wrote about impeachment with "prior convictions" 15 times. Chief Justice Warren Burger once used the phrase 12 times in one opinion.[3]

You will find it in the title, and not merely the text, of many law-review articles[4] and pattern jury instructions[5] on impeachment of witnesses. The Advisory Committee on the Federal Rules of Evidence has just promulgated a committee note summarizing the law governing "a trial court's decision to admit the defendant's *prior* convictions for impeachment."[6]

Prior? As opposed to which other convictions? When impeaching a witness with evidence of some conviction, *prior* is always redundant. (To make matters worse, statutes and court opinions often go further and refer to a person's "prior conviction record" when they simply mean his "convictions."[7] The tragic fact is that "a lawyer never uses one word when two or three will do just as well."[8])

Admittedly, the phrase arises in other contexts where it is not superfluous. For example, as the Supreme Court recently noted, a federal statute "prohibits possession of a firearm by anyone with a prior felony conviction."[9] When a person is prosecuted under that statute, it is common and sensible for the prosecutor to apprise the judge that the accused had several "prior convictions." This clarifies that those convictions, all of them necessarily dating from some point before *today* — that always goes without saying — *also* occurred before he was arrested with a gun.

But that is never true of convictions admitted under Federal Rule of Evidence 609. For impeachment purposes, convictions are admitted only for their tendency to tell us whether the witness is the sort of chap who can be trusted to tell the truth on the stand right here and now. Any conviction more than one second old — that is to say, *any* conviction — will do the trick. No judge this side of the Looking Glass has ever given a lawyer permission to impeach a witness by asking him about his *future* convictions. No wonder, therefore, that the word *prior* does not appear even once in Rule 609 ("Impeachment by Evidence of Conviction of Crime") or its original Advisory Committee Notes, both written when saner heads prevailed.

The same is also true, by the way, of impeaching a witness with evidence of "prior bad acts" and "prior inconsistent statements" — both of which are nonsensically redundant but well-worn staples of legal jargon. The Supreme Court just decided a case in which a witness was reportedly impeached with "his *prior* felony conviction and his *prior* bad acts."[10] Federal Rule of Evidence 613, "Prior Statements of Witnesses," refers repeatedly to impeachment of a witness with his *prior* statements, even though a witness has no statements that could be used against him except the ones he has already made. Sometimes I suspect that if the Rules of Evidence were drafted today, we would surely have a rule on "Prior Subsequent Remedial Measures."

In October 1998, I made this point, among others, in testimony before the Advisory Committee on the Federal Rules of Evidence, in

my unsuccessful attempt to dissuade them from mentioning "prior convictions" in the Committee Notes to Rule 103(a).[11] After the hearing, I had a pleasant chat about the matter with then Chair United States District Judge Fern M. Smith, now director of the Federal Judicial Center. Judge Smith pointed out with great sagacity that impeaching a man with his "prior convictions" is just as redundant as "tuna fish," but every bit as lodged in our legal lexicon. I fear that she is quite right, but I am not just yet prepared to abandon the fight for the maximum level of precision and clarity in the wording of the Rules and their supporting committee notes — at least not so long as we force all law students to take courses in legal writing *and* to read the Federal Rules of Evidence.

In one exotic jurisdiction, a government official once described her system of justice this way:

> "'It's a poor memory that only works backwards,' the Queen remarked. 'What sort of things do you remember best?' Alice ventured to ask. 'Oh, things that happen the week after next,' the Queen replied in a careless tone. 'For instance, now, . . . there's the King's messenger. He's in prison now, being punished: and the trial doesn't even begin till next Wednesday: and of course the crime comes last of all.'"[12]

To the best of my knowledge, that is the only jurisdiction where a sensible jurist would need to take pains to distinguish whether she is discussing impeachment of a witness with evidence of his *prior* convictions.

—James Joseph Duane
Virginia Beach, Virginia

1. *See* Fed. R. Evid. 609.

2. *Ohler v. United States*, 120 S.Ct. 1851, 1852 (2000) (also needlessly using the word "evidence" twice).

3. *Luce v. United States*, 469 U.S. 38, 39–43 (1984).

4. E.g., Robert Dodson, *What Went Wrong with Federal Rule of Evidence 609: A Look at How Jurors Really Misuse Prior Conviction Evidence*, 48 DRAKE L. REV. 1 (1999); Alan Hornstein, *Between* Rock *and a Hard Place: The Right to Testify and Impeachment by Prior Conviction*, 42 VILL. L. REV. 1 (1997); J. Walton Jackson, *Impeachment of a Witness by Prior Convictions Under Alabama Rule of Evidence 609: Everything Remains the Same, or Does It?*, 48 ALA. L. REV. 253 (1996); Rick A. Hammond, *Evidence of Prior Similar Conviction Is Admissible to Impeach Defendant If the Probative Value of Evidence Outweighs the Prejudicial Effect*, 64 MISS. L.J. 217 (1994); Edward E. Gainor, *Character Evidence by Any Other Name . . . A Proposal to Limit Impeachment by Prior Conviction Under Rule 609*,

58 GEO. WASH. L. REV. 762 (1990); Joan E. Ginsberg, *People v. Finley: Following the Leader — Prior Conviction Impeachment*, 1989 DET. C. L. REV. 227 (1989).

5. *E.g.*, UNITED STATES FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTION 29 (1987) ("Impeachment by Prior Perjury"); *id.*, Instr. 30 ("Impeachment by Prior Conviction (Witness Other Than Defendant)"); *id.*, Instr. 41 ("Defendant's Testimony: Impeachment by Prior Conviction").

6. AMENDMENTS TO FEDERAL RULES OF EVIDENCE 30 (May 2, 2000) (emphasis added) (Advisory Committee Notes to the Amendment to Federal Rule of Evidence 103(a); available at <http://www.uscourts.gov/rules/approved.htm>) (approved by the Supreme Court Apr. 17, 2000).

7. *E.g.*, 21 U.S.C. § 823(h)(3); *United States v. Wilson*, 107 F.3d 774, 783 (10th Cir. 1997); *Walker v. Deeds*, 50 F.3d 670, 673 (9th Cir. 1995); *United States v. Moore*, 936 F.2d 1508, 1515 (7th Cir. 1991).

8. *Coca Cola Bottling Co., Inc. v. Reeves*, 486 So. 2d 374, 383–84 (Miss. 1986).

9. *Old Chief v. United States*, 519 U.S. 172, 174 (1997).

10. *Portuondo v. Agard*, 120 S. Ct. 1119, 1122 (2000) (emphasis added).

11. For the text of my submission to the Advisory Committee, see James Joseph Duane, *Appellate Review of In Limine Rulings*, 182 F.R.D. 666 (1999).

12. LEWIS CARROLL, THE ANNOTATED ALICE: ALICE'S ADVENTURES IN WONDERLAND AND THROUGH THE LOOKING GLASS 248 (Martin Gardner ed., 1960).