ADVANCED LEGAL WRITING: The Muse and the Scribe

The law is complex and learning to think like a lawyer is a long, tedious, and sometimes exhilarating process. During that process, most of us become adequate legal writers. Becoming a skilled legal writer, however, requires an investment of work and time and conscious effort commiserate to that of learning to think like a lawyer. Legal writing is hard.

This presentation will focus on two issues pertaining to legal writing. First, what is good legal writing. Second, what skills does a legal writer need to write well. The first question is addressed from the viewpoint of the reader and his or her purposes. The second is met by examining the writing process and the techniques a writer can develop to meet the reader's purpose. As context for this presentation, consider the writing bankruptcy lawyers often do— preparing motions and memoranda to file in court asking a judge to grant or deny relief on a matter. A rather straight forward motion would be one for stay relief under section 362 of the Code to be decided as a contested matter under Rule 9014 of the Bankruptcy Code. A more complex motion would be one for summary judgment in an adversary proceeding under Part VII of the Bankruptcy Rules.

Who is the arbiter of what constitutes good legal writing? It can be only the reader, in this instance, the judge. So, what does a judge consider good legal writing. To that end, two West Virginia federal judges provided me with their views on what constitutes good legal writing. Their names are withheld to protect them from my errors.

VIEWS FROM THE BENCH

Judges read to gather the information needed to decide matters before them in furtherance of their job. They want to make reasonable and rational decisions—not necessarily the "right decision" but good decisions—and they rely on lawyers to help them. Accordingly, if a lawyer is writing to his audience, she or he must write so that a busy judge can extract the necessary information about the relevant facts, the

law, the matters in contention, the relief requested and why the lawyer is entitled to that relief. Judges do not have the time or patience, to wade around in a swamp of words to extract the information they need and want, nor should a lawyer expect them to.

Both interviewed judges agreed that they preferred to decide matters before them on written pleadings. As explained by one judge, written materials are like a book, with each side telling the court and each other their client's side of the story. These lawyerly books are a lasting point of reference to which a judge returns again and again in deciding a matter. Another judge noted that 90 percent of the time matters are decided on the written materials. Oral argument is held primarily because the lawyers request it although on occasion a judge may have a question that perhaps has not been adequately addressed in the briefing.

Judges are cognizant that this preference for deciding cases on written materials can disadvantage lawyers who are not adept at writing. In addition, solo practitioners or small firms may not have the time and resources to put out the polished materials that can be produced in larger firms. The nature of some lawyers' practice can mean their clients are not positioned to pay for the time required to address complex issues in a case. Unfortunately, a $100,000 legal issue is just as likely to arise in a $25,000 case as it is in a $500,000 case. Judges are sensitive to these situations, however, and will scale back their expectations based on the nature of a case and the lawyers involved.

What do judges want in the pleadings submitted to them? They want legal writing that is lucid, clear, and forthright, writing that is organized, writing that has a beginning, middle and end. To perform their duties, they need writing that is concise, pared to its essence with no excess verbiage or extraneous argument. Judges want a lawyer's strongest arguments or those most in contention, not every argument. If an argument is weak, bypass it. If necessary, concede a point, explicitly or implicitly. A lawyer can be

neither clear nor concise nor organized unless he or she knows what the case turns on. Refine your thinking and your argument.

Judges also want to know upfront what the case is about, and they want it in one or two paragraphs as a separate section in the beginning of your document. If a judge cannot determine what is in contention within the first few pages, the writer's hard work may be handed to a law clerk, and the lawyer won't be the one presenting her or his client's story or argument to the judge in the first instance. Instead, a law clerk will be summarizing it for the court at a later time, perhaps long after the judge has read the opponent's story. Accordingly, include a brief summary of your case with the determining facts and law, the matter in contention and the relief being requested in the first page or two of your pleading and again in the conclusion or prayer for relief. (Forever strike from your vocabulary the phrase: "For the foregoing reasons…")

The complexity of the case will at times dictate the burden on the court. Cases where the law is settled, and the primary issues are those of fact will be considered as more routine. However, judges are especially sensitive to cases where the law is not settled, perhaps a case where there is a split of authority as to the law, and the matter is unsettled in your district or circuit. Consider also the case where the issue is one of first impression, and precedent is scarce or nonexistent. The court knows that his or her decision may be looked to by other courts and perhaps become the basis for a minority or majority opinion. An example of this is the issue of third-party releases. This issue has arisen in many cases, small and large, and there are innumerable decisions on it at all levels. Now, with Purdue Pharma, the question is at the forefront and may likely be definitively resolved.

Lawyers have an important role to play in making law. In deciding cases, judges look to the lawyers to help them make those reasonable and rational decisions. As summed up in one legal writing source:

> "Legal writers have two competing obligations. They must do full justice to the complexity of their subject matter, no matter how torturous or ambiguous it is. Then they must transform all that complexity into a prose so lucid, so crisp and direct, that it will satisfy readers who demand absolute clarity even when—in fact especially when—the subject is most obscure".

Anderson, *Thinking like a Writer: A Lawyers Guide to Effective Writing and Editing*, PLI (3rd Ed.)

So how do lawyers write so clearly and concisely that a judge will heed? How do they write as well as think like a lawyer? I like to frame the legal writer's competing obligations in terms of the Muse and the Scribe.

THE MUSE

First, You Think.

A lawyer's writing can be neither clear nor concise nor organized unless he or she know what the case turns on. Until your thinking about the issues and the law is refined, your position and the issues in the case and your argument will be as fuzzy as your thinking; your writing will be neither concise nor organized nor lucid nor clear nor forthright nor unambiguous nor pared down. Your thinking must be focused on a clear understanding of the facts and the law, both the favorable and the unfavorable. Obsessiveness, the lawyer's hallmark, pays dividends here.

Investigate The Facts.

In addition to the usual fact sources developed through discovery in the case, if any, the court records in a bankruptcy case and in any related cases and proceedings, open or closed, can be a motherlode of admissible, indisputable facts. Look at statements, schedules, testimony (including the meeting of creditors) confirmed plans, disclosure statements, and orders.

Explore The Law.

With one exception, exploring the law means forever banishing from your vocabulary the phrase, "go find me a case that says…". That exception is when you are looking for a starting point. If an issue

involves a statute, read not only the citing cases but also the legislature history. The Committee Notes to the Bankruptcy Code are another motherlode for the legal writer. Read all the cases, pro and con, read dissenting opinions and footnotes. Find the cases that discuss any minority/majority positions. Read the original or the most cited decisions for both positions. You are looking for not just for case law to support your initial thinking on the case but for ideas and arguments that previously may not have occurred to you

Think Again.

Mull, contemplate, analyze, reflect; stir the facts and law around. Think out loud; talk your ideas. If you are so fortunate as to have other lawyers in your firm, bounce ideas against them; pop into their offices, interrupting them when they are up against a deadline; annoy them in the lunchroom and at the coffee station. If all else fails, catch them in the restroom. Jot down notes even if you may never find those scraps of paper again. Then do whatever it is you do to start the writing process, bearing in mind that you return again and again to the research and thinking and drafting and revising and editing as in an endless loop until you are satisfied with the finished product or time is up, whichever first occurs.

For purposes of the remaining discussion, think of two different types of writing. The first a motion for stay relief in a contested matter under section 362 of the Code. The second a motion for summary judgement under section 548 of the Code in an adversary proceeding. While both are motions, they are poles apart in terms of the thinking and analysis and work product required. And while both turn on the elements of their respective code provisions, the summary judgment motion is ultimately about whether the writer can show the relevant facts are not in dispute.

THE SCRIBE

If I had more time, I would have written a shorter letter.

~ Blaise Pascal 1657 (et al.)

In the Beginning

Drafting is a start. Here the writer starts translating his or her thinking into words and sentences and paragraphs on paper (or a computer screen). It is writing without regard to refinement. Lawyers have different methods of organizing their material and their thinking before the writing starts: outlines, excel spreadsheets, notebooks. The point is to start writing without attending to grammar or spelling or sentence structure or paragraphs. It is stream of consciousness. But if you consider that initial draft as your final product, stream of consciousness is how it will read to the judge. No judge wants to be flooded by the stream of a lawyer's unrefined thinking (the swamp analogy again).

An initial draft should have a rudimentary structure, an organization. Legal writers are graced with the structure imposed by their craft. First there is CREAC, which stated simply is: apply the principles to the facts and see where logic leads you. Second, legal writing is arranged around the elements of the law, be they elements of negligence, contract, or a statute. For example, the elements in contention on a section 362 stay relief motion will typically arise out of the requirements for stay relief set forth in section 362(d). the writer must decide which elements are most in contention. However, a threshold issue might be whether the interest in property subject to the stay relief motion is in fact property of the bankruptcy estate under section 541 and applicable state law. The writer first must be clear in his thinking, then he must make it clear in his writing that the nature of the debtor's interest in the subject property is a threshold issue to be addressed before the question of stay relief is reached. Note: the writer must incorporate the peculiar requirements of any local rules and general orders.

Revise

Revising a document involves a loop with the writer flowing back and forth between research and thinking and writing and thinking and revising and thinking and finally editing. At this point the lawyer's thinking becomes more focused and organized and the issues become more narrowed. The writing becomes organized around the specific issues and the matters in contention. Revising a document means focusing always on how the information is flowing through the reader's mind. The writer must revise his document so that his thinking and reasoning can be followed easily.

How does a lawyer write so that the judge can extract the information he or she needs quickly and efficiently without having to swim around in the writer's words? The good news is that there are techniques a writer can employ to write clearly, concisely, and, as an added benefit espoused by one source, engagingly. The bad news is that a lawyer must invest time and attention and energy and focus—work in other words—to learn and employ those techniques.

Just to be Clear

Clarity requires that the writer lead the reader along the path of his thinking. Following are but a few techniques that can be employed for that purpose.

- Create a framework; provide context so that the reader understands the significance and relationship among the details as he or she reads. As noted above, pleadings tell a story. That story should not be a mystery, however, where the significance of a clue is apparent only at the end.Your summary of the case at the beginning of the document is the first timber of your framework. The organization of your information and your document is another timber in the framework into which a reader can fit information.

- Follow a logical form, proving one point and then on to the next point that would logically follow. Move from the known to the unknown, whether from sentence to sentence, paragraph to paragraph or section to section. You are building your case.

- USE HEADINGS AND SUBHEADINGS (emphasis added) as signposts to guide the reader. These serve two important purposes. First, they enable the reader to follow your thinking and to know where you are going next. Second, they give the reader a break. One page of unbroken typeface is dismaying. Two or more are daunting. Numbering and bullet points serve to emphasize, to create order and again to break up the page. Block quotes serve the same purpose.

- Link sentences within a paragraph and paragraphs within a section with transitions. For example, connect sentences by repeating the subject of the prior sentence as you move into new information. Develop a paragraph with details and examples.

- Signal your turns to the reader. A classic example is the argument that starts with "Even if …" Signal your counter argument with a heading and with language that indicates where you are going. For example, "the Movant mistakenly relies on …." Words and phrases such as "in addition" and " finally " are signals to the reader. Parallel structures connect ideas.

- Keep sentences simple and direct. The subject and verb should not be submerged in a sea of text.

- Learn to paraphrase. It is a skill that will help you summarize your argument and explain case holdings clearly and succinctly.

Then be Succinct

In addition to clarity, your writing should be succinct. This requires that every superfluous word, phrase, sentence, paragraph, or argument be culled. A prepositional phrase can become an adjective. An infinitive can become a a noun. Four words can be replaced by one precise word (cull). Substitute a verb for a noun. Three sentences can become one and three paragraphs can become two or one or none. It's a fun game.

Conciseness also requires that the writer focus on issues that are dispositive of the case or those actually in contention. News flash: judges know the standard governing a motion for summary judgment.

Be Engaging, not boring

Finally, your writing should be interesting to the reader, even if the subject matter is mundane. Make the story interesting. Make the abstract, concrete. Provide examples, details, specifics. Appeal to the emotions, though not the prejudices. The writer can make a dispute between two corporation engaging by bringing it to the human level (corporations are people, too). This can be done with analogies or hypotheticals. For example, what would be the impact of your opponent's position if it were applied on the personal level. A note to the wise, do not disparage or dismiss or ridicule your opponent or the other party. At best, a judge will ignore it. At worse, it reflects poorly on the writer.

The rhythm and cadence of writing can also keep a reader reading with interest. Writing can appeal to the auditory senses. Repetitions, colorful words and phrases that paint pictures, short sentences interspersed between longer ones. Parallel structures. Think of Martin Luther King's "I Have a Dream" speech.

<u>Edit</u>

Editing is the finish work. This is where the document is spell checked and grammar checked

And punctuation checked and verb tense checked and subject-verb agreement checked, etc. Some computer programs do an excellent job editing. However, the English language is nuanced, and a human mind needs to follow up behind the artificial intelligence. An omitted "is" will send a reader backtracking to make sense of a sentence without its verb. Too many of these and the writer risks losing the reader.

CONCLUSION

In summary, the legal writer's task is to write so that the judge can quickly and easily extract the information she or he needs to make a good decision. To do so the writer first must refine and organize her or his thinking. Then he or she must learn the style and techniques necessary to write lucidly, succinctly and (hopefully) engagingly, thinking always of how the information in his document is laid out for his reader to absorb.

How does a legal writer learn to write like a lawyer? Critical reading comes first, then study and practice.

Lawyers read. It is not only an integral part of their job but part of their lives. Learn to read with a critical eye, not only as to the material's content (the content of the material) but also as to the writing's quality from a reader's perspective and a student's perspective. As a legal reader, when were you confused, what was ambiguous, where were you lost, when were you skim reading, at what point did you put it aside? If you judged the writing as good, what qualities made it good.

As a student of writing, study writing. The resources listed at the end of this material are excellent and offer information at varying levels of complexity and comprehensiveness. A couple provide exercises. Mentally revise what you read. Revise everything you write. It only takes a few seconds to substitute a precise word for the word "thing" in a text or to combine two sentences into one. In an age in which people are substituting texts and emails for phone calls and face to face meetings, it is vital that lawyers write clearly and concisely.

This author notes that the tone and rhythm of her writing ~~has been~~ was informed by the fact that her information will be presented orally ~~[that she will be presenting her information orally].~~ Many grammar rules ~~Many of the rules of grammar~~ were [~~have been~~] ignored to achieve the rhythm and cadence of the spoken word.. The writing is less formal with (t~~he use of~~] asides and what is intended as sly humor. I have alternated between the third and second person and now the first person, a practice ~~that first year writing course says is verboten~~ [~~that is~~] forbidden in any first year writing course. The document [~~It~~] is [~~has been kept~~] purposefully short in the hope that [~~it will be read~~} the audience will be read it with a critical eye, or just read it. Brackets and strike throughs in this paragraph show [~~This paragraph is an example of revisions I~~] the revisions and deletions made while [~~while~~] [~~during the few minutes I spent~~] ~~I~~ [~~was writing~~] ~~wrote~~ writing this paragraph. ~~[The brackets show what words and phrases were deleted and revised].]~~

I welcome you to revise any page or two of this document and email them to me. The address is suzannetrowbridge@gmail.com.

THE END.

RESOURCES

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