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WRITING LIKE A LAWYER

John D. Feerick†

I approach this subject from a number of perspectives: as a contributor to legal writing—hopefully not bad legal writing; as a legal educator; as a reviewer and sometimes editor of bar association reports; as a former practicing lawyer; and as a sometimes participant in the process of drafting legislation and quasi-judicial decisions.

I begin by conceding that there is a problem of bad legal writing—one that is far more serious than we recognize or are willing to admit.¹ The causes include insufficient education in good writing, carelessness, faulty thinking and reasoning, a failure to appreciate the potential and impact of legal language, an unwillingness to risk new language, and an inability or failure to make the time commitment required for good legal writing. The problem of poor legal writing is not unique to our generation, as we know from the reflections of such literary giants as William Shakespeare and Charles Dickens. Thomas Jefferson complained that “statutes . . . from their verbosity, their endless tautologies, their involutions of case within case and parenthesis within parenthesis are rendered more perplexed and incomprehensible not only to common readers, but to the lawyers themselves.”²

Jefferson’s remarks still ring true today, and the legal profession continues to struggle with the issue. Indeed, it seems to have become part of our popular culture that when one individual says to another, “You think like a lawyer,” it is taken as a compliment; when that individual states, “You write like a lawyer,” however, it is a serious criticism.

Good legal writing is a virtual necessity for good lawyering. Without good legal writing, good lawyering is wasted, if not impossible. Good lawyering appreciates and is sensitive to the power of language to persuade or antagonize, facilitate or hinder, clarify or

† Many of my colleagues contributed to my thinking as expressed in this paper. I am especially grateful to Professors Daniel Capra, James Cohen, Carl Felsenfeld, Jacqueline Nolan-Haley, Rachel Vorspan, administrators Robert Cooper, Patti Maslinoff, law student Lisa Lazarus and all of Fordham Law School. I also thank Alan Rothstein, counsel at the Association of the Bar of the City of New York.

1. For example, 12 U.S.C. § 24 (1988) contains a sentence with 32 commas and 856 words.

2. THOMAS JEFFERSON, AUTOBIOGRAPHY (Paul L. Ford, ed. 1892).

confuse, reveal or deceive, heal or hurt, inspire or demoralize. Of course, language has its limitations. What we mean and think we say may be different from what is heard or read and understood. Different individuals may give different interpretations to language, seeing it from their particular circumstance or context.

Some language that seems to be bad legal writing is not that at all. Vagueness or ambiguity is sometimes deliberate. It may result from compromises which are necessary to resolve a present dispute even though the possibility of future disagreement or even litigation is left open. I can recall often negotiating as a labor lawyer for an ambiguity in order to avoid a costly and damaging strike. The Framers of the Constitution, as we know, gave us a document not free from ambiguity.³ It created our Republic while leaving to future Congresses and courts the development of its full meaning.

Finally, the complexities and hurried circumstances of life may overtake the very best of efforts at effective use of written language. This was brought home to me as a young lawyer when I studied the succession provision of the United States Constitution.⁴ The provision was adopted in the closing days of the Constitutional Convention.⁵ It provided that in case of the removal of the President from office, or of his death, resignation or inability to discharge the powers and duties of the said office, "the same shall" devolve on the Vice President.⁶ The use of the pronoun "the same" left unclear exactly what devolved on the Vice President in a case of removal, death, resignation or inability. Was it the powers and duties of the President, which meant he became an acting President, or the office itself, which meant he became President. The ambiguity had the effect of discouraging vice-presidents, for 180 years, from standing in for the President in cases of inability.⁷ When the 25th Amendment finally resolved the ambiguity, it cre-

3. See, e.g., U.S. CONST. art. I, § 8 ("to regulate commerce"); U.S. CONST. art. II, § 6 ("inability to discharge powers and duties of" President); U.S. CONST. art. II § 4 (impeachment for "high crimes and misdemeanors"); U.S. CONST. art. IV, sec. 2 ("privileges and immunities" of citizenship); U.S. CONST. art. IV § 4 (a "Republican form of Government").

4. See FROM FAILING HANDS: THE STORY OF PRESIDENTIAL SUCCESSION (1965); THE TWENTY-FIFTH AMENDMENT: ITS COMPLETE HISTORY AND APPLICATIONS (1992), both written by the author of this essay.

5. See U.S. CONST. art. II, § 1, cl. 6.

6. *Id.*

7. See generally FROM FAILING HANDS, *supra* note 4. Chester A. Arthur declined to assume presidential authority during the 80 days President James Garfield lay in a coma; and Thomas R. Marshall studiously avoided acting as President after Woodrow Wilson suffered a disabling stroke. *Id.* at 118-29, 166-79.

ated another issue by using the disjunctive either/or in describing the procedure for declaring a president disabled.⁸ The Amendment provided for a declaration of inability either by the Cabinet or such other body as Congress may provide by law. The use of "either/or" opened the possibility of two bodies with authority existing at the same time. When this language emerged in the conference committee report, days of congressional debates were required to make clear the intent of the provision; that is, if another body were created by Congress, it would replace the Cabinet entirely in making the determination of a president's inability.⁹

At the core of all writing is communication. For lawyers, communication is essential for many purposes: to help a client understand his or her legal situation; to resolve legal problems; to set out rights and obligations in contracts, wills, and other legal documents; and to draft laws and regulations that cover the rules the government wants us to live by.

A failure to communicate can have serious consequences. Poor legal papers can be refuted by opposing counsel, cast a case in the wrong light before a judge, and affect a lawyer's credibility. Billions of dollars can turn on the interpretation of a carelessly drafted phrase in a will or contract. An improperly drafted release can expose a client to a lawsuit thought to be precluded. Unclear laws can breed unclear regulations, unnecessary litigation, and perhaps more unclear laws. For example, in the Federal Rules of Evidence, Congress wrote a rule which covered impeachment of a defendant.¹⁰ It was designed to cover only criminal defendants but the rule did not say that.¹¹ After ten years of costly litigation and absurd results, the Supreme Court finally had to decide that Congress really had meant "criminal" defendant.¹²

Bad legal writing can result in increased legal fees for clients, detrimental reliance by citizens, thousands of hours of court resolution, loss of integrity for our legal institutions, and a disrespect for

8. U.S. CONST. amend. XXV, § 4.

Thereafter, when the President transmits to the President pro tempore of the Senate and the Speaker of the House of Representatives his written declaration that no inability exists, he shall resume the powers and duties of his office unless the Vice President and a majority of either the principal officers of the executive department or of such other body as Congress may by law provide, transmit . . . their written declaration that the President is unable to discharge the powers and duties of his office.

9. See 111 Cong. Rec. 15383-85 (1965).

10. FED. R. EVID. 609.

11. See *id.*

12. *Green v. Book Laundry*, 490 U.S. 504 (1989).

law and lawyers. Lawyers who do not write clearly also leave themselves open to malpractice or disciplinary proceedings for, among other things, misleading or failing to inform clients. There is obviously a strong ethical and professional incentive for lawyers to engage in good legal writing. This may mean in a lawyer's mind that it is necessary to cover every contingency, regardless of whether it could reasonably arise, and to assert every possible point for fear it otherwise will be waived, no matter how attenuated. The result may be boilerplate clauses which have not been used in years, residue clauses where there is no residue, or briefs with countless theories and points of law. Not to cast a broad net, so to speak, runs the risk of leaving a client unprotected or without a cause of action that the client reasonably expected to have.

To be sure, attempts to protect a client's (or lawyer's) interest can result in excessive legalese. The writing in plain English movement, in which Duncan McDonald has been a leader, offers a worthwhile approach for solving this dilemma. But I am not sure we can or should eliminate the legalese that is found in many transactions. Some of this language may have settled and established meaning from previous business dealings or litigation. Moreover, the institutional pressures, regulatory concerns, and sophistication involved in complex business transactions often require the use of technical legal language. While such language can be used excessively, it does not follow that the use of technical writing is always bad legal writing.

Having said all of this, how do we deal with the problem of bad legal writing? My reflections are as follows:

At the law school level, legal writing must be given greater emphasis. We cannot be content to say that students should have learned to write as part of their secondary and college education. If our programs are not able to deal with poor command of language, grammar, and syntax, perhaps we must set a higher standard for law school applicants than exist at the present time. Our nation's medical schools have long required of their applicants a core curriculum which includes English and other courses deemed necessary to meet the educational and professional goals of physicians. Because good writing is necessary to meet the standards of the legal profession, shouldn't we expect that basic training in writing be fundamental for all lawyers?

Second, we must acknowledge at the law school level that the development of legal writing skills requires a significant time commitment. Time is the single most important adversary of every stu-

dent, professor, and practitioner. We compete against it, order our lives around it, and develop our priorities according to its dictates. These priorities often discourage the improvement of writing skills and perpetuate bad legal writing. It is my experience that most full-time faculty are reluctant to teach legal writing. Professional reputations are usually decided not by teaching writing skills to others, but by producing scholarly articles. The result is that legal writing programs often are not given the same emphasis as other areas of the law school curriculum. This may be changing, however, as a result of the increasing recognition that further initiatives are needed in the legal writing area.

At Fordham, for example, we have been helped by new programs and have implemented this year a number of new writing initiatives. These include a program of on-site tutoring in basic writing skills for first year students who are identified by legal writing instructors as in need of such support.¹³ The tutoring sessions are conducted by instructors from Fordham University's Writing Center.¹⁴ In addition, legal writing instructors at the Law School will be required to attend a series of workshops and seminars offered by members of the English and Comparative English Departments of Fordham University.¹⁵ The members of these Departments also will participate directly in our first year legal writing program by holding class sessions on particular topics identified as useful for each section's students.

In addition, we plan to experiment with integrating a "lawyering" component into the first year legal writing course. This will "contextualize" the writing that students do by having them draft documents in the context of a simulated litigation experience. We are also offering a number of advanced legal writing courses for upper class students, including civil litigation drafting, criminal liti-

13. Students are identified by their legal writing professors as needing special support after they have submitted their first writing assignment.

14. The program is voluntary in nature, with the student working out an appropriate schedule with the tutor that reflects his or her individual needs. Although the program initially was to be mandatory, this was rejected because it might stigmatize students and require additional work without awarding credit. In point of fact, all of the students designated by their professors in the Fall of 1993 semester willingly signed up for the program.

15. The seminars that the instructors are required to attend have included the following subjects: classroom techniques for teaching legal writing (such as writing workshops and peer editing); strategies for conducting student conferences; effective techniques for editing student papers; ways to develop appropriate criteria for grading writing assignments; and methods of assisting students whose basic writing skills are deficient or who have problems with the writing process.

gation drafting, advanced memo writing, legislative drafting, and corporate drafting. These courses will require students to draft and redraft a series of documents in particular substantive areas. We have concluded that a program of specialized drafting courses can serve as a highly effective vehicle for teaching substantive principles of law as well as basic writing and drafting techniques.

In addition to these courses, we have implemented a rigorous upper class writing requirement that obligates each student to participate in a program of supervised analytic writing as a prerequisite to graduation.

Clinical legal education programs need to expand their coverage of fact analysis to enhance the writing skills of future lawyers. Bad legal writing frequently reflects a lack of appreciation for the importance of the facts. As far as I am aware, only a few law schools offer courses in fact analysis, let alone require students to analyze facts in writing. Indeed, most first-year legal writing courses continue to focus on case analysis in such a way that it must appear to students that the "facts" are immutable.

As Professor Anthony Amsterdam of New York University has urged, law schools must systematically begin to teach analysis of facts and to teach students how to do it in writing.¹⁶ These skills should be taught because they are very different than the skills of case or doctrinal analysis. Fact analysis requires the ability to engage in different problem-solving techniques, such as brainstorming, ends-means thinking, cost-benefit analysis, risk-calculation, problem identification analysis, and integration of legal analysis with factual investigation.

At many schools the only courses which require students to engage in fact analysis are ones in which students represent clients under the supervision of a member of the faculty. In these courses students learn the different problem-solving techniques appropriate to fact analysis and engage in writing which requires such analysis. Legal doctrine and case analysis, although important, need to be accompanied by training in the development of facts and inferences.

But the issue of bad legal writing is more than a law school's problem to solve. Practicing lawyers have a responsibility to produce legal writing that meets professional standards. I will never

16. Professor Amsterdam is a national leader in Clinical Education and is a strong advocate of teaching the full range of lawyering skills in law school. See, e.g., Anthony Amsterdam, *Clinical Legal Education—A 21st Century Perspective*, 34 J. LEGAL EDUCATION 612 (1984).

forget the assistance I received as a young lawyer from two experienced lawyers¹⁷ who supervised my work. They brought home to me repeatedly the message that legal writing must be clear, precise, factually-based, and ethically sound. They never allowed a document to go to a client, court, or regulatory agency without the fullest review of its language and content. I watched them change my words, sharpen my sentences and reduce the number of pages of my written work, stripping it of all its verbosity and repetition. These lawyers, and others like them, passed along to every one with whom they worked the highest aspirations of the legal profession. While their kind of leadership may be hard to match, I suggest that a failure of law firms and legal supervisors to apply such principles may result in a violation of professional standards. Just recently, for example, the Professional Responsibility Committee of the Association of the Bar of the City of New York recommended that the Lawyer's Code of Professional Responsibility be amended to make law firms subject to disciplinary standards such as a failure to supervise its lawyers or non-lawyers in their work.¹⁸

Despite enormous obstacles to improving legal writing throughout the legal system, I remain optimistic that we can do something about the problem. Perhaps there may be a time in the future where there is no distinction in the popular mind between "writing like a lawyer" and "thinking like a lawyer." I am unwilling, however, to predict when that is likely to happen!

17. They were Leslie H. Arps and William R. Meagher of Skadden, Arps, Slate, Meagher & Flom.

18. See 48 Rec. Ass'n B. City of New York 628 (1993).

