Good Writing as a Professional Responsibility

By Thomas Haggard

U
nder Rule 1.1 of the ABA Model Rules of Professional Conduct, “A Lawyer shall pro-
vide competent representation to a client. Competent representation requires the legal knowledge, skill, thorough-
ness and preparation reasonably necessary for the representation.” This applies to every-	hing 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. Failure to do so can have disastrous consequences for the cli-
ent. In Henning v Kaye, the Supreme Court suggested that it would be completely justi-
fied in dismissing the appeal because of ap-
pellant’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 South Carolina and the federal rules require that a complaint contain “a short and plain statement” of the claim or facts and that “each averment of a pleading shall be simple, concise, and direct.” A New York federal district court recog-
nized 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 bench-
mark of proper pleading. However, the court’s responsibilities do not include cryptog-
raphy, especially when the plaintiff is repre-
sented by counsel.

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 typed page. 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.”

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 of those pages with words. As one judge noted, “An attorney should not prejudice his case by being pro-
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text and mood for the appellate judges.”

A Vermont lawyer who wrote “unintelligible” briefs was “far below the quality of work that its bones.”

“Plain Language” is a regular feature of the Michigan Bar Journal, edited by Joseph Kimble for the State Bar’s Plain English Committee. The assistant editor is George Hathaway, chair of the committee. The committee seeks to improve the clarity of legal writing and the public opinion of lawyers by eliminating legalese. Want to con-
tribute a plain English article? Contact Prof. Kimble at Thomas Cooley Law School, P.O. Box 13038, Lansing, MI 48901. For information about the Plain English Committee, see our website—www.michbar.org/committees/penglish/ pengcom.html.

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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.” 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 demon-
strate his fitness to practice law. A Min-
nesota lawyer who wrote “unintelligible” documents that showed a “lack of writing skill” was publicly reprimanded and ordered to take a course in legal writing. Another court noted that the writing of several law-
yers was “far below the quality of work that this Court is accustomed to seeing,” with the court thus suggesting that they “give seri-
ous consideration to not practicing in the United States District Court until such time as they have demonstrably enhanced their practice skills.”

Obfuscure 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. Likewise, the husband-lawyer in a divorce case was ordered to pay his wife's attorney fees because the "slapdash quality" of his briefs made them "almost impenetrable." 

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." 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." 

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 complaint into an information. Similarly, a plaintiff's attorney fees because the "slapdash quality" of his briefs made them "almost impenetrable." 

A government lawyer's writing was found to be so bad as to violate the Due Process Clause in a Florida court:

**FOOTNOTES**

2. FR Civ P 8(a); SCR Civ P 8(a)(2).
3. FR Civ P 8(e)(1); SCR Civ P 8(e)(1).
5. Gordon v Green, 602 F2d 743, 744 & 745 n 7 (CA 5, 1979) (requiring dismissal of the complaint, albeit without prejudice).
8. Letter from Oliver Wendell Holmes to Frederick Pollock (June 1, 1917), in 1 Holmes-Pollock Letters 245 (Mark DeWolfe Howe ed 1941).
11. United States v Zannino, 895 F2d 1, 17 (CA 1, 1990) (allowing the complaint to be set aside).
12. Id. at 1043.
13. Id. at 1275.
19. Id. at 1367 n 1.
22. Id. at 1043.
25. 681 F Supp 549, 500 n 1 (ND Ill 1988).