Good Writing as a Professional Responsibility

By 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. Failure 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 South Carolina and the federal rules require that a complaint contain "a short and plain statement"[2] of the claim or the facts and 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 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 typed 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 of 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 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 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

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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 documents, through carelessness or ignorance or as a cunning device to conceal rather than express meaning with 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 *PMF Servs, 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 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*
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> *ORDERED AND ADJUDGED that the Motion To Set Aside Default is hereby Granted.*

But judicial writing is another story—and another article. ✦

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FOOTNOTES

1. 415 SE2d 794 (SC 1992).
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).
4. *Duncan v AT & T Communications, Inc,* 668 F Supp 232, 234 (SD NY 1987).
5. *Gordon v Green,* 602 F2d 743, 744 & 745 n 7 (CA 5, 1979) (requiring dismissal of the complaint, albeit without prejudice).
6. *Arena Land & Investment Co v Petty,* No 94-4196, 1995 WL 645678, *1 (CA 10, Nov. 3, 1995) (dismissing the complaint with prejudice).
7. *Commonwealth v Angiulo,* 615 NE2d 155, 168 n 17 (Mass 1993).
8. Letter from Oliver Wendell Holmes to Frederick Pollock (June 1, 1917), in 1 *Holmes-Pollock Letters* 245 (Mark DeWolfe Howe ed 1941).
9. *Brandt v Schal Assocs,* 960 F2d 640, 646 (CA 7, 1992).
10. *Allen v G H Bass & Co,* 176 BR 91, 95 (D Me 1994).
11. *United States v Zannino,* 895 F2d 1, 17 (CA 1, 1990) (dismissing appellant's claim of error below).
12. *In re Shepperson,* 674 A2d 1273, 1274 (Vt 1996).
13. Id. at 1275.
14. *In re Hawkins,* 502 NW2d 770 (Minn 1993).
15. *Vandeventer v Wabash Nat'l Corp,* 893 F Supp 827, 859 n 43 (ND Ind 1995).
16. See *Slater v Gallman,* 339 NE2d 863, 864–65 (NY 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.
20. *Employers' Mut Liab Ins Co v Tollefsen,* 263 NW 376, 377 (Wis 1935)
21. 591 F Supp 1033 (ED NY 1984).
22. Id. at 1043.
23. *People v Vasquez,* 520 NYS2d 99, 102 (Crim. Ct. 1987).
24. 452 SE2d 356, 358 (SC Ct. App. 1994).
25. 681 F Supp 549, 500 n 1 (ND Ill 1988).
26. *State v Bridget,* No 70053, 1997 WL 25518, at *3 n 3 (Ohio Ct. App. Jan. 23, 1997).