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PERSPECTIVES

"Poor writing by an attorney can result in … the court sanctioning the attorney; the client losing his or her legal claim; or the client becoming involved in unnecessary litigation."

Consequences of Ineffective Writing[1]

BY WENDY B. DAVIS

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Daniel Webster said, "The power of a clear statement is the great power at the bar."[2] Writing clearly and concisely is not only good business practice but also an aspect of the competence in legal skills that is an ethical obligation of all attorneys.[3] Law school legal writing courses attempt to teach students effective writing. Courts have reinforced the need for effective writing by imposing sanctions for verbosity, lack of organization, and grammar and citation errors.[4]

There was a time when legal writing was intentionally verbose and obscure, to distinguish lawyers from nonlawyers. Only another lawyer could understand the lengthy documents filled with Latin and legalese, thereby ensuring that all parties would seek legal counsel. Courts now demand brevity, and clients demand plain English. Courts have commended parties for clear and concise writing. For example, a Massachusetts judge favorably quoted an appellate procedure textbook that stated: "An attorney should not prejudice his case by being prolix. … Conciseness creates a favorable context and mood for the appellate judges."[5] Courts have indicated their displeasure with wordiness[6] and lack of clarity[7] in briefs and pleadings.

Poor writing by an attorney can result in any or all of the following: the court sanctioning the attorney; the client losing his or her legal claim; or the client becoming involved in unnecessary litigation.

Attorney Sanctions

No rational attorney would intentionally anger or frustrate a judge who is deciding his or her case. If that is not sufficient incentive to write well, numerous regulations impose requirements on lawyers' writing. The Federal Rules of Civil Procedure require a short and plain statement of the claim in a simple, concise, and direct manner.[8] A federal statute allows courts to impose costs and attorney's fees on lawyers who unreasonably multiply proceedings.[9] Many courts impose page limits on briefs.[10] Lawyers who exceed the required page limits, or manipulate their writing by using smaller margins or fonts to squeeze their documents to fit the page limits, have been subject to sanction, such as fines that they are prohibited from passing on to their clients.[11]

In *Laitram Corporation v. Cambridge Wire Cloth Company*,[12] for example, the court imposed a fine of $1,000 each on the lawyers who signed briefs for both parties, because the briefs lacked references to the record, relied on attorney argument as evidence, and cited inapplicable authority. The court stated that "counsel have in this case wasted this court's resources by playing in the rarified atmosphere of a debating society."[13] The district court's decision was vacated and remanded.

In *Julien v. Zeringue*,[14] the court imposed financial sanctions, equal to the defendant's attorney's fees, against the plaintiff's counsel.

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1 A different version of this article was included in the *New York State Bar Journal*, January 2000, volume 72, number 1, published by the New York State Bar Association, One Elk Street, Albany, New York, 12207.

2 *Quote It! Memorable Legal Quotations* 18 (Eugene C. Gerhart ed., 1987).

3 "A Lawyer shall provide competent representation to a client." Model Rules of Professional Conduct Rule 1.1 (1983). It is certainly arguable that writing skills are one aspect of competent representation.

4 For an excellent discussion of this subject, see Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 Suffolk U. L. Rev. 1 (1997).

5 Commonwealth v. Angiulo, 615 N.E.2d 155, 169 n.17 (Mass. 1993) (quoting J.R. Nolan, *Appellate Procedure* § 24, at 11 (1991)).

6 *See* Gordon v. Green, 602 F.2d 743, 744–45 (5th Cir. 1979).

7 *See* Slater v. Gallman, 339 N.E.2d 863, 864 (N.Y. 1975).

8 Fed. R. Civ. P. 8(a), (e)(1).

9 28 U.S.C. § 1927. This section has been used by courts to impose fines on lawyers who violate page limits, thereby requiring the court and opposing counsel to read two sets of briefs. *See* Westinghouse Electric Corporation v. National Labor Relations Board, 809 F.2d 419 (7th Cir. 1987).

10 *See, e.g.*, U.S. Sup. Ct. R. 33(1)(d), (g); Fed. R. App. P. 28(f).

11 *See* Westinghouse Electric Corporation v. National Labor Relations Board, 809 F.2d 419 (7th Cir. 1987).

12 919 F.2d 1579 (Fed. Cir. 1990).

13 *Id.* at 1584.

14 864 F.2d 1572 (Fed. Cir. 1989).

In addition to numerous extensions and missed deadlines, the court noted that the attorney did not follow the court's rules of practice governing the preparation of a joint appendix.

Loss of Legal Claim

The inability of lawyers to write properly negatively impacts clients. Courts have dismissed complaints with grammatical errors.[15] Courts have denied motions with misplaced punctuation marks.[16] These rejected claims cost clients time and money, and may lead to loss of their legal rights.

In *Duncan v. AT&T Communications*, the court granted a motion to dismiss a complaint because the plaintiff's complaint was so poorly drafted that it failed to state a claim on which relief could be granted. The court made no attempt to hide its disgust with the plaintiff's pleadings, noting that "the court's responsibilities do not include cryptography, especially when the plaintiff is represented by counsel."[17] The court noted the grammatical and stylistic shortcomings, and stated that other allegations were written in a conclusory manner that failed to explain the facts to the court. The court stated that some of these allegations may have been legally significant if they were well pleaded. The plaintiff lost her claim for employment discrimination because of the failure of her attorney to write effectively.

In a similar case, *Feliciano v. Rhode Island*,[18] the plaintiff's claim under the Americans with Disabilities Act was dismissed because the complaint was too vague. The court found that the complaint did not describe the claim in sufficient detail, nor did it allege facts to support the claim of denial of constitutional rights. The complaint also alleged that there were differences in interpretation in the two applicable federal laws, but did not articulate those differences, and therefore the court did not consider this allegation.

Tips for Effective Writing

The following suggestions are made to assist attorneys in writing more clearly and effectively.

- Learn the rules—federal, state, and local—for page limit, font and margin requirements, and other similar restrictions.
- Be as concise as possible. Edit your work, omitting all excess words. For example: use "because" instead of "due to the fact that"; "to" instead of "in order to"; and "now" instead of "at this point in time."
- Repetition does not improve clarity. For example, use "give" instead of "give, devise, bequeath, and transfer"; "the property" instead of "All my rights, title and interest in and to the property"; and "void" instead of "Null, void, and of no further force and effect."
- Proofread a printed draft. Do not rely on a spell-checking program. It will not pick up such errors as missing apostrophes, "there" instead of "their," and "he" instead of "the." Do not rely on reading a draft document on the terminal screen, because pagination is often altered. Never reprint one page of a multiple-page document without confirming that you have not omitted or repeated the first and last lines.
- Use headings and subheadings, and begin each paragraph with a clear topic sentence for ease of comprehension.
- Shorter sentences and paragraphs are easier to read.
- Learn the *Bluebook* citation rules and use them.
- Omit legalese. English is more clear than Latin, in most cases. For example, do not use any of the following: witnesseth, hereinbefore, hereinabove, aforementioned, party of the first part, said (as a substitute for *the*), in witness whereof, to wit, from the beginning of the world to this date, quid pro quo, de minimus.
- Use the active voice. It is more direct and concise to write "the defendant breached the contract," rather than "the contract was breached by the defendant."
- Use pinpoint citations whenever practical. It is a courtesy to readers to indicate the page on which they can find your authority.

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[15] *See, e.g.,* Duncan v. AT&T Communications, 668 F. Supp. 232, 237 (S.D.N.Y. 1987).

[16] *See, e.g.,* People v. Vasquez, 520 N.Y.S.2d 99, 103 n.2 (N.Y. Crim. Ct. 1987).

[17] 668 F. Supp. at 234.

[18] 160 F.3d 780 (1st Cir. 1998).

"Clear and concise writing should be the goal of every attorney."

In *Lennon v. Rubin*,[19] the court upheld a grant of summary judgment against the plaintiff, and stated that its review was made more difficult because the plaintiff's brief lacked analysis of the statute and identification of the lower court's reasoning. "[W]herever material uncertainties result from an incomplete or indecipherable record and impede or affect our decision, we resolve uncertainties against appellants."[20]

Unnecessary Litigation

Lack of clarity in transactional documents can cause a client to be involved in a lawsuit that might not have been required if the drafting attorney had been more skilled in writing. Many lawsuits are caused by parties asking a court to determine the meaning of ambiguous terms. In both of the following examples, parties were involved in district court suits that were appealed to the circuit court of appeals. Neither case would have been necessary if the contracts were drafted clearly and accurately.

Bourke v. Dun & Bradstreet Corporation[21] is a typical case involving a poorly drafted contract that caused expense to the client. Employees sued their former employer for money due under a contractual incentive compensation plan. Under the contract, the employees were to be paid if "targets" had been achieved. Each employee had several targets and was entitled to increased compensation for each higher target. The employer claimed that the language meant that the employee would be paid at the 100 percent level, and no higher. The employees contended that the phrase entitled them to payment at the 200 percent and higher levels for higher targets. The differing interpretations resulted in a dispute worth nearly $2 million to the employees. The court found that, although the language was ambiguous, the employer's interpretation of the language was reasonable. The employees' complaint was dismissed, as it had been by the district court.

In *Baybank v. Vermont National Bank*,[22] the loan participation contract at issue was inaccurate regarding the loan origination date, maturity date, and loan amount. The plaintiff, a participant in the loan, relied on these inaccuracies to allege that the contract was ambiguous. The plaintiff refused to participate in the loan renewal. The court agreed that the inaccuracies made the contract ambiguous, but found that the plaintiff's conduct indicated its consent to participate in the loan renewal.

Conclusion

Clear and concise writing should be the goal of every attorney. A failure to achieve this goal can result in excess costs to the client, loss of rights of the client, sanctions imposed by the court against the attorney, wasted time for all parties, and frustration for opposing counsel.

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[19] 166 F.3d 6 (1st Cir. 1999).

[20] *Id.* at 9 (quoting Credit Francais International S.A. v. Bio-Vita Ltd., 78 F.3d 698, 700–01 (1st Cir. 1996)).

[21] 159 F.3d 1032 (7th Cir. 1998).

[22] 118 F.3d 30 (1st Cir. 1997).