WRITING TIPS ...

JUST ONE DAMNED THING AFTER ANOTHER: THE CHALLENGE OF MAKING LEGAL WRITING "SPATIAL"

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One of our friends is a painter who, after the second martini, likes to boast about the superiority of his art to what he describes, with a sneer, as our carpenter-like craft. In sum, his argument amounts to this: A painting is a glorious gestalt, a whole you can grasp at a glance yet spend hours exploring in detail, roaming from one part to another without ever losing sight of its overall form. Writing, on the other hand, is just one damned thing after another—word after word, sentence after sentence, unrolling tediously and interminably across the featureless page with never a vantage point from which we can see the whole at once.

He's right, of course. The sequentiality of writing is a disadvantage all writers struggle against. Those who write prose we read for pleasure have to find ways to keep us moving happily from sentence to sentence, a trick most of them perform by telling us a story. Those who write professional prose—including briefs, letters, memos, and the like—face a more difficult task. True, they have less need to keep us moving, because our sense of responsibility does some of that work. But they have another goal that novelists don't need to worry about, a goal that runs directly counter to the linearity of writing. By the time we reach a novel's end, if we have become confused about one or two threads of the plot, or forgotten a character or two, not much is lost. Legal writers, on the other hand, have to ensure that the reader emerges from the document with a grasp of the subject that is, as far as possible, somehow "present" all at once. The reader should be able to bring up before the mind's eye at least the skeleton, or the bird's-eye perspective, or the snapshot—choose your metaphor—of the analysis that unrolled step by step through the document.

The spatiality of these metaphors is no accident. Expository writers have to learn how to spatialize their prose, to draw its unrolling lines together into patterns that can be seen all at once. Novice legal writers, however, often fail to realize this. For them, a document is well organized if each sentence and paragraph unfolds logically from the preceding one, so that, step by step, they can justifiably claim that the reader never runs off the road. But a document can be well organized, in this linear sense, and still be frustrating to read—because it never satisfies the reader's craving for the bird's-eye view.

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This is a point that many law students never grasp, to the great detriment of their careers as writers. One way to get them to focus on the difference is to explain, and demonstrate, the difference between logic and coherence. Logic is (for our purposes, at least) an objective quality that is judged by testing the link between one proposition and the next. Coherence is subjective: it is the reader's perception that things fit together, a perception that requires the reader to be able to see the gestalt, not just the unfolding sequence.

In general, writing courses teach students to create coherence by creating summaries, maps, or introductions. This lesson in itself is a painful one, because these summaries require intellectual strength and courage. As a result, we read many documents written by the best graduates of the best law schools, documents well written in almost every way, that fail to satisfy our craving for an overview because they skimp on the introduction. Here are two examples, one from a research memo and the other from a brief:

> “[Writers] have to find ways of spatializing at the micro as well as the macro level, by permeating their prose with mini-introductions, road signs, and predictors.”

Before:

JONES v. SMITH
ISSUE

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

CONCLUSION

Both. In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones' cause of action, however, would probably be considered to be brought in law, and therefore would be tried by a jury.

After:

ISSUE

Is an action for unjust enrichment a legal claim, which is tried by a jury, or an equitable claim, which is tried by the court?

CONCLUSION

In many cases, an action for restitution based on unjust enrichment may be brought in either law or equity. Jones' cause of action, however, would probably be considered to be brought in law because his complaint requests only money damages—a remedy at law—and because that remedy would be adequate restitution for his alleged loss.

To persuade a court otherwise, we would have to argue (1) that the case is too complex for a jury's understanding; or (2) that the underlying issue is a breach of fiduciary duty of a kind (such as breach of constructive trust) that is a matter of equity rather than law; or (3) that the court should follow a minority line of cases that hold any action for “disgorgement” of excess profits to be a matter of equity rather than law. None of these arguments is likely to succeed.

The revision has two virtues (in addition to abandoning “both” as its first word, an opening move that is suicidally foolhardy for a non-academic audience). First, it provides a précis of the analysis, something that is required not just on general principles, but because the “probably” demands some immediate explanation. Second, it provides a map for the rest of the memo.

Before:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff's alleged breach of contract claim is one regarding which the plaintiff has not alleged and cannot allege personal jurisdiction over the bank that issued a letter of credit in connection with the transaction. Plaintiff's attempt to bolster this claim with an inherently thin and improperly alleged Racketeer Influenced and Corrupt Organizations (RICO) Act claim is not sufficient to prevent dismissal of this transaction under Fed. R. Civ. P. 9(b), 12(b)(1), 12(b)(2), 12(b)(4), 12(b)(5), and 12(b)(6).

After:

PRELIMINARY STATEMENT

This case arises from a single international sales transaction. Plaintiff and its shipping agent, Reliable Express, Inc., failed to satisfy the terms of a letter of credit through which it was to be paid for a shipment of seed. Because of this failure, the letter could not be honored by First Citizens Bank (FCB), its issuer. Plaintiff has sued FCB, Reliable Express, and Resource Development Company, to which it was attempting to sell the seed, for breach of contract. In addition, in an effort to create federal jurisdiction for a simple letter of credit case, it asserts a Racketeer Influenced and Corrupt Organizations (RICO) Act claim against the defendants for conspiring to breach the letter of credit contract.

Plaintiff's complaint should be dismissed as to FCB because it does not and could not allege that FCB—a Lebanese bank with no office or assets in the state of Panacea—has sufficient minimum contacts with the state for this court to assert personal jurisdiction over it. In addition, the complaint fails to allege any of the predicate facts necessary to establish a RICO claim, and fails to allege fraud against FCB with the particularity required by Rule 9(b) of the Federal Rules of Civil Procedure (FRCP).

Note that the revision contains both more and less than the original. It expands the story surrounding the case, so that we have a better idea of what the fight is all about. But it also clears out some underbrush at the end, disposing of a list of FRCP sections that is longer than anyone cares to see. For law students who have been trained to be detailed and thorough, and told again and again that their thinking is too rushed and superficial, it is particularly difficult to write introductions that strike the right balance between clarity and completeness. They have to learn the difference between the kind of completeness that results from accumulating details and the kind that results from distilling an analysis to its essence.

But writing good introductions isn't enough to “spatialize” prose. Even writers who have mastered introductions—which means, of course, that they write them not just at the start of a document but wherever they are needed throughout it—often fail to take spatializing far enough. To do this, they have to find ways of spatializing at the micro as well as the macro level, by permeating their prose with mini-introductions, road signs, predictors—again, choose your metaphor—that make it easier for readers to rise above the unrolling words to glimpse an overview. Here are two examples:

Before:

The reason that funded programs have been less utilized than unfunded programs is that under the tax law if employees are given a nonforfeitable interest in a nonqualified trust they will experience immediate taxation on the amounts set aside for them. Furthermore, the complex and onerous requirements of Title I of ERISA would normally apply to a funded program.

After:

Funded programs have been used less often than unfunded ones for two reasons. First, they have tax disadvantages: If

employees are given a nonforfeitable interest in a nonqualified trust, they will be taxed immediately on the amounts set aside for them. Second, they have administrative disadvantages: They are normally subject to the complex and onerous requirements of Title I of ERISA.

or

Funded programs have been less used than unfunded programs because they have both tax and administrative disadvantages. In funded programs, because employees are given a nonforfeitable interest in a nonqualified trust, they are immediately taxed on the amounts set aside for them. Furthermore, funded programs are normally subject to the complex and onerous requirements of Title I of ERISA.

Before:

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. This is achieved by setting out the requirements that must be met before liability will be imposed.

First, the lender in this position must take actual "possession" of the vessel or facility. This requirement is open to interpretation, as the term "possession" is not defined. Under one reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations. Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous. Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. For these purposes, it is important to note the fact that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

After (changes in italics):

The amendment thus explains the circumstances under which a lender who has acquired something more than its initial security interest in a property will be categorized as an "owner or operator" for environmental liability purposes. *Before liability will be imposed, two requirements must be met: the lender must take actual possession of the property and must exercise actual control over it.*

1. *Actual possession.* First, the lender must take actual "possession" of the vessel or facility. Because the amendment does not define the term "possession," this requirement is open to *two possible* interpretations:

Under the first *and more likely* reading, "possession" calls for something more than the lender taking simple title or acquiring one of the additional interests set out above. It also calls for some tangible presence on the property. This might consist of anything from putting up a protective fence to assuming and continuing the facility's ongoing operations.

Under an alternative reading, taking "possession" may not be an additional requirement where possession necessarily results from taking title or ownership, as in the case of foreclosure. It would represent an additional requirement only where the lender has acquired "operation, management, or control" without acquiring ownership. Under this construction, the legislature's inclusion of the term often would appear superfluous.

Reading the plain language of the amendment, then, the first interpretation makes more sense, as the "possession" requirement clearly has been set apart in the amendment as a separate criterion. It is important to note that this amendment was enacted to achieve clarity and provide lenders with a more precise idea of what activities they may undertake within the exemption. Thus, it should be construed narrowly, with ambiguous terms construed in favor of lender protection.

2. *Actual control.* The second prong of the amendment's two-part test for liability is whether the lender exercises "actual, ...

When we use these examples in programs for practicing lawyers, we make two points about them.

First, they demonstrate visibly the difference between logic and coherence. In each example, the sequence of information remains unchanged between the before and after versions. The revisions simply reveal the structure to the reader more quickly and clearly. Second, the revisions do not add new substance. Instead, they add "meta-information": second-level information, or information about the underlying information.

For some novice writers, the concept of "meta-information" is illuminating. It helps them to understand that, to get from linear logic to true spatial coherence, the trick is not to add more and better information of the same kind, to fill in the gaps, to be more precise and thorough (although all of this may help). It is instead to add another kind of information, a kind they usually ignore. The good news is that, once they have written a document that is precise, logical, and thorough—that is, once they have done the really hard work—the process of "spatializing" it should be relatively quick and easy. On the other hand, if it turns out not to be so easy, this almost certainly means that the underlying substance has not yet been adequately thought through and organized. In other words, there are problems with logic as well as coherence.

The distinction between information and meta-information—between logic and coherence—has a

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further implication for the teaching of legal writing, which most instructors know intuitively even if they have not applied our jargon to it. As we just noted, you can't have meaningful meta-information until the underlying substantive information is in good shape. The challenge for legal writing programs, of course, is that students already have enough trouble trying to master the substance. Teaching them to "go meta" as well, then, will never be easy. In teaching writing as well as in writing, it should usually be a second step, not one you attempt at the same time you are struggling with substance.

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