On the Papers

A NEW APPROACH TO LEGAL WRITING

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Our school systems have taught writing inefficiently and ineffectively throughout our history. Educators have not understood well how the communication process takes place. As a result, they have resigned themselves to treating the symptoms of bad writing as if those manifestations were instead the causes.

They have labored mightily to eradicate those symptoms in their students—believing, as it were, that if one never again coughed or sneezed, one would never have a cold. They have bought into a litany of advice about good writing, so long and widely accepted as to be considered unquestionable. Here are some of the major pieces of that advice, each followed by my opinion of its accuracy and helpfulness:

- Avoid the passive. (Wrong.)
- To make it better, make it shorter. (Wrong.)
- Never allow a sentence to exceed 29 words. (Wrong.)
- Write the way you speak. (Wrong.)
- To see if your writing is good, read it out loud. (Wrong.)
- Avoid the use of the verb "to be." (Wrong.)
- Every paragraph should start with a topic sentence. (Wrong.)

In this series of articles, I will try not only to explain why this old approach does not work, but also to demonstrate a more effective way to perceive and control how written English functions—in a way especially relevant to litigators.

Our school systems' traditional approach to teaching writing (which has its roots in the eighteenth century) has gone awry for many reasons, most of which are connected to a single underlying problem: They have been concentrating on the wrong person—the writer. They have given all those students a continually artificial task—to fill a number of empty pages exclusively for the purpose of being evaluated on how well they can do that. Having created this exclusively academic task, they then have to help the students accomplish it. They teach outlining and thought generation; they demand students follow rigid formats not encountered in the adult, professional world, such as the five-sentence paragraph and the five-paragraph theme. And, sometimes most arduously of all, they concentrate on teaching students how to avoid grammatical error. Students come to believe—accurately—that if they work hard and fill the right number of pages with energy, they cannot fail. If they improve since last time, they will do well.

All of this fails to suit the realities of any profession, but especially that of the trial lawyer. Can you imagine a judge, after studying an attorney's brief, exclaiming, "This is a terrible brief; but you have worked hard, and it is so much better than the one you turned in last month, you win the case." In the real world, no one cares how hard the writer tried nor what progress has been made. Where writing in the real world is concerned, the important person is not the writer; it is the reader.

The bottom-line question about writing quality is simply this: Did the reader get delivery of what the writer was intending to send? If the answer is "yes," the writing was good enough; if it is "no," the writing was not good enough. And it matters little how impressive or dazzling the writing *seemed* to be along the way.

To get control of writing, litigators must understand as much as they can about how the reader goes about the act of reading. It is insufficient to compose a sentence that is *capable* of being interpreted in the way that best serves your case. Instead you must compose it so the odds are as high as possible that an intelligent reader *will be led* to interpret it in the way you intended. We have all been taught writing according to what the writer should and should not do. The perspective

should be shifted to consider what readers actually do. That will be the task of this series of articles.

The interpretive process any reader uses is controlled by three main factors: structural location, grammatical construction, and context.

Structural location. The importance of a writer controlling the structural location of information in a sentence is the extraordinary new news here. Readers take the majority of their clues for the interpretive process not from word choice nor from word meaning, but rather from structural location. *Where* a word appears in a sentence will control much of *what* a reader is likely to do with it. We all know these things intuitively as readers. I will try to make them conscious for you as writers.

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In trying to make sense of an English sentence, the reader needs to perceive the correct answers to *all* five of the following essential questions if the reader is to understand correctly what the writer was intending to say:

- What is going on here?
- Whose story is this?
- How does this sentence connect backward to the previous sentence?
- How does this sentence lean forward to where we might go from here?
- What is the most important piece of information in this sentence, which I should be reading with extra emphasis?

Remarkably, the interpretive clues to the answers to all five questions are conveyed to the reader mainly by structural location of the sentence's information. More simply stated, as readers we know *where* to look for *what*. Since readers expect these answers to appear in specific places in the English sentence, I call this way of looking at the language the Reader Expectation Approach. Future articles will look at each of these questions and their answers individually.

Grammatical construction. Readers pay different amounts of attention to information depending on in what kind of "unit of discourse" it appears. (A unit of discourse is any group of words that has a beginning and an end—phrase, clause, sentence, paragraph, section . . . all the way up to the complete document or book.) As we look at sentences, I am going to consider only three grammatical units, discarding all those complicated terms you may or may not have had to memorize in high school ("compound clause," "complex clause," "compound-complex clause," etc.). These three are the ones that most influence readers regarding the relative importance of their contents:

- The "main clause." This group of words has a subject and verb and could stand by itself as a complete sentence.
- The "qualifying clause." This group of words has a subject and verb but cannot stand by itself as a complete sentence. (Think of a clause that begins with the word "although.") I have created this term. You will not find it in the grammar books.
- The "phrase." This group of words is a complete unit but lacks either or both a subject and a verb.

Quite simply, readers tend to give more weight to information if it appears in a main clause than if it appears in a qualifying clause—and even less weight than that if it appears in a mere phrase. This is of far greater importance than has been generally understood in any writing of complexity and force, as legal writing tends to be. Sometimes this concern for grammatical construction will coalesce with the concerns for structural location mentioned above; sometimes it will conflict. Writing cannot be made an easy thing; but we can get better at it. Thought is hard.

Context. Context controls meaning. No single sentence "means" by itself but only in combination with the other sentences that surround it. That may sound obvious; or it may sound profound. It is both. It causes problems when we try to talk about improving the construction of a given sentence—which these articles will spend a good deal of time doing. Two differing versions of the same sentence may both be excellent for two different purposes; but in a given context, one will serve better than the other. I will try to keep us aware of this as we go.

Trial lawyers, it can be argued, have the hardest writing task there is—much harder than that of doctors or scientists or philosophers. Legal writing is more difficult not because the subject matter is more complex than medicine or science or abstract philosophical thought, but rather because of the nature of its audience. When those other professionals write something, their audiences bend over backwards to figure out what the writer was trying to say.

In stark contrast, however, the audience for a legal brief is often openly and energetically hostile. It may be a senior partner who will try to find every possible weakness because "Nothing gets out of this office until it is perfect." Or it may be a judge, who, while holding in one hand your well-argued brief, in the other hand is holding an equally energetically argued brief proffered by the opposition. Or it may be an adversary who, though completely aware of what you were trying to say, will expend great energy to show that it doesn't say that or says something else or is essentially nonsense. The existence of the hostile audience makes legal writing the hardest there is. With these articles in LITIGATION, I hope to be of help to you in fighting that fight. ■