

On the Papers

MISCONCEIVING THE WRITING TASK: THE TOLL BOOTH SYNDROME

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Lawyers are educated people. Lawyers are smart people. Lawyers write for a living. Why then is so much legal writing so unnecessarily hard to read? At least in part, it stems from a misconception of the nature of the writing task.

We learn to write in schoolrooms. For a great majority of professionals, even after they have long left those schoolrooms, writing remains an academic kind of task—a burden to be dispensed with at the earliest moment possible. They receive an “assignment”; they talk with the appropriate people; they search through the library; they read whatever they need to read; they “organize their thoughts,” perhaps in some sort of outline form; and then, when the thinking has mercifully come to an end, they “write it up.” They “reduce it to words.”

Wrong from the start. Writing is not something that happens after the thinking process has ceased. It *is* a thinking process. The English teacher’s one-liner

makes good sense: “How do I know what I mean till I see what I say?” Naturally, if a writer believes the thought process has been completed before the writing begins, then the writing process becomes sheer drudgery. But this misconception of the “process” of writing is based on a deeper misconception of the “purpose” of writing. This latter misconception can be described in a metaphor I call the “toll booth syndrome.”

The Toll Booth Syndrome

The year is 1980. Picture the following: You are well known in your field. You have been summoned for three weeks to New York to consult on an important case. Staying with friends in suburban Connecticut, you commute by car into Manhattan at 5:30 a.m. to avoid the rush hour. On one particular day, you have spent from 6:00 a.m. to 9:30 p.m. in the office, with nothing to show for

it. Everything that could go wrong did go wrong. At 9:30, you make your way down to the parking lot, through wind and rain. You fight your way through 90 minutes of crosstown traffic and finally find yourself battling the dark and the elements on Route 95 as you head toward Connecticut.

Just before you leave the state of New York, you see a sign: “Toll booth, 1 mile, 40 cents, exact change, left lane.” You search in your pocket for change and find you have precisely three coins—a dime, a nickel, and a quarter—just the right amount. You enter the exact change lane. In front of you is a shining red light, but no barrier; to the left of you is the hopper. You are tired and irritable as you roll down the window, the wind and rain greeting you inhospitably. You heave the change at the hopper. The quarter drops in; the dime drops in; but the nickel hits the rim and bounces out. What do you do? Do you put the car in Park, get out, and grovel in the gravel for your nickel? No. Do you put the car in Reverse and switch to another lane where a human being can make change for your dollar bill, after which you can return to your original lane? No. You go through the red light. It is raining; it is nearing midnight; there are no police in sight; and if you did get caught, you would be able to show the proof of your good intentions in the gravel. The alternatives are just too burdensome. You go through the red light.

If you do this, I would argue you do it because you have chosen to ignore the fundamental purpose of paying tolls. You do not think that in order to continue on that road, you must transfer 40 cents of your accumulated wealth to the state government, with which it will keep the roads in good repair and pay toll booth operators. Instead, you rationalize that in order to continue on the road, *you must be dispossessed of 40 cents*—and you have been. It is therefore moral, if perhaps a bit risky, for you to plunge further on into the Connecticut darkness.

The same holds true for the writing task. Most writers do not care primarily that the intended audience actually receive their 40 cents' worth of communication; they care only that after digesting all that information and forming all those ideas, they now need only dispossess themselves of it all onto the paper. That done, all is done. If a reader complains of the lack of X later on, the writer can lead the reader to the hidden spot in the gravel where some traces of X exist, faintly gleaming through the grime in which it has become embedded.

For students, the rhetorical act of writing is not communication; rather it is a demonstration—that work has been done. That works in school. There, students are usually rewarded for demonstrating that they have done a great deal of work, have found the right facts, and have devised a way to get them down on the page. The teacher will recognize the work has been done and will reward it with an acceptable grade. Students tend to assume that the teacher already knows what thoughts can and should be made out of the facts recorded on the page. More often than not, they are right to assume this. Down deep, students are convinced writing is all performance, a private charade between student and teacher, with both in on the game.

In the professional world, it matters not how much work the writer has done; it matters only that the reader actually gets delivery of precisely that which the writer had intended to send. Communication in that professional world requires that the 40 cents' worth of thought actually be received by the reader—not just that it be jettisoned into the air and onto the page by the writer. For legal writing especially, the reader will often not be anything like a teacher, who gives the writer credit for having done the job. The legal reader is often partially or wholly hostile. He might be a senior partner who insists “Nothing gets out of this firm until it is perfection

itself.” Or she might be a judge who has your brief in one hand and an opposing one in the other, balancing them to weigh their strengths and weaknesses; or it might be an adversary who—perfectly aware of what it is you were trying to say—will bend over backward to demonstrate that it does not or cannot say that. Legal writers must write clearly and forcefully enough to control—insofar as that is possible—the interpretational acts of all possible readers. The 40 cents' worth of ideas must not be merely *possible* to perceive; it must become the dominant interpretation that almost all readers *will be led* to perceive. It is insufficient to produce a sentence that is merely capable of being interpreted in the way you want; the sentence will be sufficient only when it demands that most readers assent to the interpretation you intend to convey.

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That control of the interpretation process can be gained by knowing what most readers are likely to do with the prose you give them. Knowing what readers expect to find where in a sentence depends on understanding the “reader expectations” this series of articles has been exploring.

I have room here to explore one further issue. I have briefly mentioned the process of arranging your thoughts in an outline before writing. Many of us were taught to do this in grammar school and high school. After you get your information, you make a carefully lettered and numbered outline, from which you then generate your prose. Early in my consulting career, lawyers—especially lawyers in their 50s—would approach me

in private to ask if it really is necessary to make such a carefully constructed outline before writing. There were two possible answers the questioner might find distressing: One was “yes”; the other was “no.” “Yes” was painful to those who had not made a single outline since grade 12; “No” was painful for those who had spent 9 percent of their career making such outlines and then disposing of them so no one would know they had been created. In both cases, the questioners were wondering if their careers might have blossomed a good deal more had they known “the truth” about outlining.

My answer to all such questioners: It is absolutely essential to make a carefully numbered and lettered outline of your writing if you cannot write without one. Otherwise, don't bother. No one cares. No one is going to give you “credit” for having made the outline if the final product was not successful. Over-outlining can be really debilitating. The rest of the writing process might then be limited to filling in the missing parts for those outlined sentence fragments and eradicating all the numbers and letters. That is the process that produces all those mind-numbingly dull and pedestrian student papers. Teachers like outlines. Clients like results. ■