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Appellate Writing: Ethics and Mechanics

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APPELLATE WRITING: ETHICS AND MECHANICS

I. INTRODUCTION

“[T]he term ‘legal writing’ has become synonymous with poor writing: specifically, verbose and inflated prose that reads like – well, like it was written by a lawyer.” Steven Stark, *Why Lawyers Can’t Write*, 97 HARV. L. REV. 1389, 1389 (1984). Legal writing suffers from “convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs.” *Id.* Despite recognition of this problem and concerted efforts by law schools to fight it, legal writing continues to deteriorate. See Lynne Agress, *Teaching Lawyers the Write Stuff*, LEGAL TIMES, Oct. 2, 1995, at 37.

No one who teaches at any level will be surprised by this deterioration in writing skills. Teachers bemoan it every day in high school, college, and law school faculty lounges. This paper presents a series of practical, easily implemented steps to improve legal writing.

A. Legal Writing is Important!

Many lawyers roll their eyes at discussions of legal writing, and use legal writing presentations during seminars as coffee breaks. They regard legal writing as a topic for law professors, judges, and all-around eggheads, one that has little application to their practices. They are wrong. As Irving Younger explained:

So prevalent is bad legal writing that we get used to it, shrugging it off as a kind of unavoidable occupational disability, like a cowboy’s bowlegs. This is an unfortunate state of affairs. Bad writing goes with bad thinking, and since bad thinking is the source of many of the ills that beset us, lawyers should acknowledge a professional obligation to wage war against bad writing. If the author who produced it is you, correct it. If another, condemn it.

Irving Younger, *Symptoms of Bad Writing*, SCRIBES J. OF LEGAL WRITING 121, 121 (2001-2002).

There are many reasons for a lawyer to write well. Good writing helps attorneys by:

- Enhancing their credibility with other lawyers. Many lawyers *are* good writers, and most of them recognize and respect quality legal writing when they see it. When opposing these lawyers, your ability to write well commands respect and affects their evaluation of the likelihood of success. At my former firm, we were writing snobs. When facing attorneys from small firms, we routinely made assumptions about them based upon their legal writing. Quality legal writing gains you respect that may prove useful in litigation.
- Preventing malpractice and grievances. Inferior legal research and writing skills can give rise to malpractice liability, client grievances, and court sanctions.

- Enhancing their credibility with clients. Some clients read what you produce in their cases with a Javert-like obsession for pointing out even the tiniest errors. A superior legal writing product works like a salve on these clients' tortured psyches.
- Enhancing their credibility with judges. Judges are the most frequent victims of bad legal writing. They cannot escape a daily barrage of poorly written motions and briefs. No surprise, then, that judges take special note of well-written pleadings. Once, during a sanctions hearing, a district court judge permitted me to argue on behalf of my client for less than one minute, telling me that his reading of my brief already made clear that I was "the only lawyer in the room who knows what he is talking about" (that was not true, but it kept my client from being sanctioned and pleased my mother very much).
- Helping them win cases. Legal writing is critical to appellate success. Even at the trial court level, better legal writing – particularly at the summary judgment stage – will produce better results for your clients. Like it or not, many cases are won or lost on the briefing.

The importance of legal writing increases as the odds of reaching trial diminish. In this era of ever-rarer trials and hearings, legal writing takes on added significance. As courts expand the types of matters they will decide based solely on briefing, legal writing becomes ever more critical. See Edward D. Re, *Increased Importance of Legal Writing in the Era of the "Vanishing Trial"*, 21 *TOURO L. REV.* 665 (2005).

B. Know Your Audience – Judges Matter!

An important part of legal writing is to know your audience. Lawyers write most often for judges. With increasing frequency, judges are making public their frustration with much of the legal writing that comes before them and are asking attorneys to do better. As Supreme Court Justice Ruth Bader Ginsburg noted: "The cardinal rule: it should play to the audience . . . The best way to lose that audience is to write the brief long and cluttered . . ." Ruth Bader Ginsburg, *Appellate Advocacy: Remarks on Appellate Advocacy*, 50 *S.C. L. REV.* 567, 568 (1999). Judges do not have unlimited time to read briefs:

Briefs usually must compete with a number of other demands on the judge's time and attention. The telephone rings. The daily mail arrives with motions and petitions clamoring for immediate review. The electronic mail spits out an urgent message . . . The clerk's office sends a fax with an emergency motion. The air courier arrives with an overnight delivery. The law clerks buzz you on the intercom because they have hit a snag in a case. So the deathless prose that you have been reading . . . must await another moment. Or another hour. Or another day.

RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* 24-25 (1996).

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