At Sidebar

RACHEL CLARK HUGHEY

Age-Old ABCs of Writing Applied to the Law:
Accuracy, Brevity, and Clarity

On television shows, lawyers spend most of their time on their feet in a courtroom. Perry Mason rarely pored over a draft of a contract. Ally McBeal did not research or write appellate briefs. Ben Mattlock never perfected a patent application.

The reality, though, is that lawyers spend most of their time writing. Lawsuits begin with written complaints, followed by answers or motions to dismiss; much of the communication with the court is through briefs and letters. It may be months—or longer—before an attorney enters the courtroom. Many appeals are decided without any argument. And in argued appeals, the attorney talks for 15 minutes to a panel of judges, who have had the briefs for weeks or months and who have often nearly made up their minds already. Transactional attorneys spend much more time drafting documents than negotiating. And in-house attorneys often have to transmit large amounts of information to a varied audience via written documents.

It is no stretch to suggest that lawyers are professional writers.

Some basic writing tenets have been articulated by scholars and authors who have thought about the best way to communicate with words. And these tenets have been recognized and reinforced in the legal context by some of those we strive to persuade—judges. These tenets are accuracy, brevity, and clarity. Applying these basic and timeless principles, which are not unique to legal writing, can dramatically improve any written work product.

Accuracy

The poet Ezra Pound said, “Good writers are those who keep the language efficient. That is to say, keep it accurate, keep it clear.”

Accuracy is arguably one of the most important things in any written legal document. Inaccurate contracts, patent applications, briefs, and other legal documents can fail to achieve their purpose and may precipitate additional unneeded costs down the line.

Accuracy of language, accuracy of facts, and accuracy of law are all important. Judge Daniel M. Friedman of the Court of Appeals for the Federal Circuit warned, “If a lawyer is shown not to be accurate, he’s not candid, he’s distorting things, even the things that he’s accurately stated are likely to be rejected by the court.” The principle is clear: if you’re wrong about some things, how does one know that you’re not wrong about other things as well? Accuracy means getting the facts correct in all their details and making sure that cited cases are viable as precedent and stand for what they are cited for.

Brevity

As the noted philosopher Marcus Cicero reportedly wrote more than 2,000 years ago, “I have made this letter longer, because I have not had the time to make it shorter.” Even more tersely, as Shakespeare wrote in “Hamlet,” “Brevity is the soul of wit.”

Readers of legal documents are busy. In litigation, counsel has a limited amount of the judge’s attention. An overworked judge will appreciate and understand a concise brief more than a long and convoluted brief. Alvin A. Schall, a Federal Circuit judge, counseled, “The second point about brief writing is be as concise as possible.” In-house attorneys communicate with busy officers and short, to-the-point communications are more likely to be read and understood. In short, readers appreciate brevity.

Brevity can be accomplished by presenting points or arguments as concisely as possible, using simple straightforward language and avoiding repetition. As Thomas Jefferson stated, “The most valuable of all talents is that of never using two words when one will do.”

In addition, in litigation, weak arguments detract from the entire presentation. Before the district court and on appeal, every additional issue that is raised decreases the chances of winning on any issue, because doing so takes away the focus on an argument and uses up space that could be spent on the strong issues. A very simple way to shorten written documents—especially briefs—is to remove argumentative language. Words such as “scurrilous,” “malfeasance,” and their synonyms have no place in professional writing—especially in submissions to the courts. In addition, pejorative language has no place in a brief; nor does disparaging language about the opposing counsel, the opposing party, or the district judge. Such tactics are ineffective and counterproductive.

Ruthlessly cutting your own work is a painful but necessary step. Many attorneys struggle with making their written documents concise. They become enam-
ored with different arguments or passages and are unwilling to edit them. As author William Faulkner reportedly warned, "In writing, you must kill your darlings." In other words, be objective about your writing and willing to delete unneeded sections even if you like them. An author may be invested in something that he or she has written but that objectively does not advance the ball. If the extremely clever constitutional law argument is not going to convince the court to extend discovery by two weeks, remove the argument. Weeding out weak arguments is crucial to creating a strong written document. As Truman Capote asserted, "I believe more in the scissors than I do in the pencil." And Justice Brandeis recognized that "There is no great writing, only great rewriting."

Clarity

The novelist Nathaniel Hawthorne once said, "Easy reading is damn hard writing."

It is important to present legal points clearly and simply. If a contract is unclear, it can lead to problems down the road. If no one understands in-house counsel's advice, it is unlikely to be followed. And, in litigation, judges are on the watch for obfuscation. If a presentation is convoluted, it looks like the attorney is trying to hide something.

Clarity can be accomplished by using simple language, making points straightforward, and avoiding convoluted acronyms and abbreviations. Hippocrates once said, "The chief virtue that language can have is clearness, and nothing detracts from it so much as the use of unfamiliar words." George Orwell counseled, "Good prose should be transparent—like a window pane."

It is also important to present complicated arguments or issues simply. An unclear point is the same as a point that has not been made at all. Attorneys often spend so much time getting to know and understand their arguments or positions that they forget that their reader may not have the same background information. Federal Circuit Judge Schall counseled, "I think from my standpoint, at the risk of sounding like a broken record, to me one of the most important things is clarity, clarity, clarity. I sat earlier this year on a case and one of the members of the panel said this might as well be German ... ."

It is imperative for attorneys to recognize that their readers often do not have the same level of understanding of the law, technology, or subject matter and to provide the appropriate background. It is often helpful to have a third party who is unfamiliar with the case or issue to read the legal document. If that reader can understand the writing without knowing the background, then the target audience should be able to understand it as well.

Pursuing the age-old writing goals of accuracy, brevity, and clarity should allow an attorney to write a strong legal document, even if it's unlikely to make the attorney the star of any legal dramas on television. TFL

Rachel Clark Hughey is a member of the Editorial Board of The Federal Lawyer. She is a partner in the Minneapolis office of Merchant & Gould, where she practices intellectual property law with an emphasis on patent litigation and appellate level disputes. Hughey is a former law clerk for Hon. Alvin A. Schall of the U.S. Court of Appeals for the Federal Circuit. © 2012 Rachel Clark Hughey. All rights reserved.

MESSAGE continued from page 3

I and the other "justices" were impressed with the poise of the finalists as they delivered their arguments and addressed our questions. After due deliberation (while the participants and the attendees nibbled on food and sipped wine), we announced the winners. It was the closest decision in moot court competition history.

I also had the opportunity to speak at the induction of Hon. Clarence Thomas as an Honorary Life Fellow of the Foundation of the Federal Bar Association. Justice Thomas is the seventh Supreme Court justice to join this august group (which is open to all FBA members). During the program, which was hosted by the FBA's Eleventh Circuit and the D.C. Chapter, Justice Thomas (after three days of arguments on the health care bill) shared some personal stories and spoke eloquently to the 100-plus members of the FBA about, among other things, the importance of respectful disclosure despite strong disagreement between those who have differing views. The audience, whose viewpoints and philosophies ranged from the left to the right, were riveted by his address.

Justice Thomas also took the time to speak personally with each person in the room. I have been fortunate this year to attend two other receptions at the Supreme Court. At those events, Justices Kagan and Ginsburg, like Justice Thomas at his induction, were open, warm and genuinely interested in the FBA members with whom they spoke. Whether you have been practicing for one year or 40 years, and whether you personally agree with a specific decision or a justice's writings, spending time at the U.S. Supreme Court with a Supreme Court justice is a moving experience. I am fortunate that I will be back at the Court this spring to participate in another great YLD program: the annual Supreme Court Admissions Ceremony.

We work for the FBA, and the FBA works for us. TFL

Femi C. Bonsilie

June 2012 | The Federal Lawyer | 5