Legal Drafting: Writing As Thinking, or, Talk-Back from Your Draft and How to Exploit It

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Introduction

Let me begin by referring to what seems to be almost a conspiracy to keep Americans from learning how to write. Fortunately, the Ed Newmans, the media, and the many critics of our laws and legal instruments have so fully exposed this inability that it needs no documenting here. Instead, I will suggest an explanation for it that relates to what lawyers and law schools are currently doing. This will lead us into our main theme.

Perhaps the most critical fact is that our universities are almost uniformly neglecting expository writing.1 Take, for instance, Indiana University. According to a recent catalog, its English Department has been offering a total of 81 courses or seminars reflecting a program overwhelmingly devoted to the study of "literature." Of these courses, only 12 relate directly to writing by the student and of the 12 only 6 relate directly to exposition. Of the 6 exposition writing courses, 3 are first-year courses, taught for the most part by teaching associates. Although every student must take at least one composition course to qualify for graduation (unless he scored 600 or better on the SAT Verbal Examination), only a minuscule percentage of the University's undergraduates are exposed to sophisticated courses in composition. This seems typical of American universities.

Most American law schools teach something called "Legal Research and Writing", but for the most part it involves instruction by teaching associates in the soft-core writing of briefs or memoranda, heavily diluted with exercises in traditional legal research that it is better to handle separately. The result is that, although many students leave law school moderately well schooled in legal research, their ability to write falls well below their potential.2

* Professor of Law, Indiana University (Bloomington). Chairman: Indiana Commission on Uniform State Laws. Author: Legislative Drafting (1954); The Fundamentals of Legal Drafting (1965); The Interpretation and Application of Statutes (1975). What follows is an edited version of a talk given at Scribes' first Legal Writing Institute, held at St. John's University Law School on October 16, 1976. 1 "[There is a] pervasive feeling among teachers of English that their true calling is to teach literature, with composition courses considered a chore to be suffered through on their way to greater things." A New Affliction at the Prestige Schools: "Elite Illiteracy," 77 Brown Alumni Monthly 12, 16 (Oct. 1976), (setting forth the theories of Brown University's Professor A. D. Van Nostrand).
2 In place of "Legal Research and Writing," I would prefer something in which the emphasis was shifted from looking for materials to looking for kinks in substantive
In general, legal writing, including legal drafting, is seriously downgraded in the law schools. This is mostly by implication. The disciplines of case analysis are explored throughout the curriculum, while the equally-used disciplines of planning and synthesis (which normally culminate in the drafting of a legal instrument) are dealt with, at best, sporadically. Some of this neglect is due to the law’s historical (but now unfortunate) preoccupation with litigation, whose written work is mostly of the looser kinds. Some is due to a widespread reluctance of senior law teachers to expose themselves to the stupefying tedium of scrutinizing each student’s written work. (Here, we need a new pedagogy.) Most of it is due to a failure to adequately appreciate what writing in general, and legal writing in particular, is all about. The price that we pay for this professional ineptitude in badly botched statutes, regulations, and private legal instruments is exacted not only in immediate confusion and disappointment but in a volume of litigation that no amount of judicial reform can alleviate.

**Writing as Thinking**

The prevalent narrow view of writing, which even many professionals share, is that it is merely putting down what the writer already has in his head; first the thought, then its expression. Such a view ignores its most important potential: By using the best writing strategies, the writer can generate valuable ideas not only in other heads but also in his own.

A failure to understand what good composition entails has been the most important force in underestimating it. (No wonder we reserve our academic accolades for poets, dramatists, novelists, and the other creators of “literature.”) Through a preoccupation with style and verbal cosmetics, we have trivialized expository writing as an intellectually low-level skill.

If my information is correct, the intimate connection between conceptualizing and verbalizing is a two-way, not one-way, street. I first got some inkling of this when Professor Warren Seavey once confided in me, during a walk across campus, that he wrote his articles first and researched them later. At first I took this as academic wit, but now I believe that to disregard Professor Seavey’s insight is to waste time and impair quality. To avoid misunderstanding here, note that he did not say that he started writing with nothing in his head.

That Professor Seavey had no patent on this approach was illustrated several years ago, when Joseph Heller was interviewed in the New York Times about his working habits in putting together the book, *Something Happened*. Again, what first appeared to be flippancy had real substance.

My novels begin in a strange way. I don’t begin with a theme, or even a character. I begin with a first sentence that is independent of any conscious preparation. Most often nothing comes of it: a sentence will come to mind that doesn’t lead to a second sentence. . . . As I sat there worrying and wondering what to do, one of those first lines came to mind. . . . Immediately, the lines presented a whole explosion of possibilities and choices. . . . Ideas come to me in the policy and from emotive writing to hard-nosed exposition. Drafting is ideal for these purposes, because it involves no sales pitch (or reader lures) and does not try to create literature.
course of a sort of controlled daydream, a directed reverie. It may have something to do with the disciplines of writing advertising copy . . . , where the limitations involved provide a considerable spur to the imagination. There's an essay of T.S. Eliot's in which he praises the disciplines of writing, claiming that if one is forced to write within a certain framework the imagination is taxed to its utmost and will produce its richest ideas.3

Briefly, then, Heller, like Seavey, doesn't hold off writing until he has his substance fully in hand. Starting with at least something to say, he exploits the resources of composition to inspire and condition his own thinking. Legislative drafting, involving probably the most disciplined writing outside mathematics, offers this potential in its fullest measure. Heller's idiosyncracy is that he starts writing with very little mental warm-up.

Confirmation exists also in a recently published letter of E. B. White:

I always write a thing first and think about it afterward, which is not a bad procedure, because the easiest way to have consecutive thoughts is to start putting them down.4

The central idea here is that in the course of writing, the author, after what may seem like trying to strike a damp match, soon finds that he is party to a two-way conversation with what he has put on paper.5 The manuscript is talking back to him. In current computer jargon, it is producing “feedback.” I call it “talk-back.” For the legal writer this talk-back is mostly in the form of questions. And here we should remind ourselves that in the development of workable ideas the primary thing is not to rush for right answers, but to make sure that we are asking the right questions.6 This is what disciplined writing helps to do.

Writing as Learning

Writing also helps research. Research is inefficient unless we know what we are looking for, and trying to express and systematize a fuzzy question helps us sharpen it.7 Robert Pirsig, in his fascinating book, Zen and the Art of Motorcycle Maintenance, seems to have been thinking along these lines when he wrote:

. . . [F]acts do not exist until value has created them. . . .
If they were all present at once our consciousness would be so jammed with meaningless data we couldn’t think or act. . . . [T]he track


5 “[W]riting is an aspect of dialogue, rather than merely monologue . . . an act of communication, and not of broadcasting,” quoting Van Nostrand, op. cit. supra n. 1, at p. 17.

6 “The worst, the most corrupting, lies are problems poorly stated.” Georges Bernanos, French theologian quoted by Senator Daniel F. Moynihan at Baruch College, Chicago Tribune, sec. 1, June 24, 1977, p. 11.

7 “[P]eople acquire knowledge about any subject simply by writing about it. They do so by being forced to perceive relationships among the data that pertain to the subject.” Op. cit. supra n. 1, at p. 15.
of Quality preselects what data we're going to be conscious of.

I once had 8 summer weeks to do a legal management project for the Federal Aviation Agency. My research in this instance was confined largely to finding the experts and asking questions. Did I wait until the end of the seventh week to start writing my report? I began writing it at the end of the first week. Although the first draft was scrawny and feeble, my attempts to organize it brought to the surface inconsistencies, gaps, and other defects.

Writing that first draft at an early stage helped sharpen my sense of the relevant in time to get full mileage out of it in my later interviewing. The writer who tries to do all his research before he starts to write often finds out later that he has researched many irrelevant or insignificant things, thus wasting precious time, while he failed to research things that came to light too late to handle adequately. It is good to find the basic defects, and the earlier the better. Besides, if he over-researches before starting to write, he risks snuffing out potentially valuable insights of his own before they have had a chance to germinate in the delicate air of intellectual innocence. He also risks creating a formidable psychological hazard by inundating himself with detailed materials, distracting in their wide irrelevance, to the point of sapping his will to write.

The best part of the "write early" approach is that it works.

Most of what I have been saying seems to be supported also by John Platt in his book, The Step to Man.\textsuperscript{9} The relevant chapter is called "Strong Inference." Platt points out that some branches of science have moved forward very much faster than others, because they have been using a method of scientific research called the "accumulative method of inductive inference." Its gist is to exploit the indirect method of proof by developing a range of alternative hypotheses and seeing which ones can be eliminated, through critical experiment, as demonstrably false. Thus, no hypothesis is entertained unless it is potentially refutable. For present purposes, the important fact is that this method provides, for future testing, the sharpest possible hypotheses. This means that the supportive research will be highly relevant, highly focused, and highly efficient. The result is quicker and more useful results.

The lesson for legal writing is clear. Do \textit{not} try to do all your research first. Instead, begin to write, or at least to systematically organize your material, as soon as you have a fairly good idea of what your problem is and a generous inkling of the answer. Indeed, you should repeat the process whenever your later research accumulates enough material that it starts to become indigestible or hard to cope with. These phases correspond to the scientist's periodic switches from hypothesis to verification to modified hypothesis.

"[T]raining in writing . . . is a way of discovering things we didn't know were there in our minds . . . . How will we know what we think until we see what we have written?" M. Lerner, \textit{On the Art of Reading and Writing}, Indianapolis Star, February 14, 1977.


While writing, you should use every chance to encourage talk-back. For instance, suppose you are typing energetically, trying to develop a coherent line of thought. You discover a bad gap in your information. Do you turn off your machine and run to the law library or a telephone? Not unless you have reached a basic fork in the road. Instead, you fill the gap with statements that blend logically with your current information or argumentation. This gives you important, specific hypotheses that you can test later. Most important, it heads off what could be a serious interruption.

If you take the other approach, insights that are perched precariously on the tip of your mind may be gone by the time you come back to your typewriter. The same applies to minor imperfections of spelling, grammar, or form. While the draft is talking to you, don’t fuss with details; get the gist of its message on paper. Besides allowing the talk-back to continue, careful interpolation or extrapolation will produce not only, relatively specific hypotheses (which will focus later research) but ones that have the best chance of being verified.

If the legal writer follows this general approach, some of the talk-back will relate to matters of substantive policy that, properly dealt with, will make the final product a better instrument of the client’s will. Recognition of this contribution is likely to earn the writer an opportunity to participate earlier in the development of substantive policy. Ultimately, good performance will elevate him to a more effective position as a supportive participant in making policy.

The one real danger in the approach that I have urged is that the writer may get so carried away with the beauties of his tentative results that he forgets to follow up with the research needed to verify them. (Every good thing carries some risk.)

So far, most of what I have said applies to expository writing generally. Let us now focus on legal drafting.

Until both draftsman and client have a fuller appreciation of what the draftsman can do beyond manipulating language, many an otherwise able draftsman will continue to be called in only at the last minute to put an otherwise crystallized document into good “legal English.” (How could a draftsman be more professionally demeaned!)

But getting in early, by itself, is not enough. The draftsman should make sure that he ascertains the full scope of his client’s problem and that he digs out (and perfects) the concepts implicit in it. Because the substantive benefits of taking these steps do not derive specially from the act of writing, I will not discuss them here.

Probably the most basic step, and the compositional one most likely to produce useful talk-back, is to develop, at an appropriately early stage, a severely hierarchical topical structure called an “outline.” All the composition books tell you to make an outline, but none that I have seen gives an adequate account of how it should be conceptualized. I tried to remedy the situation in chapter 5 of The Fundamentals of Legal Drafting, but I’m afraid that I left the reader awash in a sea of abstraction.

Pirsig did better by diagramming and summarizing the structure of a motorcycle and, until we can find a better way to teach the fundamentals of hierarchy (the backbone of the biologists’ "taxonomy"), the best way is to have each student writer begin by developing a thoroughgoing hierarchical arrangement of the parts of some complicated physical object. Another useful exercise might be to prepare an organization chart for an accessible local organization. Unfortunately, such exercises fall short of full effectiveness in that at best they array observably discrete parts whose affinities are for the most part already established and need only to be observed.

Where, on the other hand, the concepts implicit in the problem are not clearly defined nor already sorted, conceptualization of the relevant components and determining the most significant affinities are much harder. Fortunately, intensive effort pays rich rewards in greater clarity and better substance. (Look, for instance, at the table of contents of title 10 of the United States Code. 12

The main advantage of severely hierarchical arrangement is that it helps produce the most significant juxtapositions of functionally related ideas. These, in turn, facilitate the most significant comparisons. We are talking here about the fundamentals of architecture. (The parallel with conventional architecture is strikingly close.)

As the draftsman moves from the architecture of whole instruments to that of particular sections, paragraphs, and sentences, there is a vast potential for substantive talk-back in the use of such traditional branching devices as tabulation (also called "paragraph sculpture") and such newer and more exotic branching devices as logic trees and switching circuits (flow charts), including "language normalization," the latter of which exploits the resources of symbolic logic and, in some cases, computers.

It would be nice to be able to give a fuller account here of written and other visible devices for exploring and organizing concepts. Unfortunately, the profession that faces man’s most sophisticated communication problems is still unable to produce an approach to legal drafting sophisticated enough to cope with the increasingly complicated problems generated by our exploding legal culture.

Supplementing sound arrangement as a means of producing substantive talk-back, and fortunately much easier, are a number of other devices. One of these is to insist on semantic and formal consistency throughout each instrument. Always say the same thing the same way. Always say different things differently. If two sections are partly the same in substance, they should, to the same extent and so far as feasible, be made similar in arrange-

ment and expression. When the similarities are treated similarly, the important differences are much easier to spot. For instance, when trying to make § 1203 of title 10 of the United States Code (dealing with the separation of regular military personnel) parallel in structure to its counterpart, § 1201 (dealing with the retirement of regular military personnel), the revisers discovered that an important contingency had been omitted from the source law for the former. Proximity was important because it drew attention to the need for uniformity.

These rules are put into practice by making specialized across-the-board checks. It is amazing what substantive deficiencies you discover in a draft when you root out what appear to be only inconsistencies of arrangement or expression.

Another way to produce substantive talk-back is to make sure that all material deviations from normal semantic understanding are removed. This is the rule against "Humpty-Dumptyism." Humpty-Dumpty usages, such as distorting the normal meaning of "supplies" to include repairs, cast a veil of obscurity over a draft that can confuse even the author.

Also important is a purely mechanical, but by no means trivial, rule: Do not turn loose as final any draft that displays substantial editorial changes. On this, let me quote my favorite text:

Drafts that seem to read well when badly marked up usually still contain, when retyped, errors or inconsistencies or awkwardnesses of expression, so that it is a good policy to keep retyping and revising until a clean draft reads satisfactorially without further revision.16

These principles are the most important in legal drafting, because they not only contribute greater clarity and readability but, in so doing, tend to improve the document as an instrument of substantive change.

The rest of the drafting process is to apply the familiar array of specific principles and rules of semantics, grammar, and syntax. In mentioning these only briefly, I do not downgrade them. Important as they are, they need to be put in better perspective in the dynamics of drafting. At the same time, we should recognize that, although many improvements have a lower potential for producing talk-back, anything that increases clarity may uncover desirable changes in substance.

Only if we take these principles to heart can we equip lawyers with the training and opportunity necessary to perform the architectural and engineering services that today's legal system badly needs.

16 Dickerson, supra note 6, p. 45.