

LEGAL WRITING ACADEMY

NEW WEBSITE LAUNCH

November 17, 2016

Membres de la faculté, membres du Barreau, étudiantes et étudiants de l'Université d'Ottawa

Permit me to thank you for your welcome this evening, and for the honour of participating in the launch of the website for this important faculty initiative, the Legal Writing Academy.

I was just recently out west visiting one of the law schools out there. And during a lunch, I was seated with a law professor, some students, and a member of the local bar.

And one of the students asked “how are standards different from when you went to law school?”

The lawyer, who was probably about 5 years older than me, gave the usual reassurances that students now are typically stronger academically, more socially aware, and more intelligent in every way, including emotionally.

But then – he said something that I’m not sure is entirely fair. He said that the current generation of students does not write nearly as well as students did when I went to law school.

As I say, I don’t think he *was* being fair. When one looks at old pleadings, old factums, old correspondence, it becomes evident very quickly that past generations have had their share of poor writers.

I think, however, that what *is* fair to say is that that good legal writing is more important *now* than *ever*. Most appellate courts, including the Supreme Court, have pared down the times for oral submissions from what they were a generation ago, with the result that most appeals – not all, but *most* – are won and lost on the factum. And increasingly complex civil *trials* usually result in extensive written submissions as a substitute for, or complement to, oral argument. The trend in litigation is towards *more* writing and *less* talking.

And, on the transactional side, writing well is no less important. Just in the past few years, we’ve relaxed the standard of review for interpretation of contractual terms, which gives an even greater incentive for clarity and precision in crafting them.

So, as I say, writing well is more important a skill for today’s lawyers than for yesterday’s.

So, as a heavy consumer of both good and bad legal writing, what do I mean when I refer to writing *well*?

For me, a useful approach to understanding the concept of good writing is to look to the needs and interests of the reader – that is, the audience. If it advances *its* purpose, if it fulfills *its* expectations, then we're at least on the way to having a well-written document.

In the context of *legal* writing, those constituencies who comprise the intended audience – lawyers, academics and judges – have very particular needs and interests when they read legal documents. Lawyers and judges read legal documents because they need to extract information from those documents that will help them make decisions in the course of discharging their respective duties. Legal academics read legal writing because they wish to remain current on the stream of scholarship in an area of interest to them, or because that writing or bit of scholarship is the latest volley in a debate in which they are participants.

Let me give you a particular example of this, written by a former academic – who shall remain anonymous – from Alberta who, having moved on to the judiciary, is rather horrified when he goes back to see the writing style he employed in some of his published works. In 2009, he wrote:

“I have argued in this paper that the structure of juristic proof, while veritistic, is distinct from the structure by which propositions are scientifically verified. As a result, neither the existence of an evidentiary gap nor scientific demurral from bridging that gap excuses the fact-finder from proceeding further in the causal inquiry”.

Today, he might make the same point as follows:

“I have argued that the standard of proof in law, while determinative of facts where it is satisfied, is distinct from the standard of proof in science. It follows that, while factual uncertainty might preclude finding a particular fact when applying a scientific standard, it might not when the legal standard is applied.

Now, of course, the earlier version was written to a different audience than that to which he would today. He was writing to probably 20 or 25 (at the most) different causation fanatics scattered around the world, for whom each one of those terms he used held much encapsulated meaning.

Now, of course, he is accustomed after almost four years on the bench to writing for *different* audiences. Initially, as a trial judge, it was for the parties. Then, as a court of appeal judge, it was for a wider audience – lawyers and trial judges, as well as the parties. And, since his time on the Supreme Court he has had to write with an even wider *public* audience in mind as well.

The point is this: irrespective of whether one is a judge, a lawyer, an academic or a law student – the intended reader's purpose and the degree to which the written document satisfies that purpose is a useful consideration in assessing what makes good writing. Good legal writing helps people make decisions.

But to judge good legal writing solely by *its fruits* risks overlooking *the qualities* that get you there. And as a heavy consumer of legal writing, I would humbly suggest *three qualities* that mark good legal writing.

The first – and I am listing these in order of importance as I see it – is *clarity*. I have heard this quality associated with the use of plain language. But clear writing and plain language are not necessarily the same thing. I sometimes wonder if the Plain Language Movement has not come with a cost, by focussing on the use of ordinary terms to the exclusion of technical terms that may enhance the *precision* of legal writing. The concern is that plain language, for example in contracts or statutes, may undermine clarity by *introducing* ambiguity, while precise legal terms enhance clarity by *reducing* ambiguity.

This of course creates a dilemma for legal writers, because clear writing entails not only conveying information with an appropriate degree of precision, but also using language that is clear to the intended audience. This is, I should add, a particular challenge at the Supreme Court, or at least for me at the Supreme Court, where the audience is a broad one.

But, irrespective of the challenge of drawing that balance, clarity will *always* mean de-cluttering. Legal writing should above all be free of unnecessary words, circular constructions, repetitively made points and meaningless jargon. In my painful experience as a legal writer, this usually entails a lengthy and careful process of ruthless refinement. As I gather this talk has been advertised, *Edit or Else!!!*

The second quality that I think denotes good legal writing is *concision*. Now, this is a term that is often confused with *brevity*. But concise legal writing is not merely, or even necessarily, brief. Some documents simply cannot be written in a few pages. Rather, concise legal writing is efficient. It conveys the writer's point as economically as possible, avoiding superfluous words, but still conveying an appropriate amount of detail.

Obviously, what constitutes an appropriate level of detail will depend on the context. Generally speaking, it's not possible to explain a complex idea as succinctly as a simple idea. A written brief in support of a motion to obtain third party disclosure in personal injury litigation will usually be shorter than an appellant's factum arguing a section 7 case.

Now, why is concision important? In a way, it is parasitic to clarity. Concise writing is *clearer* than writing that is not concise. But if that were the only reason to write concisely, concision would not be a fundamental quality of good writing, which I think it is. Concision matters *also because* it helps readers make effective use of *their* time. As such, it promotes decision-making that is both good and efficient.

Finally – good legal writing, in addition to being clear, and concise, is also *engaging*.

Now, why is that important? Because readers do not want to keep reading a document, no matter how clear and concise it is, if it does not engage their interest.

Imagine if you read a memorandum that began as follows:

Our client is Lisa Savard. Ms. Savard has sued the City of Ottawa in the Superior Court of Ontario for *Charter* damages. During a televised Ottawa Champions baseball game, she unfurled a banner. The banner said “Just Say No to Pipelines”. She was arrested by a City of Ottawa police officer. She says this was a breach of her section 2 right to free expression. She seeks \$5,000. She has asked us for our opinion on whether she will be successful in her lawsuit. This memorandum addresses that issue.

Now, aside from Professor Dodek, whose ears undoubtedly perked up when I mentioned the Ottawa Champions, nobody will want to keep reading this. It is tedious, and monotonous. It lacks any stylistic depth that would make it interesting.

Now contrast that with this excerpt from the judgment of Justice Rand, in *Saumer v. The City of Quebec*:

Strictly speaking, civil rights arise from positive law; but freedom of speech, religion and the inviolability of the person are original freedoms which are at once the necessary attributes and modes of self-expression of human beings and the primary conditions of their community life within a legal order. It is in the circumscription of these liberties by the creation of civil rights in persons who may be injured by their exercise, and by the sanctions of public law, that the positive law operates. What we realize is the residue inside that periphery.

Now, given the extraordinary breadth of the subject matter canvassed in Justice Rand’s statement, his writing is unquestionably clear and concise. But it also commands the reader’s attention. It is crisp, and powerful, and compels the reader to keep reading. It stimulates our thinking. It has that elusive quality of conveying the writer’s *voice*, so that a glimmer of the writer’s personality reveals itself through the text, letting the reader see that there is a real person behind that document. It carries an aesthetic, almost elegant quality – what we now often refer to as “beautiful” writing.

Now, if I’m right about this, or about *any* of this, there is at least one pedagogical implication worth contemplating. Because all these qualities – clarity, concision, and engagement – require *practice*. Good lawyers write well, because good lawyers write *lots*. Yet, the traditional method of teaching in which I engaged as a legal academic tends to inundate students with organizational formats (issue, rule, application, conclusion) and usage rules (like avoiding the passive voice), without providing them with an opportunity to actually *write*, cognizant of contextual considerations that should guide the writer’s choices, such as the nature of the intended audience and the purpose of the document in question. Considerations like balancing between technical terms and plain language; and between varied sentence structures which engage the reader, and simple sentence structures that make things clearer.

Which brings me to the initiative – now already with 4 or 5 years under its belt – whose website launch we celebrate today. As you users and future users make your way through the website – as I have – what I am sure will impress you is, first, that this is at once a collection of resources

for self-teaching, but also an instructor's teaching tool. And, second, because it is a collection of resources for self-teaching, it is something that *lawyers*, and not just law students, can keep coming back to again and again as they advance in their careers and in their writing ability.

But, *that said*, I think I would like to close with something of a *plea* to the law students present. There is so much excitement about this initiative, that I think it is safe to say that the word is out: legal writing is the most important skill to master in order to become an excellent lawyer. So *please* – even though this resource will still be there for you when you are out in practice, remember that *learning to write well takes time*. Acquiring the ability to write well is not the sort of thing you want to defer and undertake later as on-the-job training. You simply won't have the time you have *now*. So take the time to *do* it now, in law school. Whether it's one or two or almost three years that you have left – make use of this resource. There's nothing else like it in Canada, but you've got it here, so *use it!*

Finally, I want to congratulate all concerned: the Legal Writing Academy's co-founders Professors *Zweibel* and *Dodek*; the website production team Professors *Zweibel* and *McRae* and everyone who has contributed to the development of this website and of the Legal Writing Academy. I'm *truly* pleased to have the privilege of association with the Academy, and look forward to working with you in the years ahead.