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Law Firm Writing Programs Are a Challenge

The results are uncertain, and the time is non-billable

By Kenneth F. Oettle

Let's put legal writing in perspective. It is neither the most important nor the least important lawyering skill. One does not have to write well to advance to the highest levels of the profession. Persons who originate business, negotiate big deals or direct major litigations are the most valuable lawyers in the firm and thus the most highly compensated.

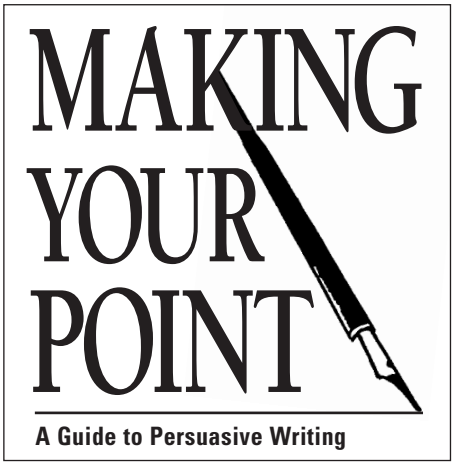
On the other hand, bad writing is bad for business. A weak brief becomes target practice for a court and opposing counsel, and it leaves a bad impression. After several poor products, a court may lose faith in the writer, thereafter presuming, until persuaded otherwise, that the writer's arguments are flawed.

Bad writing also sours relations with clients. In-house counsel easily see past the "indeed's," the "clearly's," and the "It-has-long-been-held's." Even unsophisticated clients can sense when a brief or memo is confused or pretentious. The client who discerns a glitch of skill loses confidence in the writer and the firm.

Clear writing reflects clear thinking, and usually, muddled writing reflects muddled thinking. What many lawyers don't consider is that unclear writing not only reflects, but is a hiding place for, unclear thinking. It gives the writer false comfort. Verbosity, disorganization, exaggeration, and lack of transition, among other things, conceal the absence of a point not only from the reader but from the writer.

Bad writing also sours the working atmosphere. It irritates assigning attorneys, who criticize the work and lose faith in the writer. The writer in turn loses confidence and grouses about the hypercritical atmosphere. All this is bad for morale.

Good writing, on the other hand, is a



useful tool. Or to use a metaphor more in keeping with the litigator's image, it is a useful weapon. The more powerful the weapon, the more formidable the advocate who commands it. A litigation team with a good writer has more tactical options because maneuvers that depend on clear, forceful writing have a greater chance of success. Good writing builds confidence and empowers the team.

Given the importance of persuasive writing, one would expect law firms to have flourishing writing programs. But most don't. Trying to sustain a law firm writing program is like trying to grow grass in a dead spot on your lawn. Each year, you throw in more seed; the grass springs up and looks good for a while; and then it wilts. The next year, the dead spot is still there.

Writing programs fail to take hold for many reasons, not the least of which is the billable hour. Few lawyers are willing to spend time teaching or learning writing if they are paid in proportion to the time they bill. Even those with the teaching gene are discouraged.

Law firms won't elevate writing instruction to billable status any time soon. Though writing ability is useful if not essential for an associate's early survival, it is secondary in the climb up the pecking order. To attain partnership, associates must originate business or do an excellent job in the first chair.

For that, associates need much more than writing ability. They need to relate effectively to people; to be assertive and tenacious (to have "fire in their belly"); and to be quick on their feet. They need good judgment, a sense of strategy, and vision. They also need good follow-through.

Skill at writing does not ensure any of these abilities. To the contrary, the better writers are often viewed as the "intellectuals," who may be less suited for origination or the first chair. Ironically, this tends to give good writing a bad name.

Not only does writing ability fail to ensure personal success, but it is hard to impart. Even with special attention, some lawyers seem not to improve. Gains come slowly, if at all, and they are unpredictable. Evidence of improvement may not emerge for months or years.

Motivation is also a challenge. Though criticism can euphemistically be called "constructive," it still diminishes the self-image. After a few uncomfortable

The author is a partner and co-chair of the writing and mentor programs at Sills Cummis Epstein & Gross. He invites questions and suggestions for future columns to koettle@sillscummis.com. "Making Your Point" appears every other week.

feedback sessions, some associates have an aversion reaction and give up.

Others don't want to admit that they need help; they think they can't be helped; or they are under pressure and won't spare the time. The instructional process doesn't provide enough satisfaction to offset the expected discomfort and the loss of billable time.

Good writing doesn't even guarantee a good brief. Writing is only the last step in the long process of developing an argument. First, the writer must take the assignment — getting it straight is a tall order for some.

Then the writer has to find case law and analyze it, extracting value from good cases, distinguishing harmful ones and finding common threads. If the analysis is wishful or incomplete, the writer's argument may fail whether the prose is fluid or not.

Lawyers also have to gather facts, organize them, and tell a good story. They need to know what will sell. Above all, they need the courage to confront the other side's best argument and deal with the weakness in their own case.

All these tasks — research, case interpretation and thematic analysis — require complex abilities and diligent effort even before the lawyer begins to write. Why fuss over the icing (the writing) if they can't bake the cake (everything else)?

In sum, formidable barriers discourage writing programs: Writing is only one of many important skills; though helpful, it is not essential to attain partnership; instructional success is far from assured; and writing programs consume billable hours. The cream of the associates will rise to the top with or without a writing program, and the less able and less motivated will move on. Even assuming associates could be trained to write, why train them for someone else?

If a writing program lasts, several things are probably true: The lawyers who run it are dedicated and skilled; the program is directed at the right audience; the firm demands participation and expects results; and the firm rewards or at least recognizes the efforts of those who teach and who are taught.

This is asking lot of a firm and its lawyers. Partners and senior associates looking to launch a writing program have to sell it to management and then sustain the sell with results. I don't have a problem with that. It's business.

If your firm has an enduring and effective writing program, I would appreciate your feedback.

Puzzler

How would you revise the first of the following two sentences?

> It is important to note that the lack of a fiduciary duty is instrumental to plaintiff's claims. Without such a duty, plaintiff's claims for constructive fraud and breach of the covenant of good faith and fair dealing fall away.

The opening phrase is, of course, a no-no. Your saying that something is important does not make it so. To the contrary, it may make the reader suspicious. If you have to try to jack up the significance of your facts with editorials, maybe your facts aren't so good.

"Lack of fiduciary duty" and "instrumental" are not a match. Instrumental is a supportive word whereas the lack of a fiduciary duty is harmful to plaintiff's claims. I like "absence" better than "lack" because the latter suggests that the claims rather than the defendant might bear the duty.

The revised version: The absence of a fiduciary duty is fatal to plaintiff's claims.

Alternate version: Fiduciary duty is a necessary element of plaintiff's claims. ■