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Legal Writing in the New Millennium: Lessons from a Special Teacher and a Special Classroom

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ESSAY

LEGAL WRITING IN THE NEW MILLENNIUM: LESSONS FROM A SPECIAL TEACHER AND A SPECIAL "CLASSROOM"†

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After receiving the invitation to address this conference, I found my thoughts often returning to my own education in legal writing. As I recall, my legal writing experience in law school was not a very intensive—or positive—one. As was quite typical in that era (almost thirty-three years ago), the program at my law school was not very extensive: we wrote a memorandum of law and a brief under the guidance of a graduate law student.

My real legal writing education took place in the study of the Chief Justice of the United States. For the better part of five years, I sat across from him at a massive library table as he wrote his opinions.[1] The lessons of those years deeply influenced my own approach to legal writing, to the legal writing that I have required of my students at Notre Dame, and to the legal writing that I expect of my own law clerks as they assist me as I once assisted the Chief Justice.

Tonight, I want to share with you some of my memories of those days and of the lessons learned.[2] The Chief Justice was a great teacher; his methods were his own special admixture of lecture, practicum, and critique. Above all, it was his vision, his global understanding of the place of writing in the legal enterprise, that made this melange of methods so effective. I shall try to convey to you the wis-

† This essay was originally delivered at the Notre Dame Colloquium on Legal Discourse, July 27, 1998.

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1 *See* Kenneth F. Ripple, *In Memoriam: Warren E. Burger*, 109 HARV. L. REV. 5 (1995).

2 For additional insights on lessons learned from the Chief Justice, *see* John E. Sexton, *A Tribute to Warren E. Burger*, 100 HARV. L. REV. 979 (1987); Kenneth W. Starr, *A Tribute to Chief Justice Warren E. Burger*, 100 HARV. L. REV. 971 (1987).

dom of that vision. Hopefully, you will find it helpful as you prepare the newest members of our profession for the practice of law in the new millennium.

For the Chief Justice, writing was not just a means of communication. It was a necessary tool for thinking through the most difficult problems. For him, tough analytical thought and precise legal reasoning were not the product of oral disputation. Rather, the fundamental intellectual process of lawyering and judging occurred when the validity of an initial hunch or intuitive flash[3] was tested by pen meeting legal pad. As the pen met paper, private musings and oral dialogue were transformed into solid analysis or discarded as useless as he searched for the appropriate outline of the opinion, the "best" phrase, the "right" word to convey a thought. After reading briefs, studying cases, and listening to oral arguments, he would often say, "Let's see how it writes out."

Through the process of draft and redraft, the shape of the opinion would change, not just in form but in substantive content. As he edited the piece, he was clearing not just useless words but irrelevant intellectual underbrush. Sometimes, he would lose his way and retrace his steps by reading and rereading earlier drafts. On other occasions, after many attempts, he would put the pen down and declare that "it just won't write." This was not a statement of despair but one of discovery. He had found the flaw in his reasoning and had to jettison his presuppositions about the case and start over in a new direction.

In recognizing the importance of writing as a tool of thinking, the Chief Justice followed a long-standing intellectual discipline of our profession. Justice Frankfurter, describing Justice Brandeis, wrote:

> Thought for him was the product of brooding, not the windfall of inspiration. He believed in taking pains, and the corollary of taking pains was taking time. And he spent no less time in the expression of thought than in its conception. Aim at excellence is often a paralyzing evasion of effort. In Mr. Justice Brandeis it was an expression of the aesthetic side of his nature, but even more it was a response to his desire for utmost effectiveness in communicating thought. The ultimately right word and the delicate use of punctuation were as carefully weighed as the idea of which they were the vehicles. He was rigorous in his standards of appreciation of others. Of himself, he was ruthlessly exacting. Even after the long incubating process of maturing an opinion—the wide range of investigation, the toilsome study within it, the slow, careful writing of findings and con-

3 *See* J.C. Hutchinson, Jr., *The Judgment Intuitive: The Function of the "Hunch" in Judicial Decision*, 14 CORNELL L.Q. 272 (1919).

> clusions—it was routine for him to revise his draft opinion again and again, often more than a dozen times. In at least one instance there were fifty-three revisions. One sample of this laborious, intelligent procedure, in which twenty-six drafts went to the printer, will illustrate the morality of his mind.[4]

Today, in the federal judiciary, we try to live up to this standard. One of the very best continuing legal education programs I have attended as a judge took place at a joint meeting of the judges of the First and Seventh Circuits. As part of the program, we discussed opinion writing. We began with the question: "For whom do we write?" Notably, the consensus that grew out of our discussion was that our primary audience was ourselves. Our own writing either convinced us of the correctness of our course or of the error of our ways.

For the Chief Justice, writing was also a way of helping people to reason together. When faced with a fractured vote at the Court's impression conference, the Chief Justice often asked the intellectual antagonists to write out their views and to then circulate them to the entire court. The writing process and the subsequent exchange of views required the various authors to tighten their reasoning, to present their ideas succinctly, and to meet head on opposing views. The sunlight of the written word soon melted impressionistic thinking. Slowly but surely, a consensus formed around a particular memorandum that soon became the draft opinion of the court.

The Chief Justice's appreciation of the role of writing in the process of legal analysis did not eclipse his desire that his writing communicate well the end-product of his thinking. An extremely rapid reader himself, he knew that legal writing is read by professional readers—lawyers who read whole paragraphs and even pages at one time. He appreciated the need to make legal writing "user friendly" in that regard. He preferred the short sentence over the long one, the simple, direct word over the more esoteric but obscure reference.

One of the mainstays of his legal writing admonitions to his clerks was his emphasis on a clear, fair presentation of the factual background of the case. Indeed, he gave us each a manual entitled "Ex facto jus oritur"[5]—the law is born of the facts. He counseled us to always draft our version of the facts from that materials of the side that was going to lose. Using that draft as a starting point, we then went through the tedious task of verification and then through a process of refinement to ensure that the final rendition was a balanced presentation. He showed us time and again how the excessive use of adverbs

4 Felix Frankfurter, *Mr. Justice Brandeis*, 55 HARV. L. REV. 181 (1941).

5 BLACK'S LAW DICTIONARY 572 (6th ed. 1990).

and adjectives could taint the integrity of our factual presentation and ultimately warp our legal analysis.

His own legal analysis was marked by two traits: (1) his concern about context and (2) his abhorrence of dicta. His concern with context was most evident in his attempt to place his doctrinal discussion in historical perspective. A common law lawyer par excellence, he took as a given that the serious reader of legal material must understand the historical development of the doctrine if he is going to be able to perceive that doctrine's future vectors. His abhorrence of dicta grew out of an intellectual humility that he thought ought to be a characteristic of all legal writers: stay "on task"; take care of the problem before you; do not influence by poor writing that which you are not prepared to decide definitively today.

The Chief Justice was also a great believer in "tone" in legal writing. Not all legal writing is intended to be as antiseptic as the usual law review case comment. The appropriate word choice—and even the occasional use of the passive voice—can suggest such qualities as urgency, tentativeness, and outrage. Rigidity in writing style through slavish adherence to arbitrary "rules" robs the legal writer of needed weapons of communication.

No description of the Chief Justice's lessons in legal writing would be complete without mention of his "left drawer" rule. Claiming that he had inherited the rule from a former Chief Justice, he warned us time after time against allowing our emotions to influence the substance and the tone of our writing. If you are angry at an opponent, he counseled, write out a draft describing exactly how you feel. Then place it in your left hand drawer. After three days, take it out and read it. Then revise it. Respect for all the players in the litigation, including the "lower court," a phrase he never allowed us to use even in internal memoranda, was essential to the integrity of the entire process.

The lessons I learned at that long library table in the Chief Justice's study have become a part of my own perspective as I deal with the work product of the attorneys who appear before me. I suggest that those lessons ought to provide as well a great deal of food for thought in your discussions about legal writing programs as part of the law school curriculum.

First, we need to spend more time making the students conscious of the intimate relationship between legal reasoning and legal writing. Legal writing cannot be thought of as simply a "skills course," to the extent that the term is used to describe parts of the curriculum less important than "substantive" courses. Indeed, a good writing instructor ought to take the lead in convincing students that, in essence, the

law school experience is an education in how to think. Do we emphasize sufficiently that writing is for most legal ventures the primary engine that drives the reasoning process? For the Chief Justice, the answer was clear and he consumed legal pads and felt pens at a very rapid rate as he thought his way through a term of court. We must give more thought and discussion to how we can improve our students' appreciation of the relationship between writing and thinking.

Second, we need to stress that good legal writing—because it is also good legal thinking—takes time. If it took Brandeis over ten drafts to get it right, it will take most of us quite a few more before a satisfactory product has been produced. This is not an easy proposition for today's law student or lawyer. Time pressures—whether from competing course demands, or the billable hours clock in the law firm, or the pressure of workload in government—militate against following the Brandeisian example. Here is another challenge for the legal writing instructor: accommodating the demands of quality to the time demands of contemporary practice.

Third, we need to stress that the writing process requires a certain humility of mind and spirit. There must be an openness to the possibility that something "won't write out" because it does not make sense and that a substantive course adjustment is necessary. Good legal writing requires an openness to the ever-present possibility that there is a better way to express one's thought.

Fourth, we need to stress the use of writing as a communal tool, a way by which lawyers can reason together to resolve differences. Students ought to be encouraged to write about divisive issues and then to write about the same issues from a different perspective. In difficult cases, I often ask my clerks to undertake this exercise. My final product often reflects a good deal of both versions.

Fifth, we need to emphasize the ethical dimension of legal writing. We need to stress honesty in writing style. Nothing would irritate the Chief Justice more than a submission that was less than frank in its research—or in its writing. The task of decision was difficult enough without the burden of dealing with an attorney whose play on words made getting to the bottom of the matter that much more burdensome. A lawyer's work product ought to be comprehensive in its organization, lucid in its presentation, and without guile in its word choice. In short, the legal writing program ought to be a prime venue for inculcating the new member of our profession with a sense of responsibility for speaking the truth in a professional world in which, as

Justice Douglas once put it, there are few blacks and whites; the greys predominate, and even among the greys the shades are innumerable.[6]

Sixth, we need to stress the need for civility in legal writing. Civility in legal discourse, on both sides of the bench, is fast becoming a lost art. There are many causes for this widespread phenomenon. The Ramboesque "winning is everything" psychosis that pervades the work ethic of many a law firm is certainly one factor. The strident ideological warfare present on some benches in this country is another. Our Circuit, under the leadership of our former Chief Judge, William J. Bauer, found it necessary to undertake a massive effort to restore the quality of discourse in our own courts.[7] You have the opportunity to deal with this problem in its most nascent stage. The newest members of the profession have to be told bluntly that they ought not imitate their elders' rhetorical flare for the caustic. They need to understand that such an indulgence only impedes the process of thinking through a problem. It creates wounds that scar an adversary long after the immediate problem has been solved. It also irritates the judicial mind which they are trying to convince.

Seventh, we need to be sufficiently flexible in the "rules" we suggest our students follow to permit them to adjust their writing styles to suit the many contexts in which they will be asked to write. Legal writing need not always be sterile. Recently at oral argument, a lawyer, believing his opponent had been too rhetorical in his presentation, urged the bench to "take the passion out of the law." But sometimes the law must speak passionately because the values that it protects are ones about which a member of our profession ought to be passionate, a virtue not incompatible with civility. At other times a certain tentativeness of expression is decidedly required because the law is in a state of flux or because there remain factual ambiguities. Indeed, there is even a place for an occasional use of the passive voice. As I tell my law clerks, "If God had not wanted us to use the passive voice, He would not have created it."

With respect to flexibility, the most significant challenge for today's legal writing instructor is equipping the student to make the necessary adjustments to different types of legal material. The Chief Justice was a common law lawyer. His approach to legal reasoning and his approach to legal writing were, to a very significant extent, the product of a period in our nation's jurisprudential development when most legal problems required common law analysis. Today, as Justice Scalia and Judge Calabresi of the Second Circuit have reminded us in

6 *See* Estin v. Estin, 334 U.S. 541, 545 (1948).

7 *See* STANDARDS OF CIVILITY FOR PRACTICE IN THE 7TH CIR.

their recent works,[8] we live in a legal world filled with statutory and regulatory material. Analysis of this material requires very different intellectual skills and, therefore, very different writing skills than those that worked for those who practiced in a predominately common law environment.

I remember one day in chambers when the Chief Justice was in a particularly good frame of mind. It soon became clear that the reason for his buoyancy was that he had just attended a meeting of lawyers working on alternate dispute resolution techniques and procedures. He told us that he thought that it would take a generation for alternate dispute resolution to be accepted by the bar, but he saw in that group of young lawyers a productive working group that would have a salutary impact on the future. For the same reason, he would have been cheered by the current efforts to improve legal writing education. He would have considered such work central to the profession's progress in the next century; he would have enjoyed exploration of ways to improve this core aspect of legal practice; he would have been heartened by the concern such efforts manifest for the new members of the profession, the men and women he regarded as the future of our country.

8 *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES (1982); ANTONIN SCALIA, A MATTER OF INTERPRETATION (1997).