

# Classical Persuasion through Grammar and Punctuation

Lillian B. Hardwick\*

Grammar and punctuation are rhetorical avenues that lead to or away from communication and persuasion. Near the end of his tenure as president of Scribes, the American Society of Writers on Legal Subjects, legal writing guru Bryan Garner wrote that the legal profession "has come to realize that learning how to write well is about much more than memorizing rules of grammar and punctuation. It involves much larger issues of rhetoric and persuasion."<sup>1</sup> Because one sure way to clear a room is to announce a lesson in grammar or punctuation, Garner may minimize these issues when he publicizes all-day writing workshops for law firms, government agencies, corporate legal departments, and courts. Still, Garner emphasizes that an understanding of grammar and punctuation is one of the fundamental abilities that any legal writer is expected to possess.<sup>2</sup>

In this article, I will argue that, rather than merely the foundation for the "larger issues of rhetoric and persuasion," grammar and punctuation themselves are rhetorical avenues. Because "rhetoric" is a synonym for "persuasion" in classical terms,<sup>3</sup> to say that one results in the other is almost redundant. But the use of rhetoric as a path is supported by Aristotle's

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\* © Lillian B. Hardwick 2006. Former writing instructor, University of Texas at Austin; Ph.D., English, University of Texas at Austin; J.D., University of Houston; plaintiff and defense litigation matters; consultant on judicial and attorney ethics matters; co-author of *Handbook of Texas Lawyer & Judicial Ethics* (West 2002-05) and *Juror Misconduct* (Clark Boardman 1988-89). Many thanks to Michael Smith and Linda Berger for their guidance and patience.

<sup>1</sup> Bryan A. Garner, *A Farewell Message*, *The Scrivener* 1 (Summer 1999).

<sup>2</sup> See e.g. Bryan A. Garner, *The Legal Writing Skills Test*, 5 *Scribes J. Leg. Writing* 107 (1994-95) (proposing that all law school students take a two-part, three-hour exam that would test "abilities that legal employers typically expect of their lawyers: (1) understanding grammar and usage; (2) tightening wordy sentences; (3) eliminating legalese; (4) summarizing judicial holdings; and (5) writing a cogent argument"). For more on these fundamentals of legal writing, see Bryan A. Garner, *Don't Know Much About Punctuation: Notes on a Stickler Wannabe*, 83 *Tex. L. Rev.* 1443 (2005); and Garner's articles in *Student Lawyer*, especially, *Follow These 10 Writing Tips to Succeed at Your Law Firm*, *Student Lawyer* 12 (Mar. 2005); *Put the Action in Your Verbs, and Your Verbs in Active Voice*, *Student Lawyer* 10 (May 2003); *As a Lawyer, You Will Need to Know and Use Standard English*, *Student Lawyer* 10 (Nov. 2002); *Effective Writing Requires Lifelong Commitment to Honing the Craft*, *Student Lawyer* 10 (Sept. 2002); *Take this Quiz to Gauge Your Grammar Skills*, *Student Lawyer* 10 (Feb. 2002); *To Answer Questions about Grammar and Word Usage, Consult the Proper Sources*, *Student Lawyer* 12 (Feb. 2000).

<sup>3</sup> "The key term for the old rhetoric was 'persuasion' . . . ." Kenneth Burke, *Rhetoric — Old and New*, *V J. Gen. Educ.* 202, 203 (Apr. 1951).

definition of rhetoric as "the faculty [power] of discovering in the particular case what are the available means of persuasion."<sup>4</sup> Aristotle then described "three kinds" of persuasive means: *ethos*, residing in the character of the speaker; *pathos*, deriving from the attitude created in the audience; and *logos*, stemming from the demonstration of argument.<sup>5</sup>

Although Aristotle and others in Greece who sought to persuade did so orally,<sup>6</sup> the rhetorical means they advocated are recognized as essential to the writing created by lawyers.<sup>7</sup> Due to their prominence in writing, errors in grammar and punctuation create interference with communication and persuasion, if not an unbridgeable gulf between legal author and audience. While this effect is not limited to trial lawyers, the mistakes that trial lawyers generate and litigate demonstrate why all lawyers who seek to persuade should be at least as precise in writing as they are in oral argument.

### I. The Classical Foundation

Legal scholars have little difficulty linking Aristotle's guidelines for persuasion to oral argument,<sup>8</sup> which validates their current application to lawyers' work: "It is amazing how modern, how relevant, how robust, how untrite his treatise on the art of persuasion remains today. Read Aristotle, and learn how to frame an argument."<sup>9</sup> The stretch of Aristotelian principles to writing has been a bit more attenuated: "Although Aristotle wrote about the spoken word, most of his teachings on style apply to writing as well."<sup>10</sup> Scholars who have directly addressed poor writing in law students and practicing lawyers see instruction in classical rhetorical theory as essential: "It is not our writing that is undeveloped or unclear; it is our thinking. In order to develop 'clearer' thinking, lawyers need to know something about the rhetorical tradition from which legal argument is derived."<sup>11</sup>

Nonetheless, no matter how clear the thinking or how well crafted the argument, it will not communicate and persuade if it neglects the most fundamental of writing techniques. Quintilian instructed, "Let no man . . .

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<sup>4</sup> Aristotle, *The Rhetoric of Aristotle* 7 (Lane Cooper trans., D. Appleton & Co. 1932) (bracketed language is from the translator).

<sup>5</sup> See *id.* at 8.

<sup>6</sup> "Both the mechanics of ancient civilization and its primary expression remained oral . . . . According to Plato . . . fifth-century politicians were afraid of being regarded as sophists if they published speeches." George Kennedy, *The Art of Persuasion in Greece* 4-5 (Princeton U. Press 1963).

<sup>7</sup> The classical means of persuasion have even been applied to the selection and use of citations. David S. Coale, *Classical Citation*, 3 J. App. Prac. & Process 733 (2001).

<sup>8</sup> See e.g. Steven D. Jamar, *Aristotle Teaches Persuasion: The Psychic Connection*, 8 Scribes J. Leg. Writing 61 (2001-02).

<sup>9</sup> Robert F. Hanley, *Brush Up Your Aristotle*, 12 Lit. 39, 39 (No. 2, 1986).

<sup>10</sup> Jamar, *supra* n. 8, at 101.

<sup>11</sup> Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric to Validate Legal Reasoning*, 27 Vt. L. Rev. 483, 489 (2003).

look down on the elements of grammar as small matters."<sup>12</sup> Legal writing professors who connect a "strong command of the rules of grammar, usage, and punctuation" to classical rhetoric<sup>13</sup> have detected a basic hurdle that lawyers must clear: none of Aristotle's persuasive means can reliably be achieved without proficiency in grammar and punctuation.

Those means are traditionally described as *ethos* (based on the perceived character and qualifications of the speaker/writer), *pathos* (the relationship with the audience necessary to move the audience to belief or action), and *logos* (the basis for persuading the audience to adopt a rational argument).<sup>14</sup> Especially for legal writing, it might be assumed that *logos* or the logically based argument is the key to communication (even though both the meaning and application of "*logos*" are elusive).<sup>15</sup> As one author put it, "[u]seful as *ethos* and *pathos* are, Aristotle is most concerned with *logos* — persuasion through the use of logical arguments."<sup>16</sup>

A review of translations and summaries of Aristotle may well yield more pages devoted to the logical construction of argument than to *ethos* and *pathos*. However, Aristotle listed *ethos* as the "first kind" of persuasive means, explaining that "[i]t is not true, as some writers on the art maintain, that the probity of the speaker contributes nothing to his persuasiveness; on the contrary, we might almost affirm that his character [*ethos*] is the most potent of all the means to persuasion."<sup>17</sup>

In a live speech, the audience absorbs and is affected by the appearance of the orator before hearing even the slightest hint of the argument. In the next instant or two, the audience responds to the speaker's voice, intonation, word choice, and phrasing, before recognizing any specific or even general content. Similarly, a lawyer who introduces herself to an audience in writing immediately conveys an impression of intelligence, education, carefulness, eloquence, precision, and professionalism — hence, believability and trustworthiness — through "[her] command of the rules of grammar, usage, and punctuation."<sup>18</sup> This result is similar to the effect of using *ethos* in the introduction to a speech as "a means of conciliating the minds of the judges in order that they can subsequently be persuaded."<sup>19</sup> Thus, "[r]eaders of well-

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<sup>12</sup> *Quintilian's Institutes of Oratory* vol. 1, 30 (Rev. John Selby Watson trans., George Bell & Sons 1910).

<sup>13</sup> Michael R. Smith, *Advanced Legal Writing: Theories & Strategies in Persuasive Writing* 164 (Aspen L. & Bus. 2002).

<sup>14</sup> See e.g. *id.* at 173; Linda Levine & Kurt M. Saunders, *Thinking Like a Rhetor*, 43 J. Leg. Educ. 108, 112 (1993).

<sup>15</sup> "The Greek word for speech is *logos*, an ambiguous and sometimes mystical concept which may refer concretely to a word, words, or an entire oration, or may be used abstractly to indicate the meaning behind a word or expression or the power of thought and organization or the rational principle of the universe or the will of God." Kennedy, *supra* n. 6, at 8.

<sup>16</sup> Jamar, *supra* n. 8, at 76.

<sup>17</sup> Aristotle, *supra* n. 4, at 9.

<sup>18</sup> Smith, *supra* n. 13, at 164.

<sup>19</sup> Kennedy, *supra* n. 6, at 91.

written prose are . . . more [receptive] to the substance of the message being communicated."<sup>20</sup> In contrast, a bad first impression can eliminate any chance of persuasion.

Aristotle described *pathos*, the second means of persuasion, as a way to create a certain attitude in the audience, "for we give very different decisions under the sway of pain or joy, and liking or hatred."<sup>21</sup> In 1776, interpreting Aristotle, Cicero, and Quintilian, George Campbell explained how *pathos* works:

You have proved, beyond contradiction, that acting thus is the sure way to procure such an object. I perceive that your reasoning is conclusive; but I am not affected by it. Why? I have no passion for the object. I am indifferent whether I procure it or not. You have demonstrated that such a step will mortify my enemy. I believe it; but I have no resentment, and will not trouble myself to give pain to another. Your arguments evince that it would gratify my vanity. But I prefer my ease. Thus passion is the mover to action, reason is the guide.<sup>22</sup>

Just as the legal writer can use *pathos* to create positive emotions, the writer may also evoke negative emotions — directed towards *the writer* — through errors in grammar and punctuation. Aristotle envisioned that stirring an audience to conviction or action would follow the delivery of the substance of the message.<sup>23</sup> But if the audience reacts negatively to errors found early in a piece of writing, that reaction inevitably will interfere with the audience's reception and understanding of the writer's argument.

An argument usually conveys information to listeners or readers and advances proof to convince them.<sup>24</sup> Grammar and punctuation both effect and ease the flow of information and support the structure of the argument. In this sense, the terms "grammar" and "punctuation" are very different from "style."

Writing "style" reflects the author's choices among different words meaning roughly similar things, the length of sentences, the use of active or passive voice, and the complexity of the sentence structure. Depending on the audience, two writers may communicate equally well although one uses short, simple sentences and the other prefers long, compound, complex, or compound-complex sentences. Through style, a writer may make a certain ethical appeal, presenting the writer as a straight shooter or as a complex thinker.

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<sup>20</sup> Smith, *supra* n. 13, at 98.

<sup>21</sup> Aristotle, *supra* n. 4, at 9.

<sup>22</sup> George Campbell, *The Philosophy of Rhetoric* 78 (Lloyd F. Bitzer ed., S. Ill. U. Press 1963).

<sup>23</sup> Kennedy, *supra* n. 6, at 93.

<sup>24</sup> *Id.*

Unlike stylistic choices, grammar and standard punctuation rarely reflect equally good choices; instead, they are requirements for communication. Punctuation evaporates in oral communication and exists in writing only to simulate the pauses, inflection, and emphasis that clarify meanings in speech. Deviations from the grammatical rules in speech often occur purposely, for emphasis or to suggest a certain personality trait or background. Few writers of legal documents, especially those filed with a court, violate grammatical guidelines or standard punctuation rules for emphasis or effect.<sup>25</sup> Such violations are not stylistic choices, but rather errors that potentially undermine the ethical, logical, and emotional appeals of the writer.

## II. Eviscerated *Ethos*

Writers can severely undermine their use of the "first kind" of persuasion that Aristotle described for oral situations — their ethical appeal — by ignoring the counterparts in writing of dress, grooming, poise, and manner. Legal writers risk evoking a negative response from their supervising attorneys, who are hoping the new associate will be able to shoulder drafting responsibilities that the senior attorney longs to delegate. A similar negative response may come from clients, especially if they have not yet met the new associate in person; this negative response undercuts the senior attorney's hope that the new attorney will interact effectively with the client. While unintended reactions from bosses and clients can affect income and employability, negative feedback from judges may mean that the unappealing writing of lawyers has impaired their representation of clients.

### A. Appearance affects ethical appeal

As the television advertisement notes, "You never get a second chance to make a first impression."<sup>26</sup> Although not the focus of his research, the idea of an indelible "first impression" is attributed to S.E. Asch, who in 1946 described how well people can instantly assess a stranger.<sup>27</sup>

Perhaps it is the "unthinking" and automatic nature of this process that causes us to rely so heavily on our initial conclusions; later contradictory information rarely replaces but at best modifies the initial deduction. Our first response is intuitive. The later modification is the result of logical thinking; it

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<sup>25</sup> The use (or overuse) of less common punctuation may constitute some kind of "error" but does not violate standard punctuation guidelines. Instead, such use would reflect stylistic choices, such as sentence length or pattern of construction. For example, a writer would likely never find it appropriate to use an exclamation point in a motion (quoting someone would be an exception). A frequent sprinkling of exclamation points in a motion would draw abnormal attention, probably result in the loss of their effectiveness, and undoubtedly suggest some personality trait (probably unfavorable) of the writer.

<sup>26</sup> See Advertisement, Austin (Minn.) Herald 2A (May 24, 1966) (available at <http://answers.google.com/answers/threadview?id=438532>). The slogan apparently went on to appear in television advertisements for Head & Shoulders shampoo. See Harlan Hogan, <http://harlanhogan.com/hits.shtml> (accessed May 30, 2006).

<sup>27</sup> S.E. Asch, *Forming Impressions of Personality*, 41 J. Abnormal & Soc. Psychol. 258 (1946).

is necessary to resolve any cognitive uncertainty created by contradictory data. In this way, a positive first impression can create a "halo" effect, causing the person who receives negative information to view it in a positive light. However, a negative first impression can cause the audience to ignore later, positive data;<sup>28</sup> perhaps the challenge of reconciling views or the resistance to disregarding an intuitive response is too great.

For example, because beauty, including grooming and dress, is thought to reflect morality and intelligence, a physically attractive defendant may be able to defend against some claims just by being present during voir dire, before the jury pool hears the evidence. If the jury does not see the defendant until trial begins — having already heard (and, to some extent, having come to believe) the charges — the effect of attractiveness may be eliminated altogether.<sup>29</sup>

A lawyer makes a first impression on the judge or the law clerk in an initial filing, usually a petition or complaint. The reader may not immediately notice the name of the filing attorney and the attorney's firm, so any ethical appeal that the judge or clerk associates with the law firm or lawyer because of previous acquaintance may not be realized until the signature page or the first personal appearance. Because audiences are so reliant on first impressions, a lawyer may want to consider the effects of various paper weights and colors, quality of printing, typefaces, and format.<sup>30</sup>

The opinion of a federal judge in Texas in an immigration case demonstrates the weight of appearance in written presentation. There, a party who had been acting pro se petitioned the court to appoint an attorney to represent him in the matter. He explained that he was unfamiliar with legal matters and "legal lingo," had limited access to legal research materials and typing facilities, and could not afford to obtain private counsel. Denying the motion, the court held that he protested too much: "Though Petitioner states that he has limited typing skills, the Court notes that nearly all of Petitioner's filings are neatly typed in proper form without obvious typos, if any; exhibits are plainly labeled and authenticated. . . . In short, the Court is quite confident that Petitioner will be able to represent himself in this cause."<sup>31</sup>

#### B. Typographical errors and imprecision convey carelessness and disrespect for the reader's time

A lawyer usually cannot determine whether a particular judge or clerk will have a high or low tolerance for grammatical and punctuation errors; that is, the lawyer will not know in advance whether such errors will prejudice the

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<sup>28</sup> See *id.*; Mario A. Benassi, *Effects of Order of Presentation, Primacy, and Physical Attractiveness on Attributions of Ability*, 43 J. Personality & Soc. Psychol. 48, 56 (1982).

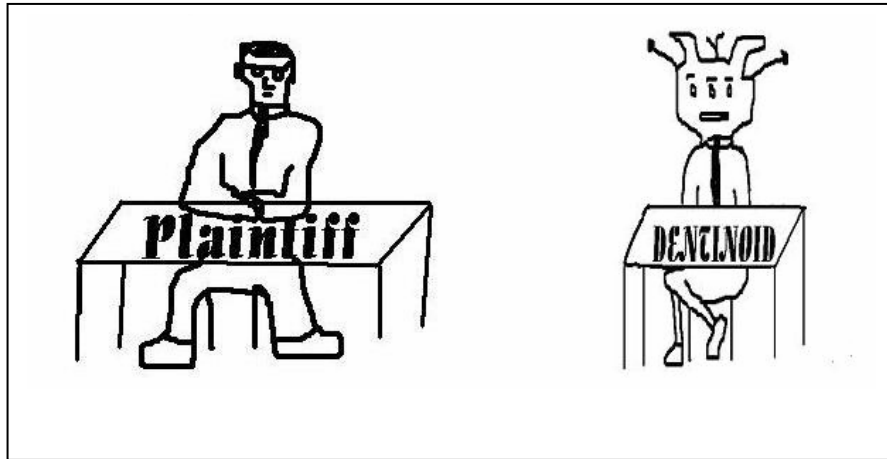
<sup>29</sup> See Benassi, *supra* n. 28, at 56.

<sup>30</sup> See e.g. Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*, 2 J. ALWD 108 (2004).

<sup>31</sup> *Rodarte v. INS*, 2001 WL 681255, at \* 2 (W.D. Tex Apr. 4, 2001).

reader before the reader ever reaches the subject of the pleading. The reaction many people have to typographical errors illustrates the point.

Years ago, when I was doing defense work, one two-page filing we received referred to the "Dentinoid" and requested "wheat the Plaintiffs have sought." Concluding that we represented the Dentinoid (the Defendant), we agreed among ourselves to give them all the "wheat" we had. Of course, in our response, we had to address "what" they had sought. Our hope was that the court took one look at the pleading and lost respect for the plaintiff's attorneys.



While "wheat" is not a word that a spell-checker would catch, "Dentinoid" certainly was. Generic spell checking is necessary, but not sufficient, as noted in a legal advocacy poem:

Spell Czech  
 I half a spelling checker,  
 It come with my PC,  
 It plainly mark four my revue,  
 Mistakes I cannot sea.  
 I've run this poem threw it,  
 I'm sure your pleas too no,  
 It's letter perfect in it's weigh,  
 My checker tolled me sew.<sup>32</sup>

Spell checking programs also cannot detect and correct personal typing idiosyncrasies (e.g., I often type "with" for "which" and "that" for "than" and vice versa); writers must allow some time to pass between typing and proofreading so they do not merely read what they recall typing but rather

<sup>32</sup> Martha Faulk, *The Matter of Mistakes*, 13 Persps.: Teaching Leg. Research & Writing 28 (2004). Reportedly, the particular poet is unknown.

what they actually typed.<sup>33</sup> A second reader can usually catch mistakes that slip by the author. While some readers may resent obvious typographical errors, these oversights do not undermine *ethos* to the same extent that misspellings do; misspellings do more harm by suggesting that the writer either lacks education or has failed to read broadly. A reader also is more likely to be able to detect the author's intent when confronted with a mere typographical error rather than with a grammatical error or a deviation from standard punctuation.

Often, though, as judges point out in their opinions, "typos" can be a euphemism for errors that should be attributed to the writer, not to a typist, and they can become so overwhelming as to result in rejection of a lawyer's position and obvious negativity, if not downright hostility, from the judge:

The Court remarks from the onset that the Motions, Responses, and Replies filed by the Parties in this matter are often confusing and wrought with misspelled words, incomplete text, and text obviously copied and pasted from one document into another without carefully ensuring that the pasting is complete and void of typos or odd characters. Furthermore, several arguments raised by both Parties are simply ignored by the other, to the extent that the Court is left with a one-sided argument in many instances. As such, deciphering all of the Parties' Motions was rendered more difficult than it otherwise should have been. The Court has made its best effort to determine what issue a Party was addressing at specific points in their respective briefing. The Court is mindful that everyone's schedule is extremely busy, including its own. However, more careful attention to detail and clarity should be utilized by Counsel for both sides in the future.<sup>34</sup>

This court clearly reacted to having to work harder because of the lawyers' writing mistakes. People tend to resent those who do not pull their share of the load, particularly in a work environment, because that increases the demands on those who do.

An experiment performed by Bryan Garner reveals this same perception in judges when they are forced to read something other than clear and concise filings by attorneys.<sup>35</sup> Garner's firm had been retained to rewrite a major appellate brief, and the result was a product that looked substantially different

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<sup>33</sup> WordPerfect 12's tool called "grammatik" pointed to several potential errors in the above poem, but it picks up so many questionable items in a single page as to make it impractical for longer documents. Also, it declared both of the following sentences perfectly fine: "I don't know which one." "I don't know with one."

<sup>34</sup> *Unroe v. Bd. of Educ. Rock Hill Local Sch. Dist.*, 2006 WL 22081, at \* 7 (S.D. Ohio Jan. 4, 2006).

<sup>35</sup> Bryan A. Garner, *Judges on Briefing: A National Survey*, 8 *Scribes J. Leg. Writing* 1 (2001-02).

from the original effort, primarily being more streamlined in content and shorter. In a short paragraph, Garner summarized his view of what a brief should be (basically a concise essay, limited to the most salient arguments and support), along with that of one of the attorneys who had prepared the original version (who advised essentially a collection of everything potentially relevant, including the kitchen sink, just in case a judge might find it helpful). Then he sent both summaries to judges, asking which they preferred. While fourteen percent of the judges said that neither view was exactly correct, eighty-six percent preferred Garner's version and none preferred the other lawyer's.<sup>36</sup> Some of their answers suggest the reaction of the responsible worker to the slacker or indicate appreciation for time saved the judge:

This is easy. A brief that follows view #1 does the work for the judge. A brief that follows view #2 makes the judge have to work too hard.

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View #1 is by far the better one. Every court that I know of is in overload. In that situation, a judge has to be able to pick up the key arguments quickly, as well as the key rebuttal arguments. The densely packed brief — as you put it, "a repository of all the information that a curious judge might want to know about the case" — forces the judge to spend more time and to work harder to form an opinion. In today's judicial environment, that's a luxury most judges can't afford.

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Even if I had the inclination (and I don't), I have no time to pore over lengthy, poorly written, inadequately researched, poorly reasoned, shotgun briefs, motions, or memoranda.

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With a small caveat, I agree strongly with view #1 for appellate briefs. The caveat relates to the statement of facts. . . . In short, do the judge's work in the statement of facts.<sup>37</sup>

### C. Slips of grammar and punctuation both confuse and offend

Instead of relying on a secretary, most new lawyers now prepare drafts of documents at their own computers. But any resulting writing errors will still be ascribed to the partner who makes the court appearance while allowing the less experienced writer to prepare the court filings. Similarly, the client who

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<sup>36</sup> *Id.* at 3.

<sup>37</sup> *Id.* at 14-26.

notices mistakes in a letter from a lawyer the client has not yet met will already have formed an image of the lawyer that can only be supplemented, but not overridden, by later data gathered in a personal encounter.

Writers must assume that their readers have an unlimited ability to assess errors, and write to the standards of those readers. Error-free writing will never offend someone who would not recognize the errors, but error-filled writing will undercut the lawyer's credibility with anyone who does recognize the errors. More important, if the lawyer lacks the skills to appeal to an audience with a first written communication, the lawyer is unlikely to be able to adapt once she learns the standards of a particular reader.

The negative effect of errors in standard English is illustrated by the following examples. My contracts professor in law school was very articulate. In an early lesson, he referred to a concept as being "unique" and explained that "unique" was an absolute term not subject to qualification. In other words, a concept cannot be "very unique" or "kind of unique," just as a woman cannot be "sort of pregnant." When I hear people qualify "unique," I conclude that they simply do not understand the term they are using. Had the professor not had the same negative reaction, he probably would not have shared his insight with us.

*The Cambridge Encyclopedia of the English Language*<sup>38</sup> describes a "grammatical top ten" of errors resulting from a compilation of letters written to the BBC Radio 4 series *English Now* in 1986. Asked to provide three points of ungrammatical usage they most disliked, most of the one thousand respondents provided many more. Letters accompanying the lists contained "intemperate and extreme" language: "abomination," "appall," "drive me wild," "pain to my ear." The list of ten included split infinitives; "I" in the objective case (as in "between you and I" instead of the correct "between you and me"); "none" incorrectly followed by a plural verb ("were") instead of a singular verb ("was"); and "who" used in the objective position (as in "I know who I like" instead of "I know whom I like"). While the radio listeners believed that they were witnessing a recent degradation of the language, perhaps caused by the permissiveness of the 1980s, many of the criticized usages were first catalogued in 1869.<sup>39</sup> Because audiences have long vented their frustration about speech and writing errors and language misuses, and continue to do so,<sup>40</sup> writers should consider that some of these very folks (or their offspring) may be among their immediate and ultimate readers.

In my first year in the legal profession, I was assisting a small law firm with briefing done in conjunction with a very large firm, whose lawyers were doing most of the writing. Professor Charles Alan Wright had been hired to comment on a brief before it was filed. Among his criticisms was a written remark, "Why can't [prominent Houston law firm's] lawyers learn the

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<sup>38</sup> David Crystal, *The Cambridge Encyclopedia of the English Language* (Cambridge U. Press 1997).

<sup>39</sup> *Id.* at 194.

<sup>40</sup> See e.g. *From our Peevish Readers*, *The Scrivener* 11 (Spring 2005).

difference between 'that' and 'which!'" Professor Wright was clearly irritated. Since that day, I have tried my best to avoid irritating any reader by using "which" when I should have used "that."

The judge in one recent case<sup>41</sup> went to great lengths to detail the extent of the errors by one of the lawyers:

[S]ome of the Amended Complaint was nearly unintelligible.

As previously mentioned, Mr. Puricelli's filings are replete with typographical errors and we would be remiss if we did not point out some of our favorites. Throughout the litigation, Mr. Puricelli identified the court as "THE UNITED STATES DISTRICT COURT FOR THE EASTER [sic] DISTRICT OF PENNSYLVANIA." Considering the religious persuasion of the presiding officer, the "Passover" District would have been more appropriate

Finally, in the most recent letter to the court, asking that we vacate the settlement agreement, Mr. Puricelli identifies the undersigned as "Honorable Jacon [sic] Hart." I appreciate the elevation to what sounds like a character in the *Lord of the Rings*, but alas, I am but a judge.<sup>42</sup>

An indication of how the judge really felt appeared in his response to the plaintiff's petition for attorneys' fees in an amount to which the defendants objected. While the court agreed with the defendants that the \$300 per hour sought was "on the high side of the customary rate," the court initially found it justified, because the plaintiff's counsel "was well prepared, his witnesses were prepped, and his case proceeded quite artfully and smoothly."<sup>43</sup> However, the court cut the rate significantly based on the error-ridden and confusing written product:

Plaintiff's counsel argues that his typographical errors require no more than a \$20 per hour reduction. We disagree. As we previously stated, Mr. Puricelli's complete lack of care in his written product shows disrespect for the court. His errors, not just typographical, caused the court a considerable amount of work . . . . Hence, a substantial reduction is in order. We believe that \$150 per hour is, in fact, generous.<sup>44</sup>

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<sup>41</sup> *Devore v. City of Philadelphia*, 2004 WL 414085 (E.D. Pa. Feb. 20, 2004).

<sup>42</sup> *Id.* at \*\* 2-3.

<sup>43</sup> *Id.* at \* 3.

<sup>44</sup> *Id.* For a virtual catalogue of opinions in which courts have criticized lawyers for "poor writing" (including poor organization and style, wordiness, poor grammar, and errors in spelling, typing, and citation) see Judith D. Fischer, *Bareheaded and Barefaced Counsel: Courts React to Unprofessionalism in Lawyers' Papers*, 31 *Suffolk U. L. Rev.* 1 (1997).

### III. Escapable Logos

Writers who resist learning and using standard grammar and punctuation are fond of saying (as if offended that you noticed their mistakes), "Well, you know what I mean." Actually, more often than these writers may suppose, the audience does *not* know their intended meaning. That is the point, or a big part of it.

In being defensive, these writers may confuse the receptivity to and appreciation for cultural and regional markers in *oral* communication with the reaction to mistakes in written products. The famed linguist James Sledd would tell my graduate English class at the University of Texas that if you understand what a person has said, you should not correct how he or she has said it. Dr. Sledd was able to pinpoint, within a tiny radius, where a person grew up based on the person's speech patterns, dialect, accent, and vocabulary. Because speech is not fixed and misunderstandings can be remedied in face-to-face conversation, the effect of a person retaining regional or cultural differences or speaking ungrammatically does not cause the confusion that follows errors in writing.

While Charles Alan Wright may have had an emotional reaction (negative, if his exclamation point was any clue) to the misuse of "that" and "which," the words create very different meanings. Because "that" introduces a restrictive clause (one that limits meaning) and "which" introduces a nonrestrictive clause (one that merely adds information and can be omitted from the sentence), the use of one when the other meaning is intended can interfere with communication. As an example, imagine two women discussing strengths of current and former boyfriends. One says, "Joe gave me jewelry which I liked." What has she meant to say?

1. She liked the fact that the previous beau gave her jewelry (with the primary information being that she liked receiving jewelry)? A speaker with this meaning would pause before "which," and a comma would indicate the pause in writing. Thus, a nonrestrictive clause is introduced with "which," combined in writing with a comma: "Joe gave me jewelry, which I liked."

2. She liked the particular jewelry that Joe gave her (implying that she is not too fond of the jewelry selections of her current boyfriend)? A speaker who intended this meaning would not pause after "jewelry" but would hurry to add "that I liked" because the phrase is necessary to the sentence's meaning. Therefore, no punctuation precedes "that" in writing the sentence "Joe gave me jewelry that I liked."

Few lawyers need convincing that unclear language in procedural rules and jury instructions leaves lawyers and jurors befuddled. Writing errors can even sabotage efforts to present evidence. Supposed "typos" in one case so muddied the meaning of an affidavit that the Supreme Court of North Dakota held it failed to establish the credibility of an informant on whom the police had relied in obtaining a search warrant.<sup>45</sup> The court was most troubled by the following quoted portion of the affidavit:

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<sup>45</sup> *State v. Donovan*, 688 N.W.2d 646 (N.D. 2004).

"Deputy Harmel has reason to believe that Veronica Gascoine Sr. has been truthful due to the fact that Veronica Gascoine Sr. has answered questions truthfully on incident's [sic] that have happened almost a year ago, and that Veronica Gascoine Sr. has testified under oath in a jury trials on the cases involving several narcotics users."<sup>46</sup>

The court said that the use of plurals ("trials," "cases," and "incident's")<sup>47</sup> gave the impression that the witness had been helpful to the police multiple times before. In reality, she had testified at only one trial previously, in an effort to establish an alibi for her accused daughter. Thus, the North Dakota Supreme Court agreed with the district court in holding that the affidavit had been "written in a manner that misled the magistrate" who signed the search warrant, since he had no way to know he was reading "typos."<sup>48</sup>

In addition to lawyers who miss filing dates because of a rule's ambiguity, jurors who make up their own guidelines because they cannot understand the jury instructions, and evidence that never makes it to the fact-finder, unclear language leads to litigation. And it is often current or former lawyers (now legislators) who have written the documents that are the subject of the lawsuits.

In Texas alone, reported appellate cases have addressed

- the supposed ambiguity of the application of a prepositional phrase — was its meaning limited to the verb phrase where it appeared or did it apply to all three verb phrases in the sentence? — denying a candidate the opportunity to run for the state supreme court;<sup>49</sup>
- the questioned application of an adverb, positioned between a helping verb and a verb, to a second verb in a drug-control statute — if the adverb applied to both verbs, the defendant would be guilty;<sup>50</sup>
- the absence of parallel constructions in a single provision of a stock purchase agreement — resulting in the court doing its own "grammatical" analysis to determine which party was responsible for certain post-closing costs.<sup>51</sup>

A United States Supreme Court case turning on grammatical interpretation explored whether an adverb ("knowingly") modifying a primary

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<sup>46</sup> *Id.* at 651.

<sup>47</sup> While "incident's" may well have been some sort of typo, billboards, shop signs, and menus suggest that a growing number of people believe the plural of a word requires an apostrophe, generally before the "s." I have given up wondering, the "egg's" what?

<sup>48</sup> *Donovan*, 688 N.W.2d at 649, 651 ("A reasonable person would think that the sentence meant that Gascoine had testified against narcotics users because the whole purpose of the paragraph is to establish Gascoine's truthfulness.")

<sup>49</sup> *Sears v. Bayoud*, 786 S.W.2d 248 (Tex. 1990).

<sup>50</sup> *Wright v. State*, 981 S.W.2d 197, 200 (Tex. Crim. App. 1998).

<sup>51</sup> *Maxus Energy Corp. v. Occidental Chemical Corp.*, 1998 WL 269994 at \* 6 (Tex. App.- Dallas May 28, 1998, *pet. denied.*).

verb<sup>52</sup> ("distributes") also related to a noun in an embedded clause (a clause containing a subject and a verb, with this one having a direct object). In other words, does a person who *knowingly* distributes a film that involved the use of a *minor* necessarily *know* that the film involved the *minor* just by virtue of the *distribution*?<sup>53</sup> Engaging in perhaps more sophisticated grammatical analysis than did the Texas appellate courts (no doubt assisted by the *amicus* brief filed by the Law and Linguistics Consortium), the Court nonetheless knowingly articulated a statutory meaning that was contrary to standard grammatical interpretation.<sup>54</sup>

A lawyer may advance sufficient reasons to override the standard rules of grammar and punctuation (and may well need to be prepared to respond to the court if the lawyer does so), but first the lawyer must know precisely what the standard rules are. In the cases listed, the courts analyzed the problems of grammar and punctuation according to the standard rules, some judges undoubtedly adopting the arguments of counsel, while others appear to have explored the rules on their own.

#### A. The thwarted candidate

Grammar refers to the structure of a language, whether oral or written. Pieces of the structure have assigned names (noun, verb, adjective) that conveniently describe how the various pieces fit together. Idiom is a grammatical term for the knowledge that dictates that particular words can fit into the structural slots. For example, "live" and "leave" are both transitive verbs, which means they can take direct objects. However, they are not interchangeable in the same structure for all sentences. We can say "leave me," but it is not idiomatic to say "live me." In this sense, word choice is a part of grammar. Otherwise, word choice is generally a matter of stylistic choice, not grammatical rules.

Punctuation applies only to written language. It has evolved as a convention for the same reason grammar has: so that we can have reliable cues for communication. The rules of punctuation are designed to permit a level of understanding as similar as possible to spoken language. These rules have changed very little over time. Although minor modifications have appeared from time to time, it is not difficult to describe a uniform set of consistent punctuation rules with reliable explanations.

In the case of the denied candidate,<sup>55</sup> the majority of the Texas Supreme Court agreed with his technical reading of the constitutional provision in question:

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<sup>52</sup> I do not pretend this to be a technical grammatical term. The portion of the statute in question is a sub-part of a 431-word sentence with much subordination and coordination.

<sup>53</sup> *United States v. X-Citement Video, Inc.*, 513 U.S. 64 (1994).

<sup>54</sup> *Id.* at 70. See also Jeffrey P. Kaplan & Georgia M. Green, *Grammar and Inferences of Rationality in Interpreting the Child Pornography Statute*, 73 Wash. U. L.Q. 1223, 1250 (1995).

<sup>55</sup> *Sears*, 786 S.W.2d 248.

No person shall be eligible to serve in the office of Chief Justice or Justice of the Supreme Court unless the person is licensed to practice law in this state and is, at the time of election, a citizen of the United States and of this state, and has attained the age of thirty-five years, and has been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years.<sup>56</sup>

The candidate argued that "at the time of the election" referred only to being a citizen of the United States and Texas and not to the rest of the sentence. That is, the candidate argued that the requirement that an eligible person must have been a practicing lawyer, or a lawyer and a judge, for ten years might be met at the time the judge takes a seat on the Supreme Court rather than at the time of the election. Five of nine justices rejected that interpretation, holding that the ten-year requirement had to have been met at the time of the election. However, that they addressed the issue defensively suggests they saw that the candidate's reading was technically correct: "We refuse to ignore clear evidence of constitutional intent in favor of technical rules of grammar." In support, the court even quoted its conclusion in *Lemp v. Armengol*<sup>57</sup> that "constructions based upon grammatical niceties are not favored."<sup>58</sup>

Justice Spears, joined by Justices Cook and Hecht and Chief Justice Phillips, dissented, leaving no doubt as to his view of the majority's disregard of the language of the constitution:

However technical it may be, language is the means by which we communicate our thoughts and ideas. Educated people try to use language correctly in order to convey their message more precisely. Berating the "technical" rules of grammar serves only to betray the court's real complaint which is that the language itself does not convey what the court wishes it did. To circumvent this problem, the court essentially rewrites the constitution to say what it thinks our constitutional founders would have said if only they had not been such poor grammarians.<sup>59</sup>

Justice Spears then detailed his analysis, referring to a main clause and "[f]our subordinate clauses," later described as "four separate clauses," indicating the four requirements for service. Here is how he explained that those "clauses" were illustrated:

No person shall be eligible to serve in the office of Chief Justice or Justice of the Supreme Court unless (1) the person is licensed to

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<sup>56</sup> Tex. Const. art. V, § 2(b).

<sup>57</sup> 26 S.W. 941 (Tex. 1894).

<sup>58</sup> *Sears*, 786 S.W.2d at 252 n. 5.

<sup>59</sup> *Id.* at 255 (Spears, J., dissenting).

practice law in this state, and (2) is, at the time of election, a citizen of the United States and of this state, and (3) has attained the age of thirty-five years, and (4) has been a practicing lawyer, or a lawyer and judge of a court of record together at least ten years.

If I thought it would make some difference, I would certainly lend any member of the court my Harbrace College Handbook for instruction in the English language.<sup>60</sup>

A clause is a group of words containing a subject and a verb. An independent clause stands alone as a sentence; a dependent clause must be attached to an independent clause to be a sentence. One might "prove" these propositions by referring to authority and by using common-sense examples. The grammar text I used when I taught English states: "[a] clause is often defined as a group of related words that contains both a subject and a predicate. Like a phrase, a subordinate or dependent clause is not a sentence."<sup>61</sup> If my audience were the court, I might cite to a source written for lawyers: "The clause forming a declarative sentence is called a principal or independent clause, since it can both stand alone and be separately punctuated . . . . Clauses that cannot stand alone are called subordinate or dependent."<sup>62</sup>

Common-sense examples are best illustrated when vocalized. Listeners can hear the difference between the sound of "when I go to the store" and "I like to go to the store." The vocal intonation is up with the first "store"; a speaker stopping there sounds as if she has been interrupted. The intonation is down with the second "store," because the thought has been completed. Both groups of words are clauses — because each contains a subject ("I") and a verb ("go" and "like") — but only the second is an independent clause.

Thus, the surface, visual, structure of the sentence the court examined contains only *two* clauses; "unless" begins the second clause, which is a dependent clause. (If you vocalize this clause, as if "unless" began the sentence, your intonation would be similar to that for the first "store" above.) The subject of the second, dependent clause ("person") has four verbs: is, is, has attained, and has been (the additional words after the verbs make each grouping a verb phrase). Thus, the "(1)" in Justice Spears's analysis above should follow the phrase "the person," not precede it.

Justice Spears likely was referring to the deep structure of the sentence, which states "the person" four times; through ellipsis, the surface structure omits "the person" the last three times, producing what we see. Although that explanation would have taken only a sentence, the absence of "the person" could cause us to question such an analysis. However, Justice Spears is correct because of a slightly different analysis. The phrase "at the time of election" is buried within the second verb phrase and *set off by commas*, making

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<sup>60</sup> *Id.* at 255-56.

<sup>61</sup> John C. Hodges & Mary E. Whitten, *Harbrace College Handbook* 19 (7th ed., Harcourt Brace Jovanovich, Inc. 1972).

<sup>62</sup> Morton S. Freeman, *The Grammatical Lawyer* 303 (ALI-ABA 1979).

the analysis more of a punctuation issue than a grammatical (structural) issue. If the sentence were spoken aloud — the reading that punctuation is designed to emulate — the speaker would pause on either side of the phrase "at the time of the election." By the time he got to "and has attained the age of thirty-five years," the listener would have forgotten about carrying over "at the time of the election" to the new phrase; in the listener's mind, that qualification would apply only to being a citizen, as in the following:

No person shall be eligible to serve in the office of Chief Justice or Justice of the Supreme Court unless the person



is licensed to practice law in this state and



is, at the time of election, a citizen of the United States and of this state, and



has attained the age of thirty-five years, and



has been a practicing lawyer or a lawyer and judge of a court of record together at least ten years.<sup>63</sup>

In testing our writing, we frequently vocalize it, a practice even more common when we write as a group and try to persuade others of our wording; think of legislators hashing out differences in drafting the language of a statute. Thus, it seems likely that the drafters of this provision sounded out the wording before committing it to paper. Unfortunately, though, no amount of precision in Justice Spears's analysis would have resulted in a different decision by the majority.

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<sup>63</sup> Tex. Const. art. V, § 2(b).

### B. The ultimate drug user

Another example concerns a woman who went across the Mexican border to see a doctor. She returned with diet pills and sleeping pills and sought an exception to the controlled substances law on the basis that she met the definition of an ultimate user, or "a person who has lawfully obtained and possesses a controlled substance for the person's own use."<sup>64</sup>

The majority agreed with the woman's interpretation of the statute and reversed and remanded so the intermediate appellate court could assess her argument that the issue of whether she was an "ultimate user" had not been submitted to the jury.<sup>65</sup> Other justices disagreed as to what the intermediate appellate court should do on remand. One of the justices explained his view that the appellate court should find that the "ultimate user" test had been met as a matter of law (meaning the defendant was entitled to acquittal) by dissecting the grammatical structure of the statutory language:

"Lawfully" clearly modifies "obtained" because the adverb immediately precedes the verb. But, "lawfully" does not immediately precede "possesses." For "lawfully" to modify "possesses," the verb "possesses" must be part of a parallel construction with the verb "obtained." But, because "lawfully" is imbedded between the helping verb "has" and its object verb "obtained," there is no parallel construction between "obtained" and "possesses" as they relate to the adverb "lawfully" due to a lack of agreement between the helping verb "has" and the posited object verb "possesses." An attempt to map a parallel construction of the provision would look like this: "a person *who has lawfully obtained and has lawfully possesses* a controlled substance for the person's own use." Such a parallel construction would be grammatically incorrect. The only proper construction, then, is that "lawfully" modifies "obtained" but does not modify "possesses."<sup>66</sup>

Assuming that the opposing lawyer could track the justice's argument (which requires comfort with grammatical structure and terms), without the grammatical background to challenge it, counsel could do little but accept it. And it is subject to challenge. For example, the following compound verb ("compound verb" is the grammatical term for "has obtained" and "possesses" in the statute above) is "parallel": John has carelessly spoken and insulted the host. "Spoken" and "insulted" are the same tense; English permits a surface structure that omits the second helping verb "has," but "has" could apply to both verbs because they are the same tense. Question: has John carelessly insulted the host? Or did he carelessly speak and intentionally insult the host? While grammatically correct, the structure does

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<sup>64</sup> *Wright*, 981 S.W.2d at 200.

<sup>65</sup> *Id.* at 201.

<sup>66</sup> *Id.* at 203 (Keller, J., dissenting).

not convey a particular meaning. What if "possesses" were "saved"? Thus, although the dissent's conclusion about this particular statutory provision seems correct, the dissent's analysis is problematic because it is not inherent in the grammatical structure itself.

C. The one left paying the costs

Next, consider how a Dallas appellate court handled the dispute over a provision about who was responsible for certain post-closing costs in a 161-page stock purchase agreement:

all environmental costs, relating to, resulting from or arising out of conditions, events or circumstances acknowledged in writing by Seller or discovered by any reimbursable party and as to which [Maxus] is provided written notice . . . prior to the expiration of ten years following the closing date, provided however, that (i) [Maxus's] share shall be limited in the aggregate to \$75,000,000 . . . .<sup>67</sup>

Occidental, the "Buyer," argued that because Maxus "had notice" of the underlying conditions (simply by awareness of them) resulting in the costs, then Occidental was not required to provide "written notice" of the costs for them to be reimbursed. The court agreed with that argument. It explained that holding, as Maxus urged, that the provision required notice of the costs (and not the conditions, events, or circumstances) would "require the court to ignore the plain meaning of the language used in this section in favor of an interpretation that ignores basic rules of sentence structure and grammar."<sup>68</sup>

But is the court correct that another interpretation of the language adheres to "basic rules of sentence structure and grammar"? The court's implicit reading of the pertinent words is that two clauses follow "circumstances": "[that are] acknowledged in writing" and "as to which [Maxus] is provided written notice." (The surface structure permits the omission of the words "that are.")

In other words, providing written notice relates to "circumstances." These suggested clauses are parallel only in that they contain passive verbs; they are not introduced the same way, nor can any simple manipulation of them make them look alike. Maxus's argument is that two clauses follow and describe "costs": "[that are] relating to" and "as to which [Maxus] is provided written notice." Again, these clauses are not linked in appearance, but a simple manipulation results in "relating to . . . conditions that are acknowledged" and "regarding which [Maxus] is provided written notice." While only somewhat closer to being truly parallel, these pieces at least now look more alike, which would support the argument that they limit "costs."

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<sup>67</sup> *Maxus Energy Corp.*, 1998 WL 269994 at \* 6.

<sup>68</sup> *Id.*

But this gets you only so far that you can conclude that the writer was sloppy. As a result, you cannot tell the intended meaning from the grammatical structure.

D. The unknowing child pornographer

The respondents (defendants below) in *United States v. X-Citement Video, Inc.*,<sup>69</sup> were Rubin Gottesman and X-Citement Video, Inc., which Gottesman owned and operated. Gottesman was the subject of a sting operation in which an undercover agent requested pornographic films featuring Traci Lords (a pornographic film star) before she had turned eighteen. While Gottesman provided such films to the agent, he later testified that he did not really know that Lords was a minor when she made the films. Thus, he claimed that the following federal statute, which he had allegedly violated, did not apply to him:

(a) Any person who

(1) knowingly transports or ships in interstate or foreign commerce by any means including by computer or mails, any visual depiction, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct;

(2) knowingly receives, or distributes, any visual depiction that has been mailed, or has been shipped or transported in interstate or foreign commerce, or which contains materials which have been mailed or so shipped or transported, by any means including by computer, or knowingly reproduces any visual depiction for distribution in interstate or foreign commerce or through the mails, if

(A) the producing of such visual depiction involves the use of a minor engaging in sexually explicit conduct; and

(B) such visual depiction is of such conduct . . .

shall be punished as provided in subsection (b) of this section.<sup>70</sup>

While evidence at trial revealed that Gottesman did know that Lords was a minor, he argued on appeal that the statute was "facially unconstitutional because it lacked a necessary *scienter* requirement."<sup>71</sup> In the first of two appeals, the Ninth Circuit held that the statute lacked a *scienter* requirement; in the second, it found the statute facially unconstitutional.<sup>72</sup>

The Supreme Court, however, decided that the statute contains the necessary *scienter* requirement because "knowingly" applies to the age of the individual appearing in the visual depiction, "as well as to the sexually explicit

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<sup>69</sup> 513 U.S. 64 (1994).

<sup>70</sup> *Id.* at 66, 68 (citing 18 U.S.C. § 2252(a)(1)-(2) (1988 & Supp. V)).

<sup>71</sup> *Id.* at 66.

<sup>72</sup> *Id.* at 67.

nature of the material."<sup>73</sup> In reaching this conclusion, the majority admitted that it was rejecting the "most natural grammatical reading" and the "most grammatical reading" advanced by the Ninth Circuit in favor of what it believed the legislature *meant* to say.<sup>74</sup>

Justice Scalia, joined by Justice Thomas, dissented, stating flatly that "Today's opinion is without antecedent. None of the decisions cited as authority support interpreting an explicit statutory *scienter* requirement in a manner that its language simply will not bear."<sup>75</sup>

Two members of the Law and Linguistics Consortium who contributed to the *amicus* brief to the Court came to the same conclusion as Justice Scalia in their analysis of these supposed precedents.<sup>76</sup> In addition, one of their more impressive feats was editing the "long and cumbersome operative sentence" of the statute to "Any person who knowingly distributes a depiction if producing the depiction involves use of a minor engaging in sexually explicit conduct shall be punished."<sup>77</sup> They then explained that Justice Rehnquist, writing for the majority, had correctly assessed the grammatical issue: "whether, in this sentence, the if-clause is part of what is modified by knowingly, or outside of what is modified by knowingly; that is, whether, under the rules of English, knowingly modifies the words in the if-clause."<sup>78</sup>

They rejected, based on grammatical "evidence," Justice Rehnquist's conclusion:

[T]he meaning of the statutory sentence cannot be represented as follows:

Any person who knowingly transports a depiction, and knows that producing the depiction involves the use of a minor engaging in sexually explicit conduct, shall be punished.<sup>79</sup>

The linguists' conclusion thus supports what Justice Scalia said in a less technical manner, when he referred to the majority's reasoning:

To say, as the Court does, that this interpretation is "the most grammatical reading," . . . or "[t]he most natural grammatical reading," . . . is understatement to the point of distortion — rather

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<sup>73</sup> *Id.* at 78.

<sup>74</sup> *Id.* at 69-70.

<sup>75</sup> *Id.* at 80 (Scalia, J., dissenting).

<sup>76</sup> Kaplan & Green, *supra* n. 54, at 1223 n. 3 ("The Law & Linguistics Consortium is an association of lawyers and linguists interested in applications of linguistics to legal problems; one goal of the consortium is to make available to courts faced with questions of statutory interpretation information about how a statutory provision would be understood as a matter of ordinary language.")

<sup>77</sup> *Id.* at 1233-34.

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 1236.

like saying that the ordinarily preferred total for two plus two is four. The Ninth Circuit's interpretation is in fact and quite obviously *the only grammatical reading*.<sup>80</sup>

Justice Scalia lamented that "[t]he Court today saves a single conviction by putting in place a relatively toothless child-pornography law that Congress did not enact, and by rendering congressional strengthening of that new law more difficult."<sup>81</sup> The linguists expressed a similar sentiment:

The jurisprudential problem presented by the X-Citement Video case, consequently, is not what the statutory text means (which is plain), but what a court is to do when that meaning is plainly absurd. The Supreme Court decision in X-Citement Video would have been a far more valuable contribution to the body of American law had it confronted this fundamental issue head on.<sup>82</sup>

The opinions in these cases show that his clients' success may depend upon a lawyer having sufficient skill to analyze and argue about the best way to resolve drafting flaws in existing documents, particularly on the micro (grammar and punctuation) level, and enough competence to advise his clients as to the possible outcome. In drafting new documents, a lawyer must be able to convey concepts clearly. Otherwise, no matter how the author seeks to make a persuasive appeal based on *ethos*, it will be unsuccessful.

#### IV. *Pathos* Lost

Trial lawyers learn to make different presentations to the court than to the jury, both in terms of content and rhetorical appeal. Viewers of television dramas often watch a judge chastising a lawyer for being dramatic or emotional in speech or a judge reacting to such speech by saying, "There's no jury here to impress." Legal writers may therefore conclude that the neutral adjudicator who will preside over their case and read their work product is incapable of an emotional reaction or is simply an unsuitable target for an appeal through *pathos*. It's true that the audience of a *speaker* in Aristotle's time was different from that of a legal *writer* today:

Given the amateur status of both the judges and juries who decided legal disputes, Greek and Roman rhetoricians understandably stressed persuasive techniques based on emotional arguments and the advocate's personal credibility instead of relying solely on legal arguments. Much of their assessment of what would persuade judges and juries was grounded in basic human psychology rather than jurisprudential philosophy or statutory law. Consequently,

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<sup>80</sup> *X-Citement Video*, 513 U.S. at 81 (Scalia, J., dissenting) (citations omitted).

<sup>81</sup> *Id.* at 86 (Scalia, J., dissenting).

<sup>82</sup> Kaplan & Green, *supra* n. 54, at 1250-51.

throughout their works, they emphasized rhetorical and psychological strategy as much as they do legal strategy. *Pathos* and *ethos* were at the heart of all their analyses of persuasive discourse.<sup>83</sup>

However, the legal communicator should be mindful of two things. First, any speech (opening statement, closing argument) to the jury is also heard by the judge. Second, a conclusion as to the character and competence of a speaker or writer (her *ethos*) may simultaneously produce an emotional response:

[C]lassical rhetoricians . . . thought emotion was a critical tool for emphasizing sympathetic facts and for determining how judges perceive those facts. Accordingly, they developed a comprehensive system for using emotion to cultivate goodwill toward both advocates and their clients. This system included suggestions about which emotions to use for particular causes of action, particular classes of clients, and particular kinds of conduct. It also stressed the necessity of thoroughly investigating the judge's background and predispositions and of sensitivity to the judge's emotional fluctuations during the course of the trial.<sup>84</sup>

The briefest consideration of the transcript of closing arguments in two cases reveals how appropriate it is to make traditionally "emotional" appeals to a judge and how effective it can be to make apparently "ethical" appeals to a jury. In the matter of Karen Quinlan,<sup>85</sup> a father sought from a court his appointment as guardian for his brain-damaged daughter and the right to discontinue life support. Karen was represented by a court-appointed guardian. The guardian was represented by counsel before the court, but it was the guardian who addressed the court, pitted against counsel for Karen's father. Although the guardian did not argue the law in detail or discuss relevant cases, he had indicated in a filed affidavit that a mercy killing of Karen would be homicide. Thus, the most poignant parts of his closing came midway, when he summarized the physician's conclusion that Karen was not brain-dead ("She is not dead") and when he ended, with a Biblical reference ("Thou shalt not kill").<sup>86</sup>

Opposing counsel necessarily covered case law, but his closing comprised a eulogy, with the last words being a plea to Karen's doctors to permit her own body to heed "the gentle call that beckons her to lasting peace."<sup>87</sup> While he adopted at that point the persona of a religious figure at a funeral —

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<sup>83</sup> Michael Frost, *Ethos, Pathos & Legal Audience*, 99 Dick. L. Rev. 85, 89 (1994).

<sup>84</sup> *Id.* at 99.

<sup>85</sup> *In re Quinlan*, 355 A.2d 647 (N.J. 1976), cert. denied sub nom *Garger v. New Jersey*, 429 U.S. 922 (1976).

<sup>86</sup> *In the Matter of Karen Quinlan* vol. I, 532 (2d ed., U. Publications Am. 1982).

<sup>87</sup> *Id.* at 532-39, 539.

exerting a decided ethical appeal — surely no one hearing his words could have avoided an emotional reaction to them, even a judge.

The case of Nicola Sacco and Bartolomeo Vanzetti involved two Italian immigrants who were arrested for robbery and murder, prosecuted and convicted, and sentenced and executed. In retrospect, their story became one of their persecution for their political alliances and working-class affiliation. While their conviction warranted a partial column in the *New York Times*, their executions several years later and the events leading up to them consumed five pages.<sup>88</sup>

The prosecutor's four-hour closing argument, made to a jury, mainly consisted of a summary of the facts, but it smacked of no appeals to patriotism.<sup>89</sup> His vocabulary, however, often had religious overtones ("bespeak," "deliverances"), at least in the early part, which reflected positively on his character.<sup>90</sup> The prosecutor deviated from these allusions in his ending words, however, because they could have focused the jury on its ability to deprive the defendants of their lives (an awesome responsibility, which a person might want to avoid). Instead, he said the jury's job was merely to do what a doctor would do when dealing with a patient who has a fatal disease: assess the facts and pronounce the conclusion, in this case, as the law dictated.<sup>91</sup> Thus, he elevated the jury's stature by comparing them to doctors, probably intending to make them feel good about themselves (and about him for thinking that way about them). And then he seems to have challenged *their* ethics, perhaps hoping to evoke an emotional response: "[D]o your duty. Do it like men."<sup>92</sup>

Thus, as Aristotle described, emotional appeals are entwined with the ethical ones, whether or not intended by the communicator. What this means for the legal writer is that he risks alienating his audience by virtue of failed, absent, or negative ethical appeals. That is, essentially everything the legal writer does that detracts from his appearance of competence, carefulness, and goodwill can cause his audience to dislike him and what he says. This may be true largely because "unlike other professionals, lawyers are constantly writing for hostile audiences," particularly including judges, who will compare the lawyers' work with that of the opposition.<sup>93</sup> Therefore, the entire range of

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<sup>88</sup> Eugene Lyons, *The Life and Death of Sacco and Vanzetti* 7 (Intl. Publishers 1927).

<sup>89</sup> *The Sacco-Vanzetti Case, Transcript of the Record of the Trial* vol. II, 2179-2238 (Paul P. Appel 1969).

<sup>90</sup> *Id.* at 2179-80.

<sup>91</sup> *Id.* at 2236-37.

<sup>92</sup> *Id.* at 2237. The jury was all male.

<sup>93</sup> George D. Gopen, *The State of Legal Writing: Res Ipsa Loquitur*, 86 Mich. L. Rev. 333, 340 (1987). *But see* Matthew J. Arnold, *The Lack Of Basic Writing Skills And Its Impact On The Legal Profession*, 24 Cap. U. L. Rev. 227, 234 (1995) ("Few lawyers possess the writing acumen demanded by the hostile audience for whom they perform. Consequently, the 'hostile audience' rationale for bad legal writing has merit only because lawyers lack basic writing skills. Rather than requiring or causing bad writing, the hostile atmosphere merely provides fertile ground in which lawyers' poor writing skills flourish.").

items discussed in Part II of this article that can eviscerate ethical appeal can also induce a negative emotional effect.

Although not a recommended tack, a lawyer who has little knowledge or pays little attention to the details of communication may hope to gain the sympathetic emotional response accorded to a person who is well-meaning but incompetent. Such a lawyer may believe that the court will be reluctant to penalize a client indirectly by holding the lawyer to the strictest standard of precision and accuracy. Such a lawyer could perhaps present the appearance of an apologetic, good-natured, and well-intentioned individual, in contrast to opposing counsel, who may act offended or even outraged by the lawyer's court filings and other work product. In other words, a careless or unskilled lawyer may hope to receive the same consideration (i.e., forgiveness) that pro se litigants may expect. Lawyers, however, do not have the excuse of limited resources, presumed unfamiliarity with procedural rules, and even marginal education, and so the court's tolerance may be slight.<sup>94</sup> Also, just as with pro se litigants, if a judge "helps out" those who seem inept, she in effect becomes co-counsel, another advocate in the courtroom, instead of a neutral adjudicator. Thus, not only will the judge resist this role, but opposing counsel will be at the ready with a motion to recuse.<sup>95</sup>

One suggestion as to why lawyers demonstrate carelessness in their writing is they have no incentive to do anything different: "If their current writing seems to get the job done, why try to change it?"<sup>96</sup> The operative word here is "seems," because attorneys cannot know what the result might be otherwise. To encourage practicing lawyers to do better, judges should more often voice their opinions about how poor writing affects them and their decisions.<sup>97</sup> Because judges have done precisely that in the decisions and surveys noted in this article, practicing lawyers should consider those comments to have been made directly to them. The conclusion is inescapable: a lawyer who sacrifices *ethos* and *logos* through grammatical and punctuation errors may wind up with *pathos*, but not the kind he counted on, as he risks drawing a negative emotional response from his audience.

## V. Getting a Grip on Grammar and Punctuation

Law students are able to learn a new language despite illogical rules; it makes little sense, for example, that you add "ant" to the party who is sued, a defendant, but that you also add "ant" to the party who brings an appeal, an appellant. Thus, they should also be able to memorize grammatical terms and

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<sup>94</sup> See generally Fischer, *supra* n. 44. Is it also possible that the bad writing makes the audience hostile?

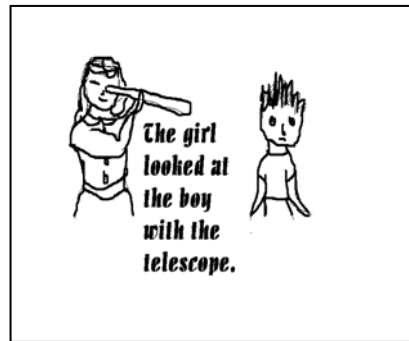
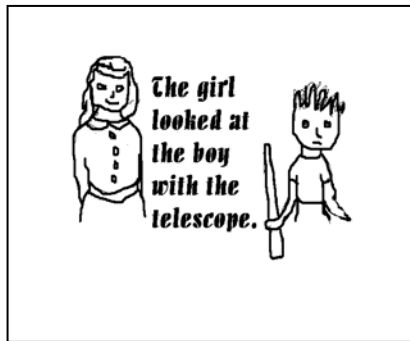
<sup>95</sup> See e.g. Robert P. Schuwerk and Lillian B. Hardwick, *Handbook of Texas Lawyer & Judicial Ethics* 1509-59 (4th ed., Thomson West 2005).

<sup>96</sup> Susan Hanley Kosse & David T. ButleRitchie, *How Judges, Practitioners, and Legal Writing Teachers Assess The Writing Skills of New Law Graduates: A Comparative Study*, 53 J. Leg. Educ. 80, 100 (2003).

<sup>97</sup> *Id.*

their meanings. Without that knowledge, they cannot understand standard punctuation: how do you follow the instruction to join independent clauses with a semicolon if you cannot recognize an independent clause? To learn grammar — the schematic indicating the structure of our language and the corresponding terminology — is to acquire a handy, time-saving tool. Simple exercises illustrate this premise.

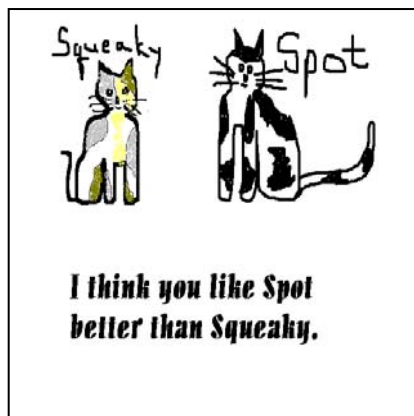
Starting with the telescope illustration, everyone can see the problem, and most people could articulate it without using the words "verb phrase" or "modifies." However, to explain the problem and to understand how to avoid it in other constructions, you must either know grammatical terms or invent generic terms. For example, you might say, the problem in this sentence is that you cannot determine whether the girl is using the telescope to look at the boy or whether the girl is looking at the boy who has the telescope.



What if instead of "the telescope," the illustration said "her glasses"? This time you might say you cannot tell whether the girl is using her glasses to look at the boy or whether the girl is looking at the boy who has her glasses. Now, what if you wanted to discuss the problem with both versions of the sentence at the same time? Would you say, the words following "with" cannot be matched with only the boy or only the girl, so as to produce a single meaning? What if a third example read "woman" instead of "girl"? Would you say, whatever follows "the" at the beginning of the sentence cannot be matched only with the thing following "with"? What happens if someone's name begins the sentence?

Instead of becoming infinitely creative so as to cover all possible examples, wouldn't it be easier to say that the confusion results from a misplaced prepositional phrase (a group of words beginning with a preposition)? If you wanted to get more technical and explain what "misplaced" means, you could say that the prepositional phrase can as easily modify or relate to a verb phrase (a group of words with a verb) relating to the subject (the doer of the action) in the first example, as it can modify or relate to a noun phrase relating to the object (the receiver of the action) in the second example.

This next example needs some background. A female calico cat with a funny way of talking adopted me several years ago. I named her Squeaky, and we have become really close. She has a great disposition, often demonstrated when other animals visit our house. The most recent occurrence involved a



rather large, but younger, black and white cat that began to creep in the back door left open for Squeaky. The second cat, whose name is Spot, eats from Squeaky's dish at times, and Squeaky does not seem to mind. She also appears to enjoy playing with Spot. But one day, Squeaky began to grunt when Spot came into the house. I asked a friend whether he thought Squeaky was tiring of Spot. His response was "I think you like Spot better than Squeaky."

This example presents a problem in clarity that rarely appears in speech but can be unavoidable in writing. This time, however, although my friend spoke this sentence, I did not know what he was saying and had to ask for clarification. On the one hand, I could scarcely believe he was saying that I was favoring the visiting kitty over Squeaky. On the other hand, I did not think he had observed Squeaky's apparent impatience with Spot.

This structural problem has a name: it is an incomplete comparative. Language often permits us to use a surface structure that omits elements that the complete, "deep" structure contains. Students first hear about this phenomenon when they learn about an indirect object. The deep structure of "I gave to Tom the book" becomes "I gave Tom the book," with Tom being the indirect object, and book being the direct object. We learn not to say or write "to" before Tom, unless we put Tom at the end of the sentence ("I gave the book to Tom"). Not only can we omit certain words in certain surface structures, but it is advisable to do so because we help the reader avoid wading through superfluous words. Thus, "do you know whether he is sick" is preferable to "do you know whether or not he is sick."<sup>98</sup>

In some surface structures, intonation provides clarity. Most people can use an intonation that distinguishes between the following meanings, demonstrated below by the parenthetical insertion of the omitted words:

I think you like Spot better than (you like) Squeaky.

<sup>98</sup> However, "Tom will go whether or not he is sick" reflects a different use of "whether"; when "whether" means "regardless," the words "or not" are needed for meaning.

I think you like Spot better than Squeaky (likes Spot).

But remember that someone said words to me out loud, but in elliptical, surface structure fashion, and I could not tell the meaning. I was able to ask the speaker what he meant, an opportunity seldom available to a reader. The grammatical lesson to avoid these ambiguities is the following: when you make comparisons (e.g., using "than," "better"), try to make sure that the omission of any words (elliptical constructions) does not result in confusion.

Examples such as incomplete comparatives have a particular significance for lawyers involved in litigation and appellate practice. For example, imagine that the statement is a question — "Do you like Spot better than Squeaky?" — asked in a deposition or at trial. The intonation conveys the meaning, so no one objects. But what happens with the written record when the answer of "yes," "no," "or "maybe" is important on appeal? Unless someone answers, "No, Squeaky is like a child to me," only the speaker will know what the answer means.

The same problem occurs with "whether" in a question. A "yes" or "no" answer to the question "Do you know whether Bill shot Johnny?" is meaningless unless followed by the question "Okay, now that we know that you know *whether* Bill shot Johnny, *did* Bill shoot Johnny?" The two-step question may be necessary to establish a foundation of knowledge, a reason to believe the witness can answer the second question. A parallel is the two-step question to an expert: "Do you have an opinion as to . . . ? What is that opinion?"

Writing style consists of choices among writing devices — long sentences versus short, multi-syllabic words versus simple ones. Writers make choices in the same sense that speakers do, but not necessarily from the same range of options:

Writers, because their work must withstand careful scrutiny and study, usually are more exacting in their sentence structure, grammar, and syntax. A speaker, however, often violates the rules of good composition, leaving some sentences unfinished, starting other sentences anew, and inserting parenthetical digressions. Yet frequently these errors in no way detract from the clarity of the message because of the speaker's use of inflection, pause, emphasis, rate, and gestures to supplement the verbal presentation.<sup>99</sup>

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<sup>99</sup> Robert C. Jeffrey & Owen Peterson, *Speech Communication* 287-88 (Am. Press 1994). Note: "oral" is a more accurate reference to speaking, since "verbal," meaning "of words," refers to both speaking and writing. As Bryan Garner has observed, "The misuse of *verbal* for *oral* has a long history and is still common. Nevertheless, the distinction is worth fighting for, especially in legal prose. Ironically, though, as one writer observes, lawyers 'are among the chief offenders in the *oral-verbal* confusion . . .'" Bryan A. Garner, *A Dictionary of Modern Legal Usage* 910 (2d ed., Oxford U. Press 1995) (quoting from Robert C. Cumbow, *The Subverting of the Goeduck*, 14 U. Puget Sound L. Rev. 755, 778 (1991)).

We do not make conscious choices about writing style unless we have the tools to choose among sentences that go beyond simple constructions or to signal readers properly with sophisticated punctuation. Until we have those tools, we should stick with the basics to insure communication and the successful application of rhetorical appeals.

Attempting to tackle that for which we are unprepared, we risk the loss of clarity and persuasiveness, by damaging at least our ethical appeal. It takes only a second's thought to realize that the shorter a sentence is, the less opportunity there generally is for a grammatical error resulting from a complex or compound structure. Similarly, an entire paragraph, perhaps even an entire brief, can be written clearly and accurately without anything but commas and periods. Many people who advocate short sentences and simple words have the skill to write beautifully flowing, remarkably complex, consistently parallel, hauntingly memorable passages that wind like runway models down the page before seeing a period. These people do not write these passages, though, without considering the reader and the occasion. These authors also have the ability to appear, for one article or periodical, authoritative, educated, distant, and respected. In another, they can be warm and engaging, funny and approachable, novel and eloquent. They achieve these disparate representations of "author"ity with choices among sentence structure, vocabulary, and punctuation.

A writer who persuades the reader of her writing skill may be surprised by the resulting stylistic freedom. She can end a sentence or a clause with a preposition (e.g., "I did not know what he was talking about"), and her reader will assume that she knew what she was doing and did it for a reason. In this case, the reason might be: let's not make the reader limp through the awkwardly formal, "I did not know about which he was speaking."

If the occasion and audience are suitable, a writer can use first person pronouns and contractions without his reader concluding he is unsophisticated; instead, the reader will assume that the writer is adopting a warm persona. A writer can even begin sentences — a few; overuse of this technique will draw abnormal attention to it — with coordinating conjunctions and might be allowed even a sentence fragment without the reader's thinking he has erred. Finally, if a writer is very skillful, she can fashion a new application for an existing word or two.

## **VI. The School of (Almost-) Last Chance**

Given their current curriculum, law students may wince at having to add the study of writing details, particularly at such a late stage of their education. But bemoaning that these specifics should have been taught earlier changes nothing: lawyers will still encounter writing on all levels that is unclear because of problems with grammar and punctuation. Without instruction in law school, these lawyers will continue to create writing that at best will confuse and alienate their audience and at worst will lead to litigation.

Moreover, there is no better, later time for people who are now law students to devote attention to the technical aspects of clear writing. If they become defense lawyers, they will live by the billable hour, with the associates having the greatest number of billable hours at the end of six or seven years being offered a partnership. If they become plaintiffs' lawyers, they will quickly learn that successful firms take on more work than their current lawyers think they can handle, to insure recoveries that will compensate for the cases that do not pan out. If the partners occasionally bring in consultants to review associates' writing or sponsor attendance at writing workshops, perhaps the associates will pick up a tip or two; still, their understandable inability to completely transform their writing will likely cause the partners to think twice before paying for such an exercise again.

In short, those who already write clearly in law school will have the advantage in practice. This alone should motivate other law students to use this practically last opportunity to learn to write clearly. Because most law school legal writing courses have a different set of goals (established by the curriculum), students may well have to seek out individual assistance for their particular needs. Also, the legal writing offerings of law schools can be diverse: some may have writing labs and advisors or provide access to interactive software; some may have expanded their formal legal writing requirements beyond the traditional format;<sup>100</sup> but all will have legal writing professors who can at least diagnose problems, even if the courses they teach do not permit time to address and solve them.

Thus, students will have to be proactive in identifying their particular writing challenges and trying to overcome them. Perhaps they could form study groups devoted to their shared problems of grammar and punctuation or add to their study group discussions an analysis of sentence structure, stylistic barriers to readability, and any grammar and punctuation errors noted in those opinions. They can practice and apply their knowledge in analyzing contracts, statutes and regulations, and rules of procedure and evidence.

Although many practicing lawyers see continuing legal education courses as consuming time without providing much benefit, they need to appreciate the importance of education as to writing, even if it does not carry Continuing Legal Education credit. As the summary of a program started years ago dictates, while the education is necessarily a continuing process, lawyers can learn to learn from each other:

One major Chicago firm has hired the same consulting team for six years now, each year allowing twenty more lawyers to take the five-day program. The positive effects seem to be expanding by osmosis and increasing geometrically instead of arithmetically. This year's "new crop" of twenty wrote significantly better than their predecessors at the start of the program, yet proved to be no brighter nor more previously aware of principles of good writing. It can be

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<sup>100</sup> See e.g. Gopen, *supra* n. 93, at 355-58.

surmised that these people had been silently influenced in their clearer style by role models in the firm who had previously been through the program. Moreover, there was a healthy sense of how hard it was to write well and how important it was to achieve that result. These lawyers have stopped conceiving of good writing as a skill that should have been learned much earlier and now think of it as a continuing professional challenge.<sup>101</sup>

If clarity becomes their primary goal, and just finishing the product is secondary, legal writers can become quicker drafters, able to adopt and implement a persuasive yet personal style, and equipped to adapt to a variety of audiences and occasions. Writers can consistently achieve this requisite clarity only through grammar and standard punctuation.

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<sup>101</sup> *Id.* at 362-63.

## From the Bookshelves

In the accompanying article, *Classical Persuasion through Grammar and Punctuation*, author Lillian Hardwick recommends that young lawyers take the initiative to identify their particular writing challenges and to overcome them. Following are recommendations from law school writing advisors for self-help books on technical writing concerns including grammar and punctuation.

### Legal writing resources

Anne Enquist & Laurel Currie Oates, *Just Writing: Grammar, Punctuation, and Style for Legal Writers* (2d ed., Aspen 2005).

Ian Gallacher, *A Form and Style Manual for Lawyers* (Carolina Academic Press 2005).

Bryan A. Garner, *The Redbook: A Manual on Legal Style* (2d ed., West 2006).

Terri LeClercq, *Guide to Legal Writing Style* (3d ed., Aspen 2004).

Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook: Research, Analysis, and Writing* (4th ed., Aspen 2006) (last one-third of the book) & Laurel Currie Oates & Anne Enquist, *The Legal Writing Handbook Practice Book* (4th ed., Aspen 2006) (exercises).

Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting It Right and Getting It Written* (4th ed., West 2005).

Richard C. Wydick, *Plain English for Lawyers* (5th ed., Carolina Academic Press 2005).

### General writing resources

*The Chicago Manual of Style* (15th ed., U. Chi. Press 2006).

Wilson Follett, *Modern American Usage: A Guide* (rev. ed., Hill & Wang 1998).

Cheryl Glenn et al., *Hodges' Harbrace Handbook* (16th ed., Heinle 2006).

George D. Gopen, *The Sense of Structure: Writing from the Reader's Perspective* (Pearson/Longman 2004) (for undergraduate or professional students) & George D. Gopen, *Expectations: Teaching*

*Writing from the Reader's Perspective* (Pearson/Longman 2004) (for teachers).

Diana Hacker, *A Writer's Reference* (5th ed., Bedford Books 2003).

Patricia O'Conner, *Woe is I: The Grammarphobe's Guide to Better English in Plain English* (2d ed., Riverhead Books 2004).

William B. Strunk Jr. et al., *The Elements of Style* (4th ed., Longman 2000).

Joseph M. Williams, *Style: Ten Lessons in Clarity and Grace* (8th ed., Longman 2005).

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