Notes & Queries

Clear Clarity

In 1964, the United States Supreme Court originally set forth the standard of proof required of a public official in a defamation action. In *New York Times v. Sullivan*,[1] the Court stated that the plaintiff must demonstrate the defendant's actual malice with "convincing clarity." Ten years later, in *Gertz v. Robert Welch, Inc.*,[2] the Court restated the standard using slightly different terminology: A public official could recover in a defamation action only on a showing of "clear and convincing proof" of actual malice.

In the years that followed, many courts—state and federal—applied the *Sullivan-Gertz* standard, some even noting that "clear and convincing" and "convincing clarity" are essentially interchangeable terms. But in 1981 and 1982, two state supreme courts, Vermont's and Hawaii's, independently synthesized the variant phrases into a single redundant hybrid. Actual malice, both courts declared, must be proved with "clear and convincing clarity."[3] About the same time, the New Mexico Court of Appeals not only used the new iteration, but refined it: "'Clear and convincing clarity' is something more than 'preponderance of the evidence' and less than 'beyond a reasonable doubt.'"[4]

During the four years following this jurisprudential and linguistic innovation, the newfangled standard lay dormant in the law. It was revived, with the assistance of a *U.S. Law Week* editor, by a federal appellate court in 1986.

Early in that year, the Supreme Court again reviewed the *Sullivan-Gertz* standard. In *Anderson v. Liberty Lobby, Inc.*,[5] the Court once more indicated that "clear and convincing" and "convincing clarity" were one and the same. At no time did the Court use the phrase "clear and convincing clarity." In summarizing the case for *U.S. Law Week*, however, a BNA editor did; the synopsis of *Liberty Lobby* read: "[F]ederal district court . . . must determine whether evidence presented could support reasonable jury finding that plaintiff has demonstrated actual malice with clear and convincing clarity."[6]

In *Ashby v. Hustler Magazine, Inc.*,[7] decided three months after *Liberty Lobby*, the Sixth Circuit confronted a defamation appeal and cited the recent Supreme Court decision (or, rather, the *Law Week* summary of it), stating: "[T]he trial court must determine if the plaintiff has produced sufficient evidence from which a reasonable jury could find that the plaintiff had demonstrated actual malice with clear and convincing clarity. *Anderson v. Liberty Lobby, Inc.*" (Did we not learn in law school to read the cases and not simply rely on the headnotes?)

With the endorsement of the Supreme Court (as interpreted by *Law Week*) and the Sixth Circuit, the standard was given new life and a broader geographic impact. No longer used only by courts in the remote corners of the United States, it has now been adopted by state courts in New York, Pennsylvania, and Louisiana.[8] The phrase has even insinuated itself into a law review article.[9]

Redundancy is triumphing. It is now clearly and transparently clear that in a defamation action by a pub-

lic official, proof of malice with muddy, murky, or turbid clarity is insufficient; the requirement of "clear clarity" is rapidly becoming the law of the land.[10]

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1. 376 U.S. 254, 280, 285-86 (1964).
2. 418 U.S. 323, 342 (1974).
3. Burns v. Times Argus Ass'n, 139 Vt. 381, 388, 430 A.2d 773, 777 (1981); Fong v. Merena, 66 Haw. 72, 74, 655 P.2d 875, 876 (1982).
4. Sands v. Am. G.I. Forum of New Mexico, Inc., 97 N.M. 625, 629, 642 P.2d 611, 615 (Ct. App. 1982).
5. 477 U.S. 242 (1986).
6. 54 U.S.L.W. 4755 (1986).
7. 802 F.2d 856 (6th Cir. 1986).
8. *See* Derrig v. Quinlan, 508 N.Y.S.2d 952, 953 (1986); Fitzpatrick v. Philadelphia Newspapers, Inc., 567 A.2d 684, 686 (Pa. Super. 1989); Spears v. McCormick & Co., 520 So. 2d 805, 809 (La. Ct. App. 1987).
9. Magnetti, *'In the End, Truth Will Out'... or Will It?*, 52 MO. L. REV. 299, 344 (1987).
10. The list of courts that have used the redundancy "transparently clear" or "transparent clarity" is very long and beyond the scope of this brief note. As to "clearly clear," see Clark v. State, 186 Ga. App. 106, 107, 366 S.E.2d 361, 363 (1988): "[T]he trial court stated that 'it [is] clearly clear ... that this plea is freely and voluntarily given ....'"

Choosing Between *Shall* and *Must* in Legal Drafting

For indicating a legal requirement, professional legislative drafters currently disagree on when to use *shall* and when to use *must*. From my experience, the root of the problem is the ambiguous notion of "requirement." First, a requirement may be a legal obligation that, if not performed, carries a penalty or risk of discipline ("The taxpayer shall file his return before April 16"). Second, it may mean that persons (or inanimate objects) cannot attain a specified legal advantage unless they meet a condition necessary to qualify ("The Secretary of State shall be a citizen of the United States"). Such a condition may be the attainment of a status or the doing of an act; failure to qualify carries no legal disapproval—it merely risks disappointment. Because the distinction is important, a linguistic convention is needed to flag it.

I will present what I consider the most useful, accurate, and succinct statement of principle, and then comment on a few deviations from it. Unfortunately, lay usage and traditional legal usage have been so heterogeneous as to be highly unreliable. Strengthening what is becoming a widely adopted legal convention may be the best course to take.

That convention is to use the modal *shall* to denote a flat-out command, the breach of which risks legal discipline, and to use *must* to

denote merely a condition precedent to legal effectiveness. (Besides fine and imprisonment, the legal discipline for breaching a command denoted by *shall* might involve termination of funds or discharge.) This useful convention is straightforward and clear, and has been widely adopted. Deviations from it risk ambiguity or require compensating language.

Trouble may result if *must* is used also to anchor one end of another distinction. The Uniform Law Commissioners have adopted a rule that *must* should replace *shall* whenever "the verb it qualifies is an inactive [intransitive] verb or an active [transitive] verb in the passive voice." But this rule often creates ambiguities.

A problem arises if there is a verb in the passive voice and the context does not show whether it states a command or merely a condition precedent. For example, because of the ambiguity in "required," the plaintiff "shall be required to show cause" is consistent with either concept and thus leaves uncertainty.

The difference between the active voice and the passive is normally stylistic because no substantive issue turns on it, beyond the greater likelihood that the person commanded will not be specifically named. On the other hand, the absence of a transitive verb has substantive implications because without it no command can exist, unless such a verb is expressed or implied from the context, as when a drafter uses the declarative language of obligation ("is obligated to") or words of entitlement that imply a command. In any event, the grammatical rationale does not tell the reader whether a statute is uttering a command or mere condition (precedent or subsequent). As so often, the context must resolve that uncertainty, but it may not.

Two other proposed distinctions have surfaced. One state's legislative-affairs agency calls for *must* "when describing requirements related to objects such as forms or criteria." The same state's department of law prefers *must* for "stating a precondition or passive role or when dealing with inanimate objects."

Unless fortified by examples, concepts such as "stating a passive role" or "dealing with inanimate objects" are too fuzzy to be helpful to either author or reader. The same is true of "requirements related to objects such as forms or criteria." Any such concept is too loose. Unless the requirement is directed at a determinable thing that is capable of assuming and discharging a duty, nothing more than a condition precedent to legal effectiveness can be presumed. The dubious notion that, if the subject of the sentence is an inanimate object, the modal should in all instances be *must* rather than *shall* assumes, I surmise, that an organic entity such as a corporation or partnership, which is capable of assuming and discharging a legal obligation, is not to be treated as an "inanimate object."

The command language of *shall* is not necessarily directed to the subject of the sentence. On the contrary, it is the very essence of the passive

voice that a verb *not* be addressed to the natural subject of the sentence. It is enough if the target of the command is expressed or implied elsewhere in the sentence. Example:

> The adjustment shall be made by deducting ....

That "adjustment" is the subject of the sentence in no way suggests that it is being commanded to make the deduction. Context makes clear that the purported command is directed at the appropriate identifiable official or organizational entity. *Shall* is therefore called for by the prevailing command convention. Example:

> An employee in Range 25 shall be paid weekly at an annual rate of ....

The "employee" is not being commanded to do the "being paid," because the command is directed not at the employee but at the appropriate official or organizational entity.

To be sure, context is strong enough in many situations to support the reading of *must* as *shall* by revealing an ultimate obligation to act in the law's behalf. Here, the use of *must* instead of *shall* would be, at worst, an inartistic usage that obscures an important legal distinction. That lay usage is indeterminate merely underscores the problem.

On the other hand, *must* can be used consistently with this approach when it lists the requirements for complying with the terms of what has been independently identified as a mandate. Example:

> Upon your return, you shall report to the Agency your activities while abroad. Your report must include ....

The keyword remains *shall*. But I do not recommend such a circumlocution.

The argument advanced for using *must* in the "Range 25" example is that it does not make sense to command a person to accept something to which that person is being given a right. But this is not the situation in that example, because it is plain that the command is directed elsewhere. A more suitable example to support this argument is:

> The worker shall receive compensation at a rate no lower than $26 an hour.

The wording is obviously inept, because the worker has a right, not a duty. The only duty here is to pay, and it is implicitly imposed on the appropriate official or organization. The better cure is not to substitute *must* for *shall* but to use a verb denoting payment or entitlement.

It may sometimes be appropriate to use *shall* with a transitive verb in the passive voice, even if the command extends also to the subject of the sentence. Example:

> A person under 16 years old who has been exposed to a class A communicable disease certified by the Board of Health shall be quarantined for no less than 60 days.

Here the legal obligation falls not only on the appropriate officials to impose the quarantine, but, by clear implication, on the afflicted person to submit to it. Switching to *must*

would be inappropriate. Using the active voice is preferable. In a context in which the implication would be shaky, the obligation should be expressed ("The patient shall cooperate").

Therefore, "A student must receive an immunization" is bad drafting. A better version is: "A student shall submit to immunization by . . . ," or "A student who is . . . shall be immunized by . . . ." The choice between the two proper versions depends on which obligation is intended.

The lessons here can be revealed more clearly by couching them in two independent rules, both of which enhance clarity and readability. First, if you intend to create an obligation to act (on the part of a person or an organization capable of being identified and legally disciplined) and you prefer the usual command language, use *shall* with the appropriate transitive verb, regardless of voice. Second, if you intend to create a mere condition (precedent or subsequent), use *must* with the appropriate transitive or intransitive verb, regardless of voice. This formulation makes clear the rationale behind the rule.

The convention supported here is appropriate for legal instruments generally. Legal drafters should follow it because it will guard against a troublesome ambiguity.

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"Numerous Mispelled Words Corrected"[1]

Many years ago, when I was a first-year law student, my legal-writing instructor, a crusty old lawyer with a passion for good prose, told our class that the basics of good *legal* writing were the same as the basics of good writing generally: paragraphs and sentences and words. You must be able, he said, to write good paragraphs. Paragraphs are made of sentences; sentences of words. The twin supports of any writing are vocabulary and grammar. And the foundation of vocabulary is spelling.

He told us that there is nothing—not even incorrect citation form—that judges hate more than briefs filled with misspelled words. He gave us a list of words that law students and lawyers misspelled or misused most frequently. We were taught that *defendant* is spelled with an *-ant* suffix; that *plaintiff* has a double *f*; that *error* is a noun, not a verb; that the trisyllabic *liable* and the bisyllabic *libel* are two completely different words; and that, unless you are English, *judgment* has only one *e* and *inquiry* has none. I constantly feared that I would write a sentence that began: "After lengthy enquiry, the appellate court found that the trial court had errored in its judgement that the defendent was libel to the plaintif . . . ." In those days before word-processors with spell-checking programs, I carefully reread every word of each memo and brief that I wrote.

The advent of computers has not only made it much easier to correct my own spelling; it has also made it possible to check that of others. It is possible to find out if my instructor was right. Certainly if judicial scorn for bad orthography is as severe as he said it was, a search of computer-assisted legal research databases for a nonword such as *defendent* would prove that no judge has ever perpetrated such a gross spelling error. Right? Wrong. In fact, it proved just the opposite: Judges, too, have feet, or at least pens, of clay.

The search was easy and the result dismaying. "Defendent" occurs in the electronic state and federal case files 2,350 times. Plaintiffs fare little better; there are only three hundred fewer "plaintifs" than there are "defendents." There are also hundreds and hundreds of plantiffs and defandants, appelants and appelees, apellants and apellees, petitoners and repondents, decedants and decendants. And that is just the tip of the iceburg.[2]

Of almost Joycean profusion and imagination, countless *faux mots* stud the opinons (475 times) of our appelate or apellate (320) coruts (765). Some are simple tranpositions or typagraphical erors, but many are plain mispellings. All are blatently erronious. The intire judical sytem of the Untied Stats—both the state and the fedral judicary at every jursdictional level from distict, to curcuit, to supeme—could benifit from remeidal speling tutelage.

A deverse varity of such occurences exits: cases involing substative contractal or porperty rigths; revocatons and recissions, easments and abatments; neglience (or negilgence or negligance), with auxillary and subsidary isues of forseeability and proxmate caustion; antitust litgation, with punative or trible dammages; bankrupties, both personel and corporte; legl and medicial malpratice; securties reglation; parterships and corportions; busness tranactions, noteably those govered by the Unform Commerical Code; numberous procedureal questons, especialy of ancilliary and pendant jursdiction; the admissability of heresay testmony, physcal evidance, and fisical docments; unconstitional searchs and siezures; unlawfull warrents; ilegal arests, crimnal indicments; prejudical utterences; affadavits and depostions and interogatories; habeus and corpis; quantum merit and non sequitor; gravaman and graveman and gravemen; ab inito, ad infintum, ad hominen, ad nauseum.[3]

There are thousands, even hundreds of thousands, of misspellings in the enormous database of printed and electronic case reports. Some of the errors can be explained. Many are not the fault of the courts. Several opinions merely quote the incorrect spelling of an attorney's petition or a trial court's written finding, often noting "[*sic*]" after the mistake. At other times, the error is one of data entry; comparison to the hard-copy reporter sometimes shows that the mistake exists only in the electronic format. But enough misspellings find their way into both the computer systems and the

official and unofficial reporters to suggest that at least a substantial minority of the mistakes are judge-made.

Words misspelled only occasionally are not too worrisome, but there are a few very common legal terms that are frequently incorrect. Unacceptable variants of *rescission* or *recision* ("recission" and "rescision"), for example, are used one time for every twelve times that a correct spelling is used; *pendent* is misspelled (as "pendant") nearly ten percent of the time. "Forseeable" and "forseeability" are very common. So are all the misspellings of words beginning with "appell."

During the first half of the nineteenth century, Judge Isaac Blackford of the Indiana Supreme Court compiled eight volumes of court reports that are widely acclaimed to have been the most error-free in the history of American law reporting. He was a careful and rigorous editor who tolerated no mistakes in grammar, punctuation, or spelling. According to his biographer, he held up the publication of his eighth volume for several days while it was at the printer so that he could determine the orthography of the word *jenny*, a female ass; he was uncertain whether it should begin with a *j* or a *g*. He was so confident in the precision of his work that he offered a reward to anyone who could find a mistake in it. (Only one person ever found one—"optionary" instead of *optional*—and Blackford not only paid the reward, but later recommended him for appointment as reporter of the Supreme Court.[4])

Judge Blackford has been dead for more than a hundred years. My old legal-writing instructor died only a few years ago. Both were exacting editors, and both would be horrified to know of the level of orthographic inexactitude found in judicial opinions. Are they, perhaps even now, rolling in their graves? Only the Graveman knows.

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1. *In re Rolling*, 229 La. 727, 731, 86 So. 2d 637, 638 (1956).
2. U.S. v. Virginia, 454 F. Supp. 1077, 1117 (E.D. Va. 1978) ("not the tip of the iceburg, but the whole iceburg").
3. Each of the 120 misspellings in the previous three paragraphs exists in state or federal case law. Some occur only a few times, others, hundreds or even thousands of times. I searched for them as individual words, not as phrases, in the GENFED/COURTS and STATES/OMNI files of Lexis. They should be considered with the caveat that some of the mistakes may be errors in the database; some may be court-recognized errors, e.g., "petitioner argues that 'defendent [sic] . . .'"; some may be quoted archaic spellings, e.g., "intire"; and a few may be correct spellings of proper names, e.g., "Varity Builders."
4. Thornton, *Isaac Blackford*, in 3 GREAT AMERICAN LAWYERS 198-99 (W.D. Lewis ed. 1908).

A [Sic]ness unto Death

One of my best friends in the classroom is ailing. In our early years together, the coursebook *International Law and World Order*[1] was a trea-

sured chum; in its maturity[2] it is still a very good friend. But I see the telltale signs of [sic]ness—scores of *sics*—each outlined by ugly brackets and arousing my concern whenever I spot one.

What do so many "[*sic*]" signs in a single book mean? The *Texas Law Review Manual on Style*[3] advises its readers that "[*sic*]" may be used "within quoted material to indicate a significant error in spelling, usage, or fact" (Rule 5:6). Fair enough. The authors of *International Law and World Order* obediently *sic* mistakes in quoted material (*lite* for *lift; keywords* for *key words*, if that be error), though some mistakes—for example, *it's* as a possessive—survive the attack without apparent detection.

The dreaded "[*sic*]" is generally reserved, however, for masculine-appearing or false generic vocabulary, such as *he* or *his* to refer to a person regardless of gender and *man* or *mankind* instead of *human* or *humankind*. The precise significance of this pervasive strain of "[*sic*]"s, though generally understandable, is a bit unclear. The authors may simply have intended to rap the knuckles of those insensitive to sexist usage or perhaps, more ambitiously, to encourage readers to adopt alternative vocabulary that is gender-neutral or nonsexist. If so, their admirable objectives are apparent, though somewhat compromised by inclusion in the materials of a lengthy, disturbingly sexist tract[4] that evidently meets with the authors' approval.

The authors *sic* scholarly writing, old and new, American and foreign; foreign legal codes in translation; United Nations documents; indeed, every kind of legal text. They treat women and men writers alike. It is ironic, but evenhanded, that excerpts from three female jurists, all of them prominent specialists in human rights, are pockmarked with "[*sic*]"s following their own use of sexist vocabulary. Another irony is that, after properly correcting one writer for failing to note that women, particularly Marjorie Whiteman, played a role in drafting the United Nations Charter, the authors proceed to *sic* Ms. Whiteman's use of *his* in the one example they include of her textual material. Apparently, however, the use of *she* and *her* as generic pronouns meets with approval, as does the generic use of *he* and *his* in material quoted (infrequently, to be sure) in the authors' own textual material.

Ultimately, the authors' success in highlighting masculine vocabulary is questionable, not because of the inconsistencies and exceptions, and certainly not because of their admirable objective of stigmatizing or discouraging insensitive English usage. Rather, the exercise is dubious because the gloss of "[*sic*]"s often obscures, retards, or even overshadows the textual message and because the project is spotty. Too much false genericism remains. For example, four masculine pronouns are used generically in just two lines, none of them marked by the dreaded "[*sic*]."

When should "[*sic*]" be used on behalf of a social cause such as educating readers and writers to be gender-neutral? There is an appealing argument that the symptoms of insensitivity should be highlighted each and every time before therapy can begin. We should use "[*sic*]," Rosalie Maggio writes, "to show that the sexist words come from the original quotation and to call attention to the fact that they are incorrect,"[5] rather than vaguely limiting the use of "[*sic*]" to "significant mistakes."[6] On the other hand, Mary Barnard Ray and Jill J. Ramsfield would restrict the use of "[*sic*]" "to indicate that a surprising or unintelligible word or phrase is not in fact a transcription error, but appeared in the original version."[7] Their rule might call into question the use of "[*sic*]" for a social cause: Vocabulary that is masculine-appearing or falsely generic is generally unsurprising and all too intelligible. Indeed its mindless, routine acceptance is precisely what motivates crusades against it.

Kate Turabian advises aspiring writers that "[t]he use of *sic* should not be overdone."[8] More specifically, Bryan A. Garner cautions that some writers "use *sic* meanly and with a false sense of superiority. Its use may frequently reveal more about the quoter than about the author of the quoted material.... Another irksome use of *sic* occurs when writers insert it in others' citations, as if to belittle the person quoted for his [or her] ignorance of correct citation form."[9] Quoted writers should have some leeway, he concludes. Whatever an author's motives, the risks of spottiness, awkwardness, or confusion of the underlying text may cause a [*sic*]ness unto death of otherwise impressive scholarship.

Fortunately, the authors of *International Law and World Order* offer an alternative to pockmarking a text with "[*sic*]"s on behalf of a worthy cause. Scattered among the ubiquitous "[*sic*]"s is the following recurrent footnote: "The reader is requested to construe the masculine gender used in this extract in the generic sense, to include women as well as men." Although this footnote appears and is absent at random, its modest message and courteous formulation are persuasive. One statement to this effect, perhaps in bold letters at the beginning of a text, might be the best means to strike a blow for gender-neutral vocabulary. *Sic transit morbus mundi.*

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1. B. WESTON, R. FALK & A. D'AMATO, INTERNATIONAL LAW AND WORLD ORDER (1980).
2. *Id.* (Prelim. 2d ed. 1989) [hereinafter Coursebook].
3. TEXAS LAW REVIEW MANUAL OF STYLE (5th ed. 1987).
4. Morgan, *Planetary Femiminism [sic]: The Politics of the 21st Century*, in SISTERHOOD IS GLOBAL—THE INTERNATIONAL WOMEN'S MOVEMENT ANTHOLOGY 1-3 (R. Morgan ed. 1984) (cited as above and quoted in Coursebook, *supra* note 2, Problem 6-1, at 98).
5. R. MAGGIO, THE NONSEXIST WORD FINDER: A DICTIONARY OF GENDER-FREE USAGE 170 (1987).
6. A UNIFORM SYSTEM OF CITATION, Rule 5.2 (14th ed. 1986).

7. M. RAY & J. RAMSFIELD, LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN 203 (1987).
8. K. TURABIAN, A MANUAL FOR WRITERS OF TERM PAPERS, THESES, AND DISSERTATIONS 80 (5th ed. 1987).
9. B. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 503-04 (1987).

In-House Editors: Letting the Experts Do It

I have heard it said that language is to the lawyer as the scalpel is to the surgeon, brush and paint to the painter—the tool of our craft (or profession, or art, depending upon how the day is going). A cynical one-liner usually follows the analogy, along the lines of: "if doctors did as poorly with scalpels as lawyers do with words . . . ."

No doubt about it, lawyers do poorly with words. The pen is an unwieldy tool in the hands of most lawyers, a medieval instrument of torture in the hands of many.

What, then, is to be done? I used to think the answer was simple: Train lawyers to write well. They are intelligent men and women, so they will understand the value of good prose. While it takes time to master the techniques of good writing, lawyers will understand that it serves their interest to take the time.

I know that something else needs to be done. Lawyers are intelligent; they understand the importance of good writing. They do not want to sound pompous and forbidding to clients. They do not want to be ambiguous. They do not want to waste their colleagues' time (or have colleagues waste theirs) with prose that must be parsed, charted, or translated before it can be understood. They do not want to be laughed at. *They* laugh at those 230-word sentences from the statute books, full of embedded clauses within embedded clauses.

The problem is not that lawyers fail to understand the problem. The problem is that most of them think they have no time to do anything about it. At the risk of being labeled a heretic, I am beginning to think they are right. The practical answer is not for all lawyers to learn to write well, but for lawyers to pay editors to help them prepare better documents.

Don't get me wrong. Everyone should strive to be a better writer, lawyers included. Some lawyers already write well; maybe they learned from an inspirational (or fearsome) grammar-school teacher, maybe from articulate parents, or maybe they just have an ear for language. Perhaps they were even set down the path to good writing by one of the writing programs, texts, video workshops, and the like that have appeared in countless numbers over the last few years.

But most lawyers write poorly and will continue to write poorly. It would be a miracle if they did not, considering that few lawyers learn to write well at any stage of their education, least of all in law school,

where we are steeped in wretched prose for three mind-numbing years.

In short, it is painfully hard to break old, bad habits. Only the most dedicated lawyers will make a serious effort. When you think of the great press of matters competing for lawyers' time—all of which are more urgent, if not more important, than the need to write better—you appreciate how futile is the hope that lawyers will hide themselves away for hours polishing their prose.

That is why I think the lawyer who hopes to improve the documents that flow in such profusion from his or her office would be money ahead to enlist expert help; that is, lawyers should pay editors to review and help revise their writing. Solo practitioners and small-firm members could hire editors by the hour for important projects, as their budgets permit; large law firms could create publications departments to help with everything from proofreading to major revisions.

While this is not a new idea, it is new to me, so my thoughts are not fully refined. Nonetheless, I offer them for what they are worth, in the hope that those in the trenches will explore the possibilities further.

The first question is obvious: is an expert editor worth the money? Granted that lawyers recognize a value in good writing, but how much is it worth to them, assuming that the benefits are largely intangible? I do not know the answer. But I cannot imagine a competent lawyer unwilling to allocate some portion of the budget to producing better documents. Think of thousands of dollars lawyers spend for attractive offices; think how much you, the lawyer reading this, have spent on various accouterments and trappings, the expensive stationery and furniture and paintings. Is the writing you produce—arguably the greater part of your work product, and certainly the most tangible to clients—really any less a reflection of who you are than the office you inhabit?

As it happens, you can get expert editorial help at bargain-basement prices. Bachelor-level and master-level business- and technical-writing programs are proliferating, turning out more and more hungry graduates. While journalists' pay scale is rising, it is still far below that of lawyers. Most firms could hire a highly skilled, highly experienced editor for far less than the salary of a beginning associate.

Finally, an in-house publications department can also serve as a writing instructor; indeed, every skillful editor delivers a lesson in good writing each time he or she reviews a document. After the editor purges the unnecessary passive voice from your associates' prose for the 50th time, the lawyer-authors will begin to produce better writing in the first instance.

So much for the sales pitch: Assuming that you have decided to seek expert editorial help, whom should you seek? Since no university I know of has a "legal editor" program (dozens soon will if this idea catches on), you must think creatively about filling the position. The most important quality is editing experience. College composition

teachers are editors of student prose and will have a command of grammar and style, assuming they are trained in composition and not just conscripts from the literature department. On the other hand, an English major—or Ph.D.—is not necessarily a skillful writer or editor. Students of English literature focus their efforts on literary criticism, not composition. It is one thing to discern 12 new levels of meaning in *Billy Budd,* another to write cleanly and tautly. Indeed, journals of literary criticism are brimming with classic acadamese. Look for the English major who concentrated, or has a strong grounding, in composition, or the graduates of those proliferating business- and technical-writing programs

Obviously, professional copy editors from newspapers, magazines, book publishing houses, and other reaches of the publishing world are good candidates. Just make sure that their standards are up to yours. In addition to requiring resumes and work samples, give candidates a standardized test in grammar, mechanics, and usage. You can even hire a placement firm in the field to administer a test for you. Also, look for someone with at least a passing knowledge of publication design and layout—almost anyone with a journalism background will—and enough facility with computers to learn a simple desktop publishing system. Researchers are learning more each year about the importance of document design to readability, and you want editors who can apply some of the emerging principles.

Perhaps you are thinking that law review editors would make wonderful in-house editors. I doubt it. Remember that most law-review members at most schools are chosen for their analytic skills (i.e., their ability to do well on final exams), not for their writing ability. Even those who write their way on to a review have met a standard of "good writing" that you hope to surpass. Obviously there are some excellent writers on law review, but more by accident than by design.

Ironically, legal training might handicap a legal editor. One of the few in-house legal editors in the country, Karen Larsen of Portland, Oregon, considers her lay status an advantage. "When [lawyers] pass their writing among one another, or even to a lawyer trained in writing, the lawyers get bogged down in the substance and do not pay enough attention to form," she told me. She went on to say that legal training could be a plus for the lawyer "well-trained in editing and style who could put the lawyer part aside to the proper degree."

Once you have an editor in place, what should you ask of him or her? Were it my firm, I would have my in-house editors review every document the office produced, from client letters to motions and pleadings, from briefs to form contract provisions—everything. If I found this comprehensive approach too expensive, I would send my most important documents to the editors first, but wise lawyers would impose

as few limits as time and budgetary constraints permitted.

Similarly, wise lawyers would encourage editors to suggest revisions on all matters of style, grammar, and mechanics, and to edit aggressively, not gingerly. Editors need not be rude or judgmental, of course, but lawyers should set aside their authorial pride—how many lawyers have cause for authorial pride? My experience as editor is that most lawyers accept even heavy editing willingly, as long as they see that it improves the documents going out over their names.

But do not ask your editors, even legally trained ones, to second-guess the lawyer-author's legal analysis, to frame arguments in briefs, or to perform other lawyerly tasks. Your editors will be most effective at improving the quality of your prose if they concentrate on that effort and leave lawyering to the lawyers. Of course, editors should question weak analogies, logical inconsistencies, and the like. For the most part, though, the editor's job will be to take the substance as he or she gets it from the lawyer and shape it into a leaner, cleaner, better-organized form.

More precisely, the editor's job is to suggest revisions that the lawyer-author may accept or reject. For ethical reasons, if for no other, final responsibility for any document must rest with the lawyer. But the shop rule should be that lawyers generally—i.e., almost always—defer to the editor's stylistic revisions, second-guessing the editor only when stylistic changes somehow compromise the document's legal quality. And editorial changes will rarely—i.e., almost never—compromise legal quality. If they do, your editor is not doing his or her job.

At my firm, I would insist that authors submit all documents to the editor as computer files rather than hard copy. Editors would save the author's original version, make revisions at the video display terminal, and send the edited version to the lawyer for review. (I find that it is much easier for authors to stomach aggressive revision when they are not confronted with marked-up hard copy.) Lawyers could read the edited version first, then check it against their original for accuracy of names, facts, and figures if necessary. (Again, if your editorial staff is good, you should have almost no re-revisions of this sort.)

I could go on, but I think I have provided enough in the way of food for thought. I hope solo practitioners, small firms, and corporate and government law departments adapt the in-house editor idea to their circumstances. Judges ought to experiment with the idea; think of the benefit if each appellate district had an editorial staff to help judges produce better-written opinions.

I am a realist, and I know that few in the profession have money to throw away. But I hope lawyers will look carefully at the prevailing buyer's market for expert editorial help, and consider hiring a skilled editor to help them hone the tools of their profession.

—*Mark Mathewson*
Managing Editor
Illinois Bar Journal

An American Style

Lawyers in the United States commonly remark on the fluency of British barristers, on the clarity, elegance, and wit that seem a natural part of legal discourse in the United Kingdom. Asked to explain, the barrister usually mentions a tradition, one in which Shakespeare and Chesterfield continue to serve as models for writers and speakers of English. Whether a corresponding tradition exists in the United States, or more exactly, whether we have an authentically American prose style, surely ought to matter to those concerned about American legal writing and speech.

In the *Saturday Evening Post* of 14 February 1959, Professor Jacques Barzun, then at Columbia, wrote to praise a lawyer with "the American style par excellence." Here is his subject, putting a case:

> John Fitzgerald, eighteen years of age, able-bodied, but without pecuniary means, came directly from Ireland to Springfield, Illinois, and there stopped, and sought employment, with no present intention of returning to Ireland or going elsewhere. After remaining in the city some three weeks, part of the time employed, and part not, he fell sick, and became a public charge. It has been submitted to me, whether the City of Springfield, or the County of Sangamon is, by law, to bear the charge.

Springfield and Sangamon of course give away the game: Barzun's essay appeared originally under the title "Lincoln the Literary Genius." Reprinted several times since, the piece now is most readily found, as "Lincoln the Writer," in Jacques Barzun's anthology *On Writing, Editing, and Publishing* (2d ed. 1986).

What are the characteristics of the American style exemplified by Lincoln? Barzun identifies "four main qualities of Lincoln's literary art—precision, vernacular ease, rhythmical virtuosity, and elegance . . . ." These are not, it must be said, words likely to spring to the minds of those who know American legal writing, past or present. Some might even call Barzun's list incoherent: precision precludes rhythmical virtuosity, does it not, just as vernacular ease rules out elegance? "Lincoln the Writer" answers such objections with passages from Lincoln's prose and, happily, by the evidence of Barzun's own writing.

Something else explains the relevance of the essay to those trained in the law. What commands attention is Barzun's unselfconscious assertion that Lincoln's legal education and courtroom work helped form the American style par excellence. Few today will connect legal training and artistry with words. Barzun offers Lincoln as proof that there is no "incompatibility between the lawyer . . . and the artist." Studying law may narrow the mind, but it also taught Lincoln precise expression; he acted "lawyerlike" when he "excluded alternatives and hit

upon right order and emphasis." Speaking to jurors demanded skillful blending of technical legal terms and the "idiom of daily life." Thus was vernacular ease born. Detachment, a quality once thought desirable for a lawyer, in Lincoln's prose "yielded the rare quality of elegance."

Other influences shaped Lincoln's style. Attention to rhythm—a feeling for the cadence of prose—distinguishes good writing from the merely proper. Barzun calls it a "gift" that Lincoln "developed to a supreme degree." Lincoln did not read widely, but he read well; from Shakespeare, the Bible, Robert Burns, and Aesop's Fables he learned terseness and strength. He wrote often, mainly letters, slowly, with a "mania . . . for condensing any matter into the fewest words." Required by ambition for office to speak frequently in public, Lincoln bemused friends and colleagues by a "singular determination to express his thoughts in the best way."

Professional training, grounding in everyday language, a natural gift for the music of prose, intense and thoughtful reading, fierce determination—all played a part in forging Lincoln's style. None but the gift is beyond the reach of lawyer or judge. Barzun hints, though, at something deeper, a more fundamental begetter of style: "Lincoln's extraordinary power was to make his spirit felt . . . ."

Many have proposed a connection between style and character. Lincoln, Barzun suggests, embodies it. Barzun does not refer to mere bland respectability. "Passionate, gloomy, seeming-cold, and conscious of superiority" better describes the historical Lincoln. Still, his law partner and partly critical biographer, William Herndon, could paint this portrait of Lincoln as lawyer without significant dissent even from the later debunkers:

> In the practice of law he was simple, honest, fair, and broadminded; he was courteous; he was open, candid, and square .... Mr. Lincoln met all questions fairly, squarely, and openly, making no concealments of his ideas, nor intentions, in any case; he . . . used [no] tricks .... Every man knew exactly where Mr. Lincoln stood, and how he would act in a law case. Mr. Lincoln never deceived his brother lawyers .... What he told you was the exact truth ....

Observe, then, how strong feeling, pessimism, detachment, and consciousness of merit combine with tact and candor to shine through the passage below from a brief letter to a prospective client. The topic is far removed from the great questions of slavery and Union, but dear to any honest practitioner:

> Judge Logan & myself are willing to attend to any business in the Supreme Court you may send us. As to fees, it is impossible to establish a rule that will apply in all, or even a great many cases. We believe we are never accused of being very un-

reasonable in this particular; and we would always be easily satisfied, provided we could see the money—but whatever fees we earn at a distance, if not paid *before*, we have noticed we never hear of after the work is done. We therefore, are growing a little sensitive on that point.

Barzun makes his case splendidly for Lincoln as originator of a distinctively American prose. Yet, taken to heart as literary exemplar, Lincoln raises the troubling question whether so many able and highly educated American lawyers write and speak as they do today because they are, much of the time, secretly a bit ashamed of what they have to say.

—*Stephen Fink*
Thompson & Knight
Dallas, Texas

Legal Quotations Dictionary

For the *Oxford Dictionary of Legal Quotations,* which I am compiling for Oxford University Press, I welcome contributions of quotations about American law, or by Americans about law in general. Quotations are sought not just from strictly legal sources, but also from literary works, philosophical, historical, or political writings, humor, folklore, cinema, and popular music. Fred R. Shapiro, Yale Law School Library, Box 401A, Yale Station, New Haven, CT 06520.

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