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Douglas E. Abrams

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Writing It Right (Column # 6, for Spring 2008 issue – Due date: April 15, 2008)

"We Are the Products of Editing. . . ."

by Douglas E. Abrams *

Justice Louis D. Brandeis taught that "there is no such thing as good writing. There is only good rewriting."[1] Literary giants without law degrees have said the same thing.[2] At some point in the often meticulous rewriting process, even talented writers lose capacity to improve the project by themselves. A strong finish depends on input from editors who critique the draft for substance and style. Biochemist George Wald acknowledged that when careful professionals write, "[w]e are the products of editing, rather than of authorship."[3]

Editing has helped shape my career because I have never completed a book, article, brief or agreement without first asking one or more colleagues to read and comment on my draft. I may enlist other lawyers, or lay persons skilled in the elements of style, or both. Fresh eyes bring objectivity that helps the writer hone the near-final product; no one, I assure reviewers when they sign on, has ever edited my writing and made it worse.

Perhaps I have helped shape other lawyers' careers too because I enjoy editing their work as much as I welcome edits of mine. British author H.G. Wells exaggerated when he asserted that "[n]o passion in the world, no love or hate, is equal to the passion to alter someone else's draft."[4] Words are tools, however, and crafting remains creative regardless of who holds the toolbox.

This article begins a two-part discussion of the central role that editors play in expository legal writing and the drafting of legal instruments. This first part presents six guidelines for lawyers

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who navigate the editorial process, which former *New Yorker* editor Harold W. Ross once likened to "quarreling with writers."[5] Quarrels may indeed characterize the magazine world, but the best writing emerges from courts, agencies, law offices and law schools when editors cooperate with writers achieve the four fundamentals – precision, conciseness, simplicity and clarity.[6]

In the Summer issue of *Precedent*, the second part of this discussion will underscore editing's central role by recounting the story of skilled editors who shaped American history by making valuable changes to an already graceful, but less than thoroughly polished, draft written by a leading lawyer who resented the editors' contributions for the rest of his life. The editors -- lawyers and lay persons alike -- were the delegates to the Second Continental Congress in 1776. The lawyer afflicted with excessive "pride of authorship" was Thomas Jefferson, and the writing was the Declaration of Independence.

EDITORIAL GUIDELINES FOR LAWYERS

Six basic guidelines direct the legal writer's quest for productive editing:

1. *Decide the best time to begin the editorial process*. Normally the writer is in the best position to determine when to begin soliciting editorial input. Timing may depend on such factors as the writer's own grasp of the subject matter at various stages, the writer's perceived need for advice about substance or style, an editor's availability, the writer's deadline, or a client's ability to compensate editors.

With only a rough outline or rudimentary notes, a briefwriter may benefit from early exchanges of ideas with one or more "oral editors," colleagues who serve as a sounding board to help the writer focus. Similar exchanges may help when the lawyer-editor provides written and oral comments on an early draft, while the writer can still sharpen initial points or stake out new

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directions. Or the writer may wait until the project approaches finality, when editors can help burnish both substance and style.

2. *Select editors who resemble the intended audience.* My Spring, 2007 "Writing It Right" article likened legal writers to actors because "[l]awyers appear on stage whenever we pick up a pen or turn on the computer to write something we hope other people will read."[7] Editing resembles a final or near-final dress rehearsal, when the writer can adjust the performance before the curtain opens to the audience, the readers of the published writing. Arguments may need to be added, deleted, amplified, tightened or recast. Syntax, tone or style may need refinement. Length may need to be pruned.

To the extent possible, the most effective editors are people likely to think and react as the writer expects and hopes the audience will think and react. An editor who looks like the audience may not look like the writer, but lack of resemblance does not matter because the writer is atop the list of people who will likely never read the document once it is published.

Where a lawyer writes a brief or other litigation document, for example, the law office's former judges and former judicial law clerks make excellent editors because their experience with judicial decisionmaking provides unique perspectives enabling them to distinguish between arguments likely to persuade the court and arguments likely to fall flat. Experienced legal drafters can assist a lawyer who wrestles with contract language or seeks to anticipate its future effects. Judicial law clerks can advise their judges who draft opinions or orders. The client (a member of the audience, whether or not trained in the law) may provide input when reviewing the draft in the ordinary course of representation. Where the lawyer writes a newspaper op-ed column or other "popular piece" for a general audience, lay editors can help rephrase legalese likely to frustrate lay

readers.

3. *Encourage candor*. Editors may feel natural reluctance to challenge the writer. Particularly where the editor holds a position subordinate to the writer in a firm or agency, nods of approval may appear the easiest path. Because legal writers usually engage only one editor or a small number on a project, however, reticence squanders a valuable opportunity for improvement.

Candid editing is a compliment because editors would not willingly labor over a draft that appears shoddy. Encourage candor by asking the editor, in a tone evincing genuine interest, to report on whether he or she followed the analysis and felt comfortable with the style. Express gratitude for criticism and praise alike. If the editor is a junior lawyer or a paralegal, perhaps assume a teacher's role by explaining why a suggestion did not find its way into the final product.

Robust, no-holds-barred editing can avoid later pitfalls because published legal writing typically faces a "hostile audience," a readership that "will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning."[8] Judges and law clerks, for example, will parse briefs to test whether arguments can withstand attack, but only after opponents have already tried to make the arguments mean precisely what the writer did not intend. Advocates will strain to distinguish troublesome precedents. Parties seeking to evade contractual obligations will seek loopholes. Opponents will strain to confound lawyers who write newspaper op-ed articles.[9] Editing can alert the writer to potential weaknesses before less friendly readers get their hands on the published document.

With a fresh perspective, the editor can pinpoint missing links in the chain of logic that escape the writer, who may have become so intimate with the project during the gestation period that he or she neglected to express each link in writing. Objectivity can also enable the editor to flag

typographical errors, omitted or superfluous words, or tangled phrasing that survive when the writer's thought process and proofreading induce the eyes to see what is in the mind rather than what is on the page.

4. *Solicit both substantive and stylistic review.* Quality legal writing is marked by substantive soundness, proper grammar and syntax and spelling, and appropriate tone. The essentials of grammar, syntax and spelling remain constant, but substance and tone may depend on whether the writing emphasizes argumentation, instruction or description.

Sometimes the writer can ask one editor to sharpen both substance and style (as Professor Melody R. Daily, director of our law school's legal writing program, does when she improves my "Writing It Right" articles). Otherwise the writer can enlist more than one editor, each adept at one element but not necessarily both.

5. *Do not rely on the editor to do the writing*. Presumably the writer knows the topic better than the editor does because the writer has lived with the project longer and more closely. If an editor suggests adding or deleting a passage or provision, the writer might invite the editor's drafting. Otherwise writers owe it to themselves and their clients to take charge, without conscripting their editors as ghost writers. To paraphrase President Harry S Truman, the buck stops with the writer. So must the writing.

In a law firm or an agency, the institutional hierarchy normally determines whether editors can upstage writers. Outside editors, however, may be another story. Law professors, for example, sometimes complain about nettlesome student editors for seeking to influence the substance and style of submitted law review manuscripts. Professors can be defensive about their writing, and they are unaccustomed to losing quarrels with students. Law review standoffs are the professor's own fault,

however, when the professor submits a manuscript with text or footnotes missing or unfinished, confident that the student editors will pick up the slack. When writers expect an outside editor to do their work, writers have nobody to blame but themselves when the editor does the work.

6. *Restrain pride of authorship until after publication*. "[F]ierce pride of authorship," says federal appeals judge Bruce M. Selya, "is, on balance, a good thing. It is the pride of the craftsman."[10]

Pride unrestrained, however, can cloud the writer's judgment. "[T]he two most crucial aspects" of a writer's character, explains Professor Ira C. Lupu, "are pride and humility. The perfect author has an optimum mix of the two. . . . Of the two qualities, . . . humility is by far the more important."[11]

Humility means viewing editors as allies, not adversaries. Editing, of course, may confirm the soundness of much of what already appears on paper. But where an editor resembling the audience experiences difficulty with substance or style, so might the audience later on. Better that the writer confront these potential barriers to communication head-on before signing off on the final product. Legal writers secure in their craft welcome give-and-take with an editor because they recognize that their own "self-editing" cannot substitute for a skilled outsider's vantage.

Normally the writer remains free to accept or reject an editor's suggestion, but Professor Lupu offers writers this formula for tempering pride with humility: "Whether or not I like the editor's correction, I always treat the editorial input as an invitation to revisit a thought or its expression. However frequently I accept an editor's revision, I far more frequently use the proposed revision as a springboard for my own rewrite. Indeed, I try to look at my original sentence, and the editor's proposal, as a self-editor as well as an author. When I can achieve that sort of simultaneous

detachment from and proximity to the work, I always come away with a profound sense of improvement in the piece."[12]

CONCLUSION: THE LEGAL WRITER'S "FAIR HOPE"

Thomas R. Marshall is a name unknown to most Americans today, but his observations about the delicate balance between humility and pride of authorship bear repeating. Marshall was Woodrow Wilson's Vice President from 1913 to1921, during tumultuous times of war and peace. For nearly a year and a half after Wilson suffered a debilitating stroke following the Versailles Peace Conference in 1919, Marshall stood a fragile heartbeat away from the Presidency, unsure of his role. If the Twenty-Fifth Amendment governing presidential succession (ratified in 1967) had been in effect, Marshall would likely have become President, or at least Acting President.

Writers today can still draw useful analogies from Marshall's insight into the fateful standoff between Wilson and Senator Henry Cabot Lodge before the Senate rejected the Versailles treaty and United States membership in the League of Nations. "Pride of opinion and authorship, and jealousy of the opinion and authorship of others," Marshall wrote in his memoirs, "wreck many a fair hope."[13]

A legal writer's "fair hope" is to enhance his or her own reputation and, when serving in a representative capacity, the client's cause. Enhancement depends on summoning the humility to respect editors, and to reserve pride of authorship for what will survive, not what will disappear.[14]

The published writing will be seen first by the intended audience, later by other lawyers and clients if the document joins an internal form file adaptable for future use, and perhaps still later by yet-unidentified readers because most writing by lawyers survives in the public domain. Carol Burnett is right that "once words are printed . . ., they have a life of their own."[15]

And preliminary drafts? They usually disappear in the trash, deleted from the computer,

forgotten and never to be seen or heard from again.

Next article: *America's Founding Editors,* the story of Thomas Jefferson, pride of authorship, and the drafting and editing of the Declaration of Independence.

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* Douglas E. Abrams, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles.

ENDNOTES

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