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# Mincing No Words: When the Court's Opinion Criticizes an Advocate's Writing

Douglas E. Abrams

# MINCING NO WORDS: WHEN THE COURT'S OPINION CRITICIZES AN ADVOCATE'S WRITING

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IN *MCDADE V. BERRYHILL*, DANIEL MCDADE SOUGHT REVIEW OF A FINAL DECISION OF THE COMMISSIONER OF SOCIAL SECURITY THAT DENIED HIS APPLICATION FOR DISABILITY BENEFITS.

**Douglas E. Abrams**

In late 2018, the U.S. District Court for the Northern District of California granted the plaintiff summary judgment, denied the commissioner summary judgment, and remanded the case to the commissioner with instructions to award benefits.[2]

The district court opinion began with lengthy discussion of the facts and law that produced the disposition, but the opinion did not stop there. "The quality of the briefs from McDade's counsel . . . is unacceptable," the court added, naming the lawyer and quoting some troublesome passages. "Portions of the brief are incoherent, and there are a number of indications that [counsel] failed to read the record closely or proofread his own briefs before filing them."[3]

*McDade* followed with a stern warning. "The Court expects submissions from licensed attorneys to adhere to at least minimal standards of grammar and comprehensibility. Counsel is admonished that any future filing from [the named counsel's law office], in this or any other case, that fails to meet those standards may be stricken sua sponte, and that extreme deficiencies may result in referral to the Court's Standing Committee on Professional Conduct."[4]

On motions by plaintiff McDade's counsel for an award of reasonable statutory attorneys' fees, expenses, and costs, the court concluded that the client had prevailed on his disability claim "[d]espite the quality of [counsel's] briefs."[5] The court added that counsel's papers supporting the fees motions demonstrated "a lack of care similar to the motion for summary judgment, albeit not as extreme"; the papers' shortcomings included sentences that were "largely ungrammatical and incomprehensible."[6] Partly because of counsel's "substandard performance" marked by "the unacceptable quality of the briefs," the court awarded only 20% of the maximum fees allowable by statute.[7]

**Discredit and Disservice**

The *McDade* court thus joined the ranks of recent federal and state trial and appellate courts whose reported opinions, either in the main text or a footnote, sharply criticize the briefs or other written submissions of advocates for one or more of the parties. Courts accept occasional shortcomings because judges understand that advocates in the public or private sector frequently write under time constraints imposed by tight, inflexible deadlines; like other conscientious writers, conscientious advocates may strive for perfection but rarely achieve it.[8] Time constraints or no, however, judicial tolerance has its limits. "While an occasional typo is perhaps inevitable and certainly forgivable," wrote one federal district court, "an abundance of errors tends to discredit the substance of a brief"[9] as the court proceeds toward an outcome consistent with the facts and the law.[10]

This abundance or errors, wrote another federal district court, is "a disservice to the court, and more importantly, to the client."[11] Other courts recite burdens that a party's inept written submission also casts on opponents, who (like the court) must spend time figuring out what counsel is trying to say.[12] The client can suffer when the lawyer's incompetent writing undermines the court's confidence in the competence of the advocacy itself. Suspicion may arise that a writer who is less than competent in one may be less than competent in the other.[13]

**Pejoratives and Reputation**

In recent years, court opinions have chastised counsel's briefs or other written submissions for such structural deficiencies as improper citations;[14] missing exhibit labels;[15] incomplete tables of citations;[16] mis-numbered counts;[17] failure to cite to the record;[18] and skirting of court rules that regulate font size, maximum page limits, mandated margins, and the like.[19] Beyond structure, opinions have also chastised counsel for written submissions that are "riddled with misspellings, typographical errors, punctuation errors, and grammar and usage errors"[20] and for those marked by careless cutting-and-pasting from forms or other prior work product, or by careless reliance on spell-check.

Court opinions mince no words, describing advocates' seriously deficient briefs or other written submissions

with such harsh pejoratives as "slipshod,"[21] "shoddy,"[22] "sloppy,"[23] "poorly written,"[24] "careless,"[25] "somewhat appalling,"[26] "marred by unprofessional errors,"[27] "professionally unacceptable,"[28] "strikingly inadequate,"[29] or even "worthless."[30] Other opinions decry an advocate's "glaring errors,"[31] "scattershot approach,"[32] "poor attention to detail,"[33] "rampant deficiencies,"[34] "lax draftsmanship,"[35] or "lack of effort."[36]

Some opinions identify the offending counsel by name; other opinions identify the offender only as "plaintiff's counsel" or by some similar label, leaving it to the opinion's present or future readers to determine identity easily from the roster of participating lawyers atop the opinion.[37] One way or another, having work product arouse public judicial criticism, likely accompanied by one or more pejoratives, can stain counsel's reputation. Arousal can also carry adverse consequences such as the prospect of professional discipline that *McDade* and other decisions have recited,[38] or the prospect of court-imposed sanctions.[39]

**Lessons from the Courts**

Court opinions such as the ones cited in the text and notes above yield three immediate lessons that can help guide advocates to write to the best of their ability:[40]

*Cutting-and-Pasting Must be Done Carefully*[41]

Courts frequently call out counsel for careless cutting-and-pasting from such documents as prior briefs or other court submissions.[42]

Forms and internal form files have long been staples in private law firms and public agencies, and courts recognize that a lawyer who carefully cuts-and-pastes from a form can avoid wasteful efforts to "reinvent the wheel."[43] The lawyer profits from prior wisdom while conserving valuable professional time, and thus presumably also reducing cost to the client.

A solid form, however, is a tool, not a crutch. Forms remain useful only when the lawyer carefully adapts them to suit the present matter. Cutting-and-pasting a form can be a tantalizing invitation to harmful corner-cutting. Form briefs and similar court submissions (like form agreements and other non-litigation documents) may appear grammatically correct and structurally sound, but they may carry unintended adverse consequences for failing to reflect the facts and law that will influence or determine the client's cause.

The form may have emerged from a context quite different from today's, though the difference may not be apparent from the face of the form months or years later. Particularly where the form appears in a national source, for example, the form may have been developed or finalized under the law of a jurisdiction other than the one governing today's proceeding. Even within a particular jurisdiction, the dispositive law may have evolved or changed in the interim.

Sometimes the threshold problem with casual reliance on a form can be stylistic. In one recent case, the appellant's brief was laden with cut-and-pasted excerpts from legal research databases. The court complained that "[i]n some instances these data dumps are double spaced and in other instances they are single spaced. The headnote designations and asterisked page numbers referring to various reporters have not even been removed."[44]

Problems, however, commonly transcend style. In another recent case, for example, the court reported that the plaintiff's counsel cut-and-pasted an entire section of the defendant's brief and thus inadvertently parroted the defendant's conclusions.[45] In yet another recent case, the court reported that "plaintiff made the bizarre choice of copying and pasting large portions of defendant's statement of material facts, verbatim, despite the fact that plaintiff goes on to offer facts which directly conflict with those facts she has already copied from defendants' statement of material facts."[46]

Some embarrassed lawyers learn the hard way that passages quickly cut-and-pasted from an earlier document can inadvertently preserve the prior matter's names, dates, or circumstances.[47] Professor Louis Lusky used to warn his Columbia Law School students that "the quickest way to lose a client is to misname the client or to spell the client's name wrong." Opponents may snicker, but the client dependent on the lawyer may feel miffed.

In high-stakes litigation, careless cutting-and-pasting can weaken the lawyer's hand, and thus the client's position, by evincing a lack of thoroughness that might lead opponents to "smell blood" and seek to take advantage.[48] As this article mentioned earlier, such carelessness can also diminish the court's confidence in the soundness of the lawyer's argument of the merits.

The bottom line? Cutting-and-pasting from prior sources can be efficient and productive when done prudently, but not as a shortcut or substitute for rigorous analysis, interpretation, and reasoning based on counsel's informed research and understanding of today's facts and law.

*Understand Spell-Check's Limitations*

In 2015, in *Ott v. H & M Hennes & Mauritz LP*, a Wisconsin federal district court criticized the plaintiff's counsel for submitting a brief with gaffes that overlooked the porous nature of spell-check and similar technology. "Spellcheck," the court's opinion cautioned, "ensures that what is written is an English word; it does not check for whether it is the word the writer intended."[49] The court's antidote? "[S]pellcheck is no substitute for proofreading."[50]

Another recent federal district court opinion called out the plaintiff's counsel for submitting motion papers with multiple "errors that spell-checking software would miss but that a conscientious human review would have caught."[51] The district court's finding demonstrated that, like cutting-and-pasting, spell-check is a tool and not a crutch. Similar to so many other so-called "labor saving" devices that affect our daily lives, misplaced reliance on spell-check can exact a heavy price.

Spell-check may usefully alert the writer to misspellings during drafting. *Ott* and other decisions, however, correctly advise that before submission the writer must turn to careful proofreading, the courts' third lesson.

*Close Proofreading Remains Essential*

As a consistent refrain, courts advise,[52] and sometimes explicitly warn,[53] advocates to proofread their briefs and other work product as finality approaches.[54] Some courts remind counsel to pay closer attention, and other courts suspect that counsel did no proofreading at all.[55] This universal judicial

command prevails even when the advocate has not cut-and-pasted or used spell-check because these two shortcuts hold no monopoly on deficient writing.

I made the point in *Effective Legal Writing: A Guide for Students and Practitioners* (West Academic 2016).[56] Proofreading begins with the writer, whose close scrutiny remains essential to any document destined to reach client, opponent, and court. As professionals licensed to practice a learned profession, lawyers bear ultimate responsibility for their own written work product. To paraphrase President Harry S Truman, the buck stops with the writer.[57]

At some point, however, even talented writers may lose capacity to polish the draft by themselves. A strong finish depends on enlisting review by others. Proofreading by others remains doubly important to lawyers who hold misgivings about the quality of their own written expression. In a law firm of any size, lawyers seeking proofreaders may consider enlisting partners, associates, administrative asssistants, or even law clerks or student interns to back up the lawyer's own proofreading.[58]

**A Lawyer's "Bread and Butter"**

This article highlights what the legal media sometimes labels "bench slaps," the court's public chastisement of a lawyer appearing before it. The serious potential short-term and long-term harm of public judicial chastisement, however, belies the somewhat flippant label. In cities, suburbs, and outstate areas alike, the practicing bar usually reduces itself to a relatively discrete circle bound by bar association memberships, other mutual relationships, word of mouth, and experience. The specialization that characterizes much of contemporary law practice[59] may constrict the circle still further.[60]

In many private law matters, lawyers' scrutiny of a peer's writing may not extend beyond the immediate parties and their counsel, even when written submissions become public records technically available to all. When the public exposure experienced by lawyers in the cases cited in this article's text and endnotes occurs, however, the deficiencies becomes a permanent record readily available to other lawyers who follow the advance sheets or sometimes the legal media. Westlaw, Lexis, and other electronic research engines extend the record even wider.

Private scrutiny or public exposure can affect not only the lawyer's self-esteem and professional standing, but also the lawyer's livelihood. Public judicial criticism, for example, may cast doubt among other bar members and past clients who might contemplate new relationships with the lawyer, including whether to send referrals the lawyer's way.[61] In a tight legal job market, a judge's public criticism may deter a firm from considering the lawyer for lateral hire based on skills demonstrated during adversary representation.

As "a representative of clients [and] an officer of the legal system" under the Missouri Rules of Professional Conduct,[62] advocates have an ethical responsibility to deliver competent, reasonably diligent representation.[63] As *McDade* and other decisions recite, the obligation may measure the quality of briefs and other written submissions.

Nearly a generation ago, the U.S. Court of Appeals for the 7th Circuit set the ethical bar high: "A lawyer's reputation for integrity, thoroughness and competence is his or her bread and butter."[64] The ethical bar remains high because competence and thoroughness, like integrity, are ingredients indispensable to the lawyer's complete package.

Competent, thorough writing is central to a lawyer's professional repertoire. Even one public "bench slap" for deficient writing can permanently damage the advocate's otherwise unblemished reputation. Benjamin Franklin was right: "It takes many good deeds to build a good reputation, and only one bad one to lose it."[65]

**Endnotes**

1 Douglas E. Abrams, a University of Missouri law professor, has written or co-written six books, which have appeared in a total of 20 editions. Four U.S. Supreme Court decisions have cited his law review articles. His writings have been downloaded worldwide more than 27,000 times. His latest book is Effective Legal Writing: A Guide for Students and Practitioners (West Academic Publishing 2016). Thank you to Matthew Neuman (MU Law Class of 2019) for his skilled research on this article.

2 *McDade v. Berryhill*, 2018 WL 4635646 (N.D. Cal. Sept. 27, 2018).

3 *Id*. at *13.

4 *Id*. at *14.

5 *McDade v. Saul*, 2019 WL 6251229 (N.D. Cal. Nov. 22, 2019).

6 *Id*. at *3.

7 *Id*. at *5, *4 n.4.

8 *Ott v. H & M Hennes & Mauritz LP*, 2015 WL 6393821, at *5 (E.D. Wis. Oct. 22, 2015) ("[A]n occasional typo will slip by even attentive writers. . . ."); Douglas E. Abrams, *How Not to Seek an Award of Attorney's Fees*, 3 Precedent 36, 37 (Summer 2009) (Precedent is The Missouri Bar's former quarterly magazine.).

9 *Gaskins v. Baltimore City Public Schools*, 2016 WL 192535, at *3 n.11 (D. Md. Jan. 15, 2016), *aff'd sub nom*. *Gaskins v. Abiodun*, 649 F. App'x 307 (4th Cir. 2016). *See also, e.g*., *Smith v. Berryhill*, 2017 WL 1153912, at *5 n.4 (M.D. Tenn. Mar 28, 2017) ("While the Court certainly does not expect the parties' briefs to be typographically flawless, counsel would do well to at least proofread any memorandum being submitted for review.").

10 *Deluca v. Berryhill*, 2017 WL 6629020, at *2 n.1 (9th Cir. Dec. 29, 2017) ("[W]e do not hold the missteps of an attorney against the attorney's client."); *Croslen v. Middleton*, 2016 WL 5661103, at *6 (S.D. Ga. Sept. 29, 2016) ("While the Court always endeavors to reach the correct conclusion, . . . disorganized and error riddled writing has the potential to distract the Court and undermine the effectiveness of counsel's argument.").

11 *Ott, supra* note 8 at *5.

12 *Devore v. City of Phila*., 2004 WL 414085 (E.D. Pa. Feb. 20, 2004) (reducing an advocate's fee award partly because his "lack of care caused the court, and . . . defense counsel, to expend an inordinate amount of time deciphering the arguments and responding, accordingly."); *Suchanek v. Sturm Foods, Inc*., 2017 WL 370406, at *2 (S.D. Ill. Aug. 28, 2017).

13 *See, e.g*., *Holmes v. Shulkin*, 2017 WL 40790027, at *2 n.1 (Ct. Vet. App. Sept. 15, 2017); *Croslen, supra* note 10 at *6.

14 *Davis v. Credit Bureau of the South*, 908 F.3d 972, 978 (5th Cir. 2018). *See also, e.g*., *Samuel v. Equifax Information Servs*., LLC, 2018 WL 305658, at *1 (E.D. Pa. June 22, 2018).

15 *Samuel, supra* note 14 at *1.

16 *Sampson v. Pennsylvania Bd. of Probation & Parole*, 2018 WL 1277456, at *4 n.9 (Pa. Commonw. Ct. Mar. 13, 2018).

17 *Merriam v. GC Servs*., 2018 WL 5722168, at *2 n.3 (N.D. Ind. Oct. 31, 2018).

18 *Hampshire v. Philadelphia Housing Admin*., 2019 WL 652481 (E.D. Pa. Feb. 14, 2019).

19 *Hardaway v. Dickerson*, 2017 WL 4475929, at *2 n.5 (N.D. Ga. June 29, 2017); *Poulter v. Cottrell, Inc*., 2016 WL 7451630, at *1 n.2 (N.D. Ill. Dec. 28, 2016); *Jones v. Con-Way Freight, Inc*., 2014 WL 1120062, at *1 (W.D.N.C Mar. 20, 2014); *BankFinancial, F.S.B., LLC v. HG King Properties, Inc*., 2016 WL 7077934, at *2 n.2 (Ill. App. Ct. Dec. 1, 2016). *See also* Douglas E. Abrams, *Sanctions For Evading Maximum Page Limits on Court Filings*, 73 J. Mo. Bar 316 (Nov.–Dec. 2017) (citing decisions).

20 *Smith v. Colvin*, 2016 WL 947181, at *6 n.1 (D. Nev. Feb. 18, 2016), *report and recommendation adopted*, 2016 WL 953 242 (D. Nev. Mar. 14, 2016). *See also,*

*e.g.*, *Davis, supra* note 14 at 978; *Ayala v. Armstrong*, 2019 WL 96299 (D. Idaho Jan. 3, 2019); *Hampshire, supra* note 18; *Samuel, supra* note 14 at *1; *Merriam, supra* note 17 at *2 n.3; *Melamed v. Melamed*, 2016 IL App (1st) 141453, para. 22, 50 N.E.3d 669 (2016).

21 *Gandy v. Lynx Credit*, 2014 WL 680550 1, at *n.2 (N.D. Tex. Dec. 3, 2014).

22 *Sampson, supra* note 16 at *4 n.9.

23 *Poulter, supra* note 19 at *1 n.2; *Agapito v. Colvin*, 2014 WL 774689, at *16 n.18 (S.D.N.Y. Feb. 20, 2014).

24 *Ayala, supra* note 20; *Kuzmin v. Thermaflo, Inc*., 2009 WL 142173, at *2 n.6 (E.D. Tex. May 20, 2009). *See also, e.g.*, *United States v. Garcia*, 672 F. App'x 442, 443 (5th Cir. 2016) ("exceptionally poor").

25 *Holmes, supra* note 13 at *2 n.1; *Pierce v. Visteon Corp*., 791 F.3d 782, 788 (7th Cir. 2015) ("The brief's writing . . . conveys the impression of 'dictated but not read.'"); *Tech Data Corp. v. Mainfreight, Inc*., 2015 WL 12915713, at *1 n.2 (M.D. Fla. Jan. 28, 2015); *Samuel, supra* note 14 at *1.

26 *Croslen, supra* note 10 at *6.

27 *Deluca, supra* note 10 at *2 n.1. *See also, e.g.*, *Bonds v. State*, 138 So.3d 914, 917 n.1 (Miss. 2014).

28 *Sackman v. New Jersey Mfrs. Ins. Co*., 131 A.3d 1204, 1217 (N.J. Super. Ct. App. Div. 2017).

29 *Eskridge v. Philadelphia Housing Auth*., 2018 WL 526485, at *2 (3d Cir. Jan. 24, 2018).

30 *High v. Rhay*, 519 F.2d 109, 113 (9th Cir. 1975).

31 *Johnson v. City of Philadelphia*, 2015 WL 1475277, at *7 (E.D. Pa. Apr. 1, 2015). *See also Gaskins, supra* note 9 at *3 n.11.

32 *Johnson, supra* note 31 at *7.

33 *Madrid-Perez v. Bowles Custom Pools & Spa, Inc*., 523 B.R. 346, 347 n.1 (D.P.R. 2014), *aff'd sub nom. In re Gil-De la Madrid*, 817 F.3d 371 (1st Cir. 2016).

34 *Sampson, supra* note 16 at *4 n.9.

35 *City of Eau Claire v. Wilczynski*, 2015 WL 13122718, at *1 (Wis. Ct. App. May 19, 2015).

36 *Sackman, supra* note 28 at 1217; *People v. Love,* 2016 WL 7427089, at *5-6 (Mich. Ct. App. Dec. 20, 2016) (Murray, J., concurring).

37 *See* Douglas E. Abrams, *How Not to File a Complaint*, 6 Precedent 52, 53 (Summer 2012).

38 *See, e.g.*, *Eskridge, supra* note 29 at *2.

39 *See, e.g., Sackman, supra* note 28 at 1217; *Bauer v. Pennsylvania State Bd. of Auctioneer Examiners*, 154 A.3d 899, 904, n.7 (Pa. Commonw. Ct. 2017).

40 *See* Douglas E. Abrams, Effective Legal Writing: A Guide for Students and Practitioners ch. 10 (2016).

41 *See* Douglas E. Abrams, *supra* note 8 at 38-39.

42 *See, e.g.*, *Electronic Privacy Info. Ctr. v. United States Drug Enf. Agency*, 192 F. Supp.3d, 92, 106 n.7 (D.D.C. 2016); *Bigby v. Stephens*, 595 Fed App'x 350, 355 n.2 (5th Cir 2014); *Sadler v. Comm'r of Soc. Sec*., 2014 WL 4724767, at *6 n.3 (E.D. Mich. Sept. 23, 2014).

43 *See, e.g.*, *Moore v. Ferris*, 2017 IL App (2d) 170031-U, para. 34; Douglas E. Abrams, *supra* note 8 at 38-39.

44 *Nationwide Life Ins. Co. v. Thompson*, 2018 WL 1901943, at *5 (N.J. Super. Ct. App. Div. Apr. 23, 2018).

45 *Norkus v. ING U.S., Inc*., 2014 WL 7051414, at *2 (W.D. Mich. Dec. 12, 2014).

46 *Dennis v. Potter*, 2015 WL 4429371, at *1 (N.D. Ind. July 20, 2015), *on reconsideration in part*, 2015 WL 5032015 (N.D. Ind. Aug. 25, 2015).

47 *See, e.g., Sadler, supra* note 42 at *6 n.3 (plaintiff's brief named a former client rather than this case's plaintiff); *Adobe Sys., Inc. v. Accoladian Res*., LLC, 2014 WL 3737979 (N.D. Cal. July 28, 2014) (defendant's brief named as the defendant an entity that was not a party).

48 Douglas E. Abrams, *supra* note 8 at 38-39.

49 *Ott, supra* note 8 at *5.

50 *Id*.

51 *See, e.g.*, *Hawthorne v. Mid-Continent Cas. Co*., 2017 WL 2363740, at *1 n.1 (W.D. Wash. May 31, 2017).

52 *See, e.g.*, *Deluca, supra* note 10 at *2 n.1; *Mosley v. Colvin*, 2015 WL 5341782, at *7 n.1 (D. Colo. Sept. 15, 2015); *Moore, supra* note 43 at 170031-U, para. 34.

53 *See, e.g.*, *Shackelford v. Blades*, 2018 WL 1546424, at *13 (D. Idaho Mar. 29, 2018); *Gaskins, supra* note 9; *Deluca, supra* note 10; *Lane v. Lane*, 38 N.E.3d 230 n.1 (Ind. Ct. App. 2015).

54 *See, e.g.*, *Holmes, supra* note 13 at *2 n.1; *Ferris v. Ford Motor Co*., 2019 WL 1100376, at *6 (N.D. Cal. Mar. 8, 2019); *Smith, supra* note 20 at *6 n.1; *Moore, supra* note 43 at 170031-U, para. 34.

55 *See, e.g.*, *Hawthorne, supra* note 48 at *1 n.1; *People v. Montanez*, 2016 IL App (1st) 133726, 55 N.E.2d 692, 699 n.2; *City of Eau Claire, supra* note 35 at *1.

56 *See* Douglas E. Abrams, *supra* note 40 at ch. 10.

57 *See* Douglas E. Abrams, *supra* note 8 at 37-38

58 *See* Douglas E. Abrams, *supra* note 40 at 89.

59 *See, e.g.*, Sol Linowitz, The Betrayed Profession, ch. 5 (1994).

60 *See* Douglas E. Abrams, *supra* note 40 at ch. 10.

61*See, e.g.*, *id*. at 93; Stephen Daniels & Joanne Martin,*"It's Darwinism – Survival of the Fittest:" How Markets and Reputations Shape the Way in Which Plaintiffs' Lawyers Obtain Clients*, 21 Law & Pol'y 377, 384-87 (1999) (a lawyer's reputation among peers determines the type and number of referrals the lawyer receives).

62 Missouri Rules of Professional Conduct, Preamble [1] ("A Lawyer's Responsibilities").

63 *Id*. R. 4-1.1 ("A lawyer shall provide competent representation to a client. Competent representation requires the legal knowledge, skill, thoroughness and preparation reasonably necessary for the representation."); *id*. R. 4-1.3 ("A lawyer shall act with reasonable diligence and promptness in representing a client."). *See also, e.g.*, *Holmes, supra* note 13 at *2 n.1.

64 *Harlyn Sales Corp. Profit Sharing Plan v. Kemper Fin. Servs*., 9 F.3d 1263, 1269 (7th Cir. 1993).

65 *Recovery and Reinvestment Spending: Implementing a Bold Oversight Strategy, Hearing Before the S. Homeland Security and Govt'l Affairs Comm*., 110th Cong., 1st Sess. (2008) (testimony by Sen. Joseph I. Lieberman) (quoting Franklin), *quoted* in Douglas E. Abrams, *supra* note 40 at 93.