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Memo of Masochism (Reflections in Legal Writing)

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Abstract

To succeed in the legal profession the law student must master, in addition to the procedural and substantive law, a combination of counseling, negotiating, advocacy, and research skills.

Memo of Masochism (Reflections in Legal Writing)

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THE TOOLS OF ARROGANCE

*With "Black Letter Law" Lighting the Way
We Are Guided Down Paths of Hazy Gray¹*

Writing

To succeed in the legal profession the law student must master, in addition to the procedural and substantive law, a combination of counseling, negotiating, advocacy, and research skills. However, these tools are of little value if the attorney-to-be cannot write effectively. "There are two things wrong with almost all legal writing. One is its style. The other is its content."² Good legal writing is not a compilation of arcane Latin phrases or mountains of dreary drivel. Rather, good legal writing is artistry. The attorney, as a craftsman, must sculpt a clear, precise, comprehensive, and most importantly, effective statement. This ability is not the manifestations of an inherent genetic mutation, although the innate passion to develop a "legal lexicon" may lend itself to some form of DNA analysis. The art of legal writing is a dynamic and perpetual operation. In fact, "there is no such thing as good writing. There is only good re-writing."³ "The beauty of good craftsmanship is that the final product masks the painstaking and difficult process by which it was created. The good writer—the craftsman—makes it look easy."⁴

* As if I have not suffered enough from the slashing slaughter of Legal "Righting," I now anxiously await the opportunity to unwarily wade into the steaming cauldron of cacophony known as Moot Court, and be reduced to a gurgling stew of pseudo-legal babble. Until that time, I continue to endure the pleasures of life and enjoy the pressures of school while pursuing a JD/MBA at Indiana University in Indianapolis. I wish to dedicate (with uncharacteristic brevity) this article to mom and dad . . . Thanx.

1. I am quoting myself.

2. Fred Rodell, *Goodbye To Law Reviews*, 23 VA. L. REV. 38, 41 (1936).

3. Louis D. Brandeis, *quoted in* George W. Pierce, *The Legal Profession*, Vol. XXX

THE TORCH Apr. 1957, at 8.

4. Nathaniel Hawthorne, *quoted in* CLIFTON FADIMAN, *THE AMERICAN TREASURY* 917 (1851).

Research

The key to successful legal research is organization. As a 1L, even after you realize that "shepardizing" is not an obscene act performed with farm animals, you will find the task ahead nonetheless daunting. If you are fortunate enough to own a personal computer with a modem, access to PERPLEXUS, GUESSLAW, ATTORNEYS ANONYMOUS ANSWER-LINE, or any other "FOR EDUCATIONAL PURPOSES ONLY", habit-forming legal database may preclude you from having to change your mailing address to the law library, as well as keeping the "copymeister" at bay. Regardless of whether you do research as a "law library lizard" or as a "database drone", without ferreting out the proper authority, the "Tools of Arrogance", in short order, become the "Tools of Ignorance."

The Open Memorandum

WELCOME TO LEGAL "JEOPARDY"

The open memorandum is legal writing in its purest form. It is the device from which all 1Ls learn why becoming a partner is so momentous. This is grunt work. The open memorandum allows the accomplished attorney to concentrate on more pressing matters, such as seeking remedies for that slight fade and properly maintaining that single digit handicap, while ensuring all junior attorneys do not have to go through "cold turkey" upon graduating from law school and passing the bar. Above all else, the open memorandum is the quintessential instrument that teaches you, as an aspiring attorney, to be objective, thorough, and effective in communicating—"to make the words absolutely disappear into the thought."⁵

It is hardly fair to compare the initial experience of writing an open memorandum with your first attempt at reciting the alphabet. A more apropos analogy is to look at this endeavor as trying to speak Portuguese to a Brazilian in Rio. As the instructor hands out the first open memorandum assignment, it dawns on you that all the prior classes which included lectures warning of the horrors of passive voice and extolling the doctrine of stare decisis were not merely sessions of sophomoric gab. This revelation is but the first of many painful insights as you peruse your "memo of masochism."

5. J.C. DERNBACH & R.V. SINGLETON II, A PRACTICAL GUIDE TO LEGAL WRITING AND LEGAL METHOD xviii (1981).

1993]

The Case

THE CLIENTS

Date: October 1, 1992

To: 1L Neophyte, Future Associate Minion

From: Judy Shillklurq, Senior Partner (Wise Scribe & Critic)

Subj: Client J. Spratt, Jr., by His Next Friend J. Spratt, Sr.

[You have visions of a precedent-setting fact pattern that could lead to any variety of thought-provoking issues. So you read on.]

THE FACTS

As a weekly chore, John (a.k.a. Jack) and his sister, Jillian (a.k.a. Jill) were tasked by their parents to refill a container with mineral water they used for cooking in their special diet. They obtained this water from a spring owned by the city of Watertown, in the country of Aquarius. The paved road leading to the spring was 1.75 miles or 3.0 kilometers from the Spratt residence. The trek to the spring usually took the Spratt children about thirty minutes. The return journey by the same route, with a water-laden five-gallon vessel, would take the children a little over an hour. The trip could be shortened by a commonly used route that reduced the time by approximately fifteen minutes. The trip required them to traverse up and down a steep, grassy knoll. In fact, the children had used this route at least a dozen times during the last twelve months. Another benefit of taking this way home was that it allowed the children to pass by the home of Dame Dob. Dame Dob is an eighty-year-old eccentric widow and self-proclaimed healer, who espouses to a lifestyle that could best be described as alternatively holistic. Whenever the children trudged by on their way home from the spring, Dame Dob greeted them. She would have them rest for a few minutes and offer them each high-fibre fructose granola biscuits and a cup of kefir. The children always consumed these with enthusiasm.

On the misty morning of February 29, 1992, after Jack and Jill filled their bucket, they began the journey home via their usual shortened route, looking forward to Dame Dob's cookies and milk. Because of the dew on the ground, the slope was slippery and footing was extremely precarious. About one-third of the way down the hill, Jack slipped and began to roll down the hill with Jill directly behind. The two of them finally came to a stop at the foot of the hill. After regaining their bearings, both of them realized that Jack had sustained a number of contusions to his head. Realizing they had to get Jack's injuries treated, they hustled home. As they approached Dame Dob's residence at a full gallop, they were abruptly halted. Dame Dob had heard their blood-curdling screams as they plummeted down the hill and was on her way to offer assistance. Jill anxiously asked Dame Dob to call an ambulance. However, Dame Dob calmly assured Jill that such medical attention was not necessary and that she could attend to Jack's wounds a lot more effectively than any "drug-peddling M.D." She then took some material and a jar from a shoulder satchel and doused the material with a clear fluid from the bottle. She placed this wrap around Jack's head, over the contusions, and "laid" her hands on Jack, mumbling some words while rolling her eyes skyward. She then gave the children high-fibre fructose granola biscuits and kefir and sent them home.

Since then, Jack has suffered fainting spells, periods of confusion, and severe emotional fits whenever the Spratts mention the spring. The Spratts have taken him to a number of medical specialists whose diagnoses have run from amnesia to demonic possession. The visits, tests, and therapies have financially decimated the Spratts.

John Spratt, Sr., on behalf of his son Jack, is asking advice as to the possibility of seeking legal action against Dame Dob. He is also requesting an assessment of the damages for which he can sue her.

After picking your mandible up off the floor, you think: "You have got to be kidding me. I am supposed to determine whether we can find a legal means to take a good-hearted old lady to the cleaners for her somewhat misguided act of kindness. There have to be more pressing and significant concerns." Get real. You are given the next two weeks to sort this matter out and provide an adequate response in the form of an open memorandum.

THE ISSUES

You swallow hard and discover that you do not have the foggiest notion of where or how to begin. You do recall an acronym . . . IV, EVAC, IRAN, IROC, IRAQ, IRAC . . . yeah, that's it—IRAC . . . that will supposedly guide you through this morass. But after some soul-searching, you determine that this acronym, instead of offering the keys to success by distinguishing the [I]ssues, identifying the [R]ules, [A]pplying the facts, and arriving at a sound legal [C]onclusion, more precisely defines your dilemma. These four letters perfectly describe your [I]gnorance of the subject, [R]esignation of your limited knowledge of the law, [A]nxiety over your inability to assimilate the two, and your total [C]onfusion of where you are and where you are going. You plug away though, and finally come up with tenuous, if not tenable, issues.

"In Search Of . . ."

*If you steal from one author, it's plagiarism;
if you steal from many, it's research.⁶*

Armed with or perhaps unarmed by the issues, you begin hacking your way into the jungle of legal research. Two hundred maddening hours and a forest of note cards later you emerge. You now know witchcraft in Winnipeg is illegal, leeches and blood-letting are still used by shamans in Lesotho and Botswana, and even marijuana can be prescribed in the U.S. (No, not for "laconic law school lethargy"). Nevertheless, you have not found one iota of documentation—not one statute, ordinance, rule, edict, or even opinion addressing the issues for which you are seeking direction.

Finally, your prayers to St. Jude and pleadings to the legal god of lost cases are answered. You stumble upon two cases. Although neither are on point, they are manna from heaven and with less than six days left you decide that it is time to "put pen to paper."

The Memo

*Facts that are not frankly faced
have a habit of stabbing us in the back.⁷*

Even though you discover that the high-fibre content in Dame Dob's biscuits is a result of a recipe that calls for a home-grown herb called *cannabis sativa* and the medallion she wears around her neck is not the Star of David but a pentagram, these facts are not relevant to the issues at hand. So you do your best to avoid trying to portray the old lady as some satanic, dope-smoking "deadhead." Instead, you focus your attention on the facts that support the issues.

STATEMENT OF FACTS

There are no facts, only interpretations.⁸

After you have stated the obligatory date and location, you succinctly bring out the salient facts:

Jack and Jill went up the hill
To fetch a pail of water;
Jack fell down and broke his crown,
And Jill came tumbling after.

Up got Jack and home did trot,
As fast as he could caper,
To old Dame Dob, who patched his nob
With vinegar and brown paper.⁹

7. Sir Harold Bowden, *quoted in* READER'S DIGEST, Sept. 1966.

8. Frederick Nietzsche, *quoted in* THE CROWN TREASURY OF RELEVANT QUOTATIONS 267 (Edward F. Murphy ed., 1978).

9. *Jack and Jill*, in BOOK OF NURSERY AND MOTHER GOOSE RHYMES 100 (Marguerite de Angeli ed., 1954).

BASIC QUESTIONS

*No question is so difficult to answer
as that which the answer is obvious.¹⁰*

After numbering the twenty variations of the issues, you choose the best with two deft flicks of the wrist. As you scratch the stubble on your chin, you note that your dart game has deteriorated as much as your personal grooming habits. You go with it, though, and compose the following inquiries:

1. Is Dame Dob, by attending to Jack's head contusions with her holistic remedy and denying Jill's request to call for certified and conventional medical attention, guilty of practicing medicine without a license?
2. Can Jack bring an action to sue Dame Dob for the medical problems he has suffered and what damages can he recover?

BASIC ANSWERS

*Explanations exist; they have existed for all times,
for there is always an easy solution to every human
problem—neat, plausible, and wrong.¹¹*

You must keep in mind that you will have to support whatever determination you make. Solely based on the two cases, you assert:

1. Yes. Based on Dame Dob's actions and inactions with regard to the treatment of Jack's head injuries, she is guilty of practicing medicine without a license.
2. Probably. Jack can seek damages against Dame Dob for the medical problems he has suffered as a result of her treatment to his head injury on February 29, 1992.

10. Ella Wheeler Wilcox, in THE HOME BOOK OF PROVERBS, MAXIMS, AND FAMILIAR PHRASES 1920 (1918).

11. H.L. Mencken, in A MENCKEN CHRESTOMATHY 443 (1967).

DISCUSSION

*We are not satisfied to be right,
unless we can prove others to be wrong.*¹²

The premise of the discussion is to be able to objectively, concisely, and thoroughly discuss both sides of each issue. Upon elevating the art of non-commitment to a new height of uncertainty, you must then plug a hole in one side or the other. The key to this iteration is to be brief; no, I mean be exhaustive; no wait, I really mean be impartial. Oh well, do whatever works.

In this case, the first issue is whether Dame Dob's care of Jack's head injury with vinegar and brown paper constitutes practicing medicine without a license. Jack's argument centers on a case where Judge M. Goose held that, in spite of all the King's horses' and all the King's men's well-intentioned, yet hard-boiled efforts to treat Humpty Dumpty's crackup, they had an obligation to first call a medical eggspert. She further stated that their actions constituted the scrambled attempts of individuals trying to practice medicine without a license and directly contributed to Mr. Dumpty's demise. *In Re Estate of Humpty Dumpty*.

Dame Dob will contend that her actions were not meant to be interpreted as practicing medicine. She can cite the case of a young woman who fell unconscious and was tended to by a group of seven men until she was brought out of her comatose state by labial stimulation from a male stranger. *Snow White v. Seven Dwarfs*. In *Snow White*, Judge W. Disney found that the group of miners was not guilty of practicing medicine without a license and dismissed the charges. *Id.*

Jack should counter that the case at hand is distinguishable from *Snow White*. In *Snow White*, one of the men, "Doc", was a medical doctor, and after an extensive examination, determined there was nothing that could medically be done for Snow White's condition. *Id.*

You proceed to the second issue with the same zeal. Again, drawing from the two aforementioned cases you hope to muster enough conviction to support your answer. As you approach your conclusion, you feel relatively certain that with this argument, the senior partner will convince Dame Dob to settle out of court for a tidy sum.

12. William Hazlitt, *Note-Books*, in *DICTIONARY OF HUMOROUS QUOTATIONS* 87 (Evan Esar ed., 1953).

1993]

CONCLUSION

*I am no athlete—but at one sport
I used to be an expert. It was a dangerous game,
called jumping to conclusions.¹³*

You are down the home stretch. Any objectivity that was once visible has been displaced by your angst to get through this suffocating rat's maze. However, with inspired insight, you suspect that this is where your senior mentor will begin his/her sojourn. So you "cut and paste" the best pieces of your discussion into an eloquent, if not slightly disjointed, synopsis in the hopes that your issues, answers, and discussion will at last, make sense.

The Product

FORMAT

*When I read some of the rules for speaking and writing
The English language correctly . . . I think—
Any fool can make a rule
And every fool will follow it.¹⁴*

This axiom is no less true in the realm of communicating the written legal word. Between the Bluebook and the provincial nuances of your particular jurisdiction, you will unearth enough rules, regulations, formats, and dicta to convince yourself that someone is having a good laugh at your expense.

CITATIONS

*I am reminded of the professor, who,
in his declining hours,
was asked by his devoted pupils for his final counsel.
He replied, "Verify your quotations."¹⁵*

That's right. Verify the cite. After completing this evolution, you may believe the only words in this document for which you can take credit are

13. EDDIE CANTOR, THE WAY I SEE IT 131 (1959).

14. Henry D. Thoreau, *Journal*, in EVA M. CURKETT & JOYCE S. STEWARD, THOREAU

15. Winston Churchill, *A Churchill Reader*, in THE HINGE OF FATE 500 (1950).

found in your name until it dawns on you that your parents could file suit. Not to worry, after a couple of weeks you will learn that between the lofty locutions of Justice Frankfurter and the sophomoric slogans of Oscar Mayer, every law student suffers this same predicament.

DEADLINE

*The difference between the right word
and the almost right word
is the difference between lightening
and lightening bug.¹⁶*

You have now pared down an initial draft of twenty-seven pages into a more digestible and allowable twelve pages. This process has only taken nine drafts, seven revisions, four reams of paper, three print ribbons, and two thesauruses, but you have finally "drafted" a final product—with a whole thirty-three minutes to spare. However, you firmly believe that perfection could be achieved if given an extra day. Well, God only had seven days to create the heavens and earth while you have had fourteen to merely make some legal sense of a single event—enough said. Turn in your first open memorandum, "lay" your hands around a "cold one," roll your eyes skyward, and mumble in Latin "There's no place like law school, there's no place like law school, there's"

The Wait (Weight)

Nothing is so good as it seems beforehand.¹⁷

You have had a couple of days to forget about the despair and agony of the last two weeks. In fact, your dismay is being replaced with a degree of confidence bordering on cockiness. Yeah, you got it wired. There is no way that your submission is not the finest open memorandum, or legal document born of 1L blood, sweat, and tears. Intuitive issues, airtight arguments, a solid statement of facts, a decisive discussion, and a concrete conclusion—the stuff of law reviews. So you wait and wait and wait and finally when the healing is just about complete, your paper is returned.

16. MARK TWAIN, MARK TWAIN LAUGHING 50 (Paul M. Zall ed., 1985).

17. George Elliott, *Silas Marner*, in THE OXFORD DICTIONARY OF QUOTATIONS 196 (2d ed. 1955).

The Grade

*Blessed is he who expects nothing,
for he shall never be disappointed.*¹⁸

You get your paper back and the first thing you notice is that if this document had been a living being it just died the "death of a thousand cuts." The only statement that may be redder than yours is GM's financial ledger. Your first instinct is to find a suitable resting place for it, as well as yourself. You wonder if Dan Quayle ever felt like this; no, you wonder if he still feels like this. After you come out of your catatonic shock, you begin the excruciating catharsis and, by and large, find that all the scarlet on your paper has been self-inflicted.

The Big Picture (From Diapers to Briefs)

THE SHORT TERM

*With pen and pencil we're learning to say nothing,
More cleverly every day.*¹⁹

As you leave the "pampered" existence of the open memorandum and are introduced to other legal documents, such as appellate briefs, you will come to realize that these humbling exercises are critical in developing the confidence you need to be an effective advocate. In the short term, enjoy the relative sanctuary law school affords. Don't be afraid to make mistakes. This is a forgiving environment. While learning the law and its applications, learn to laugh . . . especially at yourself. It can be fun and, even, therapeutic.

18. Letter from Alexander Pope to John Gay (Oct. 16, 1727), in *THE OXFORD BOOK OF APHORISMS* 39 (1983).

19. William Allingham, *Blackberries*, in *THE HOME BOOK OF PROVERBS, MAXIMS, AND FAMILIAR PHRASES* 2754 (1948).

THE LONG TERM

In the long term, zealously pursue your love of the law. Once you are fortunate enough to assign open memoranda to new associates, always provide them with these ten principles of legal writing:

1. Never use one word where ten will do.
2. Never use a small word where a big one will suffice.
3. Never use a simple statement where it appears that one of substantially greater complexity will achieve comparable goals.
4. Never use English where Latin, *mutatis mutandis*, will do.
5. Qualify virtually everything.
6. Do not be embarrassed about repeating yourself. Do not be embarrassed about repeating yourself.
7. Worry about the difference between "which" and "that."
8. In pleadings and briefs, that which is defensible should be stated. That which is indefensible, but which you wish were true, should merely be suggested.
9. Never refer to your opponent's "argument;" he only makes "assertions," and his assertions are always "bald."
10. If a layperson can read a document from beginning to end without falling asleep, it needs work.²⁰

Then go find a wide fairway and have a good laugh and life.

20. ROBERT D. WHITE, TRIALS & TRIBULATIONS APPEALING LEGAL HUMOR 246 (1989).
<https://nsuworks.nova.edu/nlr/vol17/iss2/27>



"Don't drop it, pal. It's a subpoena."

* RODNEY R. JONES, ET AL., DISORDERLY CONDUCT 35 (1987) (Illustration by Lee Lorenz).