

PLEASING THE COURT

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Writing Ethical and Effective Briefs

Second Edition

Judith D. Fischer

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*for Rose Durbin and Ruth Fischer,
who loved language;*

*for my mentors,
Warren Dwyer and Joseph A. Ball;*

and

*for John, Niki, Polly, Carrie, Preston, Neil,
Andrew, Kate, and Anna Grace,
who make it all worthwhile*

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INTRODUCTION TO THE SECOND EDITION

Since the first edition of this book, lawyers have continued to file papers that judges found inadequate. One case, a veritable compendium of attorney error, earned a place in several of this book's chapters. *In re S.C.*

The computer keeps providing opportunities for errors. One lawyer even argued that courts should create a different and presumably more lenient category for mistakes "in this new electronic age." The court was not impressed with that proposal. *Johnson v. Roma II-Waterford, LLC*.

Meanwhile, courts continue to emphasize the importance of careful legal writing. A particularly thoughtful explanation appeared in a case where a lawyer's wordy brief violated court rules and failed to cite supporting authority. *Kimble v. Muth*. The court stressed that lawyers must present well developed arguments, because in our system it is not a court's role to guess about a lawyer's points and look for support for them. Doing that would "run the risk of creating poor precedent and manipulating the adversarial process." Another court explained that lawyers must be candid with courts in order to provide clients with a realistic understanding of the law and promote judicial efficiency by reducing frivolous claims. *Bautista v. Star Cruises*. After all, our legal system seeks "the truth in order to do justice."

Of course, many lawyers uphold high professional standards, as some courts have pointed out. Several commended lawyers for excellent briefs that helped them analyze the issues. *E.g., Lolong v. Gonzales; Benedict v. Altria Group, Inc.* One court was moved to

“thank and commend” a lawyer who aided the court by clarifying a “tangled web” of facts. *State v. Jackson*. Another court complimented “the excellent briefing” by a lawyer who represented an immigrant without charge, “in the highest tradition of the profession.” *Escobar v. Gonzales*.

These courts commend excellent writing. To promote such excellence, this book’s second edition adds nearly a hundred new cautionary tales about legal writing that fell short of professional standards.

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2011

INTRODUCTION TO THE FIRST EDITION

A story survives about an advocate in Elizabethan England who filed a long, wordy brief.¹ The court showed its displeasure by ordering the brief to be hung, written side outward, around his neck. He was then paraded “bareheaded and barefaced round about Westminster Hall, whilst the Courts [were] sitting.” This incident recently stirred a judge’s “nostalgia for the rigors of the common law” as he struggled through a wordy brief.² As today’s judges decry wordiness and other errors in legal documents and politicians call for curbs on frivolous court filings, this tale of the bareheaded lawyer provides legal writers with a vivid image of what not to do.

All agree that whether it is incisive or inept, lawyers’ writing affects clients, opposing parties, the courts, and the legal system. When a lawyer fails to inform the court of relevant adverse authority, the court must spend valuable time and effort performing its own analysis. Worse, it may miss the chance to evaluate another court’s reasoning and thus formulate a consistent decision. Another error—misrepresenting facts—requires courts to spend time checking sources and may even lead to an unjust decision. Even poor writing style requires judges to waste time deciphering it, a task that prompted one court to exhort counsel “not to clog the system” with unclear briefs. *N/S Corp. v. Liberty Mut. Ins. Co.* Violations of

1. *Mylward v. Weldon* (1596), in 1 George Spence, *The Equitable Jurisdiction of the Court of Chancery* 376–77 n.h (1846).

2. *Varda, Inc. v. Ins. Co. of N. Am.*, 45 F.3d 634, 641 (2d Cir. 1995) (citing *Mylward*, in Spence, *supra* note 1, at 377).

court rules also harm the system, because the rules promote orderly arguments that lead to sound decisions. All of these lapses are unprofessional, because they fail to meet the legal profession's standards of competence and public service.

What happens to lawyers who submit unprofessional writing to the courts? While no lawyer has recently been ordered to parade around wearing a wordy brief, judges continue to find a variety of ways to express displeasure at unprofessional writing. This book examines the characteristics of good legal writing by presenting courts' reactions to a spectrum of lawyers' lapses, ranging from misrepresentations of the law to verbosity and typographical errors. The courts' reactions are classified by type of error and, within types, by court reactions ranging from bar discipline to stern judicial comments. The focus is on errors that occur in the research and writing process, not those that pervade a lawyer's approach and only incidentally manifest themselves in the written word, because those problems receive adequate treatment elsewhere. Exercises in the Appendix provide practice at avoiding the errors discussed in the text.

The cases examined here may interest lawyers and law students seeking guidance on how to write well. They may also interest those concerned about the health of our legal system. For while these cases record lawyers' errors, they also show that the system encourages high ethics and professionalism. Lawyers who write unprofessional documents may incur bar discipline or financial loss. They also risk losing credibility with the very judges who rule on their cases.

Lest this book create an inaccurately negative impression of lawyers, I want to emphasize that many lawyers write documents of high professional quality. Busy courts sometimes take the trouble to point this out. One judge, for example, "express[ed] appreciation to counsel" for briefs that were "models of clarity and precision, and evidence[d] prodigious labors." *Ray v. Chisum*. Other judges have commended counsel for "well written briefs, superior arguments, and . . . exemplary courtesy and professionalism," *Quirk v. Premium Homes, Inc.*, and "well written, dispassionate, informative" briefs, *In re Est. of Kendall*. But it is lawyers'

errors that I focus on here to provide helpful cautionary examples for law students and lawyers who want to sharpen their writing skills.

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