

2014

Legal Writing, Therapeutic Jurisprudence, and Professionalism

Shelley Kierstead

Osgoode Hall Law School of York University, skierstead@osgoode.yorku.ca

Follow this and additional works at: http://digitalcommons.osgoode.yorku.ca/scholarly_works



Part of the [Legal Profession Commons](#), and the [Legal Writing and Research Commons](#)



This work is licensed under a [Creative Commons Attribution-Noncommercial-No Derivative Works 4.0 License](#).

Recommended Citation

Kierstead, Shelley. "Legal Writing, Therapeutic Jurisprudence, and Professionalism." *Suffolk University Law review*. 2014.

This Article is brought to you for free and open access by the Faculty Scholarship at Osgoode Digital Commons. It has been accepted for inclusion in Articles & Book Chapters by an authorized administrator of Osgoode Digital Commons.

Legal Writing, Therapeutic Jurisprudence, and Professionalism

Shelley Kierstead*

“Professionalism as a personal characteristic is revealed in an attitude and approach to an occupation that is commonly characterized by intelligence, integrity, maturity, and thoughtfulness.”¹

“Words are the principal tool of lawyers and judges, whether we like it or not.”²

I. INTRODUCTION

The quotes above refer to two quintessential aspects of lawyers’ work. First, as members of a self-regulated profession, we must aspire to a level of professionalism that is characterized by intelligence, maturity, and thoughtfulness.³ Second, regardless of the tasks we undertake, words are critically important to lawyers. Not only must we be able to conduct comprehensive and coherent legal analysis; our ability to serve clients properly depends on effectively translating the analysis into words—both spoken and written.

In the work that follows, I explore the interaction of two specific ideals of professionalism—service to the public and collegiality/civility—in the context of specific examples of legal writing. More specifically, I will argue that attention to the human impact of legal writing has the potential to promote civility and service in a number of ways: through dealings with both clients and “opposite” parties; by influencing decision-makers’ writings; and through the impact of words on other lawyers in the course of their day-to-day legal work. The understanding of professionalism that I propose in this work is consistent with the concepts espoused by Therapeutic Jurisprudence.

This paper will proceed as follows. I briefly describe increasing attention to “rhetorical” devices within the legal writing field and the potential for a slightly

* LL.B, LL.M, D.Jur, Assistant Professor, Osgoode Hall Law School of York University.

1. CHIEF JUSTICE OF ONT., ADVISORY COMM. ON PROFESSIONALISM, THE LAW SOC’Y OF UPPER CAN., ELEMENTS OF PROFESSIONALISM 1 (rev. ed. 2002), available at <http://www.lsuc.on.ca/media/definingprofessoct2001revjune2002.pdf>, archived at <http://perma.cc/A5Q7-6739>.

2. Zechariah Chafee, Jr., *The Disorderly Conduct of Words*, 41 COLUM. L. REV. 381, 382 (1941).

3. See CHIEF JUSTICE ONT, *supra* note 1, at 1. The elements of professionalism have been further summarized as follows: “scholarship; integrity; honour [sic]; leadership; independence; pride; spirit; collegiality; service; and balanced commercialism.” *Id.*

nuanced understanding of rhetoric to impact the way that lawyers and judges write. Next, I briefly describe a recent Supreme Court of Canada decision that confirms the potential influence of lawyers' writing on judicial decisions. And finally, I describe a qualitative research study that a colleague and I recently completed, where writing and principles of civility were expressly linked by a number of study participants. I conclude with a call for greater emphasis at the law school level on the human impact of words.

II. RHETORIC AND CLIENT DOCUMENTS

Aristotle's teaching about *logos* (logical argument), *pathos* (emotional argument), and *ethos* (ethical appeal/credibility) focused on persuading decision-makers.⁴ Over time, however, classical rhetoric has been able to thrive and re-establish itself in different ways. Within the legal research and writing community, we have already encountered a revolution with respect to our conceptualization of rhetoric in legal writing. Theresa Godwin Phelps, in describing "the new rhetoric," sees rhetorical devices as key to the process of communicating and meaning-making involved with legal writing.⁵

There is an argument to be made for understanding the potential of rhetorical devices to assist legal writers in becoming more effective communicators vis-à-vis a range of potential readers of their work. In particular, using rhetorical devices to better understand the possible (negative or positive) impact of written messages on their recipients has the potential to improve lawyers' relationships with clients and with the general public.

Legal writing professors are accustomed to teaching the use of rhetorical devices through work with concepts such as "audience," "purpose," and "tone."⁶ Knowing whether the recipient of an opinion letter is a businessperson or a layperson, for example, should help to shape the word choices for that document. Further, the audience, along with the purpose of the particular document (for example, a letter seeking to reach compromise versus one that threatens litigation) can impact the tone with which a document is infused. These devices are fundamental to the legal writing professor's toolkit.

Another famous rhetorician, Cicero, noted that in order to establish credibility, an advocate should adopt "a mild tone, a countenance expressive

4. See MICHAEL R. SMITH, *ADVANCED LEGAL WRITING: THEORIES AND STRATEGIES IN PERSUASIVE WRITING* 22-24, 94-99 (1st ed. 2002) (summarizing forms of classical rhetoric)

5. See Teresa Godwin Phelps, *The New Legal Rhetoric*, 40 Sw. L.J. 1089, 1094-95 (1986). Phelps lists a number of elements of what she calls the New Rhetoric: writing is a non-linear process; writing is rhetorically based; audience, purpose, and occasion figure prominently; "written product is evaluated by how well it fulfills the writer's intention and meets the audience's needs;" writing can be taught; and writing should be informed by research into the writing process. See *id.*

6. See generally BRYAN A. GARNER, *THE ELEMENTS OF LEGAL STYLE* (2d ed. 2002); SMITH, *supra* note 4; Kristen K. Robbins, *Paradigm Lost: Recapturing Classical Rhetoric To Validate Legal Reasoning*, 27 VT. L. REV. 483 (2003).

of modesty, [and] gentle language.”⁷ It seems arguable that the adoption of a mild tone, gentle language, and courtesy would fit squarely with an approach that carefully considers the impact of words on their recipients. Often, however, our teaching does not focus directly on the emotional impact of the words used—on both our own clients and opposing parties—within documents such as opinion letters, pleadings, and briefs. Lawyers can produce legal documents with a tone that more clearly recognizes legal system participants as their audience without sacrificing sound legal analysis, fearless advocacy, or strength of persuasive argument. Further, those documents can give a strong voice to clients without destroying the integrity of opposing parties.

Through our teaching of both predictive and persuasive writing skills, legal writing professors can help aspiring lawyers understand ways in which their writing can better foster clients’—a key audience—sense of having been treated with fairness, respect, and dignity. In the predictive writing context, this may include producing documents that demonstrate a clear understanding of the client’s view of the problem (even when the problem is one that, in our opinion, does not give rise to legal recourse), writing in a manner that the client will understand so she will not feel alienated from the process and crafting recommendations that are truly responsive to the client’s underlying interests.

Providing this additional nuance would not require significant changes to the work we assign, but it could encourage writing that evokes more positive emotional responses from clients. Consider an opinion letter assignment. It is not uncommon for legal research and writing texts to advise students to integrate both legally relevant facts and facts that are important to the client in an opinion letter. Additionally, a brief discussion about why a compassionate recitation of facts falling into the latter category is important to the client may lead to subtle but important changes. Consider the differences in the following two paragraphs:⁸

- (1) You indicated that you have developed an attachment to the matrimonial home and the neighborhood in which it is located. However, given that your children are independent adults, there is virtually no prospect of you successfully obtaining exclusive possession of the matrimonial home.
- (2) We discussed at length your fondness for the matrimonial home—which you have lived in for 20 years—and for the neighborhood generally. Unfortunately, given that your children are now living on their own, my research suggests that a claim for exclusive possession of the matrimonial home would almost certainly be unsuccessful.

7. See Michael Frost, *Ethos, Pathos, and Legal Argument*, 99 DICK. L. REV. 85, 101 (1994) (quoting MARCUS TULLIUS CICERO, DE ORATORE, 327-29 (E. W. Sutton trans., 1942)). See generally Gregory Johnson, *Credibility in Advocacy: Humility as the First Step*, 39 VT. B.J. 22 (2013) (arguing attorney humility fosters credibility and leads to better client service).

8. This example is taken from part of a chapter that I wrote in MOIRA MCCARNEY ET AL., THE COMPREHENSIVE GUIDE TO LEGAL RESEARCH, WRITING & ANALYSIS: ONTARIO & QUEBEC § 12:8 (2013).

The second paragraph acknowledges the difficulty the client will have in leaving a home and neighborhood that he or she has enjoyed for a number of years. Both passages deliver the same message, but the second one does so with, as Cicero might say “gentle language” that may be slightly easier for the client to absorb.

III. LAWYERS’ DOCUMENTS AND COURT JUDGMENTS

Elsewhere, I have written about the therapeutic potential of judicial writing on the parties impacted by the decision.⁹ A recent decision of the Supreme Court of Canada illustrates the potential for lawyers to play a key role in the shaping of these judicial opinions.

In *Cojocar v. British Columbia Women’s Hospital & Health Center*,¹⁰ the trial judge, in a decision relating to negligence actions against a hospital, several doctors, and a number of nurses, wrote a judgment containing 368 paragraphs. Only forty-seven of the paragraphs were predominantly the judge’s own words—the rest of the judgment was copied from the plaintiffs’ submissions. The British Columbia Court of Appeal held that the form of the reasons for judgment displaced the presumption of judicial integrity and impartiality and failed to fulfill the function of advising parties and the public of reasons for the decision.

On appeal, the Supreme Court of Canada held that the trial judge’s decision should not be set aside as being procedurally unfair despite having incorporated large portions of the plaintiffs’ submissions. The court concluded it could not be said that a reasonable person apprised of all of the relevant facts would conclude the judge had not put his mind to the issues and had not made an independent decision based on the evidence and the law. Within its reasons, the Court stated:

Judges are busy. A heavy flow of work passes through the courts. The public interest demands that the disputes and legal issues brought before the courts be resolved in a timely and effective manner, all the while maintaining the integrity of the judicial process. In an ideal world, one might dream of judges recasting each proposition, principle and fact scenario before them in their own finely crafted prose. In reality, courts have recognized that copying is acceptable, and does not, without more, require the judge’s decision to be set aside. While the theoretical basis on which the result is explained varies, this is the position in England, various commonwealth countries, the U.S. and in

9. See Shelley Kierstead, *Therapeutic Jurisprudence and Child Protection*, 17 BARRY L. REV. 31 (2011); see also Amy D. Ronner & Bruce J. Winick, *Silencing the Appellant’s Voice: The Antitherapeutic Per Curiam Affirmance*, 24 SEATTLE U. L. REV. 499 (2000); Amy D. Ronner, *Therapeutic Jurisprudence on Appeal*, CT. REV., Spring 2000, at 64, available at <http://aja.ncsc.dni.us/courtrv/cr37/cr37-1/CR9Ronner.pdf>, archived at <http://perma.cc/J32E-USDR>.

10. [2013] 2 S.C.R. 357 (Can).

Canada.¹¹

Without getting into further detail about the actual wording used within this particular judgment, one point clearly emerges from this decision—there is a significant potential for a lawyer’s written characterizations to be directly incorporated into judicial decisions. This places an even greater burden on lawyers to write in a manner that is assertive and persuasive, yet respectful.

IV. LEGAL WRITING AND PROFESSIONALISM

Writing that is assertive yet respectful should also be part of the culture of communication between lawyers. Sadly, this does not seem to be the case, notwithstanding the following rule of professional conduct: “A lawyer shall be courteous, civil, and act in good faith to the tribunal and with all persons with whom the lawyer has dealings.”¹²

In a recent research collaboration, a colleague and I used focus groups to discover how lawyers learn professionalism within their day to day practice. The research included discussions about professionalism and ethical problems experienced in practice across a range of practice settings and types of practice.¹³

One of the topics that arose was civility. While civil behavior was sometimes described as polite behavior in any context (not being rude or abusive), descriptions of its opposite—incivility—included behaviour that was disruptive to the orderly process of managing a file (not returning phone calls or taking an unreasonable position). One of the places where unreasonable positions were taken was within correspondence between counsel:

“But there are tough cases and there are tough cases. . . . [O]ne of our associates will get an angry over-the-top belligerent letter or email from opposing counsel. . . .”

These lawyers had good advice:

“I usually print out the e-mail and we go in to talk about it. I try to get that junior lawyer to see the e-mail from the other side. If you were just receiving this e-mail, how are you going to receive it? Are you going to be pleasant

11. *Id.* para. 37.

12. ONT. R. OF PROF’L CONDUCT 5.1-5 (2000), available at <http://www.lsuc.on.ca/WorkArea/DownloadAsset.aspx?id=2147499501>, archived at <http://perma.cc/P5JX-YTE6>. Similar rules exist in many other jurisdictions.

13. Shelley M. Kierstead & Erika Abner, *Learning Professionalism in Practice* (Osgoode Hall Law Sch. Comparative Research in Law & Political Econ., Research Paper No. 59/2013, 2014), available at <http://digitalcommons.osgoode.yorku.ca/cgi/viewcontent.cgi?article=1301&context=clpe>.

about it or are you going to think that they're in a pretty assertive way telling you where to go and how fast to get there?"

"There's a tendency I feel to want to fight back and be combative but it really does take two. If you disengage and diffuse, you can steer the file elsewhere for the benefit of your client."

Occasionally, lawyers who most often behave professionally fall into the trap. Consider the letter excerpts below, which follow from an initial letter where one counsel requests a change in trial venue.¹⁴ In the first, one counsel adopts a condescending approach and accuses the other of not knowing the rules of civil procedure.

Dear Mr. T:

We acknowledge receipt of your letter dated XX 201X.

With the greatest of respect, the issues recited in items (a) through (d) of your letter are **completely irrelevant** to the consideration of where the trial of this action ought to be heard.

Please provide us with dates when you are available for a Motion seeking to have action transferred to XX, which is the only logical venue for the trial of this proceeding, given the case law and the *Rules of Civil Procedure*. You may wish to consider Rule X in this regard.

In the event we are required to bring a motion in this regard, and are successful, **we will be asking that the costs of the Motion be borne by your firm** pursuant to Rule 57.07(1)(c). **We do not expect your client to understand the obligations under the *Rules of Civil Procedure*. We do, however, expect opposing counsel to comply.**

In response, the lawyer who originally requested the change in trial venue fires back a sarcastic rejoinder.

Dear Mr. Y & Mr. Z:

. . . I prefer to save arguments of law for either judges or students . . .

I would characterize it [the earlier letter] as an **attempt to bully**. **Children might take it seriously**. I, on the other hand have been practicing law since 19XX. My skin is a bit thicker.

If you check the databases you will see something over 100 digested decisions with my name as counsel. **It may or may not come as a surprise that I have a passing familiarity with the *Rules of Civil Procedure*.**

14. The original letters were provided by a practitioner who consented to their use in this work. They are on file with the author.

There are layers of anti-therapeutic impact contained in these letters: messages to clients that sarcasm and uncooperative approaches are appropriate ways of resolving disputes; the negative impact on the lawyers as they receive each other's correspondence; the negative impact on the clients copied on the correspondence, who no doubt will dig in their heels and become more litigious; and the time/effort to craft the responses, for which clients will ultimately be charged.

V. CONCLUSION

Failure to write in a manner that is respectful is anti-therapeutic at many levels, and it fails the professionalism mandate. The reach of lawyers' correspondence is extensive. To serve individuals and the public generally, the profession must adopt reasonable approaches while advocating strongly for clients' positions. Teachers and mentors must help students to understand this from an early stage. Whether we specifically teach legal writing or not, we ought to be vigilant for opportunities to convey this message.