A FUNCTIONAL APPROACH TO WRITING FOR TRIAL COURT JUDGES

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Laws are nought but words. They are entirely verbal constructions (which may or may not be enacted, with greater or with lesser fidelity). Accordingly, the legal system depends upon effective word crafting in ways more essential than nearly any other institution. It is easy to see, therefore, why learning to write like a lawyer is central to being inducted into membership in the bar. Instruction in legal writing (direct or indirect) is a critical element of first year law curricula (see, for example, Boyer 23-51; Gopen 333-380). James Stratman provides an especially comprehensive exposition of legal writing as a vital field of inquiry and instruction, including an analysis of some of the rhetorical processes that distinguish expert legal writers from novices.

In this essay we contribute to the field of writing and the law by describing the rationale and design of a writing program for a typically underserved group of legal writers: trial court judges. Our purpose in doing so is to review in very pragmatic terms the particular demands faced by members of one socially significant writing-intensive profession. We wish in addition to outline an instructional response to help such experienced but beleaguered writers meet those demands.

This essay also contributes to the growing movement that advocates for diverse approaches to teaching writing correspond-

ing to the diverse rhetorical contexts of writers outside the academy. One survey of writing on the job, by way of illustration, found that the most frequent writing tasks in business and industry included forms like memoranda, letters, instructions, and proposals. Forms like articles or reports that more closely approximate the format of traditional academic essays were much less frequent (Anderson, 1985). It is debatable whether traditional college composition instruction in social or literary analysis suffices to prepare writers for the demands of such workplace writing tasks. Instead, instruction in writing for specific purposes needs to be founded upon an understanding of the practices and knowledge of the communities in which the writing takes place (Odell).

Language socialization in the legal community works like this: Novice law students learn rules of substantive law by immersing themselves in a universe of discourse comprised mainly of appellate opinions. Students thus unconsciously assimilate the style of appellate opinions through their learning of substantive rules.

Most law students also take legal writing courses in which they mainly write legal memoranda and trial or appellate briefs. The purpose of a memorandum of law is to predict the way a court will apply the law to a particular set of facts. The appellate or trial brief requires the writer to try to persuade a court to decide a case in favor of their clients. Because both of these writing exercises are oriented toward judicial decisions, students understandably tend to emulate the analysis, syntax, and structure of appellate opinions. Novice lawyers, not too surprisingly, appear only minimally able to transfer this training to the other kinds of writing tasks they will encounter in legal practice (Bryden). These other writing tasks, which are far more common in lawyering than brief writing, include the drafting of pleadings, discovery documents, contracts, letters to or on behalf of clients, and reports required by regulatory agencies.

What is true of lawyers learning to write is also true of judges, only more so. As members of the bar, judges of course receive the same early socialization in legal writing as do all other lawyers. That is, judges are trained in the mode of appellate decision writing. In the fields of rhetoric and composition, scholarship on judicial discourse is almost exclusively limited to analyses of appellate opinions and the manner in

which they are subject to influence from attorney arguments and other sources of intertextuality (see, for example, Golden and Makau 157; Hagan, 192; Ulrich, 143).

Most judges, however, preside over courts of original jurisdiction, not over courts of appellate review. Although these trial courts bear the vast burden of judicature in the United States, far less is known about judges' discourse in these less celebrated venues. And generalizing from appellate decision writing to the workaday writing of trial court judges is not warranted.

Trial court judges, for example, are likely to write under quite different conditions than most appellate judges. Trial court judges often have responsibility for impossibly bloated case loads. They typically face great administrative pressure to expedite and dispose of cases. Often they have little support staff for research or even secretarial functions. Not infrequently, trial court judges must resort to issuing oral orders or opinions relatively spontaneously from the bench. Often a trial court judge will ask one of the litigants' attorneys to draft a proposed document that will eventually be revised and issued under the judges' signature.

Some continuing judicial education programs have indeed begun to provide opportunities for trial court judges to refine their writing skills. The National Judicial College in Reno, Nevada, has helped to pioneer writing classes for judges. As developed and described by Elizabeth Francis, this instruction emphasizes uncluttered syntax in particular. The guiding principle is that clear syntax reflects clear analysis, and it is rhetorically effective. The American Academy of Judicial Education has also offered writing programs for both appellate and trial judges for a number of years.

For the most part, however, writing classes for judges present models and conduct exercises that retain an essential focus on opinion writing. One purely logistical reason for this focus on judicial opinions is that only opinions—particularly appellate opinions—are regularly compiled and published. Hence they are conveniently available for use as models in writing workshops.

Because of the differences in writing tasks between trial and appellate judges, and because so much of the work in training legal writers centers on the model of the appellate opinion, we perceived a need to create new instructional models designed specifically for trial judges. We conducted this project under joint

funding from the Georgia Institute for Continuing Judicial Education (Richard Reaves, Director), the Federal State Justice Institute, and the Colorado Judicial Department. The project resulted in an instructor's handbook containing workshop materials and document analyses, a copy of which was deposited with each state's continuing judicial education agency. Readers are directed to the handbook for a complete description of the project.

A FUNCTIONAL APPROACH TO JUDICIAL WRITING

From its inception, this project was based around the notion of writing *functions*. From the perspective of instructional pragmatics, we expected that experienced writers such as judges would be more receptive to innovation if we broke free from traditional formulaic orientations to types of documents (THE divorce decree, THE temporary restraining order, THE injunction). From the perspective of composition theory, we felt that a functional approach captured the nature of judicial writing as trans-acting both within particular institutional episodes (legal cases, trials) and also within the broader society (see Rubin, "Four Dimensions" 10-13).

The first step in this project, accordingly, was to identify the functions typically performed in writing by trial judges. After numerous discussions with judges as well as pilot efforts to apply taxonomies of functions to a corpus of documents, we identified five distinct functions: (1) discriminating between competing principles of law, (2) explicating facts, (3) directing the activities of disputing parties, (4) directing the conduct of trials and their outcomes, and (5) corresponding with allied agencies and with the public.

Multiple Functions of Documents

Any given writing task likely includes elements of several functions, although one function usually dominates (Rubin, "Effects" 217). Thus, for example, judicial opinions—in which a trial court rules some piece of evidence inadmissible, or (following a bench trial) holds some party liable for damages—primarily function to discriminate among competing principles of law. Such an opinion, however, usually must enact at least one other function as well: explication of facts. Indeed, should the trial

court's verdict be appealed by one of the parties, the court of review will rely on the findings of fact laid out in the original decision. If the trial judge has not adequately explicated those facts, then the appellate court might erroneously conclude that the court failed to apply properly the law in the original trial.

Similarly, an injunction issued by a trial court typically incorporates elements of more than one function category. A court may issue an injunction to restrain one person from disposing of assets that are contested by another, and the injunction therefore functions to direct the conduct of disputants. That same injunction may also include a section justifying the court's action by reference to legal precedent. This secondary or supportive function serves to discriminate between competing principles of law.

Describing Norms

After identifying the categories of writing functions, we collected documents representing the various categories from state trial courts in three jurisdictions: Georgia, Colorado, and Nebraska. In all, we collected about 1,000 documents, but many of these were repetitious forms such as arrest or search warrants. We directly examined about 300 court documents.

Computer aided linguistic analysis. As part of our analysis, we considered lexical and syntactic patterns. To do so, documents were scanned or typed into computer-readable text files. Each was run through the style checking program Grammatik (Wampler and Williams). Based on the output of that program, we created lists of frequently occurring content words (exclusive of typically high frequency function words, e.g., articles, auxiliary verbs). These lists represented the lexicon that characterized each function. We also compiled information about sentence length, readability levels, and number of passive constructions. In light of the considerable idiosyncratic diversity among judges, we presented these stylistic norms in terms of average values and also in terms of ranges of values (interquartile ranges in cases where extreme "outlier" values would have distorted the normal range).

To be sure, readability, sentence length, and number of passive sentences are rather gross indicators of syntax. More fine-grained syntactic analyses of legal texts are able to shed

light on types of clausal embedding, for example (Hiltunen, 1984). Moreover, readability formulae in particular fail to take into account many stylistic patterns that make for reader-considerate text and usable documents (see, for example, Campbell and Holland). The factors figured into readability scores on most formulae are words per sentence and letters (or syllables) per word. Yet simply truncating sentence and word length does not in every case result in clearer expression (Bruce and Rubin; Charrow). In the case of legal discourse, V.K. Bhatia has demonstrated that merely simplifying language does not yield more usable prose.

Indeed, research indicates that when documents are edited merely to conform to some preselected readability level (as is usually the case in developing documents for U.S. military agencies), reader comprehension can actually decline (Bruce and Rubin). Huckin and his associates (78-79) conclude that no unconditional linguistic prescription can reliably improve prose quality. Accordingly, the gross syntactic analyses of legal documents we conducted in conjunction with the judicial writing project were never intended to generate editing algorithms for judges to blindly apply.

Still, even crude indices of linguistic complexity can have heuristic value for heightening writers' sensitivity to sentence structure. In the course of the ensuing workshops, computer-generated data regarding sentence complexity would serve as the bases for discussions about the rhetorical dimensions of syntactic style. For example, an examination of readability norms led workshop participants to consider why they produce more complex sentences when stating conclusions as opposed to when they are relating facts.

Redish and Rosen (89) suggest another way in which even gross syntactic guidelines can be heuristic. When writers begin editing sentences to conform to some normative standard (Redish and Rosen discuss the injunction to preserve "which is" constructions as an alternative to reducing relative clauses), they can discover altogether new and more satisfactory ways to organize information. In the judicial writing workshops, similarly, when judges edited to eliminate passive voice, they sometimes discovered entirely new strategies for reordering information, say, grouping together all the acts initiated by the plaintiff separately from all of the acts initiated by the defendant.

Rhetorical feature analysis. In addition, the document analyses described discourse-level or rhetorical features of the texts. These included fairly obvious matters like document length, typical number of citations for each point of law, and use of subheadings. Other matters were not as easily characterized. In trying to capture the amount of descriptive detail in fact findings, for example, it was possible only to present a range of writing practices from high-inference conclusionary language (e.g., "The defendant showed due care") to concrete episodic accounts (e.g., "Before leaving the premises for a 45-minute lunch break the defendant placed two waist-high orange caution pylons in the corridor approximately 3 feet in front of the weakened floor board effectively blocking passage to the affected area"). Similarly, the only way to characterize discourse structures for some of the functions was to be very task-specific in subcategorizing typical purposes for writing. Thus, for example, it was necessary for us to subdivide the functional category that encompassed corresponding with allied agencies and with the public. Resulting subcategories included:

(a) letters to transmit documents, as in returning confidential papers to their sources;
b) letters to coordinate with other court services or jurisdictions, as in reviewing the sentencing conditions of a convict who is receiving medical treatment;
(c) letters to victims or other interested nonlitigants explaining court actions; and
(d) letters expressing views on administrative matters, as in corresponding with committees charged with revising jury duty schedules.

Each of these exhibited different rhetorical structures and consequently had to be separately analyzed.

CONTENT OF THE WORKSHOPS

Learning About Composing

Separate workshop modules are developed for each of the five function categories. In addition, an introductory module addresses general matters of composing processes. Specifically, the introduction treats the topics of (1) stages of composing

processes, (2) writers' aims or purposes, (3) writers' audiences, and (4) writing style.

Effects of time constraints on judicial writing. As the workshops have transpired with various groups of judges, the introductory workshop session resulted in some of the most interesting discussions and revelations among the participants. For example, judges observed that their composing processes were constrained by pragmatic contingencies. When dockets were especially overcrowded, judges had little time for drafting, much less revising. They often resorted to the less desirable practice of issuing oral decisions or orders from the bench. Often, too, they increased their output by cutting and pasting boiler plate language from previous writings.

For example, time constraints on composing pose an irksome problem for the exposition of facts that are contained in arrest and search warrants. Although these affidavits describing the circumstances of an alleged crime or the location of suspected evidence are in fact composed by police officers, trial court judges are responsible for ensuring that each is sufficiently detailed and unambiguous. If they are not, then ensuing arrests or confiscation of evidence may be defective. Boiler plate language describing sites or witnesses or events will often not satisfy legal requirements; each affidavit is supposed to describe a uniquely identifiable fact situation.

Audience considerations. Judges who participated in writing workshops were highly sensitive to issues of multiple audiences (see Odell 255-258 and Anderson 56-58 for discussions of multiple audiences in practical discourse). Typically, judges considered litigants' attorneys (though definitely not the litigants themselves) as their primary audiences. Attorneys interpret courtroom outcomes to the affected parties. The attorneys' comprehension, and most especially their complicity, are therefore crucial in seeing that parties adhere to the Court's decision.

Judges as writers are always conscious of courts of review as potential audiences as well. It is only the rare decision or order that actually faces judicial review. Still, the *potential* appellate court audience constitutes an invariant factor-generally a conservative influence—on judges' writing. That is, the judge writes *as if* each document would be subject to an appellate court audience. Because of the awareness of the reviewing court as an audience, we incorporated into two workshop sessions an

opportunity to hear directly from appellate court justices regarding their views of trial court judges' writing. These interviews were structured to allow interaction between the trial and appellate judges so that participants in the workshop could get specific information regarding the needs of that particular audience. The workshop sessions at which appellate judges' spoke were videotaped for subsequent use.

Trial court judges usually accord less rhetorical significance to audiences outside the judicial system: mass media, legislators, and the litigants themselves. Some judges, however, do believe that a notorious trial replete with media coverage presents an opportunity for educating the public about the legal system. They may seize the occasion to speak and write in an especially didactic fashion. Others believe that they ought not adapt their behavior to any such situational exigencies. For this latter group, the judge is bound to adhere only to technical/legal criteria for effective communication.

Stylistic considerations. Judges in writing workshops readily perceive the relationship between audience and style. The thrust of the entire instructional program rests on the premise that clear, uncluttered language is desirable because it communicates with greatest fidelity. The introductory lesson explains the stylistics of "Plain English" legal writing. The plain English movement in legal affairs originated as a means of protecting consumer rights by improving the comprehensibility of credit card agreements and other similar documents (Felsenfeld). Increasingly, the principles of plain English are promoted as a general antidote for unclear legal writing (see Flesch; Wydick). The judicial writing workshop which we developed relies primarily on Joseph Williams' principles of clear sentences and information flow.

Judges, however, did not uncritically accept the premise that clear writing—even if they could achieve it—is a desirable goal. Some were concerned about a loss of judicial voice, and the possible resultant loss of credibility before the legal community and the general public. Some regarded the relative opacity of typical judicial writing as a safeguard against laypersons interpreting legal decisions independently—and incompetently. Most judges, ever conscious of the looming appellate court audience, were reluctant to depart from "tested" language that had survived review in the past. Others, in contrast, were excited at the prospect of shedding dysfunctional stylistic fetters.

Most agreed to at least small-scale experimentation with simpler language.

An Illustrative Module: Explicating Facts

The issues raised in the initial workshop session regarding composing—issues of process, purpose, audience, and style—were revisited regularly in the subsequent sessions. Each of these subsequent meetings focused on one of the five functions of judicial writing. The module which treated the function of explicating facts illustrates instructional strategies common to the entire judicial writing program.

Articulating standards for explicating facts. To begin the workshop session, we presented participants with three samples of fact findings to compare and contrast in large-group discussion. Though the samples were presented to the judges in an open ended manner, they were in fact selected to represent varying levels of linguistic and discourse complexity. For example, one sample (drawn from a ruling regarding due process in obtaining a confession from a minor) read in part,

> After the juvenile indicated he may have been out of town with his mother in her truck on the date of the alleged offense, the officer left with the juvenile to consult with the mother. She went home to check her records, returning after just a short time with the news that the juvenile had not been out of town that day. She also noted her daughter might know something about the offense. The daughter was called in and turned out to be aware of some facts relating to a separate incident at a different location. There was an indication the juvenile was allowed a few minutes contact with his mother at about this time. During the course of the evening, except for one brief contact with his mother, the juvenile and his mother were kept separated, even though the mother did once ask to speak to her son after hearing her son cry out that the officers should stop questioning him and leave him alone. The officers all denied the juvenile cried out.

In commenting on this piece and comparing it with others presented, judges remarked about issues of relevancy, succinct-

ness, prejudicial omissions and commissions (e.g., the use of "alleged" in one instance but not in other parallel ones), abstract versus concrete or proper nouns, and the potential for excess information to create confusion (e. g., was there one "brief contact" between mother and son, as asserted, or are two distinct contacts described?). During this portion of the workshop judges sharpened and articulated their standards for what counts as a fact finding—that it ought not be the same as a summary of the testimony (as in the sample above).

As an example of an explication of facts written by a classic master of judicial writing, we asked the judges to read and comment on the initial section of Benjamin Cardozo's well known decision in *Palsgraf v. Long Island Railroad* (248 NY 330, May 1928):

> Plaintiff was standing on a platform of defendant's railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. . . .

The style in this portion of the decision can be compared with the far denser style into which Cardozo switched when analyzing the applicable law:

> These, from the point of view of the law, these were the bounds of her immunity, with perhaps some rare exceptions, survivals for the most part of ancient forms of liability, where conduct is held to be at the peril of the actor [cites precedents]. If no hazard was apparent to the eye of ordinary vigilance, an act innocent and harmless, at least to outward seeming, with reference to her, did not take to itself the quality of a tort because it happened to be a wrong, though apparently not one involving the risk of bodily insecurity, with reference to some one else. . . .

Based upon the prior analysis of fact findings in the corpus of documents collected from state trial court judges, participants discussed some of the linguistic and discourse patterns found to be characteristic of this type of judicial writing. For example

descriptive writing exhibited an average Flesch readability (grade level equivalent) score of 12.8. By way of comparison, the average readability score for injunctions was 17.5. Other discourse elements illustrated in the corpus of documents and discussed among participants included (a) amount of detail needed to specify locations and (b) amount of detail needed to recount probable cause in warrants, (c) "chunking" of information into numbered paragraphs, and (d) demarcating findings of facts from inferences and from conclusions of law.

An exercise in writing fact findings. Apropos of this latter issue, we structured an exercise for the judges. Judges viewed a film adapted from Ambrose Bierce's short story, "Occurrence at Owl Creek Bridge" (McGraw-Hill Films). This particular film is wordless, so there is no explanation of what the viewer is watching. After the film, participants spent 30 minutes writing descriptions of the events in the film. The descriptions were shared by volunteers. Ensuing discussions focused on the difficulty of avoiding drift from fact to inference, different judgments of appropriate detail, and typical clarity of descriptive writing.

Legal requirements in explicating facts. These stylistic issues regarding explication of facts interact with technical legal requirements. Depending on governing statutes and regulations, explicit fact findings may be mandatory in some circumstances—e.g., in nonjury or bench trials—and at the option of the parties in others—e.g., child custody hearings. Consequently participants at this workshop session also received a memorandum of law that outlined state requirements concerning fact findings.

Finally, judges left the workshop session with the homework assignment of submitting by mail several fact findings that they would write during the course of their work in the following weeks. These would be analyzed on the Grammatik program and by a staff assistant, and each judge would participate in an individual conference regarding them at the following workshop session.

CONCLUSION

Workshop Logistics

It is no easy matter to secure from busy trial court judges a commitment to attend six day-long sessions over the course

of nine months. In truth, only a few judges were able to attend every session. Still, it is encouraging to recognize that most participants did stick with the program, that their evaluations were positive, and that their colleagues continued to express interest in signing up for subsequent series of writing workshops. The program was initially tested by conducting the six sessions over a nine-month period, with approximately six weeks between sessions. To combat the inevitable absenteeism of the six-session program, however, the program has also been tested in a format of 3 1/2 days of intensive instruction. Each format has advantages and disadvantages. The first format allowed participants to submit writing samples for critique between sessions. The judges were also able to put techniques into practice with continuing feedback over the nine month period. The 3 1/2 day format solved the problem of discontinuity because everyone was there for the entire session. For 3 1/2 days, participants were able to concentrate on improving their writing skills without other distractions. There was also more opportunity for informal interaction between judges and between participants and the faculty because all were housed together. This format, however, did not allow for as much writing and feedback nor for slower assimilation of instruction into the judges' daily work habits.

On the negative side, we must acknowledge that both workshop formats were perceived as great impositions on judges' time. Improving writing skills is labor intensive on the part of participants as well as instructors. Judges face many other equally critical continuing education needs: staying current in matters of substantive law, sentencing options, and court administration. Moreover, it is intimidating even (perhaps especially) for judges to subject their work performance for critique. As a result, only those judges already strongly committed to writing improvement are likely to express interest in programs such as the one described here.

Peer Learning

Participants learning from their peers is a consistent factor in successful writing workshops at all levels (Gere). It is no less true in writing workshops for trial court judges. Irrespective of workshop logistics, judges learned a great deal from each other. Because their writing tasks relate to virtually all of their judging

tasks, discussion of writing often spilled over into other substantive questions, some more complex than others. These ancillary matters ranged from practical suggestions for effective note-taking on the bench to debate over simplifying the language of approved jury instructions or the difficulty of making credibility determinations. For much of the sessions, judges assumed responsibility for the group's learning, and program directors served more in the role of facilitators.

Advantages of Functional Approaches to Writing

Although writing instruction for judges and other professionals is well established, the consistent focus on functions of writing imbues this program with a distinctive character. This functional approach ensured, first of all, that we would consider the full range of judicial writing in our workshops. Since this program was motivated by an analysis of all the various acts trial court judges perform through writing, we could not be satisfied with an exclusive concern for opinion writing, as has traditionally been the case.

In addition, the functional approach ensured that the program would not issue overly simplistic, arhetorical rules about style. Corporate training and continuing education in professional writing sometimes suffers from such blanket prescriptions: "The majority of your sentences should be shorter than 24 words"; or "No paragraph should contain more than five sentences." Being attentive to functions of writing, in contrast, sensitized participants to the relationship between style and purpose. Thus, for example, one workshop session resulted in a lively discussion of situations in which one legitimately uses a passive construction to evade identifying the agent of an action. By the same token, the functional approach allowed participants to see why describing a set of facts calls for less complex syntax than comparing two competing legal principles.

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