

## A Portrait of the Lawyer as an Artist

By Daniel E. Cummins

**B**eing a lawyer has enabled me, a former English major, to earn a living by doing what I thoroughly enjoy: reading, writing and analyzing the written word. Sure, the profession can be stressful and aggravating at times, as there is at least one attorney in every county whom one does not care to deal with on a personal level.

Nothing's perfect. Yet, in no other profession, other than perhaps being an author, poet or liberal arts professor, can one be so surrounded by and immersed in words, the tools of our trade.

Like the sweep of a painter's brush on a blank canvas or the striking of a chisel against an unfinished block of marble, the stroke of a lawyer's or judge's pen (or computer keyboard) on a blank page begins a creative process. For those who enjoy legal research and writing, there is nothing like getting lost in the search for the applicable law and the crafting of a persuasive legal argument.

As an added benefit, such exercises allow a participation in the furtherance of the continuing

doctrine of *stare decisis* that governs our jurisprudence and, ultimately, our free society. Through this creative process of legal analysis and writing, one has a chance to play a vital part in the affirmation and, at times, even the alteration of the legal principles and maxims that have been handed down through generations since the Founding Fathers first put together the Constitution.

Thus, on an idealistic level, attorneys and judges are able to earn their living by using their creative writing skills developed over many years and, with those writing skills, play a vital part in the maintenance of a civil society through the application of law to everyday disputes. On a more personal level, there also is a satisfaction or vindication not only in seeing one's finished written product on paper but at times in being rewarded by having one's position accepted as correct by a court of law.

Some legal careers are initiated with the study of literature at liberal



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arts colleges, sparked by a love of reading, writing and analyzing the English language. For former English majors, legal writing can be viewed as a creative process, as a craft and even as an art form.

An English major's writing style is laboriously developed and cultivated over four years of creative writing exercises and essays in a liberal arts-heavy curriculum. Analytical writing skills are honed by way of the study and dissection of classic writings of great authors and poets throughout history, including Keats, Wordsworth, Yeats, Shakespeare, Joyce, Salinger and Vonnegut, to name a few.

In these liberal arts studies, the inclusion of personal opinions and interpretations of classic works in the creative writing process is not only encouraged in the development of one's analytical writing style but also rewarded.

Unfortunately, it was all too often that the creative writing spirit so nurtured through liberal arts curriculums was abruptly squashed and squandered with the entry into law school. Any and all creative efforts in writing and formulating colorful, yet cogent, legal arguments in law school assignments were generally frowned upon by cynical, all-knowing law professors and adjunct writing instructors.

The creative writing spirit was also rendered hesitant by the unending uncertainty imposed by the Socratic method of teaching law and legal writing, under which there is apparently no guidance permitted and no praise allowed. Typical with the overall law school learning experience, or the "hide the ball" method of teaching, students were routinely given assignments to do something they had never done before without any advance instruction — write a brief, conduct a cross-examination. Then, after the completion of the assignment, students were glibly advised how they had done everything wrong. The end result was a fear of engaging in any

free thinking "outside the box" and a consequent paralysis of the creative spirit.

Law school legal research and writing courses offered no respite. They were also apparently designed to suppress further any creative urges in writing and instead focused on drilling the robotic IRAC (issue, rule, application, conclusion) method of writing into the heads of all law students. Adjectives and adverbs were eradicated like fungi and the driest of writing was required. Sentences were to be so shortened as to end up as choppy rat-a-tat-tat lines of words stripped of any character. The facts and the law were instead to be emphasized by plain language in short paragraphs composed of arid sentences, all devoid of any creative input from the writer in terms of an inspired legal argument.

Consequently, the method of teaching legal writing invited extreme caution, suppressed any original thought and handcuffed the student in a way that prevented any freely creative writing. Sad to say, if law professors spent as much time building back up their students' confidence in their creative writing abilities as they did in stripping them down in the first place, the legal profession would likely benefit as a whole.

There was then no surprise that by the time of law school graduation, the fiery creative spirit borne out of a liberal arts education had generally been reduced to a tiny but undying, glowing orange ember waiting to be nurtured again.

Such criticism on the teaching of legal writing has been around at least since 1936, when then Yale Law School Dean Fred Rodell wrote that "[t]here are two things wrong with almost all legal writing. One is its style. The other is its content."

Rodell lamented that on the question of style, lawyers were taught to be too reserved in their writing. He complained that in terms of legal writing, creative



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urges were suppressed and “[i]t does not matter that most people — and even lawyers come into this category — read either to be convinced or to be entertained. It does not matter that even in the comparatively rare instances when people read to be informed, they like a dash of pepper or a dash of salt along with their information.”

Rodell deadpanned that instead, “[i]n the main, the straightjacket of law review style has killed what might have been a lively literature.” It was Rodell’s hope that lawyers would “come to realize that the English language is most useful when it is used normally and naturally,” and, safe to say, creatively.

Thankfully, coming out of law school and into a court of common pleas clerkship, I slowly but surely discovered that legal writing could be a creative process, even while still honoring the requirements of plain language and concise writing. There *was* a place in legal writing for interpretation, creative thought and even efforts to make the final written product interesting for the reader. For what better way is there to persuade someone to accept your position than by making them, through the creative writing process, more interested in your position by way of interesting writing?

The image shows a screenshot of the PBA (Pennsylvania Bar Association) website. At the top, it says "Visit the PBA Web Site www.pabar.org". Below this, there are several news items and announcements. One prominent item is titled "Welcome to the PBA Web Site!" and another mentions "Awards to be Presented at PBA Annual Meeting". There are also links for "JOIN PBA NOW" and "Helping you meet your CLE requirements". The website has a blue and white color scheme with various icons and text boxes.

While working with the judge in the writing of legal opinions, it became apparent that the honoring and furthering of the *stare decisis* doctrine was indeed an art form. The notion that the law was a set of principles and legal maxims handed down by the generations in order to maintain a civil society was clarified. Assisting the trial judge in crafting opinions based upon and, at times, imitating eloquently written opinions issued by such appellate court judges as Superior Court Judge William F. Cercone and Supreme Court Justice Michael Musmanno, to name a couple, only served to stoke and brighten that tiny ember of creative spirit through the realization that creativity did have an important place in legal writing.

That creativity continued to be developed with my movement into private practice. The newfound freedom to engage in creative legal writing has continued to grow with each brief written over many years of practice. The challenge to write creatively but plainly and concisely can be difficult at times. As noted by Samuel Johnson, “What is written without effort is in general read without pleasure.”

As such, through the editing and re-editing (and re-editing) of briefs in the creative writing process, the necessities of plain language and concise writing can still be met without sacrificing the goal of an interesting and compelling end product. As Justice Louis Brandeis once said, “There is no great writing, only great re-writing.” The repeated editing of the document can lead to the discovery of a new angle on an argument, a more imaginative analysis of a legal point or even something as simple as a better word to complete a sentence. In this regard, Mark Twain once offered, “The difference between the right word and the almost-right word is the difference between lightning and a lightning bug.”

Many other lessons have been learned over the years in developing the craft of legal writing. Efforts to mimic in a brief

the very language found in an applicable and well-written judicial opinion can serve not only to make the brief sound more persuasive, but such imitation can also result in an improvement in one’s writing ability.

Including in the brief direct quotes on point from opinions that may have been previously issued by the same judge who is deciding the case at hand is another creative way to craft a brief that is more interesting and compelling for that reader. Such flattery may turn out to be the key to convincing the judge to accept your position over the position set forth in an opponent’s less interesting submission. Experience has shown that in the end, efforts at a more creative written product may be the difference in the case.

And so with each written and re-written product in the practice of law, whether it be a brief, an opinion letter or even letters simply summarizing and analyzing discovery responses, I have been rewarded with the opportunity to partake in creative writing and analysis that not only pleases me on a personal level but also enables me to earn a living in this still noble profession by assisting clients in their pursuit of a favorable resolution. ☼



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