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Cautioning the careless writer: The importance of accurate and ethical legal writing*

Abstract

Legal professionals are required to write ethically, skilfully and accurately. Growing concerns over the quality of graduated students entering the profession has led to an increased sensitivity about the teaching of writing skills. This article will not consider the *how to*, but instead focus on the issue of *why* legal writers should be vigilant in guarding against the proclivity to write in a careless manner. It will be argued that the results of careless legal writing could have devastating consequences for the legal professional's career as well as his client's wallet. Legal writing has to be professional and ethical and reflect the writer's respect for his or her own workmanship as well as for the intended recipient. Careful legal writing aims to avoid misunderstandings and litigation and aids in developing and clarifying legal analysis. It recognises the permanent nature of what is being written and the persuasive potential innate to legal drafting. Responsible legal writers are mindful of the specific legal consequences of their writing and recognise that they have, in their writing, the ability to appeal to the aesthetic sensibilities of the reader.

Waarskuwing aan die onverskillige skrywer: Die belang van akkurate en etiese regtelike skryfwerk

Professionele regsgeleerdes is verplig om eties, vaardig en akkuraat te skryf. Toenemende kommer oor die kwaliteit van gegradeerde studente wat by die professie aansluit, het gelei tot 'n verhoogte sensitieweheid oor die onderrig van skryfvaardighede. Hierdie artikel sal nie aandag gee aan die *hoe* nie, maar sal eerder fokus op die kwessie van *hoekom* regsgeleerdes moet waak teen die geneigdheid om op 'n onverskillige manier te skryf. Daar sal geargumenteer word dat sorgelose regsskryfwerk vernietigende gevolge vir die professionele regsgeleerde se loopbaan sowel as sy kliënt se beursie kan inhou. Regsskryfwerk moet professioneel en eties wees en die skrywer se respek vir sy of haar eie werksprodukt sowel as vir die ontvanger daarvan reflekteer. Versigtige regsskryfwerk het ten doel om misverstande en litigasie te vermy en dra by tot die ontwikkeling en verheldering van regsanalise. Dit erken die permanente aard van wat geskryf word en die oordedende potensiaal eie tot regsskryfwerk. Verantwoordelike regsskrywers is bedag op die spesifieke regsgevolge van hul skryfwerk en besef ook dat hulle oor die vermoë beskik om deur hul skryfwerk tot die estetiese ontvanklikheid van die leser deur te dring.

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1. Introduction

Lawyers have two common failings. One is that they do not write well and the other is that they think they do.¹

Few who have spent any measure of time practising or teaching law would argue against the assertion that the activity of writing, in one form or another, represents the backbone of our profession.² It is a crucial skill justifying proper consideration in the legal curriculum.³ In support of this view, one could readily point to the numerous appeals in recent years from the profession, and specifically from courts⁴ and law societies on behalf of their members,⁵ to our universities.⁶ These have been calls to produce professionals with improved writing skills in order to address mounting concerns about the quality of graduates entering the profession.⁷

This widely perceived problem with the current standard of legal writing⁸ is further exacerbated by the reality that bad writing⁹ often has its birth in bad thinking.¹⁰ According to O’Conner, “[w]henver there’s something wrong with your writing, suspect that there’s something wrong with your thinking”.¹¹ The activity of writing or drafting legal documents “after all, is merely the expression of your thoughts on paper”.¹²

Legal writing not only represents the product of legal thought, but is also arguably the most important tool for legal communication.¹³ Legal

1 Felsenfeld 1981:413.

2 See, for example, Greenbaum 2004:3, quoting Rideout & Ramsfield; Feerick 1993:381; Vinson 2005:507-508, 516; Mencer 1995:218.

3 Newby 1998:1.

4 Courts have, at times, expressed and reinforced their appeals by including punitive sanctions against legal practitioners who neglect their legal writing duties. See, for example, Davis 2000:97.

5 See, for example, Moneri 2005:3.

6 Greenbaum 2004:3, 7, 17; Bangeni & Greenbaum 2013:72; Osbeck 2012:418-419; Mencer 1995:228; Searle 2011:v; Newby 1998:1.

7 Greenbaum 2012:32; Bangeni & Greenbaum 2013:72; Vinson 2005:525 footnote 77. Samuelson (1984:149) suggests that law students are presented with so much bad writing during their studies that they are unable to identify the proper specimen.

8 Hoffmann 2011:295; Newby 1998:2. Feerick (1993:381) argues that this problem is “far more serious than we recognise or are willing to admit”.

9 As opposed to accurate and ethical legal writing. Osbeck (2012:426) suggests that good legal writing is characterised by its ability to assist applicable parties to reach required decisions.

10 See, for example, Vinson 2005:511 and the authority quoted in footnote 16-17, 524; Radulescu 2012:368; Rylance 1994:7, 66; Gauntlett 2009:24-25; Re (2005:675, 677) where the author states: “The thinking process and the learning process precede the actual writing process”.

11 PT O’Conner, “Words fail me”. <http://www.scribd.com/doc/225241707/Words-Fail-Me-Patricia-T-O-Conner#> (accessed on 5 August 2014).

12 Palmer *et al.* 2003:33.

13 Ehrenberg (2004:1170-1171) discusses the “speech-writing hierarchy” where she refers to the ideas of Socrates and Plato in prioritizing speech

professionals typically engage with writing in the process of conveying or recording their important communications.¹⁴ Poor writing, therefore, inevitably leads to poor communication, which opens the door to various further issues.¹⁵

Tertiary education institutions, many of whom have developed courses on writing skills with the aid of skilled professionals, have duly noted the appeals for warranted attention to teaching writing skills.¹⁶ This development follows the trend in international universities, where the importance of cultivating this trait in the education of the next generation of jurists has long since been advocated and, to a large extent, established.¹⁷ For example, Duke University in the United States of America has no less than ten different writing courses available to its law students.¹⁸ These courses teach students to conduct legal analysis and to write clearly and persuasively.

The availability of a wealth of books and articles on the topic of legal writing¹⁹ further validates the emphasis that should be placed on this core activity. These resources are generally readily accessible and provide valuable guidelines and instructions on how to improve one's writing. Unfortunately, in my experience, these guidelines and instructions are often ignored when practitioners rush through the formality of recording information in writing.²⁰ Sadly, legal practitioners, in general, are notoriously bad writers, as illustrated by the quote at the start of this article.²¹ Of even greater concern is the reputation some in the legal profession have

above writing as a mode of communication. She shows that the expressive comprehension possible with face-to-face speech is preferable to the inherent communicative limitations of written argument, specifically in ensuring that the recipient properly understands the message. However, Ehrenberg (2004:1186) argues for the advancement of "a multi-layered process of research, writing and editing by lawyers as well as judges".

14 Newby (1998:3) suggests that writing is the typical way in which lawyers communicate what they do, namely to solve legal problems.

15 Wimpey 2006:155.

16 The Law Faculty at Stellenbosch University recently introduced a compulsory writing skills course for their first-year students. The Faculty has identified certain writing intensive courses where writing consultants have been employed to assist in the development of student writing skills. See also Greenbaum 2004:19; Searle 2011:v.

17 Fershee 2011:5-8; Mencer 1995:228; Feerick 1993:384-385; Vinson 2005:526-528; Greenbaum 2004:17; Re 2005:685; Osbeck 2012:419; Ehrenberg 2004:1197.

18 Legal writing at Duke Law School. <http://law.duke.edu/curriculum/legalwrit/> (accessed on 5 August 2014).

19 See, for example, Rood 2006:19; Fershee 2011:4-5; Re 2005:667; Osbeck 2012:421, 428 at footnote 35.

20 For support of this view, see Osbeck 2012:420; Mencer 1995:227-228. See C H Benson, *The consequences of bad legal writing* http://paralegaltoday.com/issue_archive/columns/LglWrtng_ma07.htm (accessed on 5 August 2014), where the author quotes Will Rogers: "The minute you read something that you can't understand, you can almost be sure it was drawn up by a lawyer."

21 See also Rood 2006:19; Samuelson 1984:149.

earned for engaging in dishonest writing, testing the ethical boundaries of the profession.

I shall not be revisiting the *how to* in this article.²² Instead, I aim to encourage all legal writers to place the required emphasis on constantly challenging themselves to improve their own writing and drafting skills. This will be done by investigating the arguably severe consequences of a careless, inaccurate or unethical approach to reducing ideas to writing. The focus will, therefore, be on *why* it is important to concentrate on developing and improving the fundamental skill of legal writing.²³ While this approach steers clear of adding to the debate on *what* good legal writing should be,²⁴ it is valuable as considerably less emphasis and study have been invested on the elaborate results of inaccurate and unethical legal writing.

It is hoped that this article will serve as motivation for a renewed focus on careful legal writing. Its message is primarily aimed at the legal practitioner, at lawyers and advocates, but the principles are also relevant to academics and scholars of the law.

At the outset, I wish to state that I approach this topic with a great deal of humility and reverence.²⁵ I do not want to give the impression that I am infallible with regard to my own writing prowess, as I firmly believe that no one is.²⁶ The art of proper penmanship is as much a laboured and acquired skill as any other, and as such the pursuit of excellence should always be the target of those who make their living in the practice of its various disciplines. I sympathise with Paul Rylance in the introduction to his *Legal practice handbook on legal writing and drafting*,²⁷ where he refers to an article in *The Sunday Times* by Julie Burchill. She wrote: "Perhaps the hardest thing to write about without coming across as a complete and utter twit is writing itself."²⁸ This article is, therefore, an attempt (sufficiently modest, I trust) to emphasise the importance of avoiding the temptation of carelessness in the preparation of legal documents.

22 Many authors have made valuable suggestions in this regard. See, for example, Greenbaum 2004:4.

23 Osbeck (2012:421) counsels that thorough training of legal writers requires more than just the teaching of rules, but that a proper understanding of the motivation for improved skills in this regard is required.

24 See Fershee (2011:4) and Re (2005:670) where the authors make the point that, while few would dispute the importance of legal writing, what exactly constitutes quality writing is a far more challenging pursuit.

25 Noting the warning by Rylance (1994:4) that writing is stylistic and that every person will have to develop his or her own style.

26 Rylance (1994:6) and Van Blerk (1998:v) support this view, whereas Harms (2009:xv), quoting Harry Snitcher QC, seems to be of the opinion that the drawing of pleadings is a skill that can be perfected over time.

27 Rylance 1994:6.

28 Eugene Meehan QC, *Strategic legal writing: Preparing persuasive documents*, at paragraph 1, is of the opinion that "[t]here's nothing worse than reading someone else's writing about writing" <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> (accessed on 5 August 2014).

In this article, the term 'legal documents' is used to denote its widest possible meaning,²⁹ to include any legal correspondence, pleadings, opinions, research or related documents drafted during the course of the rendering of legal services or academic pursuits. Similarly, 'writing' includes drafting,³⁰ authoring, editing and related activities.³¹

In the following sections, I shall investigate the consequences of careless (and specifically inaccurate and unethical) legal writing.

2. Professionalism

It is unfortunate that a stream of thought has developed in our culture, which views the tag of 'professionalism' in a derogatory manner.³² This is especially true of the legal profession.³³ The perception, even among some members of a profession, is that to refer to oneself as a professional is a sign of vanity and arrogance. Some of the blame for this perception could possibly be placed before those members of the profession who tend to be overtly big-headed.³⁴ Pompous attitudes are often reflected in legal writing, where professionals choose to use big and complicated words instead of more familiar options under the impression that this conveys some sense of learning and grandeur.³⁵ It has, however, been argued that it is a fallacy to equate inflated words, which are more often than not outdated and misunderstood, with professionalism.³⁶ Rylance warns against falling victim to this trap when he writes "[s]o write to express not to impress".³⁷

While one should not attempt to justify elitist writing in the name of professionalism, one should be very careful to forfeit or compromise the innate beneficial nature of what being professional is all about. The 5th edition of Collins Concise Dictionary defines a professional as "a person who engages in an activity with great competence", being "extremely competent in a job", who "produces a piece of work or anything performed

29 See Schwikkard & Van der Merwe (2010:404-405) where "data messages" are included in the author's definition of "document".

30 Palmer *et al.* (2003:33) define drafting as "the process of constructing specific legal documents".

31 See Re (2005:666) and Osbeck (2012:421) where the authors list a wide array of documents understood to be products of "legal writing" produced by legal professionals in the course of their work.

32 <http://www.geeklawblog.com/2013/01/the-arrogance-of-lawyers-will-it-be.html> (accessed on 5 August 2014).

33 See, for example, Louw (2011:25) where the author points to "the stigma attached to the legal profession and legal documents that sees legal practitioners as disguisers of the truth".

34 Vinson 2005:508, 520.

35 Rylance 1994:35; Re 2005:668; Rood (2006:19-20) quotes Samuel Johnson: "Don't, Sir, accustom yourself to use big words for little matters".

36 Wimpey 2006:162.

37 Rylance 1994:35.

with competence or skill”.³⁸ Implicit in this definition is the realisation that, if something can be done in a professional manner, it could conversely also be done in an amateurish fashion. While any literate person can be tasked with drafting a letter, it does not follow that the written product necessarily meets a professional (competent and skilled) standard.

Professionals are also well-educated people who are paid for their services. The practice of law is undoubtedly a profession³⁹ whose members make a living from the “products” they supply. These “products”, as argued earlier, are usually written documents. If these documents fail to live up to the required standards of what can be expected of a writing-centred profession, they paint a negative picture of the specific practitioner and the profession as a whole.⁴⁰ As will be argued later, poorly articulated arguments also lose cases for clients and lead to far-reaching negative legal consequences. While we are all human and prone to occasional errors in the production of documents (I certainly have made my share of *bona fide* mistakes during my years of practice as attorney and notary), we must always strive to deliver a “performance of skill and competence”.⁴¹

The modern-day introduction of electronic communication has been of great benefit to the legal profession. Developments such as e-mail communications have enabled lawyers to work faster and more efficiently.⁴² This technological development has, however, also done a huge disservice to our craft.⁴³ It has meant that the legal environment has had to change and adapt to the rapid moving pace of modern society, where possibilities such as “late-night communication[s]”⁴⁴ have raised the service expectations of clients. This demand for an increased output under the strain of reducing billable hours, as competition among law firms increases, must surely influence the quality of writing.⁴⁵ This also affects the approach of professionals to the time and effort invested in drafting and re-drafting legal documents.⁴⁶ It has been argued, and convincingly so, that the advent of electronic communication has also negatively impacted on the writing skills of law students.⁴⁷

The developments in how information is communicated to a modern audience gave rise to new writing challenges.⁴⁸ Society has by now been thoroughly conditioned to a system where many forms of interaction with

38 *Collins Concise Dictionary* 2001:1196.

39 Wimpey 2006:162; Osman-Hyder 2006:7-8.

40 Feerick 1993:383-384.

41 *Collins Concise Dictionary* 2001:1196.

42 Fershee 1993:9.

43 Fershee 1993:9. Rood (2006:20) states that “grammar and syntax have gone to the dogs in the modern world”. See also Lewis 2009:23.

44 Fershee 1993:9.

45 Vinson 2005:534.

46 Vinson 2005:534.

47 Vinson 2005:523, and see the authority quoted in footnote 71.

48 <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> at paragraph 6 (accessed on 5 August 2014).

others are conducted at once. It is possible to have a conversation on the office phone while simultaneously sending an sms, BBM or a WhatsApp message per cell phone. During all this, one has to also be mindful of the desk computer for any important incoming e-mail messages.⁴⁹ The result has been the development of an altogether new written language; one where conveying a message in the shortest and fastest possible way, irrespective of any logical grammar or spelling requirements, is the only rule.⁵⁰ E-mail and other cell phone messages are generally sent quickly in keeping with the demands of a busy schedule. These messages are seldom checked for errors and then re-drafted and improved, as would be the case with hard copies of documents which require physical signatures. This approach suggests a kind of lazy anti-intellectualism, where the communicative goal for the production of legal documents trumps the contextual accuracy. Nowadays, students have been raised on a fast-food diet of superficial written communication.⁵¹ It should then come as no surprise that they find it difficult to digest the multifaceted demands of professional drafting.⁵²

This abandonment of formal standards is not appropriate in the context of legal communication.⁵³ The duty to conduct ourselves in a professional manner, especially in the way we write, is what separates jurists from laypersons and amateurs. We should not allow negative sentiments towards the concept of professionalism or an 'anything goes sms mentality' to permeate our writing and relegate our responsibility to write skilfully and competently to nothing more than an afterthought. Merely paying lip service⁵⁴ to our commitment to writing excellence is not only lazy, but irresponsible as it tarnishes the reputation of the legal profession in the eyes of an already sceptical society. Moreover, there is a strong case to be made for emphasising competence in legal writing as a basic requirement, a characteristic that should be demonstrated for the privilege of achieving professional responsibility.⁵⁵ Neglecting this vital aspect could also cause serious damage to the reputation and financial practice of a legal professional, serving as an important incentive to write professionally.⁵⁶

3. Maintaining ethical standards

As members of a profession, lawyers and advocates are normally required to belong to a representative body regulated by a code of conduct.

49 Fershee (1993:1) refers to research proving that e-mails are currently the most common way of communication used by legal professionals.

50 Fershee 1993:11-12, 14, 16. See also Rood 2006:20.

51 Fershee 2011:11.

52 Fershee 2011:8.

53 Fershee 2011:12.

54 Vinson 2005:514.

55 Vinson 2005:514.

56 Feerick 1993:384.

Regional and national law societies are well positioned to act as mediators between the general public and the profession, and specific rules can be set in place to hold legal professionals accountable for maintaining ethical protocols.⁵⁷ These bodies prescribe ethical standards of good practice imposed through various sanctions.⁵⁸ International instruments such as the *International Code of Ethics*⁵⁹ and the *International Bar Association's International Principles on Conduct for the Legal Profession*⁶⁰ also create an ethical framework for the operations of members of the legal profession.

There can be no doubt that the majority of these regulations are either directly or indirectly applicable to the written engagements of lawyers.⁶¹ Broad and generic guidelines normally underscore values such as honour, integrity and dignity, cautioning professionals to act with due competence, care and diligence and to safeguard respect for the profession and the legal system.⁶² More specific rules are directly aimed at enforcing ethically sound writing practices. Examples of these abound and include duties such as refraining from producing offensive and dishonest communication.⁶³ Moreover, being dishonest or allowing or inciting clients to lie in sworn affidavits could also lead to the possible criminal prosecution of legal professionals and their clients.

Careless writing violates the ethical obligations of the legal professional.⁶⁴ Young and aspiring practitioners must be taught that acceptable legal writing is synonymous with following the ethical high road; it is simply what is to be expected from those engaged in legal pursuits.⁶⁵ This is especially important in the modern era of legal practice, where there is a progressive trend toward deciding matters on the documents before the court.⁶⁶ Courts rely on the *bona fides* of the advocates and lawyers who prepare these papers that are placed before them, and to that end we must continually

57 See, for example, rule 14 of the *Rules of the Law Society of the Cape of Good Hope*. <http://www.capelawsoc.law.za/docs/CLS%20Rules%20Amended%20Oct%202011%20FINAL.pdf> (accessed on 5 August 2014).

58 See, for example, *Law Society of South Africa Code of Ethics for Legal Practitioners*, adopted March 2006.

59 *International Bar Association International Code of Ethics*. <http://ethics.iit.edu/ecodes/node/3460> (accessed on 5 August 2014).

60 Adopted on 28 May 2011.

61 As argued by Davis (2000:97 at footnote 3).

62 See Palmer & McQuoid-Mason (2001:6) who refer to rules 2 and 10 of the *International Code of Ethics*.

63 See, for example, rule 14(4) of the *Rules of the Cape Law Society*, <http://www.capelawsoc.law.za/docs/CLS%20Rules%20Amended%20Oct%202011%20FINAL.pdf> (accessed on 5 August 2014); Re 2005:679.

64 Walsh 2012:5; Davis 2000:97.

65 Feerick 1993:387.

66 Re 2005:684; Ehrenberg 2004:1177, 1185, 1195. Erasmus (1994:B1-48 at footnote 5) refers to several cases to show "that the court must take 'a robust, common-sense approach' to a dispute on motion and not hesitate to decide an issue on affidavit merely because it may be difficult to do so." Erasmus (1994: B1-47) cautions that "[a] party will ... not be allowed to lead oral evidence to make out a case which is not already made out in his affidavits".

remind ourselves that we are first and foremost “officers of the court”.⁶⁷ Even in an adversarial system, a legal practitioner’s commitment towards winning his client’s case can never jeopardise his ethical duty towards the court. Lewis’ golden rule, “[a] practitioner must avoid all conduct which, if known, could damage his reputation as an honourable lawyer and honourable citizen”,⁶⁸ should be borne in mind in all transactions, especially so when writing legal documents.⁶⁹

4. Self-respect

It is a fact of life that more often than not people who are deemed to have excelled in some discipline are so characterised as a result of the contribution they make in their field and to society in general. This is again mainly measured by the quality of the product or service they deliver.⁷⁰ It could then be argued that self-respecting labourers, who are also interested in the respect of co-workers, will be consciously invested in the fruits of their labours. I am certainly not arguing the converse, in other words that people who do bad work have no self-respect, but would suggest that the majority of professionals would like to have a sense of pride in their product. In a certain sense, the product of one’s labour is a reflection of oneself.⁷¹ To that end, being a professional, one would surely prefer to be esteemed and respected by one’s peers as a result of the quality of one’s work, being a reflection of the effort invested therein⁷²

It was argued earlier that, in the case of the practice of law, these efforts are mainly reflected in written legal documents. Careless writing is often associated with inexact and sloppy proficiency on the part of the drafter.⁷³ The following is a *verbatim* extract from an Afrikaans letter⁷⁴ sent to my office some years back from a reputable law firm during settlement negotiations on behalf of our respective clients. Since then, I have used this letter (obviously having removed the firm’s letterhead and details to spare them from what would be some well-deserved embarrassment) in

67 Re 2005:684.

68 Lewis 1982:8.

69 Rood (2006:20) encourages lawyers to aspire to use their written words to be “considered to be honest, reliable, a man (or woman) of your word”.

70 As reflected in the caution by Van Blerk (1998:101).

71 Herbstein *et al.* (2009:xiv): “The tone of your professional character, intellectually and morally, will depend on the estimate which you form of the nature of the duties which you have undertaken, and of the spirit which ought to actuate you.”

72 Fershee 2011:7. Hoffmann (2011:295) warns: “your clients and other practitioners will judge your competence by how well you can compose a letter”.

73 ER Firestone and SB Hooker, Careful scientific writing: A guide for the nitpicker, the novice, and the nervous. http://www.researchgate.net/publication/228758030_Careful_scientific_writing_a_guide_for_the_nitpicker_the_novice_and_the_nervous (accessed on 5 August 2014).

74 On file with author.

lectures to illustrate this point to law students. No less than 10 errors,⁷⁵ as indicated, are contained in this short document.

DATUM: 21 *January* 2002

ONS VERW: ...

U VERW: ...

Universiteit van Stellenbosch

Regshulpkliniek

TELEFAX: ...

... / ...

Ons verwys na bogemelde aangeleentheid en verskaf hiermee ons *bank besonderhede*:

NEDBANK BELLVILLE, Rekening no:....., *tak kode*:...

Geliewe onder die skuldenaar se aandag te bring om ons te *wettig* wanneer sy *betaalings* maak sodat ons dit onmiddelik kan ontvang.

Die uwe

Being the recipient of such a letter leaves one with a distinct impression about the capabilities, or lack thereof, of the author and the firm he represents. Irrespective of whether this letter is, ultimately, the result of careless writing, poor typing or bad editing, the supposition remains the same: A professional who would attach his signature to such a document on behalf of a client and send it out into the world arguably lacks respect for his own work and for the value of his reputation among peers. Writers undoubtedly convey a sense of who they are by their writing.⁷⁶

We should consistently strive to maintain the respect, dignity and honour (because ours is after all an honourable profession) of our office in the eyes of the general public,⁷⁷ our clients and our colleagues.⁷⁸ Bad writing causes society to lose respect for, and faith in the credibility of its legal profession.⁷⁹

5. Respect for reader

Similarly, poor drafting can also create the impression that the writer has a lack of respect for the recipient of the document. Simple good manners

75 Rylance (1994:95) remarks that poor spelling reflects poorly on the capabilities and reputation of the writer and causes a loss of faith in the writer's workmanship.

76 Fershee (2011:7) states: "The words a lawyer puts on a page tells a multi-layered story about the lawyer herself ... A lawyer can signal her competence, intelligence, diligence ... and more, through her writing."

77 Vinson 2005:518-519.

78 Rylance (1994:89) states that our colleagues are the greatest critics of our writing.

79 Fershee 2011:5, 9; Feerick 1993:383-384.

and etiquette would dictate that one addresses those he esteems with a certain level of propriety and sensitivity.⁸⁰ This is true when we have verbal conversations with persons we respect, and there should be no reason to assume that written communication should be any less considerate.⁸¹

Conveying a sense of respect in one's writing should, of course, not be equated with rigid formality,⁸² and it is still possible to be courteous and professional while engaging in less reserved styles and forms of correspondence. It is important to maintain a sense of individuality to one's writing while pursuing excellence in professional standards.⁸³ It is, however, extremely difficult to portray a semblance of respect for the reader when documents are littered with errors, as noted in the above example. The impression is created that the author thought so little of the recipient of the document that he did not even make the effort to run a simple spellcheck or to proofread the letter before it was sent. In my opinion, it is not only disrespectful, but also rude to send a letter of this quality to a fellow professional.⁸⁴

The point has also been made that legal writing is a social activity,⁸⁵ governed by the particular social framework in which it operates, "in which there are a specific set of communicative practices, shared by the legal discourse community ...".⁸⁶ I would suggest that careless writing inherently bears the potential to violate this social expectation. Bunell stated that "[r]eading is not a duty, and has consequently no business to be made disagreeable."⁸⁷

In this regard, the importance of utilising the 'Recipient's point of view' (REPOV) technique in engaging in strategic writing cannot be overemphasized.⁸⁸ Rylance is of the opinion that "[t]he first rule of legal writing and drafting is to begin by thinking and to keep thinking about the needs of your reader".⁸⁹ Osbeck argues that the writer's own aims with, and estimation of his writing is "immaterial" if it does not cater to the expectations of the reader.⁹⁰ Writing is useless if it does not assist the reader in the process of drawing some kind of conclusion.⁹¹ Writing should

80 Rylance 1994:77.

81 Re 2005:677-678.

82 In fact, Wimpey (2006:162) argues that "pompous words and elitist language" do not equate to professionalism.

83 Osbeck 2012:444-445.

84 Bearing in mind Lord Denning's warning that "many cases have been won by courtesy and lost by rudeness ...", as quoted in Wimpey (2006:164 at footnote 6).

85 See, for example, Osbeck 2012:423.

86 Greenbaum 2004:6.

87 As quoted in <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> at paragraph 29 (accessed on 5 August 2014).

88 See, for example Rood 2006:20; Van Eck 2012:21; Rylance 1994:8-9; Palmer *et al.* 2003:45.

89 Rylance 1994:9.

90 Osbeck 2012:426.

91 Osbeck 2012:426; Radulescu 2012:369.

thus be characterised by a sensitive awareness of the needs of the reader, and aimed at meeting those needs.⁹² The writer must take cognisance of both the reader's language preferences and his or her emotional, physical, intellectual⁹³ (especially his or her knowledge of the law) and cultural interests, requirements and constraints.⁹⁴ This is especially important when one serves a diverse community⁹⁵ and can be a complicated exercise when writing to more than one recipient.⁹⁶

Placing oneself in the shoes of the recipient of the document,⁹⁷ adjusting one's writing to meet his or her needs and thereby ensuring that he or she will understand and appreciate its content, serve at least two crucial purposes. First, it impresses on the recipient that the writer was, in fact, sensitive to his or her readership. It denotes exactly the sense of respect for others that I am advocating in this instance. Secondly, and more importantly, it ensures that the recipient not only has a clear picture of what is required, but is also (if the document is written effectively) motivated to give proper consideration to the writer's suggestions and arguments. This second purpose is to effectively persuade the reader; this is discussed in more detail in paragraph 9 below.

Every aspect of writing⁹⁸ should be aimed at eliciting a positive response from the reader, whatever that may mean in the specific circumstances.⁹⁹ This can hardly be attained if the reader feels disregarded by what he or she has read. Judge Dhaya Pillay previously wrote on this topic: "Write for the reader to understand, empathise, accept, enjoy and, best of all, to remember your ideas. But always write for the reader."¹⁰⁰

6. Avoid misunderstanding and litigation

Writing in an ethical and professional manner, while respecting the quality of your own work and the reader's participation in the communication process, will have further positive derivatives. The most important benefit of competent and accurate writing is that it will allow the document so

92 Schiess 2002:546; Greenbaum 2004:6, 13.

93 <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> paragraph 29 warns that good writing makes the reader feel smart, while bad writing has the opposite effect (accessed on 5 August 2014).

94 Searle 2011:19, 27-28; Osbeck 2012:426; Radulescu 2012:370.

95 Wimpey 2006:171.

96 Pillay <http://www.derebus.org.za/nxt/gateway.dll?f=templates&fn=default.htm&vid=derebus:10.1048/enu> (accessed on 5 August 2014) puts forth the common wisdom on the matter, which is that the writing should then be aimed at the person least likely to comprehend it.

97 Rylance 1994:95.

98 Including the tone of the document. See Samuelson 1984:155-156; Osbeck 2012:454.

99 Searle 2011:3.

100 Pillay 2007:30.

produced to accomplish the reason for its creation.¹⁰¹ This reason is almost always to facilitate clear communication between parties.¹⁰² When communicating clearly to their reading audience, writers are able to convey their ideas in an understandable and persuasive manner. In this way, misunderstandings can be avoided; this drastically diminishes the risk of unnecessary and costly litigation.¹⁰³ At the very least, clearly written documents, which do not require further clarification, will contribute to a saving of time and costs.¹⁰⁴

In those circumstances where parties are eventually forced to litigate, earlier bad drafting can return to haunt them, and this “places in jeopardy a hard won victory ...”.¹⁰⁵ Thoughtless writing has the potential to ruin the likelihood of even the “innocent” party being afforded a satisfactory remedy at court, and in so doing it further handicaps an already hazardous task.¹⁰⁶ The application of the common law *contra proferentem* rule penalises the lazy drafter in so much as it results in a negative interpretation of ambiguous terms in a contract.¹⁰⁷ Many further negative legal consequences are the result of careless legal writing, some of which will be considered below.

The most basic aim with any written form of communication should, therefore, be for the writer to clearly and unambiguously *state* (as opposed to orally say) exactly what he or she means.¹⁰⁸ Careless writing is often considered synonymous with inexact, vague and abstract statements that only serve to obfuscate the true meaning of the author.¹⁰⁹ Writing in this manner is counterproductive,¹¹⁰ leading to more uncertainty in what can often be already complicated legal questions and relationships. Consistent

101 Re 2005:680.

102 Osbeck 2012:428. Searle (2011:3) suggests that “effective legal writing is legal writing that achieves its legal purpose”. She then lists several examples illustrating that the success of a letter is measured against its ability to bring about the desired outcome the writer had in mind. In my opinion, all of these illustrations support the assertion that writing can only be effective if it results in clear communication between the parties.

103 Searle 2011:1, 8. See also Davis (2000:99) who briefly discusses two cases where parties were forced to approach the court due to poorly drafted transactional documents.

104 Walsh 2006:5.

105 Walsh 2006:9.

106 Stilwell 2006:219.

107 Louw (2011:23) states the scope of the *contra proferentem* rule as “broadly, ... where there is doubt about the meaning of the contract, the words will be construed against the person who put them forward”.

108 It is interesting to note that the apostle Paul in Colossians 4:4 (Amplified Bible) prioritises clarity in his communication as a prayer petition.

109 There are, of course, situations where the writer intends to be vague and writes precisely with this aim in mind. See, for example, Feerick 1993:382; Assy 2011:387 at footnote 37.

110 Mencer 1995:219.

calls for more brevity¹¹¹ and clarity¹¹² in legal drafting are echoed in an ever-increasing number of national and international laws and treaties such as the American *Plain Language Contract Act* and the South African *Consumer Protection Act* 68 of 2008.¹¹³ Section 22 of the *Consumer Protection Act* requires drafters of any relevant documents to write in plain, understandable language. The protection offered by this section is repeated almost *verbatim* in section 64 of the *National Credit Act* 34 of 2005. The strict requirement in legislation such as these are intended to combat the rampant victimisation of illiterate and unformed consumers.¹¹⁴

The various statutory requirements to write in plain language have lent credence to the notion that legal writing must “[b]e short, be simple [and] be human.”¹¹⁵ It is in this regard that the Plain Language Movement (also referred to as the Plain English Movement)¹¹⁶ has made important strides in the promotion of clear legal (English) communication.¹¹⁷ In the aftermath of the considerable volume of work produced by prominent jurists such as Mellinkoff and later Kimble, it is generally accepted that modern legal writing should be fashioned in a “plain” manner.¹¹⁸ In so doing, the movement has been an influential agent for change in worldwide efforts to get rid of bad legalese. There can be little doubt that the legal fraternity has benefited from concerted efforts to encourage its members to reconsider the habitual and lazy act of copying and pasting archaic terms.¹¹⁹ It must, however, be noted that there has also been a growing concern under some legal academia that the emphasis placed on demystifying legal language could easily lead to an erosion of the sometimes necessary technical language of our profession.¹²⁰ Perhaps the challenge lies in correctly applying the

111 See, for example, Re 2005:681; Searle 2011:28-32; Stilwell 2006:225; Osbeck 2012:436-440; Davis 2000:97-99.

112 See, for example, Re 2005:667, 670, 681; Gauntlett 2009:24-25; Lewis 2009:22; Wimpey2006:161; Stilwell 2006:225; Osbeck 2012:427-436; Feerick 1993:387; Mencer 1995:219; Radulescu 2012:370; Davis 2000:97-99.

113 See Walsh 2012:6; Mencer 1995:220 at footnote 11; Searle 2011:2 at footnotes 5 and 6; Assy 2011:378.

114 See, for example, discussion in Van der Merwe (2008:71-86).

115 Rylance (1994:1), in quoting Sir Ernest Gowers.

116 See, for example, Feerick 1993:384; Assy 2011:377; Radulescu 2012:370-371.

117 Osbeck 2012:431.

118 Osbeck 2012:430; Hoffmann 2011:298-299; Lewis 2009:22-24.

119 Rylance 1994:164.

120 Gauntlett 2009:24. Rylance (1994:105) warns against “oversimplifying” complicated legal documents. Feerick (1993:384) argues that “institutional pressures, regulatory concerns and sophistication involved in complex business transactions often require the use of technical legal language”. Assy (2011:376-404) writes a fairly scathing critique of the Plain English Movement. Assy (2011:378) argues that the Plain English Movement has “propagated a false belief that the law could speak directly to its subjects merely by simplifying its language”. Assy is quoted in Radulescu (2012:370-371) and referenced in Osbeck (2012:431).

requirements of plain legal writing, not merely as an excuse to “dumb down” legal language,¹²¹ but as a means to educate and benefit its users.

7. Developing and clarifying legal analysis

As stated earlier, it is a well-accepted premise that good legal writing stems from good legal thinking. One would be hard-pressed to imagine a situation where professional and accurate legal writing is produced without being preceded by crisp legal thought and analysis.¹²² Feerick points to the lack of emphasis on the training of legal, and especially factual, analysis as a factor contributing to the bad writing skills of law students.¹²³ Newby supports this view and argues that legal writing courses at law-school level should avoid teaching basic English writing.¹²⁴ He contends that legal writing courses should instead focus on the law by teaching students the art of legal analysis.¹²⁵ This approach is echoed in South Africa where pupils to the bar are exposed to an analytical writing course instead of an English language course.¹²⁶ If this is done successfully, improved writing skills will be a by-product of empowering students with a better “understanding of legal problem-solving techniques”.¹²⁷ Mencer states that “quality legal writing cannot be separated from quality legal reasoning and analysis”.¹²⁸

There can be no doubt that writing is (or should be) governed by thinking.¹²⁹ An interesting question is whether the converse can also be true? Can well-considered legal writing serve as catalyst or incentive for proper legal analysis? It has indeed been argued that smart legal writing should not only gain from, but also be a benefactor of thorough legal analysis.¹³⁰ Greenbaum points to studies that have emphasised the importance of writing as a tool for cognitive development.¹³¹

From the available research,¹³² it would seem that legal writing serves a far greater purpose than simply being an instrument for conveying thoughts to paper. The process of considered drafting provides the ideal

121 Gauntlett 2009:24.

122 Ehrenberg 2004:1186. Vinson (2005:511) argues that we cannot expect law students to perfect their legal writing while they are still training their legal thought.

123 Feerick 1993:386.

124 Newby 1998:2.

125 Newby 1998:3.

126 Gottlieb 2007:18. See also Greenbaum & Rycroft (2014:96-98) on the importance of teaching critical thinking at university level.

127 Newby 1998:4.

128 Mencer 1995:228.

129 Lewis 2009:22. Bangeni & Greenbaum (2013:72) note that “the grasp of legal language cannot be separated from the acquisition of new conceptual frameworks”.

130 See, for example, Vinson (2005:511-513) and especially the authority referred to in footnotes 16 and 17. See also Greenbaum 2004:5, 6, 8.

131 Greenbaum 2004:8.

132 See, for example, Ehrenberg 2004:1185-1195; Vinson 2005:511-513.

opportunity to engage with the material at hand, “to grow and cook the message”¹³³ which the writer wishes to convey. Ehrenberg argues that “[t]he writing process serves both a creative function in generating ideas, and a critical function in allowing the writer to identify ambiguities and inconsistencies in her reasoning”.¹³⁴

8. Recording

Lawyers often prefer written communication to its oral counterpart for various reasons.¹³⁵ As argued earlier, the activity of writing promotes detailed analysis and reflection, and lawyers are more likely to convey their thoughts in a structured, logical, clear and precise manner than would be the case through (what can often be heated) oral argument. In so doing, good legal writing combats misunderstandings between parties and facilitates conflict resolution.

One of the most important functions of legal writing is to produce a record of legal activities.¹³⁶ On a micro scale, this may involve ensuring that all the wishes of the parties are correctly recorded in the written contract between them.¹³⁷ Careful minutes in corroboration of any oral communication entered into by opposing parties could prove vital in subsequent litigation between them. In terms of the bigger picture, the contemporary legal fraternity is immensely indebted to the labours of scribes, later known as notaries,¹³⁸ who were tasked with the creation and preservation of the written legal records of the earliest civilizations.¹³⁹ As is the case with historical records in general, legal history, and specifically the common law, is only available to us nowadays as a result of the dedicated work of these men and women.

The benefits implicit in the systematic and accurate recording of legal communication and process of judgements, laws and academic evaluation are tremendous. Legal development would not be possible without it. There is, however, a flip side to this fact. As is the case with the majority of benefits, it comes with responsibilities.

In our modern society, with its strong emphasis on the sharing of information through technology, written records are generally in the public domain.¹⁴⁰ Once someone has authored a written document, it is easily

133 Ehrenberg 2004:1164, quoting Elbow.

134 Ehrenberg 2004:1164.

135 See, for example, Ehrenberg 2004:1190.

136 Haupt & Boniface (2006:73) argue that “[r]ecord-keeping and file management are some of the most important tasks in any office”.

137 Stilwell 2006:219.

138 Law Society of South Africa Legal Education and Development Notarial Practice Guide (2006) 1.

139 Law Society of South Africa Legal Education and Development Notarial Practice Guide (2006) 1.

140 Court files, for example, are generally matters of public record.

preserved and accessed in electronic format. Nowadays, tens, hundreds or even thousands of people may view documents intended for a particular recipient. Another important consideration is that these documents are also generally set in stone; what you write will probably be accessible for an indefinite period of time, whether you like it or not. As Ehrenberg pointed out, “a work of writing is static and permanent in form ...”.¹⁴¹

The result is, as illustrated earlier by the letter in paragraph 4, that products of inaccurate legal writing may result in embarrassing its authors. Dishonest and unethical statements contained in written correspondence can, similarly, prejudicially affect the author’s reputation.

9. Persuasiveness

Careful writing is implicitly sensitive to the needs of the reader.¹⁴² All writers should consider their audience. However, good legal writing goes further than simply considering the reader; it is by its very nature persuasive writing.¹⁴³ This imperative goal of persuading the reader, be it the opponent, client, fellow academics, judge, arbitrator or any other decision-maker, is perhaps the single most important characteristic that distinguishes legal writing from all other forms of writing.¹⁴⁴ Good legal writers are aware of this fact and are attuned to the crucial role that language-effective legal writing plays in the power to persuade.¹⁴⁵ They know that their success depends on the persuasiveness of their writing.¹⁴⁶ Judge Ismail Hussain regularly lectures to legal practitioners on litigation techniques, where he emphasises that legal battles before court are won on the basis of which side’s evidence and argument is more persuasive.¹⁴⁷ The simple truth is that lawyers are employed to persuade a court to accept their client’s point of view, and this overarching goal should direct all their writing.¹⁴⁸

Good legal writing is clear and precise, and is understood by its recipient. A reader is unlikely to be persuaded by writing which she is unable to understand.¹⁴⁹ Likewise, readers are normally less persuaded by a dry recital of factual information than they would be with intelligent writing describing scenarios with which they are familiar.¹⁵⁰ Writers who are able

141 Ehrenberg 2004:1188.

142 Lewis (2009:23) advocates “[m]ak[ing] the task of the reader simple”.

143 Samuelson 1984:154-155.

144 <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> at paragraph 17 (accessed on 5 August 2014).

145 Feerick 1993:381.

146 Radulescu 2012:368.

147 Law Society of South Africa Legal Education and Development <http://www.issa.org.za/upload/LSSA%20Newsletter%2010%20October%202013.pdf> (accessed on 5 August 2014).

148 Van Blerk 1998:79.

149 <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> at paragraph 2 (accessed on 5 August 2014).

150 Osbeck 2012:450.

to explain their thoughts in an interesting, carefully considered manner have already gone some distance towards convincing the reader of their case, simply because the reader will be thinking: "That makes sense".¹⁵¹

Writers who produce sloppy and careless writing will find it difficult to be persuasive.¹⁵² Readers will not be impressed with or be persuaded to rely on the content of a narrative, if the form in which it is delivered serves to distract or to frustrate. Viewed from this perspective, the result of careless writing is the production of ineffective legal documents. The writer has wasted his or her own time and effort in drafting the document as well as that of the reader in having to plod his way through it.¹⁵³

10. Legal consequences

There are numerous legal consequences to legal documents.¹⁵⁴ I shall briefly address some of the most important consequences below, as a detailed and thorough exposition of the legal principles discussed in this paragraph falls beyond the scope of this article.¹⁵⁵ These consequences can be far-reaching and quite detrimental to the future reputation and career of a legal practitioner. Persons involved in the drafting of legal documents should always be vigilant to ensure that they do not fall foul of these concerns as a result of unethical or careless writing.

10.1 Agency

Legal representatives act as agents for their principals and their relationship is essentially regulated by the general principles of agency.¹⁵⁶ This implies that legal practitioners act on the instructions of their clients, serving their clients' interests when they have dealings on their behalf. Within the context of legal writing, this is a critical consideration, as statements made by agents could be enforced against their principals.¹⁵⁷ Nowhere is this principle to be observed more keenly than in the legal drafter's duty to prepare accurate pleadings and affidavits on behalf of his or her client, as parties will be firmly kept to the representations made in these documents in later trials. Even informal correspondence sent on

151 <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> at paragraph 4 (accessed on 5 August 2014).

152 Samuelson 1984:163.

153 Said writer's client also has to pay for substandard services.

154 For the sake of brevity, this article will only focus on some of the more relevant consequences. Other important legal consequences include the statutory presumptions pertaining to documents in terms of the *Criminal Procedure Act 51/1977*, as mentioned by Schwikkard & Van der Merwe (2010:301).

155 The purpose in mentioning these legal consequences is simply to draw the reader's attention to these realities in the hope of strengthening the argument to guard against careless writing.

156 De Klerk 2006:39.

157 Schwikkard & Van der Merwe 2010:318.

behalf of clients must be drafted with the highest degree of care, as it can be used to show inconsistency in evidence.¹⁵⁸ Morris is of the opinion that, in commercial civil trials, “at least 75 per cent of the cross-examination will turn on incautious and inaccurate statements in letters which have passed between the parties and, far too often, that have been written by the attorneys on one side or the other”.¹⁵⁹

It has also been a long-established doctrine of our law that principals can be held vicariously liable for the wrongful acts of their agents.¹⁶⁰ When legal representatives produce fraudulent¹⁶¹ or slanderous documents, dire consequences could accordingly arise for their clients. Inconsiderate (mis)representations and unsubstantiated warranties or guarantees made by dishonest or negligent agents can likewise be attributed to their principals.

10.2 Admissions

One of the consequences of the agency relationship is that admissions¹⁶² made by legal representatives, particularly written admissions made in a civil law context, are admissible against their clients.¹⁶³ Admissions are normally made explicitly, but there are circumstances where the courts could decide that an admission has been made by silence,¹⁶⁴ as “[s]ilence in the face of an accusation may amount to an admission when it forms the basis for a common sense inference against a party”.¹⁶⁵

Whether produced through an agent or originating directly from the client, confessions play a significant role in terms of the law of evidence. Formal admissions are made in court documents and serve to limit the disputes between the parties. Parties are kept to these statements. Informal admittances usually occur in correspondence addressed between parties outside of court, and serve as evidentiary material.¹⁶⁶ As such, legal drafters will be well advised to avoid making any unnecessary and unwittingly, unintended admissions as a result of careless writing.

158 Searle 2011:1.

159 Morris 2010:50.

160 See, for example, Harms 2009:27.

161 Harms (2009:215) sets out the essential allegations for a claim based on fraud as, *inter alia*, “[a] representation by the other party or his ... agent ... The principal’s liability for the fraud of an agent does not depend on the principal’s own fraudulent conduct or knowledge”.

162 Schwikkard & Van der Merwe (2010:305) define an admission as “a statement made by a party ... which is adverse to that party’s case”.

163 Schwikkard & Van der Merwe 2010:319.

164 Rule 22(3) of the *Uniform Rules to the Supreme Court Act 59/1959* and rule 17(3) of the *Rules to the Magistrates’ Courts Act 32/1944* are examples of statutes that dictate that failure to deny facts contained in pleadings will be deemed to be an admission thereof.

165 Schwikkard & Van der Merwe 2010:307.

166 Schwikkard & Van der Merwe 2010:305.

10.3 Plagiarism

Plagiarism is the theft of another person's intellectual property.¹⁶⁷ This is usually observed where a writer fails to give proper acknowledgement to the words and ideas of intellectual predecessors to his writing. It is especially in the field of legal research and academic writing where writers should proceed with care to avoid falling into this trap,¹⁶⁸ although lawyers and legal practice are not immune to this threat.¹⁶⁹ Samuelson warns against the temptation to "track closely the language of a case or an article".¹⁷⁰ Even when writers include many footnotes, without having internalized and personalized the content of the material, this practice still amounts to plagiarism.¹⁷¹

If found guilty of plagiarism, students could face academic penalties ranging from the forfeiture of course credits to expulsion from the teaching institution.¹⁷² More problematic than the immediate loss of credits or learning opportunity is the long-term implication of receiving a record of being found guilty of dishonest conduct, as this will certainly impede their later attempts to be admitted to the profession.¹⁷³ The effect of plagiarism allegations against faculty members is even more serious, as their current and future employability hinges on their academic integrity and their ability to contribute original material to their field of study.¹⁷⁴ Legal practitioners have been publicly censured and admonished for their plagiaristic misconduct.¹⁷⁵

167 Mawdsley (2010:77 at footnote 1) quotes Weidenborner and Caruso's definition of plagiarism as "a kind of theft [whereby] one writer steals the ideas or even the exact words of another writer without giving credit where it is due".

168 Schiess 2002:538.

169 Schiess 2002:539.

170 Samuelson 1984:162.

171 Samuelson 1984:162.

172 See e. g. 2014 General Yearbook of the University of Stellenbosch, Part 1, at para 9.

173 See, for example, *Attorneys Act 53/1979*:section 15: "Admission and readmission of attorneys. – (1) Unless cause to the contrary to its satisfaction is shown, the court shall on application in accordance with this Act, admit and enrol any person as an attorney if – such person, in the discretion of the court, is a *fit and proper person* to be so admitted and enrolled". See also Schiess 2002:538-539.

174 Mawdsley 2010:78.

175 Schiess 2002:539.

10.4 Perjury

Perjury¹⁷⁶ is a criminal offence.¹⁷⁷ While careless drafting and signing of documents could certainly expose legal practitioners to charges of perjury, this consequence is more likely to arise due to unethical writing. In terms of the *Justices of the Peace and Commissioners of Oaths Act 16 of 1963*,¹⁷⁸ a person who knowingly made an untruthful written statement in the form of a sworn affidavit, in front of a commissioner of oaths, could be guilty of perjury. Moreover, a closely related criminal offence is that of subornation or incitement¹⁷⁹ of perjury. This offence is directed at any person who wilfully and intentionally persuades another to lie in a statement made under oath.¹⁸⁰ Perjury and incitement to perjury also overlap with a number of other offences such as defeating or obstructing the course of justice, or attempting to do so.¹⁸¹ Lawyers who stoop to dishonest behaviour in the drafting of affidavits could, therefore, find that they not only overstepped the ethical boundaries of their profession, but could, in fact, also be prosecuted for criminal conduct.

10.5 Defamation and iniuria

Section 10 in chapter 2 (The Bill of Rights) of the *Constitution of the Republic of South Africa 1996*¹⁸² entrenches every person's right to the protection of his or her human dignity.¹⁸³ This constitutional imperative represents a well-recognised and developed field of personality rights in international private law.¹⁸⁴ Incautious and defamatory allegations contained in legal documents, typically in letters between parties, could give rise to actions based on insult (*iniuria*) or defamation.

It is trite law that a cause of action based on insult or defamation requires an element of publication, and that such publication often occurs in writing.¹⁸⁵ Correspondence drafted and sent in the heat of the moment,

176 For purposes of this article, it is not essential to differentiate between the so-called common law and statutory forms of perjury. For a detailed discussion, see South African Criminal Law and Procedure:129-162. http://books.google.co.za/books?id=Ou2MUJWCTwEC&pg=PA135&lpg=PA135&dq=perjury+south+africa+law&source=bl&ots=NUO8POI2k8&sig=2e7rDFFFxw5BRdi2q39uctRTwag&hl=en&sa=X&ei=oeeiU56mGYm_ygOC9IHIDg&ved=0CBsQ6AEwAA#v=onepage&q=perjury%20south%20africa%20law&f=false (accessed on 23 June 2014).

177 Skeen paragraph 211; Snyman 1992:363.

178 In section 9 of the *Act*.

179 Skeen at paragraph 216 notes that there is a slight difference between mere incitement to commit perjury, and subornation, which is the completed act of having successfully incited another to commit perjury.

180 Skeen at paragraph 216.

181 Skeen at paragraph 211.

182 *Constitution of the Republic of South Africa* 108/1996.

183 "Everyone has inherent dignity and the right to have their dignity respected and protected."

184 Neethling & Potgieter 2010:330-331.

185 Harms 2009:162, 223; Neethling & Potgieter 2010:332; 346; Wimpey 2006:164.

without proper consideration being afforded to the effect it will have on the *fama* or *dignitas* of the recipient, could quite easily ruin the reputation or bank account of the writer.¹⁸⁶ Legal writers should, therefore, refrain from launching personal attacks on opposing parties, their legal representatives or judicial officers.¹⁸⁷ There are but limited defences against a *bona fide* claim of *iniuria* or defamation,¹⁸⁸ and lawyers will be well served in marking their correspondence as “private and confidential” and seeing to personal delivery where they are concerned that the content of their documents could be perceived to be defamatory in nature.¹⁸⁹

10.6 Estoppel by representation

The doctrine of estoppel by representation “applies where a person makes a representation to another, who, believing in the truth thereof, acts thereon to his prejudice”.¹⁹⁰ In these circumstances, the person who made the representation is barred or estopped from relying on any other position, thereby denying the accuracy of the representation.¹⁹¹ Estoppel can be raised as a substantive defence against a plaintiff’s cause of action, and legal representatives could potentially ruin their client’s case by written statements made in their capacity as agents of the plaintiff. Responsible legal writers should, therefore, take great care to ensure that the representations they make in their writing are, in fact, correct so that they may convey that which they intend to convey.

10.7 Parol evidence and “without prejudice” correspondence

The parol or extrinsic evidence rule¹⁹² confines a court to the consideration of the content of the document before it to ascertain the ambit of the agreement. Any contradictory terms, which may have been agreed upon verbally or in written correspondence in anticipation of reaching a final agreement, will be ignored if those terms were omitted from the eventual document. This rule emphasises the importance of thorough legal drafting.¹⁹³

Legal writers are, therefore, required to have a clear understanding of the context within which they are engaged in legal correspondence. *Bona fide* offers made during the course of settlement negotiations, which are absent from the final contract between the parties, could be affected by

186 See, for example, Schiess 2002:544-545.

187 Schiess 2002:543.

188 See Harms 2009:167-70.

189 Wimpey 2006:164.

190 Schwikkard & Van der Merwe 2010:36.

191 Harms 2009:195.

192 Schwikkard & Van der Merwe 2010:37-38.

193 Rylance 1994:126.

the parol evidence rule.¹⁹⁴ Moreover, such offers are normally protected from later disclosure under the privilege rule, in order to encourage candid negotiation and settlement between disputing parties without the threat of these statements being used against them later at trial.¹⁹⁵ Judicial awareness of these offers is not only excluded in terms of the law of evidence, but documents containing *bona fide* offers of settlement will also be excluded from the process of discovery during the preparation-for-trial phase.¹⁹⁶

10.8 Duty to disclose

When drafting pleadings and affidavits, parties and their legal representatives have an ethical legal duty to disclose all the relevant facts to the court. This includes facts that may be negative or even detrimental to their client's case.¹⁹⁷ This duty is especially relevant in the case of *ex parte* applications, where the court relies on the "utmost good faith" of the only party present before it.¹⁹⁸

The legal practitioner's duty to disclose is subject to his legal professional privilege and his client's right to confidentiality.¹⁹⁹ As discussed earlier, the legal practitioner's primary responsibility is, however, towards the court and the legal system and, as such, a party will not be allowed to conceal unethical or illegal conduct behind a veil of confidentiality and privilege.²⁰⁰

10.9 Formal objections to pleadings and affidavits

The law of civil procedure is concerned with the formal enforcement of substantive rights.²⁰¹ It dictates the processes to be followed to advance a matter from the point where rights have accrued to where judgement is entered and enforced against a party. In South Africa, with its largely adversarial system,²⁰² much of this process is facilitated through the drafting and exchange of pleadings (in the case of actions) or affidavits (in applications) between the parties.

The exercise of drafting these legal documents on behalf of a client requires exceptional skill and care by legal representatives. During the subsequent trial, clients will be held bound by the allegations, concessions and denials contained in these documents, as they either constitute

194 Schwikkard & Van der Merwe 2010:37.

195 Schwikkard & Van der Merwe 2010:322-323; Wimpey 2006:167-169.

196 Theophilopoulos *et al.* 2012:289.

197 Steenhuisen 2006:177.

198 Theophilopoulos *et al.* 2012:134.

199 Steenhuisen 2006:177.

200 De Klerk 2006:42.

201 Peté *et al.* 2011:xxxv.

202 Schwikkard & Van der Merwe 2010:5.

evidence (in the case of affidavits) or limit and define the *facta probanda* which will be proved at trial (in pleadings).²⁰³

Affidavits are subject to applications to strike out or to expunge any “scandalous, vexatious or irrelevant” allegations.²⁰⁴ Poorly drafted pleadings are also vulnerable to applications to strike out.²⁰⁵ In addition, the court rules provide for the raising of exceptions against entire pleadings on the basis that they fail to disclose a legal cause of action (or defence)²⁰⁶ or that they are “vague and embarrassing”.²⁰⁷ The production of non-conforming pleadings, as well as affidavits, can also be instrumental in a party having to defend themselves against an application to set aside an irregular step.²⁰⁸

Rules governing the drafting of legal documents are often cumbersome and very technical in nature.²⁰⁹ Even cautious writers will find it an arduous task to avoid all challenges to their pleadings.²¹⁰ For those situations where legal drafters stumble by making *bona fide*²¹¹ errors in their writing, the rules fortunately provide for the possibility of amending offending pleadings.²¹² However, where these amendments result from careless drafting, prejudicial cost orders are likely to follow against the drafter thereof.²¹³

10.10 Professional negligence

“Being able to write clearly is an aspect of an attorney’s duty to act with skill.”²¹⁴ Legal practitioners who fail to prioritize their professional responsibility in their written works are at serious risk of facing negligence claims from irate clients, as incautious drafting invariably leads to missed

203 Theophilopoulos *et al.* 2012:159; Steenhuisen 2006:192.

204 Rule 6(15) of the *Uniform Rules to Act 59/1959*; rule 55(9) of the *Rules to Act 32/1944*.

205 Rule 23(2) of the *Uniform Rules to Act 59/1959*; rule 19(2) of the *Rules to Act 32/1944*.

206 Depending on whether the pleading is drafted on behalf of the plaintiff or defendant.

207 Rule 23(1) of the *Uniform Rules to Act 59/1959*; rule 19(1) of the *Rules to Act 32/1944*. For a discussion of what constitutes “vague and embarrassing” allegations, see, for example, Van Blerk (1998:36); Theophilopoulos *et al.* (2012:219-221).

208 Rule 30 of the *Uniform Rules to Act 59/1959*; rule 60A of the *Rules to Act 32/1944*. For a discussion of what constitutes an irregular step, see, for example, Theophilopoulos *et al.* (2012:228-230).

209 See, for example, rule 18 of the *Uniform Rules to Act 59/1959*.

210 Van Blerk 1998:102.

211 The applicant must show “a reasonable explanation for the proposed amendment”. See Theophilopoulos *et al.* (2012:273) and the authority quoted therein.

212 Rule 28 of the *Uniform Rules to Act 59/1959*; rule 55A of the *Rules to Act 32/1944*. Note that affidavits cannot be amended, but have to be corrected by the filing of supplementary affidavits.

213 Theophilopoulos *et al.* 2012:278.

214 Searle 2011:2.

opportunities, unnecessary expenses and potentially serious financial losses.²¹⁵ When these damages can be attributed to a legal representative's negligence in failing to act with the "knowledge, skill and diligence of an average practising attorney",²¹⁶ they are unlikely to find much sympathy from the legal system they are supposed to promote. The same is true of practitioners guilty of ethical misconduct.

11. Legal writing as an artistic activity

There is a further aspect to briefly consider in the quest to improve the quality of one's legal writing, as it affords the writer the opportunity to create a thing of beauty. When legal writing is crafted with the utmost care and diligence, it can rise above the norm and has the potential to transcend to something more than mere legal writing. An exceptional product of writing prowess should be an engaging,²¹⁷ compelling and rewarding read. After all, "[a] good letter is like a good play".²¹⁸

Osbeck suggests that the very best writing can be identified by a trait that he defines as elegance.²¹⁹ He argues that human beings inherently appreciate things of beauty, quoting among others the philosopher George Santayana who states that we have "in our nature a very radical and wide-spread tendency to observe beauty, and to value it".²²⁰ Osbeck contends that this admiration of aesthetically beautiful things in general includes an appreciation of documents (being products of our innate creative nature) that are "beautifully written".²²¹ We are thus drawn to works of art, and appreciate that which "appeals to our aesthetic sensibilities".²²²

Examples of legal documents that could be classified as art are normally restricted to the written judgements and commentaries of exceptional jurists. Osbeck analyses works by judges Jackson, Brandeis and Easterbrook and proposes them as American "models of great legal writing".²²³ Similarly, every other jurisdiction will be able to point to examples of their own legal professionals who are widely regarded as artists in their field.²²⁴

215 See, for example, Rylance (1994:110) who refers to "boilerplate terms" which, if omitted without good reason, could lead to professional negligence lawsuits. See also Feerick 1993:383-384.

216 *Elizabeth Adriana Croucamp v Schoeman Maree Inc unreported*, OPD case no 4056/2006, 16 October 2008, as quoted in Searle (2011:2).

217 Osbeck (2012:440-456) identifies the degree to which the reader engages with material as a crucial factor in determining its quality.

218 Rood 2006:20.

219 Osbeck 2012:456-464.

220 Osbeck 2012:457.

221 Osbeck 2012:457.

222 Osbeck 2012:461.

223 Osbeck 2012:458-461.

224 In South Africa, the writings of renowned jurists such as Corbett and Holmes are held in high esteem.

There is, however, a very valid and important counterpoint to bear in mind. Legal texts are, for the most part, practical in nature.²²⁵ Osbeck rightfully questions whether the time and skill required for elegant writing is justified within the context of legal practice, where financial constraints limit the amount of effort that legal drafters can afford to invest in their work.²²⁶ As Rylance and others²²⁷ contend, legal writing is generally formulated with the aim to achieve very functional purposes, and not to amuse, impress or entertain the reader. Not every writer has the time and ability, or the inclination, to craft a Shakespearian masterpiece every time they put their pen to paper.²²⁸

It is obvious that legal drafters should prioritise their duty to produce accurate and persuasive documents to further the interests of their clients.²²⁹ In circumstances where these two considerations are in competition, loyalty to the substantive accuracy of legal texts should always trump the drive to instil aesthetic elegance in one's writing. The harsh reality of legal practice will often necessitate that such a choice be made. The context of the majority of legal documents will also render the luxury of artistic prose obsolete.²³⁰ This is, however, not always the case. There will often be opportunities where the drafter of a document will be able to vastly improve its quality with a small investment of time and effort.²³¹ Legal drafters willing to make the sacrifice required to better their writing will probably find it to be a self-rewarding exercise. Like a beautiful, lovingly created painting, an elegant piece of writing can be enjoyed by both the intended beneficiary and the creator.

12. Conclusion

I have discussed ten of what I consider to be the most important reasons to guard against the onset of complacency with regard to one's own writing abilities. It is hoped that this article will contribute to the growing concern²³² for the importance of sound theoretical teaching and skills development training in professional legal writing.

The good news is that legal writing is a skill that "can be learned and can be taught".²³³ Those who are not naturally gifted writers can acquire this skill that can be improved with practice.²³⁴ Universities and law schools

225 Briefs, pleadings, letters, contracts, and so on are generally written to protect or promote the interests of a party.

226 Osbeck 2012:458.

227 See, for example, Stilwell 2006:225; Searle 2011:41.

228 As pointed out by Osbeck (2012:458).

229 Re 2005:680.

230 Osbeck 2012:464.

231 Sometimes just running a spellcheck will dramatically improve the quality of one's writing, as noted earlier.

232 See, for example, Ehrenberg 2004:1164.

233 Re 2005:675.

234 Harms 2009:xv.

must accept the responsibility that they are primarily tasked with this challenge,²³⁵ although there is undoubtedly a need for the legal profession to join with academia in an effort to improve legal writing.²³⁶ It is a vital skill for any legal practitioner; teaching students to write like a professional should be one of the primary aims of legal education.²³⁷

[L]awyers must be more than walking photocopiers and note-takers. They should be accomplished writers – meaning strategic writers, tactical writers. It's important to be strategic and be a tactician on your feet in the courtroom — it's just as important to be strategic and be a tactician on the page. It takes hard work, but the finished product is worth the effort.²³⁸

If the responsibility to teach accurate and ethical legal writing is shirked, future legal writers will be hamstrung in the execution of their duties by the bad writing habits we tend to pick up in our formative years.²³⁹ Moreover, by allowing a culture of careless legal writing to infiltrate our profession, legal educators are contributing to the devastating results of bad legal writing stated in this article.²⁴⁰ Future lawyers who are unable to engage in professional written communication will harm their clients and could be found to be unfit to practise law;²⁴¹ this could lead to their dismissal.²⁴² It is thus no exaggeration to claim that the quality of one's writing can make or break one's legal career.

235 See, for example, Re 2005:685-687; Greenbaum 2004:7, 12; Osbeck 2012:466; Newby 1998:1; Ehrenberg 2004:1199.

236 Vinson 2005:509, 521; Ehrenberg 2004:1199.

237 Osbeck 2012:466.

238 <http://supremeadvocacy.ca/articles/strategic-legal-writing-preparing-persuasive-documents/> at paragraph 1 (accessed on 5 August 2014).

239 Fershee 2011:7; Pillay 2007:32.

240 Mencer (1995:217) submits that “few professions exist in which parties are likely to be more drastically affected [by poor writing]. Results are sometimes devastating”.

241 See, for example, rules 14.3 and 14.10 read with rule 14.2 of the *Rules of the Law Society of the Cape of Good Hope*. See also Hoffmann 2011:197-198, 296.

242 See Walsh (2006:5) who refers to the case of *Grigsby v. Kane*, 157 Fed. Appx. 539, 2005 U.S. App. LEXIS 27299 (3rd Cir. 2005), in which an attorney's service was terminated after her employers “were specifically concerned about [among other things] her poor written work product (both in terms of substantive legal errors and proofreading problems)”.

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