Avoid Bad Habits

Legal Writing in the 21st Century

By Stephanie C. Zimmerman

There is no denying that technology has affected legal writing. Gone are the days of the Dictaphone and typewriter Now, most lawyers exclusively use a computer to prepare their writing projects. While personal computers unquestionably have made legal drafting easier and faster, certain "old school" writing techniques remain necessary At the same time, some "new school" methods have the potential to create bad habits. An effective and efficient writer knows how to combine the best attributes of both schools of practice.

Old School Techniques

It is no accident that many refer to dictation as an art. True, it is easier to speak your thoughts into a recorder than it is to commit those same thoughts to the page. But, dictation requires preparation, focus, and organization. An attorney who dictates must know the law and his or her arguments before he or she begins.

The best technique you can borrow from attorneys who dictate is to start with an outline It is foolish to presume that someone can produce high-quality, written material without a plan. Yet, far too many attorneys who use only a computer to draft their work begin typing the first sentence of their project without knowing what they will say in the next sentence, much less the next paragraph.

A diligent lawyer will prepare a written outline of both the fact section and the argument section of his or her motion or brief. If you don't know where to begin, start by outlining your facts in chronological order. Then, reorganize those facts into an order that best helps you write the fact section in a way that has the reader convinced that you are correct when he or she has finished reading the section. You want the reader on your side before he or she even reads your arguments.

When outlining your arguments, begin with the headings. Your headings should provide the reader with a roadmap of the issues that you will address and your stance on those issues. When building that roadmap, it is generally best to lead with your strongest argument and arrange the remainder of your arguments so that each argument naturally builds on the one before it.

The second best lesson that you can learn from "old school" lawyers is to revise your written product with pencil on paper after putting it to the side for a short time. An attorney who dictates or handwrites his or her work usually has someone else type his or her document. When the attorney reviews the prepared document, he or she assesses it just as a judge would, with a fresh pair of eyes. In contrast, if you solely use a computer to revise your work, without taking a break between versions, you will less aptly notice the flaws in your writing. Moreover, it is easier to catch typos and formatting errors if you edit your work on paper Also, you can best appreciate how each argument fits into the bigger picture with a paper copy than you could by reading a small portion of your work on a screen.

New School Tools

"New school" lawyers make technology work for them Submitting hyperlinked versions of briefs or motions is one effective "new school" tool. A hyperlinked brief gives a court access to relevant pleadings, exhibits, or case law simply by clicking on the party's citation to that material in the brief. Many courts permit the filing of hyper linked briefs, and the Second Circuit has observed that such briefs are "more versatile" and "more useful" than standard briefs. *Phansalkar v. Andersen, Weinroth & Co., L.P.*, 356 F.3d 188, 190 (2d Cir 2004). However, an attorney who considers filing this kind of brief must carefully choose a format that is easy to navigate You will lose all the benefits of hyperlinked briefs if a judge becomes frustrated while trying to read your arguments.

A more frequently used "new school" tool is the copy and paste function in word processing programs. Not only can a writer easily reorganize his or her motion or reuse portions of a prior brief, someone can now copy and paste into a document case quotations with citations directly from Westlaw or LEXIS. Unfortunately, this tool can be abused. For example, in *U.S. v. Bowen*, 194 Fed. Appx. 393, 402 n.3 (6th Cir. 2006), the Sixth Circuit discovered that an attorney had copied the analysis of a published opinion verbatim into his brief without citing the opinion. Referring to "this outright plagiarism," the court found the attorney's behavior to be "completely unacceptable" and issued an admonishment to all attorneys who are tempted to "cut and paste" analysis into their briefs. *Id.*

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Approximately one month after Judge Scheindlin issued an amended opinion and order in *Pension Committee*, Judge Lee H Rosenthal handed down the *Rimkus* decision, which also addressed spoliation sanctions. *See Rimkus Consulting Group, Inc v. Cammarata*, 688 F Supp. 2d 598, No. H-07 0405, 2010 WL 645253 (S.D. Tex. Feb. 19, 2010). Judge Rosenthal, the current chair of the Federal Judicial Conference Advisory Committee for Federal Rules of Civil Procedure, was directly involved in developing the 2006 e-discovery amendments to the Federal Rules of Civil Procedure In other words, Judge Rosenthal is a recognized authority on modern discovery issues.

While certain commentators have remarked that several principles set forth in *Pension Committee* and *Rimkus* are at odds, the discovery duties and obligations recounted in *Rimkus* are largely consistent with those in *Pension Committee*. The two judges confronted different facts, as Judge Rosenthal explicitly acknowledged: "The spoliation allegations in the present case are different. They are allegations of willful misconduct· the intentional destruction of emails and other electronic information at a time when they were known to be relevant to anticipated or pending litigation." *Rimkus*, 688 F Supp. 2d at 607, 2010 WL 645253, at *13; *see also* 688 F Supp. 2d at 611, 2010 WL 645253, at *16 ("Unlike *Pension Committee*... this case involves allegations of intentional destruction of electronically stored evidence "). Of course, sanctions for spoliation will largely depend on the conduct at issue. *Pension Committee*, 685 F Supp. 2d at 471, 2010 WL 184312, at *18. *Rimkus* reflects this truism—with one particularly significant difference based on the law as interpreted by the Fifth Circuit

In *Rimkus*, the parties subject to the sanctions motions intentionally deleted e-mails and attachments after the duty to preserve arose and attempted to conceal the destruction. *Rimkus*, 688 F Supp. 2d at 611, 2010 WL 645253, at *16. Judge Rosenthal concluded that the appropriate sanction under the circumstances was to permit the jury to hear evidence of the misconduct, including (1) evidence of the deletion of electronic information, and (2) the discovery responses in which parties distorted the truth concerning the deletions. The court further determined that it would instruct the jury that if it "finds that the defendants deleted emails to prevent their use in litigation it may, but is not required to, infer that the content of the deleted lost emails would have been unfavorable to the defendants." 688 F Supp. 2d at 646, 2010 WL 645253, at *46.

In *Pension Committee*, Judge Scheindlin held that "[r]elevance and prejudice *may be presumed* when the spoliating party acted in bad faith *or in a grossly negligent manner*" *Pension Committee*, 685 F Supp. 2d at 467, 2010 WL 184312, at *14. (emphasis added). Judge Rosenthal, however, did not believe that she could award an adverse inference instruction based on anything less than intentional misconduct "In the Fifth Circuit and others, negligent as opposed to intentional, 'bad faith' destruction of evidence is not sufficient to give an adverse inference instruction and may not relieve the party seeking discovery of the need to show that missing documents are relevant and their loss prejudicial." *Rimkus*, 688 F. Supp. 2d at 615, 2010 WL 645253, at *20. Judge Rosenthal further observed that the "*Pension Committee* approach" to sanctions could conflict with United States Supreme Court precedent, which "may also require a degree of culpability greater than negligence " *Id.* (citing *Chambers v. NASCO, Inc.*, 501 U.S. 32, 43–46 (1991)).

Finally, while Judge Scheindlin's jury instruction in *Pension Committee* included informing the jury that plaintiffs' discovery failures "resulted from their gross negligence," Judge Rosenthal left the determination of bad faith to the jury· "[T]he jury will not be instructed that the defendants engaged in intentional misconduct. Instead, the instruction will ask the jury to decide whether the defendants intentionally deleted emails and attachments to prevent their use in litigation." *Rimkus*, 688 F. Supp. 2d at 620, 2010 WL 645253, at *25. Judge Rosenthal's observations concerning the potential degree of prejudice that the moving party suffered directly influenced her sanction determination. Specifically, the court noted that the moving party had "extensive evidence to use in this case," and the facts indicated that some of the deleted information was "helpful" to the spoliators' positions. 688 F Supp. 2d at 646, 2010 WL 645253, at *46.

Moving Forward

Regardless of the standard that a court may apply in issuing severe sanctions in a particular jurisdiction, ignoring *Pension Committee*'s preservation, collection, and production guidelines may well amount to rolling the dice with your clients' discovery obligations and your professional responsibilities. An erosion of credibility with a court is sanction enough. Given Judge Scheindlin's demonstrated influence on modern discovery in general, and electronic discovery in particular, litigators should view the principles announced in *Pension Committee* and *Zubulake* as an integral part of a sound offensive and defensive discovery playbook.

Litigation is rarely inexpensive, and discovery costs often consume the vast majority of counsel's most carefully crafted budgets. The best time to discuss litigation and discovery costs with clients is, appropriately, when counsel provide their initial written litigation hold directives. Complying with the principles of *Pension Committee* will likely increase the time and resources that clients devote to discovery. Counsel must help clients understand that the costs of adhering to *Pension Committee* are likely far less than those that potentially await if they do not. FD

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The worst habit that lawyers can develop today with respect to their writing is depending on the spell check or grammar check functions of word processing programs. Those tools will not catch that "trail" should be "trial," or "statue" should be "statute " Do not let these tools lull you into a false sense that your work is polished.

In sum, take a cue from "old school" lawyers by having a plan before you write and by editing your work on paper after some time has elapsed. And, take advantage of technology that enhances your written product, but don't depend on it to do the work for you. FD