

**Atlanta Consumer Bankruptcy
Skills Training
Written and Oral Advocacy
June 4, 2009**

Writing Skills - Part I

Preparation, Structure and General Principles

“A writer is a person for whom writing is more difficult than it is for other people.”

Thomas Mann

**James E. Massey
U. S. Bankruptcy Court
N. D. Georgia**

A. Overview

There is no significant tax on the mind in writing down, without preparation, whatever pops into one’s head. Writing well, on the other hand, requires strenuous mental effort. To be understood – to convey a message – a writer must have something to say. The “something” is what the writer is thinking. In his essay “On Style,” Arthur Schopenhauer argued that “words [must be] so set down that they directly force the reader to think precisely the same thing as the author thought when he wrote them.” If the writer’s thinking is muddled, however, so will be his written product. Thus, writing well is difficult in part because thinking clearly is difficult.

The purpose of this paper is provide guidance in thinking about the process of writing, particularly in the preparation of documents requesting a court to grant some kind of relief. Included are tips on how to write more clearly and how to improve a draft by careful proof-reading and by questioning oneself about the accuracy, logic and meaning of the writing.

No law requires members of the legal profession to write turgid, complex and ambiguous prose. Good legal writing is simply good writing. As Floyd Abrams put it, “[t]he difficult task, after one learns how to think like a lawyer, is relearning how to write like a human being.”

Thinking About Writing	
<u>What You Try To Do When You Write</u>	<u>What The Reader Does In Reading</u>
É" F guetkdg."gz rnckp."pqvkh{."uvcvg	É"Dgeq o gu"kpht o gf"qt"pqv
É"Cpcn{ g."ctiwg."rgtuwcfg	É"Dgeq o gu"eqpxkpegf"qt"pqv
<u>What You Convey to The Reader</u>	<u>What the Reader Comprehends</u>
É" Y jcv"{qw"cevwcm{"uckf"	É" Y jcv"{qw"uckf"{qw"ygtg"vj kpmkpi

B. Preparation - The Template for Obtaining Relief

Documents filed in court, like any writing, are intended to convey information. Some provide notice of some fact, such as a notice of a deadline or notice of a hearing or of a right to respond to a motion; other documents, such as schedules or a statement of financial affairs, inform by providing background information. Still others describe an agreement or proposed agreement such as a plan, a disclosure statement in a Chapter 11 case or a consent order.

Motions and complaints seek relief of some sort and responses to motions and answers to memoranda of law argue the issues presented.

In this Part I, the focus is on the template for documents that tee up a legal dispute such as motions and complaints and on some basic techniques for more effective writing. Part II addresses the fundamentals of preparing a persuasive brief. Finally, Part III applies some of the basic principles of effective writing to familiar types of bankruptcy pleadings.

The lawyer's knowledge of facts will inform her judgment about what law may be applicable and her knowledge of the law will inform her questions about what facts are relevant

A law professor teaches in a context of known facts – those stated in cases or imagined in hypothetical situations. A practicing attorney, on the other hand, has to dig out the facts and figure out which ones are important and which ones may be ignored. He must identify the applicable law. Then applying the law to the facts, he must advise the client on the most appropriate course of action.

In the context of litigation, the attorney must construct a persuasive argument for the desired result. The preliminary work in preparing a motion, complaint or other document in which relief is demanded is thus focused on making sure that the appropriate claim for relief is selected, that the elements of the claim are identified and that those elements are supported by factual allegations. When the facts alleged satisfy the elements of the law in question, we say that the pleading states a claim for relief.

The elements of a claim for relief are general descriptions or summaries of what the actual facts would show. For example, the elements of a claim to determine that a debt is not dischargeable based on a false representation are (1) an untrue statement, (2) made with intent to mislead, (3) on which the plaintiff relied (4) and was justified in doing so, (5) causing the plaintiff to suffer damage. To win the case, the lawyer for the plaintiff or movant must allege and introduce evidence proving facts that satisfy each element of the claim. The job of the lawyer for the defendant or respondent is to refute an essential fact or to point out that an essential fact has not been alleged or proven.

Imagine an array of boxes (like post-office boxes viewed from the side without doors). Each column of boxes is labeled at the top with the description of an element of a claim. Dgpgcvj "gcej "ncdgn"ctg"dqzgu."gcej "qpg"c"eqpvckpgt"hqt"ncevu0""Qpg"qt" o qtg"dqzgu"kp"gcej "eqnw o p must be filled with enough facts to prove that element of the claim. If an element of the claim is missing, that is, the array lacks a column labeled with a description of that element, the array will not state a claim for relief, notwithstanding that facts exist that could prove the missing element. If a column's label correctly describes an element of the claim, but the boxes in that column are

empty, the array does not state a claim for relief, notwithstanding that all of the other boxes under all other elements are filled with facts as well as they could possibly be filled.

The process of stating a claim for relief is so basic to law practice that it may seem pedantic to explain the concepts in this much detail to experienced attorneys. All too often, however, attorneys appearing in bankruptcy cases fail to get the relevant facts and fail to fully understand the applicable law. While this phenomenon is not confined to consumer lawyers or to lawyers in small firms, it is somewhat more common in consumer cases. Cases on “mass” not lulled to sleep by the routines needed to deal with the volume of such cases but instead have carefully mastered the facts in their cases.

The Claim For Relief				
Element 1	Element 2	Element 3	Element 4	Etc.
Fact A	Fact C	Fact F	Fact G	Etc.
Hcev"D	Hcev"F		Hcev" J	Gve0
	Fact E			Etc.

C. Preparation - Getting the Facts

Every lawyer with any experience knows that if you don’t get the facts, the facts will get you. The first rule of getting the facts is to **ASSUME NOTHING** allegation on a reliable source. A reliable source is one that can be used to prove a fact in court. Ask more than once, “how do I know that is true?”

Every party has a name that identifies and distinguishes that party. Find out what that name is and use it. “Chase Mortgage” is not the full name of the company those words are meant to describe. Many large companies, particularly in the finance industry, have numerous

uwdukfcktkgu" ykvj"vjg"uc o g" y qtfu"kp"vjgkt"pc o gu"Vjwu."vjg"pc o g"öDgpgkkekcnö"cnqpg"ku"pqv
beneficial in figuring out who the real party in interest is. Corporate names end with Inc., Corp., LLC, etc. Similarly, if the petition shows the debtor is “John J. Schmidt, Jr.,” don’t leave off “Jr.” Failure to find out the complete name of a party can have fatal consequences, of which the first and most important is insufficient service of process. The wrong name may point to the wrong address, and the wrong address could mean the debt is not discharged.

Read documentary evidence critically. Is the meaning plain or is there ambiguity? Can the words be fairly read to have a different meaning in different contexts? Make up facts to test a hypothesis. Make a note of where you find relevant provisions so that you can refer to them if necessary when you begin to write.

The word “interrogate” has a certain biting connotation. Alleged or possible facts have to be tasted, chewed and digested to get to the truth. Interrogate witnesses, including your own
enkgpv" Cpcn{ |g"cpf." y jgtg"rtwfgpv"vq"fq"uq."swguvkqp" o g o qt{."cuuw o rvkqpu." o qvkgu"cpf
reasoning.

Examine the available information for inconsistencies. If one document refers to the note dated February 1, 2001 and another document dealing with the same transaction refers to a note dated March 1, 2001, were there two notes? If the client says that the arrearage includes more than missed payments, does the security deed or the note permit the additional charges? Assume nothing.

“Cross-pollinate” the factual investigation with the implications of the legal analysis. In other words, just as a set of facts may suggest a particular claim for relief, thinking about the

elements of a particular claim for relief may suggest factual inquiries that might otherwise be overlooked.

The last rule of getting the facts is to **ASSUME NOTHING**.

Gathering Facts	
É"Cuuw o g"pqv jkp i É"Kfgpvkh{"vjg"rctvkgu É"Tgcf"fqew o gpvct{"gxkfgpeg"etkvecm{" É"Kpvgttqi cvg"y kvpguugu"	É"Gzc o kpg"kphqt o cvkqp"hqt"..... inconsistencies É"Etquu/rqnnkpcvg"hcevwcn"kpvguik i cvkqp"..... with legal analysis É"Cuuw o g"pqv jkp i

D. Beginning The Writing Process

Outline the document before beginning formal drafting. Create a structure that will permit a reader with no knowledge of the situation to comprehend the facts and the issues presented by those facts. Show how those facts entitle the client to relief by mapping the facts to the elements of the claim.

Put facts in chronological order, unless there is a compelling reason to do otherwise. The facts will be used to tell a story - an account of what happened. Stories are easier to understand if they start at the beginning and unfold in the order of time.

Reread the motion, brief or complaint several times as you draft the response to make certain that you understand the position of your opponent. As a rule, respond to allegations or arguments in a motion or brief in the same order that they appear in the earlier document.

To guard against taking inconsistent positions on facts and to uncover those of an opponent, reread documents already filed in the case and those filed in prior cases.

E. A Few Tips on Style

1. As a general rule, clarity improves by making actors the subjects and by using verbs that express the action. Using nouns to do the work of verbs requires more prepositional phrases.

In the following examples, nouns expressing action are in italics.

The *eviction* of the debtor followed the *termination* of the stay by the court.

Rewrite: The court terminated the stay, and the landlord evicted the debtor.

The effect of the *commencement* of the case by the debtor was the *prevention* of the *garnishment* of his wages by the judgment creditor.

Rewrite: The debtor filed bankruptcy to stop the judgment creditor from garnishing his wages.

2. Using shorter sentences makes it easier to follow rule 1.

3. Use the active voice, unless you have a reason for using the passive voice. Example:

The payment was made on time by debtor. Rewrite: Debtor made the payment on time.

4. Omit “clearly” and “obviously.” If it is clear or obvious, saying so is redundant.

5. Use simple words. If you are not sure about the meaning of a word, look it up in a dictionary.

6. Avoid legal jargon. Use language that a lay person of ordinary intelligence would understand.

7. Omit unnecessary definitions. Example: Citibank Mortgage Finance Corporation (“Citibank Mortgage”) moves for stay relief pursuant to that certain security deed – blah, blah – (the “Security Deed”) with respect to property located in Land Lot — blah blah (the “Property”). If there is no other Citibank, no other security deed and no other property mentioned in the

motion, not even a judge would be confused by: “Under the security deed, Citibank holds a first priority lien against the property.”

8. The first sentence of each paragraph should state the topic of that paragraph, and each subsequent sentence in the paragraph should be linked to the prior sentences by references to the topic or other themes so that there is a “march of thought” through the composition. See Appendix to Part I.

9. Avoid at all costs attacking your opponent personally. The more an adversary uses inflammatory language or takes extreme positions, the more effective the response that turns down the volume and understates the defects in the opposing argument or statement of facts.

persuasion is grounded in the craft of thorough, honest, calm and thoughtful attention to detail.

Style	
<p>É"Eqpxgtv"pqwpu"gzrtguukpi"cevkqp"vq"***** verbs É"Wug"ujqtv"ugpvgegu É"Cxqkf"vjg"rcuukxg"xqkeg" É"Qokv"öengctn{ö"cpf"qdxkqwun{ö" É"Wug"ukorng"yqtfu É"Gfkv"qwwngicn"lctiqp"</p>	<p>É"Qokv"wppgeguuct{"cddtgxkcvkqpu É"Nkpm"vjgoguhqo"qpg"ugpvgegu"vq"vjg"***** next É"Kh"gzjkdkvu"ctg"pgeguuct{."eqodkpg"***** short ones in the main document É"Wpfgtuvcvg"cpf"dg"ecpckf É"Tgcf0</p>

F. A Few Tips on Proofreading and Rewriting

1. Print the document, rather than use the computer to proofread and revise.
2. If possible, set aside the document for an hour or preferably a day or week, and then re-read it. Mistakes will jump out, and ambiguity will be easier to identify.
3. Work on overall structure, including placement of paragraphs before attacking individual sentences. In the left margin, write a word or phrase that describes the subject matter

of the adjacent text. If the same word or phrase in the margin appears in widely spaced sections of the document, consolidate the same ideas in one section.

4. Maintain consistent use of verb tense.
5. Eliminate unnecessary words. Which ones? The ones that add nothing to the meaning.
6. Do not rely on the word processing program's spell-checker. Look at each word, and pay particular attention to homonyms like there/their, your/ you're, to/too/two, red/read, etc.
7. Read the document aloud and slowly. Follow Robert Frost's advice that "the ear is the only true writer and the only true reader." Listen to the tone as well as the substance of what you have written. Use a ruler or piece of paper to hide the unread text so that your eyes are forced to focus on one line at a time. Reading each line backward is also an effective way to catch typos.
8. Double check the punctuation. *Eats, Shoots and Leaves*, mentioned in section G, is a delightful guide to punctuation.
9. Double check all numbers and dates.
10. Pay particular attention to documents prepared using forms. Forms are as dangerous as they are useful because they lull us into a false sense of security about their accuracy. The problem is not just that a form may not have been revised in ten years. Forms are usually designed for specific, recurring situations. If the present situation does not match the one for which the form was designed, the document will likely contain errors of logic or fact.
11. Check to see that all exhibits to the document are in fact attached.
12. Double check the facts. Is the information provided accurate and true?
13. Reread the document again, putting yourself in the shoes of persons who will read it.

What have you actually said?

Appendix to Part I

Freemanville Water System, Inc. v. Poarch Band of Creek Indians, 2009 WL 805785 (11th Cir. 2009)

EXCERPT FROM BRIEF OF PLAINTIFF-APPELLANT FREEMANVILLE WATER SYSTEM, INC.

{Edited to Remove Citations to the Record and Footnotes}

Statement of the Issues

Y jgvjgt"vjg"Rqcte j"Dcpf"qh"Etggm"kpfkcpu"ku"uwdlgev"vq"vjg"Cpvk/Ewtvckno gpv"rtqxkukqpu of 7 U.S.C. 1926(b) such that its tribal sovereign immunity has been abrogated for off-reservation conduct that is violative of said section?

Statement of Facts

Appellant FWS is a rural water authority in Escambia County, Alabama, which has received federal loans in order to establish and provide water service to the rural residents of the unincorporated community of Freemanville, Alabama, and the terms of these loans remain in effect. In addition to Freemanville, FWS serves several other unincorporated rural areas in Escambia County, including the communities Poarch, Martinville, and McCullough. A map of FWS's Service Area shows the as-built system and geographical map for the Freemanville Water System, Alabama. The FWS water system lines and associated infrastructure facilities currently serves the entire geographic area depicted in the map, which area also encompasses all of the Tribe's properties and facilities within Escambia County, Alabama.

Cr rgnngg"Rqcte j"Dcpf"qh"Etggm"kpfkcpu"ku"chgfgtcnn{"tgeq i pk|gf"kpfkcp"vtdg"*vjg"öVtdgö+ primarily situated in Escambia County, Alabama, doing business through related economic development and commercial entities also named as defendants before the District Court and appellees in this appeal (collectively, all referenced as "the Tribe"). All of the principal tribal

lands at issue in this dispute, including the reservation or trust lands within the neighboring Poarch and Freemanville Communities, and other non-contiguous parcels throughout Escambia County, are within FWS's service area and served by FWS. Insert A on Doc. 16, Exhibit 1 (circled and enlarged at the foot of the map) encompasses the main Poarch Creek Indian Reservation in Escambia County, Alabama, covering portions of Sections 27, 28, 33 and 34, Township 5 East, approximately one mile northwest of Interstate 65, at Exit 54.

In addition to the main reservation included within Inset A of Doc. 16, Exhibit 1, the Poarch Creek non-trust properties are currently scattered throughout the FWS Service Area., with Poarch's gambling operations and bingo hall located several miles away, near the intersection of Escambia County highway 21 and Interstate 65, at Exit 57, in Sections 28, 29, 32 and 33, of Township 6 East. The geographic separation and location of these tribal properties are also shown, without surrounding geographical context, in the American Indian Tribal Census Tract

The Tribe has planned and begun construction of a water distribution system that will effectively overbuild the FWS system, throughout the FWS Service Area shown on Exhibit 1 to Doc. 16, servicing customers now being served by FWS.

* * *

FIRST TWO PARAGRAPHS OF THE COURT’S OPINION WRITTEN BY JUDGE ED CARNES

An Indian tribe would like to develop its own water facilities and distribution system, but a rural water authority already exists to serve parts of the county, including all of the tribe's lands and members. Not wanting to lose any of its customer base, the water authority claims an exclusive right to continue serving those parts of the county. The source of the claimed right is the anti-curtailment provision of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. §§ 1921-2009dd-7, which protects water authorities funded with federal loans from encroachment on their territories. The tribe asserts that it has sovereign immunity.

Indian tribes have sovereign immunity from lawsuits unless Congress has abrogated it in the statute creating the right of action that is asserted against the tribe. To be effective the expression of Congressional intent must be a clarion call of clarity. Ambiguity is the enemy of abrogation, and the critical part of the Rural Development Act is ambiguous.

* * *

An Indian **tribe** would like to develop its own water facilities and distribution system, but a rural **water authority** already exists to serve parts of the county, including all of the **tribe's** lands and members. Not wanting to lose any of its customer base, the **water authority** claims an **exclusive right** to continue serving those parts of the county. The source of the **claimed right** is the anti-curtailment provision of the Consolidated Farm and Rural Development Act of 1961, 7 U.S.C. §§ 1921-2009dd-7, which protects **water authorities** funded with federal loans from encroachment on their territories. The **tribe** asserts that it has **sovereign immunity**.

Indian **tribes** have **sovereign immunity** from lawsuits **unless Congress** has **abrogated** it in the statute creating the right of action that is asserted against the tribe. To be effective **the expression of Congressional intent** must be a clarion call of **clarity**. **Ambiguity** is the enemy of **abrogation**, and the critical part of the Rural Development Act is **ambiguous**.