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By Gerald Lebovits

The *Journal*'s November/December 2002 cover story by Professor McCloskey extolled the virtues of rhetoric.[1] It's a must-read: Rhetoric improves writing. As Justice Cardozo explained, legal writing "will need persuasive force, or the impressive virtue of sincerity and fire, or the mnemonic power of alliteration and antithesis, or the terseness and tang of proverb and maxim. Neglect of these allies, and it may never win its way."[2] But not all rhetoric succeeds.[3]

Rhetorical devices are figures of speech, or ornamental uses of language. A figure may be a scheme, which emphasizes the figure's appearance. An example of a scheme is James Joyce's chalice in *Portrait of the Artist as a Young Man*. Schemes are unknown in legal writing except when writers use artificial, unsuccessful devices like italicizing or bolding for emphasis. A figure may also be a trope, which emphasizes the figure to suggest something different from what's said. Some figures work; some fail; most work only if done well.

This column explores rhetoric that fails.

Oxymorons. It's a sure bet, say amateur experts, that an oxymoron will combine contradictory words. Some would-be oxymorons are not oxymorons at all. There is military intelligence.

Mixed Metaphors. Mixed metaphors are a pain in the neck. If you don't use clichés, you won't mix up your metaphors or wix up your murds.

Rhyming. Rhyme, however clever, wastes time. Rhyming is juvenile. With few exceptions, legal writing in rhyme contains little reason. Words that come close to rhyming are just as bad: "*President* Washington set a two-term *precedent*."

Comparisons. Comparisons are as awful as clichés. But use them to compare the facts in case-law authority to the facts of your case.

Alliteration and Assonance. Always avoid annoying alliteration – lest you become a nattering nabob of negativism. Alliteration is the repetition of consonant sounds. Assonance is the repetition of vowel sounds.

Are the following effective? No. They prove that "[a]lliteration . . . is a novice's toy."[4]

• Governor Mark Hatfield, nominating Richard Nixon for President: "A man to match the momentous need [who has] demonstrated courage in crisis from Caracas to the Kremlin, . . . a fighter for freedom, a pilgrim for peace."[5]

• Georgia Court of Appeals: "Personal prefatory pensive ponderings, such as the foregoing, recognizably play partial part in this court's eventual decision."[6]

But subtle alliteration is effective if used sparingly:

• Justice Douglas: "*F*ull and *f*ree discussion has indeed been the *f*irst article of our *f*aith."[7]

• Justice Holmes: "The *l*ife of the *l*aw has not been *l*ogic; it has been experience."[8]

• Justice Johnson: "[E]very *b*equest is *b*ut a *b*ounty, and a *b*ounty must *b*e taken as it is given."[9]

• Justice Murphy: "Moral *t*urpitude is not a *t*ouchstone of *t*axability."[10]

Rhetorical Questions. Who needs rhetorical questions? May you use this device if you know that a skeptical reader will not supply an unanticipated answer; if your goal is to make your reader think and you don't care about convincing anyone of anything; or if you enjoy befuddling? Yes, if you're Clarence Darrow.

Rhetorical questions are ineffective because legal writers should answer questions, not pose them except as issue statements. Rhetorical questions allow for miscommunication. Legal writers should state their points confidently and directly, without ambiguity.

Some believe that a good way to involve readers is to ask them questions. Do you agree?

Analogies. Analogies in writing are like feathers on a fish. But use analogies in legal writing if no authority is on point.

Some believe that a good way to involve readers is to ask them questions. Do you agree?

Hyperbole. Hyperbole lies without fooling. Your reader will be eternally grateful for this infinite wisdom: Resist hyperbole. Not one in a trillion uses it correctly. From Professor Rodell, whose writing about writing led to writing courses at every law school: "[T]he awful fact is . . . that 90 percent of American scholars and at least 99.44 percent of American legal scholars not only do not know how to write simply; they do not know how to write."[11]

Exaggeration. Exaggeration is ludicrous. It's a billion times worse than understatement. If I've told you once I've told you a million times: "Never exaggerate."

Understatement. Understatement is always the absolute best way to illustrate earth-shaking ideas.

Adages and Proverbs. Annihilate adages; pontificate against proverbs: "A rule of law should not be drawn from a figure of speech."[12]

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Every rule of statutory construction has a thrust and a parry.[13] Similarly, every adage has a counter-adage:

• Is it "Birds of a feather flock together" *or* "Opposites attract"?

• Is it "Great minds think alike" *or* "It takes a fool to know a fool"?

• Is it "A stitch in time saves nine" *or* "Haste makes waste"?

• Is it "Justice delayed is justice denied" *or* "Act in haste, repent at leisure"?

• Is it "Too many cooks spoil the broth" *or* "Many hands make light work"?

But twisting adages into something original will draw smiles, if not guffaws: "A fool and his money are soon partying."

Avoiding errors will not alone make a writer a stylist. It's not enough to use good grammar and proper punctuation and to be clear and concise. What makes a writer a stylist is an effective, engaging, entertaining style that combines variety and force and elegance in simple, readable, error-free prose. That – and separating rhetoric from shmetoric.

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1. Susan McCloskey, Writing Clinic, *Rhetoric Is Part of the Lawyer's Craft*, 74 N.Y. St. B.J. 8 (2002).
2. Benjamin N. Cardozo, *Law and Literature*, 39 Colum. L. Rev. 119, 122–23, 52 Harv. L. Rev. 471, 474–75, 48 Yale L.J. 489, 492–93 (1939) (simultaneously published), reprinted from 14 Yale Rev. [N.S.] 699 (July 1925).
3. *See* McCloskey, *supra*, note 1, at 8 ("[S]ome rhetorical devices warrant your healthy skepticism").
4. H.W. Fowler & F.G. Fowler, *The King's English* 292 (3d ed. 1930).
5. Quoted in Henry Weihofen, *Legal Writing Style* 313 (2d ed. 1980).
6. *Kingston Dev. Co., Inc. v. Kenerly*, 132 Ga. App. 346, 346, 208 S.E.2d 118, 119 (Ga. Ct. App. 1974) (Clark, J.) (footnote omitted).
7. *Dennis v. U.S.*, 341 U.S. 494, 584 (1951) (Douglas, J., dissenting).
8. Oliver Wendell Holmes, The Common Law 5 (1881).
9. *Hunter v. Bryant*, 15 U.S. 32, 37 (1817) (Johnson, J.).
10. *Commissioner Revenue v. Wilcox*, 327 U.S. 404, 408 (1946) (Murphy, J.).
11. Fred Rodell, *Goodbye to Law Reviews – Revisited*, 48 Va. L. Rev. 279, 288 (1962).
12. *Illinois ex rel. McCollum v. Bd. of Educ.*, 333 U.S. 203, 247 (1948) (Reed, J., dissenting).
13. *See* Karl N. Llewellyn, Symposium on Statutory Construction, *Remarks on the Theory of Appellate Decision and the Rules or Canons About How Statutes are to be Interpreted*, 3 Vand. L. Rev. 395, 401 (1950) (classic article reprinted dozens of times).

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