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Recommended Citation

Robert S. Anderson, U.S. Supreme Court Interviews on Effective Legal Writing – Part III, *Colo. Law.*, Aug. 2008, at 99.

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U.S. Supreme Court Interviews on Effective Legal Writing—Part III

by Robert S. Anderson

This month's column concludes the discussion of legal writing interviews given by eight of the nine sitting justices of the U.S. Supreme Court.¹ The justices discussed usage and grammar issues, as well as their own pet peeves as readers of legal writing.

Channeling the Inner Schoolmarm

When the interviews of the justices turned to questions of usage, an interesting division became evident among the justices. A few were passionate on the subject. Among the more vocal were Justices Anthony Kennedy, Ruth Bader Ginsburg, Samuel Alito, and Antonin Scalia. Justice Scalia spoke at length about the importance of proper use of language and grammar, saying that he is a nitpicker for using words in the correct manner.² "I cannot imagine why any lawyer would not be [a stickler for usage and grammar]. [Words are] the tools of your trade, man!"

Notably, several of the justices volunteered that the importance of writing correctly had been drilled into them at a young age. Justice Alito said that his father was an English teacher who picked apart young Sam's writing assignments, correcting the improper use of "healthy" where "healthful" was the more appropriate modifier. Justice John Paul Stevens's mother also was an English teacher, and his father wrote poetry. Justice Scalia's father was a linguist who took it upon himself to correct the grammar in the opinions he wrote for the D.C. Circuit. Justice Ginsburg studied writing with Vladimir Nabokov, from whom she learned important lessons about word choice and how to correctly order her sentences.

By contrast, other justices confessed no great concern for the niceties of usage and grammar. As Chief Justice John Roberts put it, "I don't have fetishes about particular language." Justice Clarence Thomas made plain that he was not picky about issues of usage. When asked whether he was a "word lover," he replied, "Not par-

ticularly. I have to do what I have to do. I have to learn English. . . . I never liked reading. I never liked school."

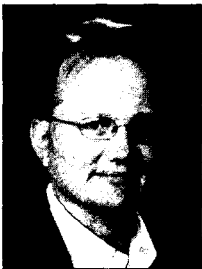
Grammar Matters

Although only some of the justices were concerned about usage and grammar for their own sake, most were concerned with precision. A common sentiment was that a legal writer should take pains to ensure that the product is free from errors that detract either from the reader's comprehension or the writer's credibility. Justice Stevens noted the effect that sloppy writing has on the reader, saying, "Grammar matters. When you see bad grammar, it gives you the suspicion that the writer may not be careful about his work generally."

Chief Justice Roberts and Justice Scalia echoed the view that grammatical and other errors call into question not only the quality of the writing, but also the quality of the analysis that underlies it. Chief Justice Roberts explained, "If [the attorney] didn't have enough time to spend writing [the brief], well, how much time did he spend researching it? How much time did he spend thinking out the ramifications of his position?" Justice Scalia quoted the Latin proverb normally applied to the credibility of witnesses, "*Falsus in uno, falsus in omnibus*." From that saying—which translates to "false in one, false in all"—Scalia drew the analogy that a lawyer who is sloppy in writing also may be sloppy in thinking. "Even typographical errors show you're not careful. . . . If you can't even proofread your brief, I don't think you're careful generally."

✓ Anderson's Tip on Proofreading

Proofread with a purpose. Proofreading is more effective when adequate time is set aside for it; it is even more effective when the writer allows time to leave the document alone for awhile so he or she can proofread the document later with fresh eyes. In practice,



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In 1991, K.K. DuVivier created "The Scrivener" exclusively for *The Colorado Lawyer*. After writing the column and teaching legal writing for seventeen years, K.K. is shifting focus. For the near future, her writing and teaching will concentrate on the area of natural resources law. Robert S. Anderson, Lawyering Process Professor at the University of Denver Sturm College of Law, is contributing a three-part article under The Scrivener title, after which that title will be retired. A legal writing column will resume in 2009 under a new title. Readers interested in contributing ideas about the new legal writing column are encouraged to contact Managing Editor Leona Martinez at leonamartinez@cobar.org.

however, time is not always on the writer's side. To be efficient with the time you do have, always proofread with a purpose. This means devising a system for yourself that is likely to turn up the errors you most commonly make. A proposed method for proofreading is listed below; use the steps as a template for developing a system that works best for you.³

1. Begin proofreading only after you have completed all substantive revisions. Proofreading is not the same as editing, and trying to do both at the same time will make each less effective.
2. Run a spell-check and grammar-check on the document using your computer's word-processing software.
3. Use the "find" function to locate commonly misspelled words that your computer's spell-check will miss. Some examples include: trail (should it be "trial"?); statue (statute?); form (from?); principal (principle?); affect (effect?); and tortuous (tortious?). Over time, develop a list of words you commonly misspell.
4. Print your document and complete at least one proofing run on the hard copy; you will see things in hard copy that would escape notice on the computer screen. Circle potential errors with a pencil, but take no action until you have completed reading the entire text. Stopping to correct each error may cause you to lose momentum.
5. Read the text aloud at a normal pace. This practice will help you spot errors by forcing you to recognize and enunciate each word. Alternatively, consider using software that will read the text to you.⁴ Hearing the text in someone else's voice can give you objectivity; you will hear the pace and rhythm of the writing as if it had been written by someone else.
6. Proofread citations separately from the rest of the text. Always save this citation check for last; a round of substantive edits may affect your citations.

Pet Peeves

Many of the justices mentioned specific practices in legal writing that particularly annoy them. Among the language pet peeves the justices mentioned were overuse of string citations, as well as the misuse and overuse of legalese and clichéd language.

Justice Thomas joked about the futility of citing numerous authorities in support of the same proposition: "You can beat a dead horse until it turns to glue. Cite one case if that is all you need." Justice Alito bemoaned the tendency toward using too much citation and was not optimistic about convincing lawyers to limit their citations. "You're running into the wind," he said.

Legalese and Clichés

Misuse and overuse of legalese and clichéd language often were linked with a more general concern about word choice. Legalese in particular was universally disdained by the justices. Justice Roberts, reflecting on the use of legalese in briefs he had read, pondered aloud, "You wonder why people felt compelled to shift into different language that didn't reflect how people talked." Justice Stephen Breyer was more succinct: "I'm against [legalese]. Legal jargon? Terrible. No point. Adds nothing."

Several justices expanded their criticism of legalese to include clichéd terms. Justice Scalia called the frequently used formulation, "The First Amendment informs our consideration" a "cant," or

mindless use of jargon on the part of the reader. He also scorned the phrasing "[Case name] and its progeny" when referring to a line of authority. Both Justice Scalia and Justice Kennedy used the term "trendy" to refer to language they found particularly offensive. Justice Kennedy applied this invective to the use of nouns as verbs, as in "impacts" or "tasks."

Other clichéd terms that fell in for criticism among the justices included "nexus," "pursuant to," "notwithstanding," and, from two justices, "the instant case." Justice Scalia offered a personal favorite—"beyond the peradventure of a doubt"—and also a rule of thumb to help writers identify legalese: If you were to use the word at a cocktail party, would people look at you funny? If so, look for a simpler word.

✓ Anderson's Tip for Simplifying Your Writing

Learn how and when to eliminate legalese. Favor simple language over more complicated terms, legalese, or clichés. At the same time, recognize that some complex terms cannot be avoided. As Justice Alito pointed out, what makes legal writing difficult is the need to use and repeat terms of art that often are complex or arcane. Still, many exemplars of legal writing, including published opinions, use legalese when more simple terms would do. Thus, identifying and rooting out legalese in your own writing can be difficult. Follow the steps below to achieve more simplicity in your writing:⁵

1. Identify legalese, starting with Latin terms and compound words beginning with "here-," "there-," and "where-." Refer to the accompanying sidebar to learn which common legalisms can be eliminated or substituted with a simpler word or phrase.
2. Consider whether the legalese is a term that can be substituted with a simpler term, or whether it is a term of art for which there is not substitute, such as "res ipsa loquitur."
3. Note that in some instances, use of legalese may be preferable if the context would require a much wordier substitute. For example, "whereas" is appropriate where the only meaningful substitute would be "in view of the fact that."

Conclusion

Language pet peeves often are idiosyncratic. This can be seen in the differences among the U.S. Supreme Court justices who took a particular interest in word usage and those who did not. These differences also exist among general readers of legal writing. Some readers who may be more concerned with language usage might take personal offense when a pet rule of usage is broken. Justice Kennedy provided a long list of pet peeves that might confound many writers; however, he feels strongly about them. For example, he considers the word "focus" to be overused. He also disdains verbs ending in "ize" (he singled out the word "incentivize" as one that makes him picture "someone wearing a very ugly cravat"). Also, some readers' pet peeves contradict those of other readers. For example, Justices Breyer and Thomas disdained the use of footnotes, whereas Justices Alito and Scalia said they have their place in legal writing.

Negotiating all of the components of legal writing requires the writer to be very attentive to his or her use of language. It may not be possible to please every reader's language preferences, but every writer should strive to improve the reader's understanding of the argument being made. In their interviews, the U.S. Supreme Court justices agreed that lawyers must focus on writing clearly, concisely,

and simply. The justices also agreed that attention to language usage removes the potential for distraction and aids reader comprehension. Removing impediments to understanding should be one of the chief goals of any piece of legal writing, and was a fundamental lesson that the Supreme Court justices imparted during their interviews.

Notes

1. See Law Prose, Inc., “Interviews of United States Supreme Court Justices,” available at www.lawprose.org/supreme_court.php. The eight justices interviewed were: Chief Justice John Roberts; Hon. Samuel Alito; Hon. Stephen Breyer; Hon. Ruth Bader Ginsburg; Hon. Anthony Kennedy; Hon. Antonin Scalia; Hon. John Paul Stevens; and Hon. Clarence Thomas.

2. In fact, Justice Scalia identified himself as a “snoot,” a term coined by author David Foster Wallace in reference to those who take matters of usage and grammar in the English language very seriously. The author highly recommends Wallace’s lengthy yet readable (and hilarious) essay on the subject, entitled “Authority and American Usage.” See Wallace, *Consider the Lobster: And Other Essays* 60 (Little Brown and Company, 2006).

3. See Enquist and Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 20 (2d ed., Aspen Publishers, 2005). Thanks to Nantiya Ruan, Assistant Professor of Legal Writing at the University of Denver Sturm College of Law, who suggested the commonly misspelled terms that can escape spell-check.

4. Read Please,[®] www.readplease.com, is one source of text-to-speech software.

5. See Enquist and Oates, *supra* note 3 at 139-43. ■

Eliminating Legalese in Text

Legalese makes writing less accessible to the layperson, and it often adds no meaning to the sentence. Consider the phrase, “Plaintiff hereby submits his motion to admit evidence.” There is no loss of meaning if the legalese is removed: “Plaintiff submits his motion to admit evidence.” The following list of legalisms represents only a sampling of terms that can be substituted with simpler language. Where no substitute is listed, the term can most often be eliminated without a loss of meaning.

Legalism	Substitute	Legalism	Substitute
forementioned	previously mentioned (if necessary; it usually is not necessary to note that something was previously mentioned)	<i>sui generis</i>	unique
		<i>supra</i>	above
aforesaid	above	thence	from there, from that place, for that reason
<i>arguendo</i>	for the sake of argument	thenceforth	from that time on, after that
behoove	to be necessary; to be proper	thereabout	
comes now the plaintiff	plaintiff	thereafter	
<i>et al.</i>	and others	thereafter	from that time on
foregoing		therefrom	
forthwith	immediately	therein	
henceforth	from now on	thereof	
hereafter		thereon	
herebefore		thereto	
hereby		thereunto	
herein		therewith	
hereinabove	above	to wit	namely, that is to say
hereinafter		<i>viz.</i>	namely, that is to say
hereinunder	below	whence	from where
hereof		whensoever	whenever
heretofore	before, up to this time	whereas	because, considering that, while on the contrary, inasmuch as
hereunder		whereat	
herewith		whereby	
hitherto	until this time, up to now	wherefore	
<i>infra</i>	below	wherein	there
<i>inter alia</i>	among other things	whereof	
<i>per curiam</i>	by the court	wheresoever	
pursuant to	under, according to	whereupon	
<i>seriatim</i>	in turn, serially, on after another		

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Colorado Legal Services Seeks Participants for Needs-Assessment Survey

The mission of Colorado Legal Services (CLS) is to provide meaningful access to high-quality, civil legal services in the pursuit of justice for as many low-income persons and members of vulnerable populations throughout Colorado as possible. To ensure that CLS continues to fulfill its mission by addressing the most critical legal needs of its client population, CLS is undertaking a comprehensive statewide legal needs assessment. Please assist CLS in this process by completing an online survey that will help to determine the most pressing legal issues currently encountered by low-income and elderly persons in Colorado.

To access the survey, visit the CLS website at www.coloradolegalservices.org and click on the link for the Legal Needs-Assessment Survey. The survey takes approximately five to ten minutes to complete.

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