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

by Robert S. Anderson

This month's column continues the discussion of legal writing interviews given by eight of the nine sitting justices of the U.S. Supreme Court.¹ In addition to discussing the elements of effective legal writing, the justices talked about their own writing processes.

Seeking Clarity, Conciseness, and Simplicity

The consensus among all of the justices interviewed was that the primary elements of effective legal writing are clarity, conciseness, and simplicity.² Each justice spoke about his or her efforts to achieve those qualities in their own writing. Justice Ruth Bader Ginsburg remarked, "I try to write an opinion as clear and concise as it can be; if it runs more than twenty pages, it bothers me." Justice Clarence Thomas said that when he was a practicing contracts lawyer, he tried to make the contracts he wrote concise and to use accessible language, which meant eliminating legalese wherever he could. Justice Thomas also addressed his reputation for writing concise Supreme Court opinions, stating: "The genius is having a ten-dollar idea and a five-cent sentence."

Two justices noted that they make particular efforts to write simply. Justice Ginsburg recalled a law professor who commented that her writing was too elaborate. She stated that from that point on, she worked to cut out unnecessary adjectives and to make her writing as "sparse" as possible. Justice Anthony Kennedy said that he avoids using adverbs, as a response both to seeing their overuse in legal writing and to his admiration for writers who employ a spare writing style, such as Ernest Hemingway. "Adverbs are a cop-out, a way for you to qualify; taking them out forces you to confront your conclusion at the end of your sentence," Kennedy said.

✓ Anderson's Tip on Simplicity

Mind your modifiers. Adjectives and adverbs can be useful, but they often are overused. Circle the adjectives and adverbs in your draft, and then ask yourself three questions to determine whether some can be eliminated.³

1. Does the modifier only intensify the verb (for example, "totally absent" or "clearly erroneous")? Such modifiers can be deleted because they do not add meaning (note how there is no meaningful difference between "absent" and "totally absent"). Unnecessary intensifiers include: *clear, clearly, express, expressly, simply, totally, quite, very, essentially, basically, really, actually, just, merely, given.*
2. Does the modifier repeat the essence of the word it modifies (for example, "true facts" or "brief overview")? Eliminate these types of redundancies. Other examples are: *mandatory requirement, patently obvious, binding contract, short synopsis, excess verbiage, and actively engaged.*
3. Can a more vivid verb be used in place of the modifier (for example, "sped" instead of "moved quickly")? Justice Kennedy remarked that when you limit your use of adverbs, you can expand your catalog of verbs.

The Writing Process: Sweat and Editing

The justices did not divulge any magic formula for making the writing process easy. To the contrary, Justice Antonin Scalia stated, "I don't write briskly; I write painfully." He added, "I don't enjoy writing, but I enjoy having written."

Confirming Justice Scalia's message that good writing requires effort, Justices Samuel Alito, Stephen Breyer, Ginsburg, Thomas,



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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 Martínez at leonamartinez@cobar.org.

and Chief Justice Roberts each stressed the importance of editing in their writing processes. Justice Thomas stated that producing a good written product requires a number of rounds of editing. Justice Breyer echoed this sentiment, stating that he creates several drafts to ensure that all pertinent details are included:

It is not easy to achieve clarity in legal writing. The trouble is you know too much about the subject, so you assume knowledge on the part of the reader. If you make an effort to think about the reader as someone who does not know, then the reader will understand. That is why for me it requires a number of drafts.

Justice Alito, on the other hand, cautioned against providing too much detail. He commented that first drafts often include irrelevant information that can be rooted out if the writer takes adequate time to revise and edit.

✓ **Anderson's Tip on Drafting**

*Draft deliberately. To make the revision process meaningful and manageable, adopt a step-by-step process that assigns a purpose to each draft. Below is a process developed by legal writing teacher Bryan Garner that can be useful when undertaking a substantial writing project, such as a formal memo or a brief:*⁴

1. Develop a nonlinear outline through brainstorming, listing the ideas you need to address and the points you plan to make in no particular order.
2. Shape the nonlinear outline into a more traditional outline that provides the large-scale organization for your piece.
3. Write a first draft, putting the emphasis on completing the draft quickly, not making everything perfect. This step allows you to get

past what usually is the hardest step in the writing process—facing the blank page.

4. Revise the draft with an emphasis on getting the organization right and filling in any ideas or points you missed when creating the first draft.
5. Focus the second revision on sharpening the writing and making your points clearly and concisely.
6. Direct final revisions to correcting style problems, focusing particular attention on the structure of individual sentences and on making effective transitions.⁵

Conclusion

Justice Scalia emphasized the importance of taking the time to revise when he said, "I don't believe in the facile writer." The justices' counsel that good writing springs from careful editing presents a challenge to those who confront time pressures in their law practice. At the same time, their counsel contains the promise that the effort put into revising will reap a reward in the quality of the final product.

The August column will conclude this three-part look at the Supreme Court justices' views on legal writing. It will focus on the justices' usage concerns and pet peeves in briefs submitted to the Court.

Notes

1. The interviews were conducted by Brian Garner, editor of *Black's Law Dictionary* (Thomson West, 2004). The eight justices Garner interviewed were: U.S. 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. To access streaming videos of the interviews, see Law Prose, Inc., "Interviews of United States Supreme Court Justices," available at www.lawprose.org/supreme_court.php.

2. See the discussion of clarity and conciseness in the June 2008 column, Anderson, "U.S. Supreme Court Interviews on Effective Legal Writing—Part I," 37 *The Colorado Lawyer* 61 (June 2008).

3. See Kinder, *Writing Techniques for Winning Cases* 2-3 (Kinder, 2003) (Kinder uses the term "junk words" to describe overused terms such as "clearly" and "simply" that tend not to add meaning to the words they modify).

4. See Garner, *Legal Writing in Plain English* 5-10 (University of Chicago Press, 2001). The proposed drafting process outlined in this article draws heavily on the "madman/architect/carpenter/judge" approach that Garner describes.

5. See Anderson, "Legal Writing Triage: Self-Edit to Solve the Most Common Style Problems," 36 *The Colorado Lawyer* 85 (Nov. 2007). ■

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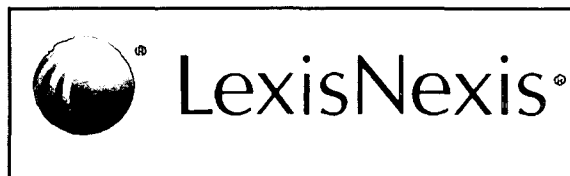
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