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

by Robert S. Anderson

Recently, eight of the nine sitting justices of the U.S. Supreme Court were interviewed by Bryan Garner, editor of *Black's Law Dictionary*.¹ Garner has made streaming videos of those interviews available on his website.² The interviews provide unique insight into the minds of the individuals who serve on the highest judicial body of the United States.

The Supreme Court justices answer questions on a wide range of legal topics, from effective advocacy at oral argument to use of law clerks. However, the main focus of the interviews—and the focus of this article—is on legal writing.

It becomes apparent through the course of the interviews that the justices have strong feelings about the craft of legal writing. Although the justices may differ on the outcome of cases that come before the Court, they largely agree on what makes for effective legal writing. The insights of each justice spring from his or her experiences reading appellate briefs and writing legal opinions, but the lessons each imparts have application for lawyers in any area of practice. As Chief Justice John Roberts observes in reference to the practice of law generally: “Language is the central tool of our trade.”

This month's article is the first of three parts discussing the justices' lessons on legal writing, and offering tips to help you put their instruction into practice. This first part will explore the two aspects of good legal writing that were most often mentioned by the justices during their interviews: clarity and conciseness. Part II of this article, which will appear in the July 2008 issue of *The Colorado Lawyer*, will explore the justices' discussion of their own writing processes. Part III, printing in the August 2008 issue, will review some of the justices' pet peeves regarding usage and grammar.

The Importance of Clarity

The importance of clarity in legal writing arises again and again in the Supreme Court interviews. The Court's newest associate jus-

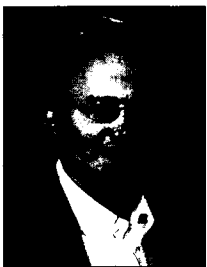
tice, Samuel Alito, stated: “The first quality that is necessary in writing is clarity, so that you can understand what the lawyer is trying to say.” Several other justices referred to clarity as a primary attribute of good legal writing. Justice Stephen Breyer named a number of past Supreme Court justices whom he admired as good writers. The recurring compliment he paid to each was to mention the clarity of the justice's written opinions. Justice Breyer singled out the opinions of Justice Robert Jackson, who served on the Supreme Court from 1941 to 1954, as models of clarity. Likewise, Chief Justice Roberts pointed out that Chief Justice William Rehnquist, for whom Justice Roberts clerked, wrote clearly.

Chief Justice Roberts also elaborated on the difference in quality between a brief that is clearly written and one that is not:

It is just a different experience when you pick up a well-written brief. You kind of get a little bit swept along with the argument and you can deal with it more clearly; rather than trying to hack through—it is almost like hacking through a jungle with a machete to try to get to the point. You expend all your energy trying to figure out what the argument is as opposed to putting your arms around it and seeing if it works.

Putting Yourself in the Reader's Shoes

Several justices, including Justices Breyer, Roberts, and Clarence Thomas, expressed the importance of clarity in terms of having empathy for the audience and recognizing the importance of making a piece of legal writing easily understood. Justices Breyer and Thomas, in particular, made the point that legal writing should be clear enough to be understandable by laypeople. Justices Alito, Ruth Bader Ginsburg, Roberts, Antonin Scalia, and Thomas all stated in similar terms that a judge or other legal reader counts on the writer to help make complex legal concepts easier to digest by writing clearly. Justice Scalia put it this way: “You can't expect [the reader]



About the Author

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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, will be 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.

to pay a lot of attention to what you're writing unless you have taken the pains to make it as easy as possible." Justice Breyer explicitly made the point about having empathy for the reader. He paraphrased a quote from Spanish philosopher José Ortega y Gasset, saying, "Clarity is the courtesy or politeness of the author."³

Organization and Logic

In terms of what creates clarity in legal writing, some justices referred to the importance of good organization and having a logical flow to the writing. Justice Ruth Bader Ginsburg credited good writers on the Supreme Court with following a clear organization and a logical progression. Speaking specifically of the second Justice Harlan who served from 1955 to 1971, Justice Ginsburg said that his opinions "laid it all out; you knew every step in his reasoning."

Chief Justice Roberts referred to the flow of good writing in terms of what he called "pacing." He observed that, "[P]acing is so important; you want to take the judge by the hand and lead them along" through the points of the argument.

✓ Anderson's Tip on Pacing

Check topic sentence progression. Check the pacing of your writing by isolating the topic sentence of each paragraph. Cut the first sentence of each paragraph into a separate document. Then, review that document to see whether the topic sentences follow a logical progression when read one after the other.⁴ Wherever you don't see a logical progression, consider one of these potential fixes to remedy the problem:

1. Write stronger topic sentences that more directly state the point that is made in the paragraph.
2. Add paragraphs, or break up long paragraphs, to fill gaps in the logical progression.
3. Reorder your paragraphs to create a more logical progression.

Using Transitions and Other Signposts

More than one justice said that transitions promote clarity by providing signposts in places where a piece of legal writing moves from one point to another. The use of transitional terms and phrases helps the reader understand where an analysis is going, and saves the reader from embarking on what Justice Alito called a "mystery trip."⁵

Justice Scalia provided an example of how transitions can help convey the point the writer is trying to make. First, he proffered two sentences: "He was a good writer. He was not always accurate." He explained that although the two sentences are simple, declarative statements, a reader may not understand the significance of stating them together absent a transition to connect them. Scalia then added an appropriate transitional term. "He was a good writer, but he was not always accurate." Scalia's example demonstrates how the addition of a simple transitional term can make all the difference in clarifying a point. Scalia also said that he starts many sentences in his opinions with transitional terms to signal to the reader where his analysis is going, and prescribed that good legal writers should do the same.

✓ Anderson's Tip on Flow of Writing

Use transitional terms to fix flow problems. When proof-reading your document, you often can diagnose problems with the flow of the writing, such as choppy sentences or paragraphs that do not progress to a clear conclusion. Circle each place in your document where you see flow problems. Then, as a first step to making the language flow better, consider adding transitional terms and phrases as appropriate. See the accompanying sidebar for examples.

The Importance of Conciseness

Without exception, each of the justices stressed the importance of conciseness in legal writing, both as a virtue unto itself and as a

Transitions*	
Transitional Function	Transitional Terms and Phrases
Contrast	However, nevertheless, conversely, on the other hand, on the contrary, although, though, rather
Comparison	Likewise, similarly, analogously, in like manner, in the same way, for the same reason
Cause and effect	Therefore, accordingly, thus, because, so, for
Addition	Also, moreover, further, besides, in addition, additionally
Examples	For example, for instance, specifically, namely, that is
Restatement	In other words, simply put, that is
Concession	Granted, to be sure
Resumption after a concession	Still, nonetheless, nevertheless
Time	Subsequently, later, earlier, recently, initially, formerly, simultaneously
Place	Next to, nearby, here, beyond, opposite
Sequence	First, second, third, next, also, finally
Conclusion	Therefore, in summary, to conclude, in conclusion, finally

*See Enquist and Oates, *Just Writing: Grammar, Punctuation, and Style for the Legal Writer* 56 (2d ed., Aspen Publishers, 2005) (listing these and other generic transitional terms and phrases); Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 235 (2d ed., Matthew Bender, 2006); Bartholomew, "Attention to Work Product: Errors and Edits—Part II," 37 *The Colorado Lawyer* 67 (March 2008).

means to achieving clarity. Justice Ginsburg, a former law school professor, noted that her final exams always contained the legend, "Good, concise writing counts." Justice Scalia stated that the greatest problem with briefs he reads is "prolixity." Justice Thomas rhapsodized about a brief submitted to the Court by Judge Robert Bork that ran to a relatively short twenty pages—twenty "beautifully written pages." Making the same point from another perspective, Chief Justice Roberts noted that he has yet to finish reading a brief and think to himself, "I wish that had been longer."

Chief Justice Roberts also recalled a valuable editing lesson he received while clerking for Chief Justice Rehnquist. The Chief Justice returned a draft opinion to his clerk with the instruction to move everything but the topic sentences of the paragraphs into footnotes. After clerk Roberts had moved most of the text into footnotes as directed, Chief Justice Rehnquist met with him again and said, "Fine. Now cut out all the footnotes."

✓ *Anderson's Tip on Conciseness*

Read your document backward. You can make your writing more concise by editing individual sentences. Proofread your document backward, starting with the last sentence and then reading each sentence in reverse order. Doing so will force you to focus on each sentence in isolation. While reading each sentence, ask yourself two questions:

1. *Does this sentence serve a purpose (in other words, does the meaning remain essentially the same when the sentence is removed)?*
2. *Can I say the same thing in fewer words?*²⁶

Conclusion

In separate interviews, the U.S. Supreme Court justices agreed that good legal writing is essential to the successful practice of law. This first article reviewed the consensus by the justices that, first

and foremost, legal writing must be clear and concise. Part II will discuss the practices the justices follow in their own efforts to achieve good legal writing.

Notes

1. Garner, ed., *Black's Law Dictionary* (Thomson West, 2004). Garner has authored many leading works on legal style, including *A Dictionary of Modern Legal Usage* (Oxford University Press, 2004); *The Elements of Legal Style* (Oxford University Press, 2002); Garner *et al.*, *The Redbook: A Manual on Legal Style* (West, 2006).

2. Law Prose, Inc., "Interviews of United States Supreme Court Justices," available at www.lawprose.org/supreme_court.php. The eight justices interviewed by Garner 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.

3. The actual quote is "Clarity is the philosopher's courtesy." José Ortega y Gasset (1883–1955).

4. From author's notes of Colorado Court of Appeals Judge John Daniel Dailey's presentation to students of the University of Denver's (DU) Lawyering Process program (March 28, 2007). Judge Dailey offered this tip in the context of noting the distinction between making sense to yourself and making sense to the reader. Understanding what you want to say is a necessary first step toward ensuring that the reader understands as well.

5. See Slocum, *Legal Reasoning, Writing, and Persuasive Argument* 235 (2d ed., Matthew Bender, 2006). Slocum notes that readers "understand information more easily if each sentence shows its link to old information before it conveys new information." *Id.* at 235. Transitional terms provide the link between the old information and the new, thus giving the reader what Chief Justice Roberts referred to as the "hand" that leads the reader through the document. *See id.* at 236.

6. From author's notes of a DU Sturm College of Law Lawyering Process class on revising briefs (April 1, 2008). Thanks to Kate Stoker, Legal Writing Specialist at the DU Sturm College of Law, for contributing this tip. *See also* Emery *et al.*, *Handbook of English Fundamentals* 190 (Prentice Hall 1978). ■

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