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WHAT GREAT WRITERS CAN TEACH LAWYERS AND JUDGES:

Precise, Concise, Simple and Clear

By Douglas E. Abrams*

“Writing,” said lawyer Abraham Lincoln in 1859, is “the great invention of the world.”¹ From ancient times, the writer’s craft has captivated leading figures in literature, non-lawyers who are remembered most often for what they wrote, and not for what they said about how to write. Their commentary about the writing process, however, seems unsurprising because facility with the written language brought recognition in their day and later in history.

Like most other close analogies, analogies between literature and legal writing may be imperfect at their edges. “Literature is not the goal of lawyers,” wrote Justice Felix Frankfurter nearly 80 years ago, “though they occasionally attain it.”² “The law,” said Justice Oliver Wendell Holmes even earlier, “is not the place for the artist or the poet.”³

Despite some imperfections across disciplines, advice from well-known fiction and non-fiction writers can serve lawyers and judges well because law, in its essence, is a literary profession heavily dependent on the written word. There are only two types of writing – good writing and bad writing. As poet (and Massachusetts Bar member) Archibald MacLeish recognized, good legal writing is simply good writing about a legal subject.⁴ “[L]awyers would be better off,” said MacLeish, “if they stopped thinking of the language of the law as a different language and realized that the art of writing for legal purposes is in no way distinguishable from the art of writing for any other purpose.”⁵

As Justices Frankfurter and Holmes intimated, the tone and cadence of non-lawyer writers might vary from those of professionals who write in the law. Variance aside, however, the core aim of any writer, lawyers and judges included, remains constant – to convey ideas through precise, concise, simple, and clear expression.⁶ This article presents instruction from master non-lawyer writers about these four characteristics

PRECISION

1. *“The difference between the almost right word and right word is . . . the difference between the lightning and the lightning bug” – Mark Twain.⁷*

When we read personal messages from acquaintances or newspaper columns by writers friendly to our point of view, tolerance may lead us to recast inartful words or sentences in our minds, tacit collaboration that may help cure imprecision. “I know what they really meant to say,” we think silently to ourselves, extending a helping hand even if the words on the page did not quite say it.

Readers, however, normally do not throw lawyers and judges such lifelines. Quite the contrary. Legal writing typically faces a “hostile audience,” a readership that “will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning.”⁸ Judges and law clerks dissect briefs to test arguments, but only after opponents have tried to make the arguments mean something the writers did not intend. Advocates strain to distinguish language that complicates an appeal or creates a troublesome precedent later on. Parties seeking to evade contractual obligations seek loopholes left by a paragraph, a clause, or even a single word.⁹

The adversary system of civil and criminal justice induces lawyers and judges to strive for the right words and phrases the first time, even when extra care means reviewing drafts line-by-line. Legal writers beset later by a hostile reader’s parsing cannot always rely on a second chance to achieve precision.

2. *“The words in prose ought to express the intended meaning, and nothing more” – Samuel Taylor Coleridge.¹⁰*

Experienced litigators seek to avoid the predicament of having to ask the court to excuse their missteps by doing them a favor. Lawyers weaken the client’s cause when, for example, they miss a deadline, file the wrong paper, or overlook an argument and must summon the court’s discretion for an extension of time or permission to amend.

“To condense the diffused light of a page of thought into the luminous flash of a single sentence, is worthy to rank as a prize composition just by itself.”

Mark Twain

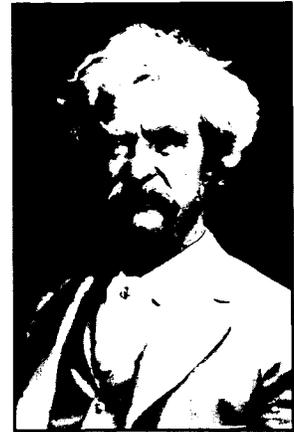


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Lawyers similarly weaken the cause when they must summon the generosity of judges or adversaries to do them a favor by acknowledging what the brief, agreement or other filing “really meant to say.”

France’s greatest short-story writer Guy de Maupassant was no lawyer, but his advice can remind lawyers that imprecise or otherwise inapt words can affect legal rights and obligations. “Whatever you want to say,” he asserted, “there is only one word to express it, only one verb to give it movement, only one adjective to qualify it. You must search for that word, that verb, that adjective, and never be content with an approximation, never resort to tricks, even clever ones, and never have recourse to verbal sleight-of-hand to avoid a difficulty.”¹¹

Maupassant’s directive sets the bar high, perhaps a bit too high because some imprecision is inescapable in language. Justice Frankfurter, a prolific writer as a Harvard law professor before joining the Supreme Court, was right that “[a]nything that is written may present a problem of meaning” because words “seldom attain[] more than approximate precision.”¹²

Imprecise tools though words may be, they remain tools nonetheless, sometimes the only tools that lawyers or judges have for stating their position or explaining a decision. Achieving the greatest possible precision remains the reason for meticulous writing and careful editing. Lawyering and judging, like politics, often depend on the “art of the possible,”¹³ even as perfection remains unattainable.¹⁴

CONCISENESS

1. ***“Brevity is the soul of wit,” and “Men of few words are the best men” – William Shakespeare.***¹⁵

Perhaps more than any other foundation for precision, preeminent writers often stress conciseness. “Less is more,” said British Victorian poet and playwright Robert Browning, wasting no words.¹⁶ “Brevity is in writing what charity is to all the other virtues,” said British writer and cleric Sydney Smith (1771-1845). “Righteousness is worth nothing without the one, nor authorship without the other.”¹⁷

Journalist and satirist Ambrose Bierce acidly defined “novel” as “[a] short story padded,” and wrote what is probably history’s short-

est book review, only nine words: “The covers of this book are too far apart.”¹⁸ One of the world’s greatest short-story writers, Russian Anton Chekhov, understood that “[c]onciseness is the sister of talent.”¹⁹

2. ***“This report by its very length, defends itself against the risk of being read” – Sir Winston Churchill.***²⁰

Conciseness increases the odds that the legal writer will hold the readers’ attention to the finish line. “I want the reader to turn the page and keep on turning to the end,” said Pulitzer Prize winning historian Barbara W. Tuchman. “This is accomplished only when the narrative moves steadily ahead, not when it comes to a weary standstill, overloaded with every item uncovered in the research.”²¹

“There is but one art – to omit!” said Scottish writer Robert Louis Stevenson, who lamented that, “O if I only knew how to omit, I would ask no other knowledge.”²²

Churchill, Tuchman and Stevenson accent the point that where the writer can convey the message efficiently in five pages, the writer risks losing the audience by consuming ten. Readers with a choice may not even start a lengthy document, and weary readers may throw in the towel well before the end.

Talented writers succeed best when professional modesty leads them to recognize, as historian David McCullough puts it, “how many distractions the reader has in life today, how many good reasons there are to put the book down.”²³ Distractions in the information age can be personal or professional. Like other Americans, lawyers and judges can choose from thousands of new books each year, plus Internet sources, digital and electronic resources, blogs, and the world’s newspapers and magazines available a mouse-click away. Federal and state judicial dockets have increased faster than population growth for most of the past generation or so, limiting judges’ patience for overwritten submissions.²⁴ Judges may sense when they have read enough of a brief, just as counsel researching precedents may grow bored with an overwritten judicial opinion. Counsel may have no choice but to plod through an opponent’s unwieldy brief or motion papers, or through unnecessarily verbose legislation or administrative regulations or



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Archibald MacLeish

private agreements, though the writer still risks obscuring important points amid the baggage.

Judges, in particular, can appreciate this short verse by Theodor Geisel (“Dr. Seuss”), who wrote for children, but often with an eye toward the adults: “[T]he writer who breeds/ more words than he needs/ is making a chore/ for the reader who reads./ That’s why my belief is/ the briefer the brief is,/ the greater the sigh/ of the reader’s relief is.”²⁵

3. *“I have made this [letter] longer, because I have not had the time to make it shorter” – French writer and mathematician Blaise Pascal.*²⁶

As any brief writer knows who has ever tried to present an argument within page limits imposed by court rules, achieving brevity without diminished meaning is no easy chore. Without rules or other formal restraints, verbosity can seem the path of least resistance. British poet, essayist and biographer Samuel Johnson, however, aptly likened “[a] man who uses a great many words to express his meaning” to “a bad marksman who, instead of aiming a single stone at an object, takes up a handful and throws at it in hopes he may hit.”²⁷

Conciseness demands self-discipline and clear thinking, usually through multiple drafts. Achieving brevity can be particularly hard work nowadays because computers may grease the skids for verbosity, but Johnson was right that “[w]hat is written without effort is in general read without pleasure.”²⁸

“Not that the story need be long,” said transcendentalist writer Henry David Thoreau, “but it will take a long time to make it short.”²⁹ Editing by the writer and others remains central, even though lawyers and judges typically write under time pressures (and, in the lawyer’s case, also financial pressures) that might not constrain other writers. “It is not the writing but the rewriting that counts,” said Pulitzer Prize winning novelist Willa Cather.³⁰

Environmentalist Rachel Carson observed that writing is “largely a matter of application and hard work, of writing and rewriting endlessly until you are satisfied that you have said what you want to say

as clearly and simply as possible,” a process that meant “many, many revisions” for her.³¹ Novelist Ernest Hemingway believed that “easy writing makes hard reading,”³² and he made no secret that he rewrote the last page of *A Farewell to Arms* 39 times before the words satisfied him.³³

Carson and Hemingway were not the only eminent writers candid enough to acknowledge publicly the inadequacy of their early drafts. “To be a writer,” said Pulitzer Prize winner John Hersey, “is to throw away a great deal, not to be satisfied, to type again, and then again and once more, and over and over.”³⁴

“Half my life is an act of revision; more than half the act is performed with small changes,” wrote novelist and Academy Award winning screenwriter John Irving, who recognizes that writing requires “strict toiling with the language.”³⁵ “I’m not a very good writer, but I’m an excellent rewriter,” reported James A. Michener,³⁶ who could not “recall anything of mine that’s ever been printed in less than three drafts.”³⁷

Dr. Seuss, who wrote for a particularly demanding audience, estimated that “[f]or a 60-page book, I’ll probably write 500 pages. . . . I winnow out.”³⁸ The rewards of winnowing may become apparent only with the finished document. “To get the right word in the right place is a rare achievement,” said Mark Twain, whom novelist William Dean Howells once called “sole, incomparable, the Lincoln of our literature.”³⁹ “To condense the diffused light of a page of thought into the luminous flash of a single sentence, is worthy to rank as a prize composition just by itself,” Twain explained. “Anybody can have ideas – the difficulty is to express them without squandering a quire of paper on an idea that ought to be reduced to one glittering paragraph.”⁴⁰

4. *“It is words as with sunbeams—the more condensed, the deeper they burn” – British Romantic poet Robert Southey.*⁴¹

Concise, precise writing can be the most direct, and thus the most forceful. “When you wish to instruct, be brief; that men’s minds take in quickly what you say, learn its lesson, and retain it faithfully,” said Ro-

“This report by its very length, defends itself against the risk of being read.”

Winston Churchill



man author, orator and politician Marcus Tullius Cicero. “Every word that is unnecessary only pours over the side of a brimming mind.”⁴²

Eighteenth century British poet Alexander Pope said that “[w]ords are like leaves; and where they most abound, much fruit of sense beneath is rarely found.”⁴³ Pope found “a certain majesty in simplicity”⁴⁴ because wordiness breeds imprecision when underbrush shrouds expression.

Does “less” really mean “less”? Not to writer and Nobel Prize winner Elie Wiesel, who says that “even when you cut, you don’t.”⁴⁵ “Writing is not like painting where you add. . . . Writing is more like a sculpture where you remove.” “Even those pages you remove somehow remain,” says Wiesel, “There is a difference between a book of 200 pages from the very beginning, and a book of 200 pages which is the result of an original 800 pages. The 600 pages are there. Only you don’t see them.”⁴⁶

The quest for conciseness nonetheless may raise a judgment call for lawyers and judges. Justice Joseph Story, one of the most prolific legal writers in the nation’s history, warned that sometimes “[b]revity becomes of itself a source of obscurity.”⁴⁷ Where full exposition of a legal doctrine, argument or agreement requires extended discussion, conciseness for its own sake may actual breed imprecision and compromise the sound administration of justice or the rights of clients.

5. ***“It wasn’t by accident that the Gettysburg Address was so short. The laws of prose writing are as immutable as those of flight, of mathematics, of physics” – Ernest Hemingway.***⁴⁸

“History at its best is vicarious experience,” said leading 20th century historian Edmund S. Morgan.⁴⁹ Sometimes an historical

example can help dispel a writer’s concern that readers might mistake conciseness for weakness. The “less is more” school profits from recounting President Abraham Lincoln’s Gettysburg Address, which he delivered on November 19, 1863 to help dedicate a national cemetery to fallen Civil War soldiers.

Preceding the President to the podium that day was Edward Everett, widely regarded as the greatest American orator of the era, a luminary whose resume included service as U.S. Representative, U.S. Senator, Massachusetts Governor, Minister to Great Britain, Secretary of State, and Harvard University professor and president. After Everett held the podium for more than two hours, Lincoln rose with a masterpiece that took less than two minutes.

Mindful that the nation’s newspaper and magazine readers needed a concise, stirring and readily embraceable rationale for wartime perseverance, Lincoln knew that his audience extended beyond the shadows of the cemetery. Indeed, the greatest praise for the Gettysburg Address came not from the President’s listeners that November day, but from his readers almost immediately. Ralph Waldo Emerson anticipated the



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“There is but one art – to omit! O if I only knew how to omit, I would ask no other knowledge.”

Robert Louis Stevenson

verdict of history when he predicted that the President’s “brief speech at Gettysburg will not easily be surpassed by words on any recorded occasion.”⁵⁰ “Perhaps [in] no language, ancient or modern, are any number of words found more touching or eloquent,” echoed abolitionist writer Harriet Beecher Stowe.⁵¹

Everett knew immediately that his interminable oration had bequeathed nothing memorable. “I should be glad,” he wrote the President the day after the Gettysburg dedication, “if . . . I came as near the central idea of the occasion in two hours, as you did in two minutes.”⁵² “My speech will soon be forgotten, yours never will be,” the prescient Everett told the President, adding “How gladly would I exchange my 100 pages for your 20 lines.”⁵³

6. “Great is the art of beginning, but greater the art is of ending;/ Many a poem is marred by a superfluous verse” – Henry Wadsworth Longfellow.⁵⁴

7. “Many a poem is marred by a superfluous word” – Henry Wadsworth Longfellow.⁵⁵

Conciseness begins with a document’s broad design and overall structure, but extends to choice of individual words. “The most valuable of all talents is that of never using two words when one will do,” said lawyer Thomas Jefferson, who found “[n]o stile of writing . . . so delightful as that which is all pith, which never omits a necessary word, nor uses an unnecessary one.”⁵⁶

British writer H.G. Wells concisely stated the case for conciseness: “I write as straight as I can, just as I walk as straight as I can, because that is the best way to get there.”⁵⁷ British historian and educator Thomas Arnold (1795-1842) introduces the next section of this article. “Brevity and simplicity,” Arnold wrote, “are two of the greatest merits which style can have.”⁵⁸

SIMPLICITY

1. “If you can’t explain something simply, you don’t understand it well” – attributed to Albert Einstein.⁵⁹

2. “Make everything as simple as possible, but no simpler” – paraphrasing Albert Einstein.⁶⁰

In more than 300 scientific and 150 non-scientific papers, Einstein sought to explain complex ideas as simply as possible.⁶¹ “Any fool,” he said, “can make things bigger, more complex, and more violent. It takes a touch of genius – and a lot of courage – to move in the opposite direction.”⁶²

English playwright and novelist W. Somerset Maugham offered two secrets of play writing – “have common sense and . . . stick to the point.”⁶³ For lawyers, common sense recognizes that legal arguments are not always as complex as they first seem. “Out of intense complexities,” observed Winston Churchill, “intense simplicities emerge.”⁶⁴

On the other hand, simplicity for its own sake can snare unwary legal writers. Where full exposition of a legal doctrine or argument requires extended discussion, over-simplification may impede rather than enhance communication. Lawyers heed Einstein’s formula best with the same sound judgment at the keyboard that they would exercise when speaking in the courtroom or other halls of justice.

3. “[B]eauty of style and harmony and grace and good rhythm depend on simplicity” – Plato.⁶⁵

4. “The supreme excellence is simplicity” – Edith Wharton.⁶⁶

Lawyers and judges write best by playing the percentages, which (as Einstein taught) usually points the compass toward simplicity. “Simplicity is the ultimate sophistication,” said Leonardo da Vinci, a Renaissance thinker whose writings have survived the centuries.⁶⁷ “[T]o be simple is to be great,” agreed essayist and poet Ralph Waldo Emerson.⁶⁸

Thomas Jefferson left no doubt about where he stood. “I dislike

"It is not the writing but the rewriting that counts."

Willa Cather



Photo by Van Vechten

the verbose and intricate style of the English statutes," the elderly lawyer wrote a friend in 1817, "and in our [Virginia's] revised code I endeavored to restore it to the simple one of the ancient statutes."⁶⁹

5. "Any word you have to hunt for in a thesaurus is the wrong word. There are no exceptions to this rule" – Stephen King.⁷⁰

"One of the really bad things you can do to your writing," King explains, "is to dress up the vocabulary, looking for long words because you're maybe a little bit ashamed of your short ones."⁷¹

Ernest Hemingway said that he wrote "what I see and what I feel in the best and simplest way I can tell it."⁷² Hemingway and William Faulkner went back and forth about the virtues of simplicity in writing. Faulkner once criticized Hemingway, who he said "had no courage, never been known to use a word that might send the reader to the dictionary." "Poor Faulkner," Hemingway responded, "Does he really think big emotions come from big words? He thinks I don't know the ten-dollar words. I know them all right. But there are older and simpler and better words, and those are the ones I use."⁷³

Kurt Vonnegut placed himself comfortably in Hemingway's camp: "I wonder now what Ernest Hemingway's dictionary looked like, since he got along so well with dinky words that everybody can spell and truly understand."⁷⁴

Will Rogers is most remembered as a humorist, but satire about public issues frequently conveys perceptive underlying messages. Rogers wrote more than 4,000 nationally syndicated newspaper columns, and he contributed wisdom about language.⁷⁵ His advice resembled Hemingway's and King's: "[H]ere's one good thing about language, there is always a short word for it," Rogers said. "Course the Greeks have a word for it, the dictionary has a word for it, but I believe in using your own word for it.

I love words but I don't like strange ones. You don't understand them, and they don't understand you. Old words is like old friends – you know 'em the minute you see 'em."⁷⁶

6. "The finest language is mostly made up of simple unimposing words" – British Victorian novelist George Eliot (Mary Ann Evans).⁷⁷

"Broadly speaking," said Churchill, "the short words are the best, and the old words when short are best of all."⁷⁸ "Use the smallest word that does the job," advised essayist and journalist E. B. White.⁷⁹

In a letter to a 12-year-old boy, Mark Twain praised his young correspondent for "us[ing] plain, simple language, short words, and brief sentences. That is the way to write English – it is the modern way and the best way. Stick to it; don't let fluff and flowers and verbosity creep in."⁸⁰

"Where a short word will do," said British writer and theologian Henry Alford (1810-1871), "you always lose by using a long one."⁸¹

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“Easy writing makes hard reading.”

Ernest Hemingway

“Elegance of language may not be in the power of all of us,” Alford concluded, “but simplicity and straightforwardness are.”⁸²

CLARITY

1. **“Have something to say, and say it as clearly as you can. That is the only secret of style” – British poet and writer Matthew Arnold.**⁸³

“[T]he first end of a writer,” British Poet Laureate and literary critic John Dryden counseled in 1700, is “to be understood.” “Everyone who writes strives for the same thing,” added poet William Carlos Williams: “To say it swiftly, clearly, to say the hard thing that way, using few words. Not to gum up the paragraph. To know when to quit when you’ve done.”⁸⁴

British writer and poet John Ruskin (1819-1900) found it “excellent discipline for an author to feel that he must say all he has to say in the fewest possible words, or his reader is sure to skip them; and in the plainest possible words, or his reader will certainly misunderstand them.”⁸⁵

2. **“The chief virtue that language can have is clarity, and nothing detracts from it so much as the use of unfamiliar words” – Hippocrates.**⁸⁶
3. **“Think like a wise man but communicate in the language of the people” – William Butler Yeats.**⁸⁷

“Don’t *implement* promises, but *keep* them,” instructed British novelist and essayist C.S. Lewis.⁸⁸ “Don’t say ‘infinitely’ when you mean ‘very’, otherwise you’ll have no word left when you want to talk about something really infinite.”⁸⁹

“Plain clarity is better than ornate obscurity,” advised Mark Twain.⁹⁰ “Words in prose,” said British Romantic poet and philosopher Samuel Taylor Coleridge, “ought to express the intended meaning; if they attract attention to themselves, it is a fault; in the very best styles you read page after page without noticing the medium.”⁹¹

Coleridge’s point is universal. Lawyers and judges normally write best when precision, conciseness, simplicity and clarity craft a style that

induces readers to remember the message more than they remember the messenger.

CONCLUSION

Literary figures have long disparaged lawyers’ writing as unworthy of emulation. “[D]o not give it to a lawyer’s clerk to write,” warned Miguel de Cervantes in *Don Quixote*, “for they use a legal hand that Satan himself will not understand.”⁹² Lawyers, said Jonathan Swift in *Gulliver’s Travels*, use “a peculiar cant and jargon of their own that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong.”⁹³

In his poem, “The Lawyers Know Too Much,” Pulitzer Prize winning writer and poet Carl Sandberg chided “higgling lawyers” for “Too many slippery ifs and buts and howevers, Too much hereinbefore provided whereas, Too many doors to go in and out of.”⁹⁴ Perhaps, Sandberg’s poem mused, a lifetime of unvarnished legalese helps explain “why a hearse horse snickers hauling a lawyer’s bones.”⁹⁵

Lawyers who appreciated literary style have expressed similar criticism. Near the end of his life, for example, Thomas Jefferson chastised his fellow lawyers for “making every other word a ‘said’ or ‘aforesaid’ and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means.”⁹⁶

“I quote others in order to better express my own self,” explained French Renaissance essayist Michel de Montaigne.⁹⁷ In this two-part article, I have quoted from some of history’s best-known writers to show how literature can help lawyers and judges achieve what Mark Twain called “the supreme function of language. . . – to convey ideas and emotions.”⁹⁸

For lawyers and judges alike, the core aspiration is continually to hone writing skills because, as Hemingway put it, “We are all apprentices in a craft where no one ever becomes a master.”⁹⁹ “As with all other aspects of the narrative art,” says Stephen King, writers “improve with practice, but practice will never make you perfect. Why should it? What fun would that be?”¹⁰⁰

“My speech will soon be forgotten, yours never will be. How gladly would I exchange my 100 pages for your 20 lines.”

Edward Everett, to President Abraham Lincoln. Everett's two-hour oration preceded Lincoln's Gettysburg Address.

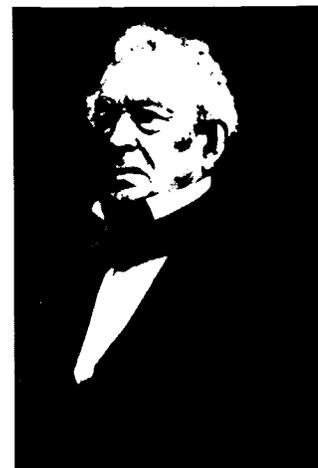


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***“Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of.”***

***Carl Sandburg, from his poem,
“The Lawyers Know Too Much”***

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