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EIGHT STRATEGIES THAT ENHANCE LEGAL WRITING

DOUGLAS E. ABRAMS¹

A FEW YEARS AGO, I SPOKE ABOUT LEGAL WRITING AT AN ANNUAL FORUM OF MISSOURI’S APPELLATE JUDGES, HELD AT THE UNIVERSITY OF MISSOURI SCHOOL OF LAW IN COLUMBIA.

The hour-long presentation advanced eight strategies that enable judges and practicing lawyers to sharpen their writing. These eight strategies appear below in this article.

Judges typically write for audiences that differ from the audiences practitioners typically strive to reach. In judicial decision making as in advocacy or counseling, a legal writer communicates best by tailoring expression (1) to meet the writer’s own goals (which may be informative, persuasive, adversarial, cooperative, or some combination); (2) to meet the legal and factual context; and (3) to meet the likely audience’s circumstances.²

Regardless of individual goals, context, and circumstances, however, the eight strategies profiled below remain universal because the English language at its core knows only two types of writing – good and bad. Good legal writing is good writing about a legal subject.³ Justice Elena Kagan states the formula: “To be a good legal writer . . . is to know the law and be a good writer.”⁴

Now for the eight strategies. . . .

1. Be Well-Read

Justice Felix Frankfurter had perceptive advice for young people who contemplate careers in the law: “The best way to prepare for the law is to [be] a well-read person.”⁵ Reading, he explained, enables lawyers to “acquire the capacity to use the English language on paper and in speech with the habits of clear thinking.”⁶

Justice Frankfurter did not mean to restrict the would-be lawyer’s reading list to law books and other sources of written legal expression. He meant to urge a diverse diet of fiction and non-fiction works whose styles and rhetorical competence can influence readers page by page.

Reading to improve one’s writing need not cease when a student receives the J.D., but can continue for years with

both literary and legal works. A lawyer’s quest for improved writing skills remains a lifelong work in progress.

Writing styles and conventions have evolved over the years, but (as Justice Frankfurter suggested) fiction and non-fiction classics have generally stood the test of time. With so many print voices competing for attention today, more recent quality fiction and non-fiction works also tend to satisfy public scrutiny when the work emerges from significant effort and close editorial refinement.

Throughout a career, a lawyer reading law works for their legal doctrine can also weigh whether a particular book, treatise, law review article, or other source demonstrates a writing style worth emulating. One prominent contemporary nationwide law source stands out for meeting the test: U.S. Supreme Court opinions. The Court remains divided ideologically, but its opinions demonstrate quality writing,

whether a particular decision seems liberal or conservative, and whether an opinion is a majority, concurrence, or dissent. The justices and their law clerks meet and surpass benchmarks for superior expression.

Paying attention to well-written literary or law works does not end the reader’s learning process. In their decision making and representational roles, judges and lawyers often must plod through writing that remains unpalatable to the eyes and ears. Even when a work of literature or law falls short on writing prowess, the work may nonetheless yield valuable lessons by demonstrating how *not* to write. As in many other areas of daily life, a person can learn from others’ failures as well as from their successes.



Douglas E. Abrams

2. Treat Writing as a Full-Time Job

Judges and lawyers write when they compose at the keyboard, but that is not all. Without letting writing consume a well-rounded life, serious legal writers recognize that they are never “off duty” when a writing project beckons.

When I pursued a writing project early in my career, for example, I would keep a pen and paper in my pocket whenever I jogged or took a walk. I jotted down thoughts or phrases that came to me at the moment. Now I keep my phone in my pocket, ready to text, email, or dictate into my home or office. I even keep a pad and phone on the night table near the bed because words, phrases, or ideas that come at 2 a.m. may disappear from memory by morning. An idea here and an idea there can contribute to a quality final writing.

Inspiration can come when least expected. “Write down the thoughts of the moment,” advised Sir Francis Bacon

(1561-1626), because thoughts that “come unsought are commonly the most valuable and should be secured, because they seldom return.”⁷

3. Strive to Overcome the “Hostile Audience”

When a person writes an inartfully expressed message to a friend, the friend may lend a helping hand. “I know what he really meant to say,” or “She could have said it better, but I get it.” The intended, but inartful, message can still resonate.

No such helpful lifeline normally rescues judges and lawyers who write in an adversary system of civil and criminal justice. Judges and lawyers regularly face a “hostile audience,” readers who may try to make the words and ideas mean something the writer did not intend.⁸ For example, advocates and courts may seek to distinguish a judicial precedent or its analysis. Litigants and courts may parse a party’s briefs for apparent but unintended argument or concession. A meandering law review article may invite unintended interpretation, or else later application hurtful to the writer’s cause.⁹ In public and private forums alike, the legal writer may have little or no second chance to explain, clarify, or restate.

How can judges and practitioners help overcome the hostile audience? In a quite different context, French writer Guy de Maupassant advised writers to choose their words with especial care. “Whatever you want to say, there is only one word to express it, only one verb to give it movement, only one adjective to qualify it.”¹⁰ This advice seems too simple, however, because as Justice Frankfurter correctly observed in a legal context, words “seldom attain more than approximate precision.”¹¹

President and Chief Justice William Howard Taft offered judges and lawyers this more realistic strategy for carefully navigating hostile waters: “Don’t write so that you can be understood; write so that you can’t be misunderstood.”¹² In our adversary system, a legal writer may not be able to prevent “hostile” readers from attempting to refashion a precedent or written argument to suit the readers’ purposes, but a meticulous legal writer can make any attempts more difficult.

4. Respect the Fundamentals. . .

As they do in many other lawyering pursuits, lawyers striving to write well should heed the fundamentals most of the time. Heeding the fundamentals of rhetoric makes sense because fundamentals earned their status by being generally applicable rather than inapplicable and generally helpful rather than unhelpful. The passage of time is their pedigree.

Basic rules of grammar, syntax, and spelling qualify as fundamentals. So too do the four characteristics of good legal writing advanced by professor Henry Weihofen: Good legal writing is concise, precise, simple, and clear.¹³

5. . . . But Follow a “Rule of Reason”

As they heed the fundamentals most of the time, legal writers should also remain masters of language, not its prisoners. Good writing sometimes summons a “rule of reason” that counsels prudent departures from expressive norms or conventions.

Purists sometimes frown on, for example, splitting infinitives, using contractions, writing sentence fragments, beginning sentences with conjunctions, or ending sentences with prepositions. But when “violating” a norm or convention seems to advance the message’s meaning, persuasion, or delivery, the legal writer should “violate.”

Consider the tart reply that Winston Churchill, a Nobel Laureate in Literature, reportedly delivered to criticism that his writing sometimes ended sentences with a preposition: “That is the sort of arrant pedantry up with which I shall not put.”¹⁴

6. Encourage Third-Person Editing

During a writing’s gestation, editing begins with the author because Justice Louis D. Brandeis was right: “There is no such thing as good writing. There is only good rewriting.”¹⁵ At some point before the final product emerges, however, self-editing may reach its outer limits. After living with the project for hours or days, the author may lose some capacity to bring a fresh perspective to the screen. Repetitive proof-reading may dull the senses, and incomplete analysis, grammatical miscues, typos, or other shortcomings may escape detection.



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Enter third-person editing, the enlisting of fresh eyes and ears. My first professional exposure to the value of third-person editing came in the late 1970s, when I clerked for New York Court of Appeals Judge Hugh R. Jones.¹⁶ Judge Jones would draft an opinion longhand on a legal pad, and our administrative assistant would type it. Before the draft opinion left our chambers for circulation to the court's other six members, the judge and his two law clerks — the third-person editors — would gather around the table to parse words, sentences, and paragraphs for content, style, grammar, spelling, and other elements that would help produce the best possible final writing.

Truth be told, Judge Jones' drafts were exemplars even before the two law clerks contributed our input. The New York Times called him "an intellectual leader of the state's highest court and one of its best writers," accolades he richly deserved.¹⁷ He did not truly need the clerks' input, but he made clear that he wanted it. "There is always room for improvement," he would explain with genuine respect for our contributions. The final calls on suggested editorial changes were his as the author, but he also knew that few drafts left our editorial table as they had arrived because improvement is the essence of competent third-person editing.

Practicing lawyers also benefit from third-person editing of their drafts. Their editor can be a partner, associate, student intern, or someone else familiar with law and written expression. Practitioners often face tight time deadlines and lurking financial constraints, but allowing time for this law office give-and-take where possible can help produce more artful writing.

In judicial chambers and law offices alike, a talented, conscientious third-person editor is the writer's ally, not a troublesome meddler. Judges and lawyers should write with fierce pride of authorship, the inner spark that generates the impulse to produce a quality product. But these writers should temper this pride with humility that encourages and welcomes editorial input. A legal writer should reward skillful editors with the gratitude they deserve as essential, productive colleagues.

7. Avoid Textual Footnotes

"I hate footnotes and endnotes," wrote President Barack Obama in his 2020 memoir.¹⁸

Footnotes (and their cousins, endnotes) come in two primary categories. The first category, "citation footnotes," largely identify case law and other relevant sources to support factual, legal, or other points that the writer makes in the main text.

Critics such as the former president level most of their harshest criticism at the second category, "textual footnotes," which consist of sentences or paragraphs that continue discussion that appears in the main text or that introduce new ideas or concepts.

Citation footnotes can serve essential purposes because, as professor John Kenneth Galbraith said, "everyone, professional and lay reader alike, needs to know on occasion the credential of a fact."¹⁹ For judges and lawyers, these "credentials" usually mean case law or other precedent. Citation footnotes, professor Galbraith continued, can also "provide an

exceedingly good index of the care with which a subject has been researched."²⁰ A citation footnote may also suggest supportive further sources the reader may consult. Where the footnote is appended to a substantial quote or paraphrased source that appears in the main text, the citation may help avoid plagiarism or copyright concerns.

Textual footnotes, however, have been harshly criticized as annoying distractions that interrupt the flow with discussion that belongs either in the main text or else deleted altogether. Punctuating the criticism over the years have been such pejoratives as labeling textual footnotes as "an addiction . . . which mangles all legal writing," "an insidious plague," and "a lazy form of writing."²¹

U.S. Circuit Judge Abner J. Mikva attacked textual footnotes as "abominations" contrary to human physiology. "If God had intended the use of footnotes to be a norm, He would have put our eyes in vertically instead of horizontally."²²

In a court submission, an advocate's decision whether to use citation footnotes or textual footnotes must heed applicable court rules. These rules may prohibit footnotes, may discourage them, or may instruct advocates to place citations in the main text immediately following the sentence or passage they support.

In judicial opinions, textual footnotes and citation footnotes laden with string cites can burden the administration of justice. On the one hand, the precedential effect of judicial footnotes remains a matter of controversy — are these footnotes merely extraneous, or is anything in an opinion "good law" potentially citable and relevant in future cases? When future advocates confront an arguably unnecessary footnote or an overwritten footnoted string cite, they may feel compelled to devote time (and the client's resources) to deciphering each source for potential meaning and import.

On the other hand, some judges have identified a "rule of reason" that finds discrete useful purposes for textual footnotes in opinions, such as (1) to treat collateral issues controlled by binding precedent; (2) to identify issues not reached; (3) to present trial testimony that supports discussion in the main text; (4) to reply to concurring or dissenting opinions; or (5) to invite legislative or other law reform on one or more issues presented in the trial or appeal.²³

Prudence commends a default position for footnoting in judicial opinions, briefs, or other court submissions: Use citation footnotes for any of the worthwhile purposes discussed above. But avoid textual footnotes and use them only for sound reasons that appear consistent with the writer's goals, the legal and factual context, and the likely audience's circumstances.

8. Frontload

"Frontloading" has the legal writer enhance understanding and effect by opening a section, subsection, or other lengthy writing with a paragraph or two that orients readers with a summary and roadmap of what will follow. Frontloading recognizes that the writer's familiarity with the facts and circumstances may initially exceed the reader's, and it serves the writer's communicative mission by focusing the reader's attention at the outset.

