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What Great Writers Can Teach Lawyers and Judges

Wisdom from Plato to Mark Twain to Stephen King (Part I)

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 two-part article presents instruction from master non-lawyer writers about precision and conciseness. In the next issue of *Precedent*, Part II will present their instruction about simplicity and clarity.

PRECISION

1. *“The difference between the almost right word and right word is ... the difference between the lightning and the lightning bug.”*
— Mark Twain⁷

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 Coleridge¹⁰

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. 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 great 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 Shakespeare¹⁵

Perhaps more than any other foundation for precision, pre-eminent 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 shortest book review, only nine words: “The covers of this book are too far apart.”¹⁸ One of the world’s greatest short story writers, 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 Churchill²⁰

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, “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 10. 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 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 Pascal²⁶

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 Roman 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 two hundred pages from the very beginning, and a book of two hundred pages which is the result of an original eight hundred pages. The six hundred 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 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 Nov. 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 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 hundred pages for your twenty lines.”⁵³

6. *“Many a poem is marred by a superfluous verse.” — Henry Wadsworth Longfellow*⁵⁴

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.”⁵⁵

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.”⁵⁶ British historian and educator Thomas Arnold (1795-1842) introduces Part II of this article, which will begin by discussing simplicity. “Brevity and simplicity,” Arnold wrote, “are two of the greatest merits which style can have.”⁵⁷

COMING SOON — *What Great Writers Can Teach Lawyers and Judges: Wisdom from Plato to Mark Twain to Stephen King (Part II)*

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