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The Department of Redundancy Department: Concision and Succinctness—Part I

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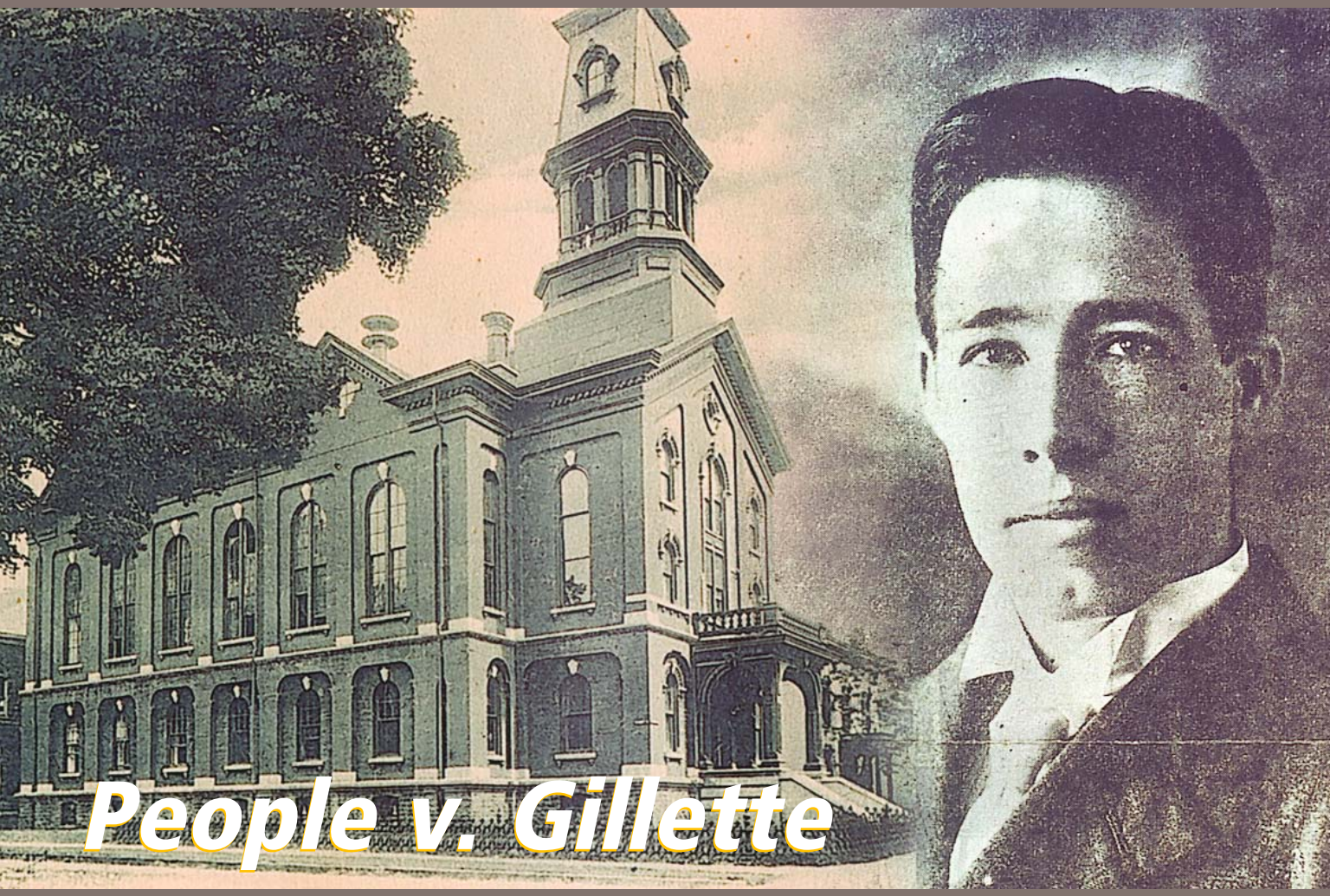

People v. Gillette

The Trial of the 20th Century Lives on in the 21st

by Thomas G. Smith

Also in this Issue

BY GERALD LEBOVITS

The Department of Redundancy Department: Concision and Succinctness — Part I

We've heard it before. Be concise: Use only necessary words. Be succinct: Use only necessary content. The goal of concision and succinctness is to get the most thoughts in the shortest space — to make every word and thought tell. Less is more in legal writing. Ecclesiastes 32:8 put it perfectly: "Let thy speech be short, comprehending much in few words." Brevity covers everything from the number of pages in a document to word size and number of syllables.

Why brevity? Everyone knows that writing must tell. Not everyone knows why. If you internalize the reasons, you'll learn the techniques to make every word tell. Brevity makes the written product easier to read and more likely to be read. Brevity adds power. Brevity reduces ambiguity and inconsistency. Fewer words mean fewer mistakes. Extra words make both reader and writer forget what came before. And verbosity is impolite: Legal readers "should not be addressed at undue length, in paragraphs wordy and windy, for the tone should imply two busy [people], writer and reader, both perfectly capable of following an argument that is succinct, and efficiently composed."[1]

Some legal writing is so flabby it can be cut by 50 percent.[2] This two-part column explores how to write concisely and succinctly — to make your writing 50 percent better by making it 50 percent shorter.

When Not to Be Concise or Succinct

Precision is more important than concision. "The ball was thrown by me to her." *Becomes:* "I threw her the ball." *Becomes:* "I threw the ball to her." The first example is passive. The second, with a miscue, suggests that "I threw her." In the second example, the reader doesn't know until the end that a ball was thrown.

Persuasion is more important than concision and succinctness. Which words can you cut in this example? "Fresh fish sold here today." Answer: Every word. But then you'd sell no fish. Amplification is better than concision and succinctness if your point is important and must be stressed.[3]

Articulation also is better than concision and succinctness: "Shorter is usually better, but not if it hides rather than exposes meaning."[4]

Interesting writing is better than concise writing. Prefer short words, sentences, paragraphs, and documents, but "[v]ariety is important."[5] In his Gettysburg Address, President Abraham Lincoln could have cut a few words by saying, "A people's government." He used, instead, a longer but more memorable variant: A "government of the people, by the people, [and] for the people."[6]

Succinctness in Law

- Don't waste time and space discussing obiter dictum from case law unless you've got nothing more authoritative or persuasive. This is what Mortimer Levitan advised lawyers to tell non-lawyers about dicta:

> Any lawyer who soberly — or otherwise — suggests to a non-lawyer that a single word in a court opinion is unimportant could imperil the entire judicial system. The non-lawyer might naively ask, "Why did the court write such a fantastically elongated opinion if all of it wasn't important?" Taking a hint from the courts, the lawyer should neither hear nor answer the question; but if an answer is coerced, it should be that courts are frequently so overburdened that they haven't time to write concise opinions. It takes more time to take off excess weight than it does to put it on . . . .[7]

- Define terms substantively, not procedurally. Incorrect procedural definition: "According to the courts, the statute of limitations applies *where* [use *when* or, much better, *if*] a court determines that a litigant proves to a preponderance that six years passed since a contract was signed." In defining the concept "statute of limitations," it's insignificant whether a court holds it to apply, how a court determines its application, and what is the standard of proof to which a litigant must prove it.
- Use only legally significant and emotional facts, without writing emotionally.
- Don't recite testimony witness by witness. Doing so is ineffective, not only space-wasting.[8]
- Cut from your brief's or memorandum's facts section any fact not discussed in your argument or discussion section when you apply law to fact. Similarly, don't raise in your argument section facts not in your facts section.
- Don't add your opinion about facts in your facts section. Save your

CONTINUED ON PAGE 52

opinions about the facts for the argument section.

- Kill irrelevant details like people, places, and dates. They take up room, burn brain cells, and emphasize the wrong issues. Some writers include extra details because they're afraid of leaving something out. They should be more afraid that their readers will stop reading or, worse, misconstrue their point.
- Make your citations speak to save text.[9]
- Begin sentences with content, not with "*the court held* or *the court went on to say*."[10] Save text and persuade by arguing rules, not cases. Give the rule first, then the citation.
- Use appropriate amounts of authority with appropriate amounts of explanation. Predict how much authority a busy but skeptical reader needs. Then use the most authoritative citations: the highest court, the clearest statement of law. Avoid string citing except to give research necessary to understanding the outcome or the controversy, such as if there is a split in authority.
- Don't analyze cases in depth or give their facts unless you want to analogize your case to or distinguish your case from the case to which you are citing.
- Don't regurgitate the entire procedural history.
- Don't list the litigants' papers.[11]
- A legal argument isn't a mystery novel, with the conclusion at the end. Begin paragraphs and sections with your conclusion. That'll lessen the possibility of offering a long explanation before getting to the point. Legal argument should be structured like an inverted pyramid, with a broad conclusion that precedes justification.
- Don't dwell on givens, stress history, or impress with legal research.

Concision Techniques

Trash Tautologies. Tautologies repeat the same thought in different words. Don't be wordy, verbose, prolix, loquacious, long-winded, repetitive, chatterbox-like, and so on and so forth, etc.

Quibble Over Quoting. Limit the length of your quotations by quoting only the most pungent words and what you can't say better yourself. Don't use blocked quotations unless the blocked quotation of 50 words or more contains a critical test from a seminal case or quotes an important statutory or contractual provision. Even then, break up the quotation into manageable bits. Be careful not to quote unessential statutory or contractual provisions.

Obliterate the Obvious. Consider this, from President Calvin Coolidge: "When a great number of people cannot find work, unemployment results."[12]

Circumnavigate Circular Platitudes. Circular platitudes are logically fallacious, waste space, and stop the reader from reading further. Only the most obvious circular platitudes succeed, like Yogi Berra's home run: "It ain't over till it's over."

Say It Once, All in One Place. Avoid repeating ideas already expressed. A fact that applies to more than one legal point can be mentioned more than once. The point itself should be mentioned but once.

Sometimes Use Gerunds. A gerund is a verb form used as a noun. Gerunds end in "-ing." "The act of eviction will make the tenant homeless." *Becomes:* "Evicting the tenant will make her homeless."

Coordinating Conjunctions. Replace coordinating conjunctions ("and," "but," "or," "for," "nor," "so," "yet") with a period. Then start a new sentence: "I was walking down the street one day, and a man came up to me to ask me what time it was." *Becomes:* "I was walking down the street one day. A man came up to me to ask me what time it was."[13]

Embedded Clauses. Embedded clauses are parenthetical expressions: internal word groups with their own subjects and verbs. Transfer them to a second sentence. Doing so shortens your sentences and thus is concise, even though it might add text: "The judge's chambers, which has a hunter-green carpet, is at 100 Centre Street in Manhattan." *Becomes:* "The judge's chambers is at 100 Centre Street. Her carpet is hunter green." *But* compress childish writing: "The man was tall. He was fat. He had yellow teeth. He wore a green tie." *Becomes:* "The tall, fat man with yellow teeth wore a green tie."

Live for Line Editing. Experiment with cutting words from every paragraph that has only a few words on the last line. The cutting will make your writing tighter. This is one of the most successful techniques for lawyers who fear exceeding a page limit specified in a court rule.

Defy Defining and Quit Qualifying. Lawyers add unnecessary text by defining and qualifying whenever they can. Here's Dan White's satirical advice: "Do not stop with hundreds of useless definitions and qualifications. Go through it again and again, expanding clauses and inserting redundancies. This will enable you to avoid the perils of certain forms of punctuation — such as the period."[14]

Expunge Expletives. The word "expletive" comes from the Latin *expletus*, meaning "filled out." Expletives, which should be deleted, include the phrases "there are," "there is," "there were," "there was," "there to be," "it is," "it was." Some jargonmongers call expletives "dummy subjects."

Some examples: "*There are* two things wrong with almost all legal writing. One is its style. The other is its

"Let thy speech be short, comprehending much in few words." Ecclesiastes 32:8.

content."[15] *Becomes:* "Two things are wrong . . . ." "*There is* no rule *that* is more important." *Becomes:* "No rule is more important." "*There is* no case law *that* addresses the question." *Becomes:* "No case addresses the question." "The court found *there to be* a discovery violation." *Becomes:* "The court found a discovery violation." "*It is* the theory *that* lends itself." *Becomes:* "The theory lends itself."

A double expletive is double trouble. *It is* clear that *it* will cause problems.

There are some exceptions to avoiding "there are" expletives: First, expletives may be used for emphasis.[16] It's more concise to write, "Judge Jones wrote the opinion" than to write, "It was Judge Jones who wrote the opinion." But if the writer has a strong reason to emphasize Judge Jones's authorship — to correct a mistaken impression that Judge Smith wrote the opinion, for example — the expletive "it was . . . who" will serve that function. Like all techniques of emphasis, expletives should be used sparingly.

Second, expletives may be used for rhythm. Ecclesiastes 3:1 would be different if, instead of "To everything *there is* a season," the author wrote, "To everything is a season." Different, too, would be Robert Service's opening line in *The Cremation of Sam McGee*: "*There are* strange things done in the midnight sun" *rather than* the more concise "Strange things are done in the midnight sun."

Third, expletives may be used to climax or to write sentences that go from short to long, from old to new, or from simple to complex. Thus, the uninverted form, "There is a prejudice against sentences that begin with expletives," is better than the inverted form, "A prejudice against sentences that begin with expletives exists." The climax shouldn't be on "exists." The writer could have avoided the issue: "People are prejudiced against sentences that begin with expletives."

Prune the Passive Voice. Passives are wordy, not merely hard to read: "The passive voice is avoided by good lawyers." *Becomes:* "Good lawyers avoid the passive voice." Voila! The sentence, with two fewer words, is easier to read. "The following PREVIEW has been approved for ALL AUDIENCES by the Motion Picture Association of America." *Becomes:* "The Motion Picture Association of America has approved the following PREVIEW for ALL AUDIENCES." Huzzah! The sentence, with two fewer words, is easier to read.

As You Like It. Delete "as," if possible: "Some consider drinking *as* a defense to murder." *Becomes:* "Some consider drinking a defense to murder." "He was appointed *as* a court attorney." *Becomes:* "He was appointed court attorney."[17]

To Be or Not to Be. Delete "to be," if possible: "Some consider drinking *to be* a defense to murder." *Becomes:* "Some consider drinking a defense to murder." "The opinion needs *to be* lengthened." *Becomes:* "The opinion needs lengthening."

Don't Let It Come Into Being. Banish "being," if possible: "The attorney was regarded as *being* a persuasive advocate." *Becomes:* "The attorney was regarded as a persuasive advocate." And being that we are on the subject, don't substitute "being that" for "because": "The court reporter types quickly *being that* he has magic fingers." *Becomes:* "The court reporter types quickly *because* he has magic fingers."

In the Nick of Time. Toss "time," if you've got the time to do so: "The brief will be submitted in two weeks' time." *Becomes:* "The brief will be submitted in two weeks."

In That. Don't begin sentences with "in that" or use "in that" in an internal clause: "*In that* the judge's mother was a litigant, the judge recused herself." *Becomes:* "The judge recused herself because her mother was a litigant."

Relative Pronouns. Best not begin sentences or subordinate clauses with relative pronouns: "who," "whose," "whoever," "whichever," "whatever," and "which." Beginning that way adds unnecessary fat and is unnecessarily complex.

> Don't be wordy, verbose, prolix, loquacious, long-winded, repetitive, chatterbox-like, and so on and so forth, etc.

Rally Against Relative Clauses. Strike the nonstructural "who," "who are," "who is," "whoever," "whom," "whomever," "which," "which is," "which are," "which were," "that," "that is," "that are," and "that were." Structural example: "The attorney believed his client owed him $500." *Becomes:* "The attorney believed *that* his client owed him $500. (The attorney didn't believe his client.) Nonstructural example: "I hope that you will write concisely." *Becomes:* "I hope you will write concisely."

Excise nonstructural relative clauses in an appositive. Appositives rename or ascribe new qualities to a noun: "The judge, *who is* 44 years old, is a strong editor." *Becomes:* "The judge, 44 years old, is a strong editor." "Law clerks [remove *who are*] not averse to writing might find their words quoted and remembered." "Albany, [remove *which is*] a large city even though natives call it 'Smallbany,' is the state capital."

-Er & -Est. Add "-er" to one- or, depending on your ear, two-syllable words after "more": "More close" *becomes* "Closer." What do you think of the two syllable "often"? Massachusetts Supreme Judicial Court Justice Holmes, later of the Supreme Court, added the "er" in *Ryalls v. Mechanics' Mills*:[18] "General maxims are oftener an excuse for the want of accurate analysis than a help . . . ." This rule

doesn't apply to words having three syllables or more. Lewis Carroll's poetic "curiouser and curiouser" in *Alice's Adventures in Wonderland* is remembered because "curious" has three syllables and thus shouldn't have had the "-er" suffix.

Add "-est" to one- or two-syllable suffixes: "Most close" *becomes* "Closest." This rule doesn't apply to words that have three syllables or more.

Reduce "Fact" Phrases. Delete "in fact" (a trite formula that, if ever used, should in fact be restricted to facts, not opinions), "in point of fact," "as a matter of fact," "the fact is that," "given the fact that," "the fact that," "of the fact that," "in spite of the fact that" (meaning "although"), and "the court was unaware of the fact that."

"The fact that" can almost always be deleted. Other "fact" expressions should be replaced by something more concise, such as "actually."

A good rule: Don't confuse facts with rules. *Incorrect:* "The opinion relies on the fact [should be *on the rule*] that involuntary confessions are inadmissible at trial."

Vitiate Verbosity. Needless to say, of course, anything that is wordy or need not be written should not be written. (*Should be:* "Anything that need not be written should not be written.")

Verbose: "There can be no doubt but that [delete throat clearer] you should not use empty phrases [write in affirmative] despite the fact that [although] many writers would appear to [delete qualifier] register disagreement [fix nominalization—disagree]."

Verbose: "Plaintiff, Ms. A, filed a lawsuit against defendant, Mr. B, alleging that Mr. B. committed a breach of their contract of employment." *Becomes:* "Ms. A sued Ms. B for breaching their employment contract."

Next month: This column continues with concision techniques. ■

1. Walker Gibson, *Literary Minds and Judicial Style*, 36 N.Y.U. L. Rev. 915, 923 (1961).

2. Most legal writing can be cut in half. *See* Mortimer Levitan, *Some Words That Don't Belong in Briefs*, (1960) Wis. L. Rev. 421, 421 ("A discussion of some words that don't belong in briefs could probably be condensed into this concise statement: about fifty percent of them."). Levitan went even further for judicial opinions: "This comment could not accurately be made in regard to judicial opinions; it would be necessary to omit 'fifty percent' and substitute 'sixty-five percent.'" *Id.*

3. This concept is discussed in Gerald Lebovits, The Legal Writer, *Legal-Writing Myths — Part I*, 78 N.Y. St. B.J. 64, 57 (Feb. 2006) ("Myth #9. If you have little to say about something, even something important, don't devote much space to it.").

4. Robert E. Keeton, Judging 142 (1990).

5. Bradley G. Clary & Pamela Lysaght, Successful Legal Analysis and Writing: The Fundamentals 87 (2003).

6. Abraham Lincoln, The Gettysburg Address (Nov. 19, 1863), in Selected Speeches and Writings by Abraham Lincoln 405 (1st Vintage Books, Library of America ed., 1992).

7. Mortimer Levitan, *Professional Trade-Secrets: What Illusions Should Lawyers Cultivate?*, 43 A.B.A. J. 628, 666 (July 1957).

8. David O. Boehm, View From the Bench, *Clarity and Candor are Vital in Appellate Advocacy*, 71 N.Y. St. B.J. 52, 54 (Nov. 1999) ("In setting forth the facts, avoid like the plague a witness-by-witness recital of testimony . . . . [C]ondense the testimony into a narrative that provides a concise and clear foundation for the legal argument.").

9. For an explanation of this concept, see Gerald Lebovits, The Legal Writer, *Write the Cites Right — Part I*, 76 N.Y. St. B.J. 64, 61 (Oct. 2004) ("Citing also condenses your writing. Unless you need to explain procedural history in your text, let your citation speak for you.").

10. Mary Bernard Ray & Jill J. Ramsfield, Legal Writing: Getting it Right and Getting it Written 96 (4th ed. 2005) (emphasis in original).

11. This rule doesn't apply to New York state judges. CPLR 2219(a) requires that orders that determine motions made upon supporting papers "recite the papers used on the motion."

12. Marjorie E. Kornhauser, *The Rhetoric of the Anti-Progressive Income Tax Movement: A Typical Male Reaction*, 86 Mich. L. Rev. 465, 486 n.88 (1987).

13. Adapted from the Chicago Transit Authority song, *Does Anybody Really Know What Time It Is?* (Chicago I, Robert Lamm) ("As I was walking down the street one day / A man came up to me and asked me what the time was that was on my watch, yeah.").

14. D. Robert White, The Official Lawyer's Handbook 186 (1983).

15. From Fred Rodell, *Goodbye to Law Reviews*, 23 Va. L. Rev. 38, 38 (1936) (emphasis added), a legal-writing classic.

16. *See, e.g.*, *State v. Baker*, 103 Idaho 43, 43, 644 P.2d 365, 365 (Ct. App. 1982) (Burnett, J.) ("*It was* a shotgun blast in the early morning *that* killed Merardo Rodriguez.") (emphasis added).

17. Just as an aside, the direct object of "regard" should always be followed by "as." *Correct:* "She regards it *as* a heinous crime."

18. 150 Mass. 190, 194 (1889).

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