Free at Last from Obscurity: Achieving Clarity

Gerald Lebovits
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Tribute to Beverly Ray Burlingame by Bryan A. Garner

Articles by
Joseph Kimble
Kenneth A. Adams
Ross Guberman
Matthew R. Salzwedel
Kenneth Bresler

The “Best of”
Gerald Lebovits
From the Editor

We’ve got an agenda. Just one. And it’s right there in our back-cover manifesto: promoting better legal writing. Yet our manifesto also acknowledges the subject’s breadth. The field of legal writing is expansive, and some of its not-so-far reaches touch the blurry edges of jurisprudential and political perspective. This volume reflects that; it contains some spirited entries with frank points of view. As you’ll see, it all comes back to writing. And the frequent subtext is that inattentive (or untrained) drafting sometimes forces courts to make educated guesses.

A number of our authors examine judicial writing and decision-making, and their commentary ranges from the laudatory to the instructional to the critical. For our editorial staff, the sharper points posed a dilemma. The judiciary has long been a welcome and active partner in our mission. (Just check volumes 13 and 15.) But if there was occasional editorial discomfort over authorial candidness, we were even less comfortable censoring authors who’ve more than earned their lines in the legal-writing dialogue. We strove for a fair, even tone, but we did not mute our authors’ voices.

Again, in the end, it all comes back to writing, and we welcome — encourage — submissions offering a different perspective on any point raised in this volume.

We lead with Joe Kimble’s latest work, which takes on the canons of construction and textualism. Joe was the drafting consultant on the projects to restyle the Federal Rules of Civil Procedure and Evidence — projects meant to help judges and lawyers more easily extract meaning from the rules’ text. So some may find it ironic that this plain-language lion now sinks his teeth into textualism, which was historically known as a “plain language” theory of jurisprudence and which still,
in its modern form, puts a premium on the words in the text.\footnote{See Ronald Turner, \textit{Title VII, the Third-Party Retaliation Issue, and the “Plain Language” Mirage}, 5 Ala. C.R. & C.L. L. Rev. 77, 82 (2013); Jonathan T. Molot, \textit{The Rise and Fall of Textualism}, 106 Colum. L. Rev. 1, passim (2006).} Whatever your views, you’ll find the article thought-provoking.

Drafting expert Ken Adams, a recent recipient of the Legal Writing Institute’s prestigious Golden Pen Award, also advocates against a strict adherence to canons of construction. His petri dish is a federal case in which, he believes, a long-recognized canon produced mischief instead of genuine insight.

Stepping beyond the canons, our remaining authors offer a unique mix of style and content, including a bit of memoir, prophecy, Oscar Wilde wit, and praise for “impure” court opinions.

Ross Guberman, whose book \textit{Point Made: How to Write Like the Nation’s Top Advocates} has been something of a sensation, shares an excerpt from his forthcoming book, \textit{Point Taken: How to Write Like the World’s Greatest Judges}. The book advises judges on effective opinion-writing, and his article shows how and why some judges infuse breezy prose into their opinions.

Matthew Salzwedel, founder of the \textit{Legal Writing Editor} and \textit{Lawyerist} blogs, recounts his formative years while exploring the challenges faced by new legal writers. And he wonders whether the best educational innovation for today’s students might be to restore some old-fashioned traditions.

Kenneth Bresler, who penned Massachusetts’ first legislative-drafting manual (among other things), gives us a potpourri of sorts. He gazes into his crystal ball for a peek at legal language’s future, advocates for a new entry in \textit{Black’s Law Dictionary}, and teaches us how to avoid those common, everyday redundancies that so frequently sneak into our prose.

We finish with the next installment of our “Best of” series, this time featuring short pieces by Gerald Lebovits. Judge
Lebovits is a frequent contributor to the *New York State Bar Association Journal*, in which he offers practical advice shaped by his years as a legal reader and writer. He has written many pieces worthy of inclusion here, but we’ve picked our favorite favorites.

Besides these articles, you’ll find a few items of special note. First, we take a moment to remember Beverly Ray Burlingame, whose passing touched so many Scribes members. Her name and work will always be associated with this publication, and it’s an association that we wear with pride.

You’ll also notice a page (the back inside cover, actually) thanking the law firms whose generous financial contributions helped make this volume possible.

Let me thank our new assistant editor, Laurel Romanella, for her hard work. And my thanks to Joe Kimble and Ray Ward for their usual editorial excellence. As always, we thank Karen Magnuson, the world’s finest copyeditor. And thank you, Cindy Hurst, for your eagle eyes.

Finally, I offer special thanks to our dedicated (and remarkably tolerant) typesetter, Patricia Schuelke. Thank you, Trish. After all, you make the *Journal*.

— Mark Cooney
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Free at Last from Obscurity: Achieving Clarity

Gerald Lebovits

Oscar Wilde was kidding when he wrote, “‘Remain, as I do, incomprehensible: to be great is to be misunderstood.’”¹ President and later Chief Justice Taft got it right, though in the negative: “‘Don’t write so that you can be understood; write so that you can’t be misunderstood.’”² The hallmark of good legal writing is that an intelligent layperson will understand it on the first read. Some writers use complicated language, intentionally or not, to mask their lack of understanding of the subject. Others write turgidly because they want to impress, because they believe that people are supposed to write that way, or because they don’t know better. They err. As Webster stated in 1849, “‘The power of a clear statement is the great power at the bar.’”³

In short, above all else, the legal writer must be understood. This article offers some suggestions for achieving that goal.

1. Write only if you have something to say. Simplify your writing by omitting unnecessary law, facts, and procedure. Cut clutter, redundancies, and extraneous words, thoughts, and points.

2. Put essential things first in sections and paragraphs.

3. Assume that your reader knows little or nothing about your case.

³ Quoted in Quote It! Memorable Legal Quotations 18 (Eugene C. Gerhart ed., 1987).
4. Give the rule first; then give the exception in a separate sentence. Explain any exception you give. Don’t simply write that exceptions exist. If you don’t want to devote space to explaining exceptions, state your rules so precisely that they admit no exceptions.

5. Introduce before you explain. Novices often discuss something before they lay a foundation for it. The reader won’t understand if you discuss the terms of a contract before you establish that the parties have a contract.

6. Dovetail (a type of segue) to connect one sentence or paragraph to the next. Move from old to new, from short to long, and from simple to complex.

7. State the point before you give the details, raise the issue before you answer it, and answer before you justify.

8. Stress issues, not legal authority. Novices devote one paragraph after another to cases. Good writers organize by issues, not caselaw. Authority should be used to support conclusions within issues, not as an end in itself. Thus, cite authority as a separate sentence (or in a footnote), after the stated proposition, to de-emphasize authority and to emphasize issues.

9. Familiarize the reader with the person or entity before you discuss what that person or entity did or didn’t do. Give the full names of people and entities the first time you mention them. Use a shorthand variant thereafter. Similarly, familiarize the reader with the concept before you discuss it, familiarize the reader with the case before you draw an analogy or distinguish it, and define technical terms as you use them.

10. Keep related matters together. Then say it once, all in one place.

11. Begin with an effective introduction, or road map, that summarizes your case and the legal principles. Use small-scale transitions — concepts and words — to link sentences, paragraphs, and sections. Use topic sentences to bridge between paragraphs.

12. Minimize acronyms.
13. Avoid, as if your writing depended on it (and often it does), intrusive phrases or clauses — like the two in this sentence.

14. Untangle complex conditionals and negative statements by writing in the affirmative. A sign next to the judges’ elevator bank at the Criminal Courts Building in Manhattan reads: “NOTICE: USE OF THIS ELEVATOR IS RESTRICTED TO JUDGES ONLY.” The sign means that anyone but a judge may use the judges’ elevator; no restrictions have been placed on anyone else.

15. Make comparisons complete and logical.

16. State whose position is being asserted. “Plaintiff moves for summary judgment because the facts are not in dispute” becomes: “Plaintiff moves for summary judgment because, he argues, the facts are not in dispute.”

17. Shun overspecifcity, which prevents the reader from distinguishing between the important, the less important, and the unimportant. Overspecificity also bores the reader.

18. Write directly, not indirectly. Whatever the merits of indirect speech among thoughtful, attentive people, legal writers must prefer directness and clarity to politesse. Readers should debate as little as possible the meaning of a judicial opinion or a statute. Example: “Defendant is entitled to a fair trial” becomes: “The People must turn over all exculpatory material by 3:00 p.m. today.”

19. Use headings and subheadings to break up the text of an argument that exceeds a few pages. Divide sections by procedure or issue or both. Make your headings descriptive. Prefer boldface. Do not use all capitals, initial capitals, or underlining. One caveat: Headings and subheadings should relate to the text and not be invented to amuse. In Young v. Lynaugh,4 the court opined that “the state has played procedural football” in a case in which the defendant sought to set aside his guilty

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4 821 F.2d 1133, 1134 (5th Cir. 1987).
plea. On that premise, the court’s headings included “The Players and the Background,” “Jurisdiction on the § 2254(a) Playing Field,” “Illegal Motion,” and “The Final Score.” And in City of Marshall v. Bryant Air Conditioning Co., the court created a reason to compose musical headings like John Sebastian’s Summer in the City, the Beatles’ We Can Work It Out, and Burt Bacharach’s Promises, Promises. But devices like these can come across as too clever or self-satisfied, and even as disrespectful.

20. Use concrete nouns to be clear, concise, and subtle. Avoid abstract nouns unless, as a persuasive-writing device, you wish to de-emphasize a point. Abstract nouns convey intangibles: ideas and concepts (justice, transportation, contact). Concrete nouns describe tangibles (automobile, not transportation; wrote a letter, not contacted). The more concrete the writing, the better (souped-up 1966 Corvette, not automobile). Phrases should also be concrete: “After the accident, plaintiffs sought justice” becomes: “Johnny Smith’s parents sued Jones after Jones’s souped-up 1966 Corvette struck five-year-old Johnny, who was riding his tricycle on a sidewalk in Central Park.”

21. Take the plain-English movement seriously. Why write a means of egress and then define the phrase as a way to get out when you can write a way to get out or exit? Note the power of earthiness, without foreign or polysyllabic words, from Justice Marshall: “A sign that says ‘men only’ looks very different on a bathroom door than a courthouse door.” For the power of plain English in opinion-writing, read anything by Judge Richard Posner of the Seventh Circuit and Judge Alex Kozinski of the Ninth Circuit. Compare their work with this impenetrable, pathological legaldegook from an appellate court: “Parens patriae

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5 650 F.2d 724 (5th Cir. 1981).
cannot be ad fundandam jurisdictionem. The zoning question is res inter alios acta.”

22. Punctuate for clarity. Periods, commas, colons, semicolons, and hyphens have many uses. They divide text for readability and provide elegance and variety. They also promote clarity.

**Hyphens:** Ten inch thick briefs becomes, depending on what you mean, Ten-inch-thick briefs or Ten inch-thick briefs. Consider the song about “purple people eaters.” Without the hyphen between purple and people, the song is about purple creatures that eat people. With the hyphen between purple and people, the song is about creatures that eat purple people.

**Commas:** Judge: “I want to see Ms. X and her client and I will be in court all morning.” Without a comma between Ms. X and and or between client and and, the reader does not know whether the judge wants to see Ms. X and her client or whether the client and the judge will be in court all morning.

**Serial commas:** “The court clerk must file the stipulation, the court papers and the decision and order” becomes: “The court clerk must file the stipulation, the court papers, and the decision and order.”

Good legal writing is clear, simple writing. Judge Albert M. Rosenblatt noted one result from a lack of clarity: “[W]hen a dispute breaks out and the contract is susceptible of two interpretations, it will be construed against the author’s side. This is an apt legal punishment designed to fit the crime of Writing with Lack of Clarity in the First Degree.”

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8 Lawyers as Wordsmiths, 69 N.Y. St. B.J., Nov. 1997, at 12 (citation omitted).
Notes on Contributors

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The Scribes Journal of Legal Writing seeks to promote better writing within the legal community. Because the field is so broad, the Journal’s contents are purposely eclectic. We hope to appeal to all with an interest in improving legal writing, whether in the courthouse, the law office, the publishing house, or the law school.

The writing in the Journal should exemplify the qualities we advocate: lucidity, concision, and felicitous expression. Meanwhile, we hope to spread the growing scorn for whatever is turgid, obscure, and needlessly dull.