Elegant Expressions: Reflections on the Nature of Great Legal Writing

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ELEGANT EXPRESSIONS: REFLECTIONS ON THE NATURE OF GREAT LEGAL WRITING

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The scholarly literature on legal writing is replete with various tips on how legal writers can improve their writing. Yet no scholar has provided, or even attempted to provide, a comprehensive account of what it is that characterizes the best legal writing. This article fills that void. It analyzes the nature of excellence in legal writing and argues that great legal writing has four essential qualities: it is clear, it is concise, it is engaging, and it is elegant. The scholarly literature has ignored this last quality, focusing only on clarity, conciseness, and engagement. Yet it is the quality of elegance, I argue, that distinguishes great legal writing from legal writing that is merely good. The article also discusses at length what it is that makes writing clear, concise, engaging, and elegant. And it concludes that the legal writer can optimize these qualities only by paying close attention to contextual considerations and by striking a reasonable balance among the writer’s sometimes conflicting objectives.

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INTRODUCTION

Great writing—you know it when you see it (though if you work in the legal profession, you may not see it very often). But when you do see it, say in an acclaimed Supreme Court opinion, can you identify what it is that makes the writing great?

Writing ability is perhaps the most important skill a lawyer can possess. Yet the existing scholarly literature lacks a comprehensive account of what it is that distinguishes the best legal writing from the merely commonplace. A number of books and articles offer specific tips on writing. But there is little theoretical discussion about the nature of great legal writing. And I am aware of no attempt to provide a systematic analysis of its essential qualities. This article does just that. It attempts to construct a comprehensive account what it is that makes great legal writing distinctive. My goal in the article is not to offer advice on writing or to discuss pedagogical concerns. It is instead to inspire a conversation concerning the nature of excellence in legal writing.

The article argues that great legal writing has four essential qualities, and it explores these qualities in depth. Sections I and II of the article discuss the two qualities that are most commonly associated with excellence in writing: clarity and conciseness. Section III discusses a third essential quality: the ability of great writing to actively engage the reader. And Section IV discusses a separate, aesthetic quality characteristic of only the best legal writing, a quality that I refer to as “elegance.” Section V of the article discusses two important considerations that enable the writer to optimize these qualities. The first is the need for the legal writer to strike an appropriate balance among competing interests when the writer’s objectives conflict. And the second is the need for the writer to carefully evaluate the context of a document. Where the conventional view on legal writing falls short, I conclude, is in failing to recognize that elegance is an essential quality of great legal writing, and in failing to give due regard to the importance of contextual considerations and the need for the writer to balance among competing interests.

I. GREAT LEGAL WRITING IS CLEAR

To my knowledge, no legal commentator has yet attempted to provide a systematic analysis of the essential qualities of great legal writing. Yet there does appear to be a consensus in the scholarly literature that the chief hallmark of good writing is clarity. As Justice Benjamin Cardozo stated in his classic essay Law and Literature, “there can be little doubt that in matters of literary style the sovereign virtue for the judge is clearness.” Likewise, most contemporary commentators on legal writing extol clarity above all else. In their recent book Making Your Case, for example, Brian Garner and Justice Antonin Scalia claim that “one feature of good writing style trumps all others. Literary elegance, erudition, sophistication of expression—these

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1 By “legal writing” I mean to include all the various types of writing lawyers and judges produce as part of their jobs. The differences in the qualities that are important for one type of legal writing rather than another (e.g., briefs versus contracts) are discussed primarily in section 5 below. While the focus of the article is on legal writing specifically, much of the analysis applies more broadly to expository writing generally.

and all other qualities must be sacrificed if they detract from clarity.”  

So the quality of clarity provides a good starting point for our analysis.

A. The Importance of Clarity

What accounts for the exalted status of clarity? At the most basic level, of course, clarity is important because writing is form of communication, and a purported communication that is not clear (i.e., understandable) cannot achieve its essential purpose. As Bryan Garner explains in the The Redbook: “A lawyer should keep in mind that the purpose of communication is to communicate, and this can’t be done if the reader doesn’t understand the words used.”  

Or as Strunk and White succinctly put it in their classic work, The Elements of Style: “since writing is communication, clarity can only be a virtue.”

Clarity, therefore, is the foundational quality of great legal writing. For it is only when writing is clear that the reader can accurately comprehend the writer’s intended meaning. And it is this connection between the writer’s intended meaning and the reader’s comprehension of it that enables a document to accomplish its objective, whether that objective is to explain (as in a memorandum), to persuade (as in a brief), or to accurately memorialize a meeting of the minds (as in a contract).

Now admittedly, there are certain times when a legal writer--particularly a drafter--prefers to leave some term or provision open-ended. The parties to an agreement, for example, may choose to defer the negotiation of certain minor provisions to the future in order to finalize a deal quickly. Likewise, certain constitutional provisions, such as the due process clause, appear to have been drafted in a deliberately indefinite manner. But an important distinction should be drawn between intentionally open-ended provisions on the one hand and unclear provisions on the other. Lawyers who draft open-ended provisions do not intend for the provisions to be elusive or for the meanings of their words to be misunderstood. Rather, they elect for


6 See Charles R. Calleros, Legal Method and Writing 4 (5th ed. 2006) (“The importance of clarity in legal writing should be obvious: Your legal memorandum will not enlighten, nor will your brief persuade, unless the reader of each can understand it.”).

7 For more on the importance of a document’s fulfilling its objective, see section V.


9 See also subsection C below regarding the relationship between clarity and precision.

10 A possible exception to this rule is a lawyer who has a weak case and deliberately tries to obscure the issues through murky writing. A lawyer opposing a summary judgment motion, for example, may hope that the court will be too confused after reading the opposition brief to feel comfortable rendering summary judgment. Whether or nor this is an effective (or ethical) strategy, it is doubtful that such a piece would deserve to be called “well written”--crafty perhaps, but not a model of good writing.
strategic reasons not to resolve everything in the particular document, preferring to defer some decisions to a later date. But the writing itself can still be clear, even if some of the terms are indefinite. So the occasional use of these types of open ended provisions in drafting does not undermine the premise that clarity is essential to good legal writing.

B. The Basic Building Blocks of Clarity

If clarity is the legal writer’s primary goal, then the next question is what it is that makes writing clear. Here the legal-writing literature is fairly well-developed. As a starting point, it recognizes proper (i.e., conventional) grammar and punctuation as essential to clear writing. And while there is not much scholarly attention paid to the reason why writers need to follow conventional grammatical rules in order to be clear, it seems apparent that language has to have certain agreed upon rules to govern its basic functioning. Otherwise there would be no possibility of shared meaning, and therefore no possibility of language itself.

We can certainly debate the wisdom of certain minor rules that reside around the periphery of our system of linguistic rules. Rules such as not ending a sentence with a preposition, for example, or requiring commas and periods to be placed inside quotation marks, are certainly not essential to understanding the language. And there may even be instances when clarity is advanced by ignoring some of these minor rules rather than following them rigidly.

But if a writer significantly disregards the conventional rules of a language--particularly its core rules--it will be difficult, if not impossible, for readers accustomed to following those rules to understand the writer’s message. Imagine, for example, a brief that contains no verbs, or that consistently misuses verb tenses, or worse still, scrambles the words in sentences in completely unconventional ways (e.g., “head his man hit the door the on”). Generally, the greater the deviation from the core rules of grammar and syntax, the more difficult it will be for the reader to understand the writing. And the same is true of semantics. If a writer’s use of words is completely at odds with the way everyone else uses them, no one is going to understand the purported communication.

So a fundamental conformance with the conventional rules of the language does seem essential to clear communication. The speakers of a language, I would argue, need to adhere to a

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11 See Lillian B. Hardwick, Classical Persuasion through Grammar and Punctuation, 3 J.A.L.W.D. 75-107 (2006). See also STRUNK & WHITE, supra note 5 at 1-14 (first chapter devoted to basic rules of grammar and usage); JOHN C. DERNBACH, ET AL., A PRACTICAL GUIDE TO LEGAL WRITING & LEGAL METHOD 200 (3d ed. 2007) (“Errors in grammar, punctuation, and spelling suggest that the writer is sloppy and careless—qualities that people do not want in a lawyer. Minor errors distract the reader from the message to be conveyed. Major errors may distort the message or make it unintelligible.”); RICHARD K. NEUMANN, LEGAL REASONING AND LEGAL WRITING 55 (6th ed. 2009) (correct punctuation and grammar make writing clearer and easier to understand); RICHARD C. WYDECK, PLAIN ENGLISH FOR LAWYERS 84 (2005) (noting in final chapter devoted to punctuation that “when you write, you should punctuate carefully, in accordance with ordinary English usage.”); OATES & ENQUIST, supra note 8, at 607 (noting that effective and correct writing “depends on understanding the grammar of an English sentence”). But see JOHN BRONSTEEN, WRITING A LEGAL MEMO 35-37 (2006) (arguing that conforming to grammatical rules is frequently “an enormous waste of time”).


13 BRONSTEEN, supra note 11, at 36.
shared set of basic linguistic rules for the same reason that football players need to follow the fundamental rules of football. If the players mutually adopt a completely different set of rules, it is no longer football they are playing, but some other game. And if they all follow different rules from each other, then they are not playing any game at all. And so it is with the rules of grammar, syntax and semantics.  

Of course, clear writing requires more than just staying within the rough confines of conventional grammar, syntax, and semantics. The conventional rules have a fair degree of flexibility. And thus a writer has to make choices with regard to sentence structure and word usage. The skillful writer is one who effectively chooses particular sentence structures and words from within the universe of acceptable conventions so as to maximize clarity. How does a writer do this? In the literature on writing, the main focus is on using language that is plain and sentence structures that are simple (e.g., using short sentences in which the verb follows closely behind the subject). As Richard Wydick puts it in his classic book *Plain English for Lawyers*: “[t]he premise of this book is that good legal writing should not differ, without good reason, from ordinary, well-written English.”

Judge Cardozo’s description of the facts in his famous opinion in *Palsgraf v. Long Island Railroad Co.* provides good example of this type of writing. There Cardozo summarizes the complicated events that led to the plaintiff’s injuries in a lucid and succinct fashion:

Plaintiff was standing on a platform of defendant’s railroad after buying a ticket to go to Rockaway Beach. A train stopped at the station, bound for another place. Two men ran forward to catch it. One of the men reached the platform of the car without mishap, though the train was already moving. The other man, carrying a package, jumped aboard, but seemed unsteady as if about to fall. A guard on the car, who held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act, the package was dislodged, and fell upon the rails. It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was nothing in its appearance to give notice of its contents.

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16 A number of legal writing texts emphasize the importance of these types of short, simple sentences to clarity. *See, e.g., BRONSTEEN, supra note 11, at 19-29; VEDA R. CHARROW, ET AL., CLEAR AND EFFECTIVE WRITING 163-165(2007); TERRI LECLERCUE, GUIDE TO LEGAL WRITING STYLE 23-31 (4th ed. 2007); ANNE ENQUIST & LAUREL CURRIE OATES, JUST WRITING 36 (3d ed. 2009); LINDA H. EDWARDS, LEGAL WRITING: PROCESS, ANALYSIS AND ORGANIZATION 225-226 (5th ed. 2010); SCHULTZ & SIRICO, supra note 15, at 98-99; NEUMANN, supra note 11, at 227-228; WYDICK, supra note 11, at 41-43.*

17 WYDICK, supra note 11, at 4.

18 162 N.E. 99, 99 (1928).
The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries for which she now sues.

By using simple sentence structure and plain language, Cardozo makes a fairly complicated scenario seem simple. The reader needs to read the paragraph only once to understand what happened and to gain a clear idea of what caused the plaintiff’s injuries.

The proposition that legal writing should adopt a simple, concise style that uses common, ordinary language is now widely accepted. This is due in no small part to the efforts of the so-called Plain Language Movement, an influential group of legal scholars, judges, and practitioners who argue that traditional legal writing needs to be purged of cumbersome sentence constructions and empty legal jargon.

Proponents of the Plain Language Movement apply this prescription broadly to all types of legal writing, including transactional drafting.

The Plain Language Movement deserves a good deal of credit for advancing the goal of clarity in legal writing. As discussed above, the use of complicated constructions and unfamiliar words can inhibit clarity because the writing more difficult for the audience to follow and understand. And yet the basic prescription to use plain or simple language in legal writing cannot, without further elaboration, provide any meaningful guidance to the legal writer because it glosses over important contextual considerations. For when someone says that legal writers should use plain language, the question inevitably arises: plain to whom? What constitutes a “plain” or “ordinary” term is ultimately relative to the audience and dependent upon factors such as the readers’ vocabulary, language proficiency, and background knowledge. A term such as “ventricular tachycardia,” for example, is obviously plain to a cardiologist--but probably not so plain to the average lay person.

In the context of brief writing, Scalia and Garner say that the good legal writer does not use words that require the judge to get out a dictionary. But even that depends on the judge: a wordsmith such as Justice Scalia likely requires the use of a dictionary less frequently than some other judges. So the legal writer following the Garner and Scalia “dictionary” rule would need to adapt it to the intended audience, writing in language that is simpler for some audiences than for others. Likewise, an associate writing an office memo intended solely for a partner may benefit from using certain legal terms of art, but not if the

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19 The seminal work in this area is David Mellinkoff’s book THE LANGUAGE OF THE LAW (1963). Perhaps the most significant recent work is JOSEPH KIMBLE, LIFTING THE FOG OF LEGALESE: ESSAYS ON PLAIN LANGUAGE (2006).

20 See, e.g., Joseph Kimble, Writing for Dollars, Writing to Please, 6 SCRIBES J. LEGAL WRIT. 1 (1996-97) (summarizing various studies that show readers have a preference for plain language).

21 See, e.g., Wayne Sheiss, The Art of Consumer Drafting, 11 SCRIBES J. LEGAL WRIT. 1(2007) (arguing that the use of short, simple sentences and simple words advances clarity in transactional drafting).

22 See SCALIA & GARNER, supra note 3, at 107 (“Clarity is amply justified on the ground that it ensures you’ll be understood.”); GARNER, supra note 4, at 183.

23 SCALIA & GARNER, supra note 3, at 107.

24 Even he needed it for the word “orthogonal,” however. See Robert Barnes, Supreme Court Justices, Law Professor Play with Words, WASHINGTON POST, January 12, 2010, at A03. (describing Justice Scalia’s delight in learning a new word during Professor Richard Friedman’s oral argument).
partner is going to send the memo to a client who lacks legal sophistication. The skillful legal writer, therefore, needs to consider the context in which the writing takes place and match the writing to the intended audience; otherwise, the communication will not be as effective as it could otherwise be.

C. Plain Language, Clarity, and Precision

The question of what constitutes “plain” language raises also some important issues concerning the subtle relationship between precision and clarity. Some critics of the Plain Language Movement have argued that replacing legalese with plain language inhibits the precision of legal writing. They assert that, particularly in the drafting context, ordinary terms can be vague and ambiguous, while technical legal terms can add precision. If this is true, it creates a problem for the advocates of plain language, since an important aspect of clear writing is the ability to convey information and make arguments with an appropriate degree of precision. Suppose, for example, I leave written directions for my auto mechanic to check out the low-pitched grinding sound coming from the driver’s side of the engine. That instruction gives the mechanic a lot more to work with than if I just say that the car is making a funny noise. By being more precise, I have made my communication clearer.

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25 Terri leclercq, supra note 16, at 50.

26 Some writers, e.g., literary authors, may reasonably assume that the reader will look up unfamiliar words, in which case the writer’s more extensive vocabulary may serve to educate and engage the reader. But given the context of legal writing, with its inherent time constraints, this is probably not a prudent assumption.

27 It is useful here to distinguish precision from accuracy, since it is only the former that directly pertains to writing style. The essential difference between the two concepts seems to be that accuracy implicates the truth value of a statement, whereas precision goes to its specificity. If a statement is accurate, then it is true, and if it is inaccurate, then it is not true (although it may still approximate the truth). For example, if a writer asserts that the human heart is located in the right thigh exactly 2 inches above the knee, the statement is clear and precise, but it is obviously not true. That doesn’t necessarily mean that the statement was written poorly. It is just inaccurate. An imprecise statement, on the other hand, is not untrue; it just lacks specificity. If I say “It is around 4,” when the actual time is 4:03 and 34 seconds, my statement is imprecise, but it is not untrue. Or if I answer the question “What is that in the apple tree?” with the statement “That is a bird,” my statement might be unhelpful (particularly if my companion is an avid bird-watcher) because of its imprecision, but it is not inaccurate or incorrect. My communication would be more effective if I said: “That is a blue jay.” And it would be better still, if my companion is an ornithologist, for me to say: “That is a Cyanocitta cristata”. But none of the responses is untrue or inaccurate. Precision, therefore, implicates the effectiveness of the communication (in particular the quality of clarity) because it concerns the appropriate level of information provided by a statement, rather than the correctness of the statement. Accuracy, on the other hand, implicates the correctness of a statement, but not the effectiveness of the communication.


29 One could argue that precision is a separate quality from clarity (though closely related), rather than a component of clarity. Consider, for example, a statement such as: “The victim was shot in the chest.” If the writer states instead that the victim was shot through the heart, or that the gunshot hit the victim’s aorta, the statement definitely conveys more information, and is therefore more precise. And that may be important in some contexts. But is it really fair to say that the more precise statement is clearer by virtue of conveying more specific information? My
Proponents of the Plain Language Movement describe as a myth the argument that plain language is inconsistent with precision. They argue that plain language is generally just as precise—and often more precise—than traditional legalese. And that may be. Yet even plain-language advocates concede that there are times when plain language is less precise than more technical language. They just maintain that such instances are relatively uncommon in legal writing and do not detract in any significant way from their general prescription against legalese.

But while plain language advocates and their critics may disagree as to how frequently plain language and precision come into conflict, it is hard to deny that on some occasions communications can be made clearer by the use of more precise technical terms. The emergency-room physician, for example, is not likely to tell the on-call cardiologist that the patient has a “rapid heartbeat.” Rather, the physician is likely to report that the patient has a “ventricular tachycardia,” because that is the level of specificity the cardiologist requires. Likewise in the context of legal writing, it is sometimes clearer—depending on the audience—for a lawyer to use a term of art such as *preliminary injunction*, *promissory estoppel* or *quantum meruit* than try to translate those concepts into “plain language.” So in any given document, the writer needs to balance the advantages of plain language against the advantages of specialized language. And in striking the appropriate balance, the writer must evaluate the context in which the writing occurs.

Recently I attended a conference on transactional drafting where a speaker started with the statement “Now we all know legalese is bad.” I thought to myself, okay, fair enough, but then what exactly is “legalese”? Is it simply terminology that is distinctive to the law? If so, that would seem to preclude words such as “contract” and “plaintiff.” No, you might say, “legalese” refers only to legal terms and phrases that constitute superfluous jargon and add no meaning to their plain-language counterparts. And certainly we can all think of some terms where this is

intuitions on this point are mixed. But in any event, I’m not sure it really matters here. In either event, the writer needs to balance the goal of precision against a competing interest in order to communicate most effectively. So if precision is a component of clarity, as I tend to think, then the writer needs to balance it against the benefits of using plain language in order to maximize clarity. And if precision is actually a separate quality of good writing, distinct from clarity, then the writer needs to appropriately balance the goal of clarity against the need for precision.


32 See id. at 54 (“Plain language advocates have repeatedly said that technical terms and terms of art are sometimes necessary, and that legal ideas can only be stated so simply. But technical terms and terms of art are only a small part of any legal document—less than 3% in one study. This hardly puts a damper on plain language.”); GARNER, Plain Language, supra note 30, at 663 (“Of course, where clarity and precision are at loggerheads, precision must usually prevail. But the instances of actual conflict are much rarer than lawyers often suppose. Precision is not sacrificed when the drafter uses technical words where necessary and avoids JARGON that serves no substantive purpose.”)

33 Brian Garner, for example, defines legalese as “unnecessarily complex legal JARGON.” See BRIAN A. GARNER, GARNER’S MODERN AMERICAN USAGE 489 (2003) (emphasis in original).
almost always the case: e.g., *said Defendant, party of the first part, comes now Plaintiff, the aforesaid argument*, and so on. But how do we go about determining in a given instance what is superfluous jargon and what is not? Superfluous legal terms are not self-identifying. While we can discard some obvious legal jargon summarily because it never adds value,\(^{34}\) with respect to other legal terms we will have to decide on a case-by-case basis whether the term adds anything to the meaning of the document above and beyond a plain-language alternative. And this decision will turn in large part on considerations of context, including the needs and background knowledge of the intended audience.\(^ {35}\)

Plain language proponents may argue that one should always use the simpler term, regardless of the audience. But that is not a very workable rule. Following that rule, the emergency room physician would tell the on-call cardiologist that the patient has a rapid heartbeat rather than a ventricular tachycardia. That particular use of plain language would be ill-advised, however, given that a rapid heartbeat is frequently rather benign, but this specific type of rapid heart beat—the ventricular tachycardia—can be quite dangerous. So the emergency room physician would be doing the patient a significant disservice by using the simpler but less precise term.

The simple prescription to avoid legalese, therefore, is not helpful unless it is merely shorthand for a more nuanced prescription, something like the following:

> When using distinctive technical or legal terms, consider whether the terms add any value above and beyond their plain-language equivalents. If not, use the ordinary term. If so, then consider the context of the communication to determine whether the increased precision of the legal term outweighs any loss of clarity that may be caused by using a term that may not be familiar to all members of the intended audience.

Plain-language devotees may not object to this prescription. Some of them, in fact, would probably agree that the more general prescription to use plain language is actually just shorthand for some such detailed prescription. Bryan Garner, for example, grants that simple language is not appropriate in every context:

> Despite the myth to the contrary, no formula unfailingly produces a good prose style. Much hangs on the context and the purpose. So the “Plain English” movement in the law—a salutary force in almost every respect—would be misguided to the extent some of its advocates might believe that every motion can be simply expressed. Though it is true that lawyers often obscure simple thoughts by using murky language, it is also true that complex expressions are sometimes unavoidable.\(^ {36}\)

\(^{34}\) See *Enquist & Oates*, *supra* note 16, at 132-133 (distinguishing between legal terms of art, which by definition do not have satisfactory substitutes, and *argot*, which is just superfluous legal jargon); *Neumann*, *supra* note 11, at 232 (advocating the appropriate use of legal terms of art and distinguishing these from legal argot).

\(^{35}\) See *Leclercue*, *supra* note 16, at 50 (“Jargon, then, is a matter of audience. You need to meet your specific audience’s needs with each choice of word”).

\(^{36}\) *Bryan A. Garner, Garner on Language and Writing* 48 (2009).
A prescription to eschew legalese in favor of plain language is workable, therefore, only if we recognize: (1) that the writer must weigh the advantage of using plain terms against the occasional need for more precise technical terms, and (2) that this balancing requires careful consideration of the context of the writing. 37 Linda Edwards summarizes this point succinctly: “When writing to a law-trained reader, you may choose to use some legal terms unfamiliar to laypersons because those terms communicate legal concepts more clearly and concisely than non-legal terms would. But do not resort to the jargon of law unless it is necessary to convey your point more clearly and concisely.”38

Determining whether a distinctively legal term adds sufficient value can be particularly challenging in the arena of transactional drafting. There, as Garner puts it, “lawyers have aimed for a type of ‘precision’ that results in cumbersome writing, with many long sentences collapsing under the weight of obscure qualifications.”39 Indeed, we have all seen contracts that are virtually unintelligible because the drafters have added an untenable number of qualifiers to various clauses in an attempt to make precise the parties’ intent. On the other hand, as Garner notes, “[l]awyers need not invent homegrown ways of saying res ipsa loquitur.”40 And avoiding the use of more precise, technical terms altogether “would be an affectation as noticeable as the over-frequent use of such words when they are not needed.”41

Thus, legal drafters should keep in mind that clarity in an agreement can suffer from excessive attempts at precision as well as from the use of inadequately precise language. If, for example, the reader can’t understand the agreement because the writer has employed too many qualifiers, then precision becomes the enemy of clarity. 42 Contract drafters--like legal writers generally--accordingly need to strive for an appropriate balance between simplicity and precision, given the purpose of a particular agreement and the needs of the parties.

D. Other Components of Clarity

There are a number of other important components of clear writing besides proper grammar and the use of plain language and simple sentence structures. For example, most legal writing texts agree with the premise that “[g]ood organization is crucial in legal writing.”43 Accordingly, they stress the importance of conforming to the conventional patterns of

37 Professors Enquist and Oates offer a similar test that is a bit simpler: “Given the document’s reader, writer, purpose, and surrounding circumstances, does the legalese increase or decrease communication between writer and reader?” See Enquist & Oates, supra note 16, at 128.

38 Edwards, supra note 16, at 228.

39 Garner, supra note 33, at 663.

40 Garner, supra note 36, at 311.


43 Neumann, supra note 11, at 55.
organization in the profession with respect to memoranda, briefs, and similar documents.\textsuperscript{44} And while writing authorities outside of the law also stress logical organization as an important part of writing,\textsuperscript{45} it is particularly emphasized in legal writing, where the conventional organization tends to be more formulaic.\textsuperscript{46} For that reason, teaching students the conventional forms of organization tends to occupy a significant part of the first-year legal writing curriculum in most law schools.\textsuperscript{47}

Another common prescription for improving clarity is to rid documents of all unnecessary words and phrases that may impede the reader’s comprehension. Commentators argue that removing such “clutter” advances clarity because it keeps the emphasis on the writer’s intended message.\textsuperscript{48} According to William Zinsser, removing clutter is essential because “[c]lutter is the disease of American writing. We are a society strangling in unnecessary words, circular constructions, pompous frills and meaningless jargon.”\textsuperscript{49}

Clarity is also advanced, according to the scholarly literature, when the writer makes appropriate use of repetition. Using a particular term consistently, for example, and avoiding what is sometimes called “elegant variation” in word choice\textsuperscript{50} can avoid needless confusion. This is particularly true in the transactional drafting context, where the reader may incorrectly assumes that synonyms have slightly different connotations.\textsuperscript{51} Repetition is also helpful for emphasis. Repeating key words or phrases in a document can be an effective way to highlight them for the reader.\textsuperscript{52} And while there are downsides to this type of repetition (e.g., redundancy

\textsuperscript{44} See, e.g., \textit{Id.}, at 88-102; HELEN S. SHAPO, ET AL., \textit{WRITING AND ANALYSIS IN THE LAW} 117-159 (5th ed. 2008); DERNBACH, supra note 11 at115-132; BOUCHOUX, supra note 15, at 115-126; LECLERQUE, \textit{supra} note 16, at 7-22; CALLEROS, \textit{supra} note 6, at 7 (“an important element of clarity in any legal document is effective organization on all levels….”).

\textsuperscript{45} See, e.g., STRUNK & WHITE, supra note 5, at 15 (“[I]n most case, planning must be a deliberate prelude to writing. The first principle of composition, therefore, is to foresee or determine the shape of what is to come and pursue that shape.”).

\textsuperscript{46} See \textit{ENQUIST & OATES, supra} note 16, at 36 (following the IRAC format is the common practice in the law and expected for memos and briefs).

\textsuperscript{47} For example, almost everyone who has taken an introductory legal writing course in an American law school during the last 15-20 years is familiar with some variant of the IRAC format for organizing legal analyses. For a detailed discussion of that format, see CALLEROS, \textit{supra} note 6, at 71-94.

\textsuperscript{48} See \textit{e.g.}, WYDICK, supra note 11, at 7-22; \textit{ENQUIST & OATES, supra} note 16, at 121-126; STRUNK & WHITE, \textit{supra} note 5, at 23-25; WILLIAM ZINSSER, \textit{ON WRITING WELL} 6-16 (7th ed. 2006); EDWARDS, \textit{supra} note 16, at 347 (“Clutter reduces clarity, irritates the reader, and de-emphasizes the important facts.”).

\textsuperscript{49} ZINSSER, \textit{supra} note 48, at 6.

\textsuperscript{50} See \textit{e.g.}, WYDICK, supra note 11, at 69-70; BOUCHOUX, \textit{supra} note 15, at 86-87; EDWARDS, \textit{supra} note 16, at 228.

\textsuperscript{51} EDWARDS, \textit{supra} note 16, at 228; OATES & ENQUIST, \textit{supra} note 8, at 546.

\textsuperscript{52} See, \textit{e.g.}, BRONSTEEN, \textit{supra} note 11, at 59; \textit{ENQUIST & OATES, supra} note 16, at 2 (“skillful legal writers often use selected repetition to emphasize a point”).
can make the writing less engaging and less concise), its judicious use makes the writer’s key points more memorable.

I will not attempt to catalog here all of the other techniques writers use to make their writing clearer. The literature contains a number of suggestions for how the legal writer can better achieve clarity, such as eliminating “throat-clearing phrases,” the overuse of negatives, avoiding noun strings and nominalizations, preferring the active voice, and various other devices. But the take-away for this section is that there is no simple prescription for clarity. Clarity is context-dependant. It requires the writer to consider carefully the purpose of the writing, as well as the needs, interests, and background knowledge of the intended audience when deciding what is appropriate for a particular document.

II. GREAT LEGAL WRITING IS CONCISE

The second essential quality of good legal writing on the conventional view is conciseness. Conciseness is often confused with brevity, but it is actually a different and somewhat richer concept. Concise writing is not merely brief, or brusque. Rather, it conveys the writer’s points directly, without superfluous words or details, and without unnecessarily complicated complications. It is lean and makes its point with a minimum of effort. It is efficient.

The appropriate level of detail for any given document depends on the context. Often, it is simply not possible to explain a complex idea with the same degree of economy as one can express a simple idea. A motion in limine on a minor point of evidence and a complicated

53 LECLERQUE, supra note 16, at 52 (“[R]epetition results in lengthy documents and uninteresting reading”).

54 By this the writers mean introductory phrases (e.g., “It should be noted…”) that allegedly add little or nothing to the meaning of a sentence. See, e.g., CHARROW, supra note 16, at 165; ENQUIST & OATES, supra note 16, at 115-117; EDWARDS, supra note 16, at 224; NEUMANN, supra note 11, at 229.

55 BOUCHOUX, supra note 15, at 87-88; WYDICK, supra note 11, at 71-72.

56 See, e.g., WYDICK, supra note 11, at 71; CHARROW, supra note 16, at 192-193.


59 For a good overview on writing clear and effective paragraphs and sentences, see SHAPO, supra note 44, at 209-249.

60 Many legal writing texts stress the importance of concise writing. See, e.g., DERNBACH., supra note 11, at 200; BOUCHOUX, supra note 15, at 109-114; NEUMANN, supra note 11, at 217-219; ENQUIST & OATES, supra note 16, at 295 (“In all types of expository prose in the United States, conciseness is heralded as a writing virtue.”).

61 STRUNK & WHITE, supra note 5, at 23 (“This requires not that the writer make all sentences short, or avoid all detail and treat subjects only in outline, but that every word tell.”).

62 GARNER, supra note 36, at 48 (noting that it is not possible to convey all concepts in simple language and that “complex expressions are sometimes unavoidable”).
appellate brief on an important matter of public policy may both be written in a concise fashion, even though the appellate brief is much longer and more detailed than the motion. This is not only because of the relative complexity of the issues, but also because the appellate court has more time to give a careful reading to each brief, and because the consequences of its decision are significantly weightier. The interests and needs of the audience are paramount here: the same judge who has time and inclination to read *War and Peace* on his vacation may not have a similar inclination to wade through an unnecessarily long brief during a busy work week. 
Concise writing, therefore, is often though not always brief, but it is always efficient. Within any given context, the writing makes its points in the most economical way. 63 

Consider the following excerpt from Judge Posner’s dissent in *Jordan v. Duff & Phelps, Inc.*:64 

> A corporate employee at will quit, owning shares that he had agreed to sell back to the corporation at book value. The agreement was explicit that his status as a shareholder conferred no job rights on him. Nevertheless the court holds that the corporation had, as a matter of law, a duty, enforceable by proceeding under Rule 10b-5 of the Securities Exchange Act, to volunteer to the employee information about the corporation’s prospects that might have led him to change his mind about quitting, although as an employee at will he had no right to change his mind. I disagree with this holding. The terms of the stockholder agreement show that there was no duty of disclosure, and since there was no duty there was no violation of Rule 10b-5.

In one short paragraph, Posner effectively describes the essential facts, the majority’s position, and the basis for his dissent. Wasting no words in dealing with a matter of some complexity, the paragraph is (appropriately for Judge Posner) a model of efficiency.

So what is it about conciseness, or efficiency, that makes it essential to great legal writing? Most commentators seem to just assume that conciseness is a virtue. Strunk and White, for example, tell us: “A sentence should contain no unnecessary words, a paragraph no unnecessary sentences, for the same reason that a drawing should have no unnecessary lines, and a machine no unnecessary parts.” 65 But they do not tell us what that reason is, nor is it at all obvious that conciseness in writing can be justified on the same grounds as not adding a superfluous part to a machine, or not adding an extra line in a drawing. 66 It is worth considering, therefore, why conciseness is valuable if in fact it is an essential element of great legal writing.

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63 For this reason, it might be preferable to refer to this foundational quality of good legal writing as “efficiency” rather than “conciseness.”

64 815 F.2d 429, 444 (7th Cir. 1987).

65 STRUNK & WHITE, *supra* note 5, at 23.

66 Are we to assume, for example, that a drawing that depicts a flock of birds in flight has more birds than necessary if it has twelve birds in the picture rather than eleven, or perhaps ten? How would that determination be made? And does it really involve the same rationale as eliminating superfluous words from a sentence?
One possible rationale, as some legal writing texts note, is that concise writing is *clearer* than writing that is not concise. Because it is less complex and has fewer working parts to distract or confuse the reader, concise writing is generally easier to understand. A second possibility, as discussed in the subsequent section, is that conciseness is important because it is part of what makes writing *engaging*. Writing that is not concise is frequently turgid and ponderous, the reader tends to lose interest having to slog through an unnecessarily long text in order to grasp the writer’s meaning.

But conciseness cannot be an essential quality of good writing if these are its only virtues. For if conciseness were valuable only because it made writing clearer and more engaging, it would not have independent value. It would merely be an extrinsic good--not something valued for its own sake, but rather a virtue reducible to the qualities of clarity and engagement. So there must be something more to conciseness than this. What is it? My own view is that conciseness is an essential quality of great legal writing because it shows respect for the reader. A concise piece makes its point in the least intrusive and time-consuming way possible. And thus it doesn’t waste the reader’s time. This may not be essential to all types of writing, but it is essential in the context of legal writing because “the typical reader of legal writing has no time to spare and either will resent inflated verbiage or will simply refuse to read it.”

How then does the skillful writer achieve conciseness? At first blush, that would seem to be an easy question--just shorten the document. But the real answer is more complicated. For concise writing, as discussed above, is not fundamentally about brevity; rather, it is about efficiency. Concise writing is writing that is as succinct as possible without unduly restricting the amount of information conveyed. As Strunk and White put it in the quote above, the writer must eliminate all unnecessary words from sentences, and all unnecessary sentences from paragraphs. The tricky part, of course, is in knowing what words and sentences are “unnecessary.” If one or more words can be eliminated from a sentence without impairing the meaning in any way, then making the sentence more concise is easy. But often the task is more difficult. What if writer has to choose between eliminating language that makes a sentence or paragraph more thorough, but also adds to its length and complexity? The same question arises

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67 *See, e.g.*, NEUMANN, *supra* note 11, at 217-219 (“concise writing is by nature more clear...”); ELIZABETH FAJANS, ET AL., *WRITING FOR LAW PRACTICE* 163 (2010) (“Roundabout, repetitive, and wordy sentences are difficult to understand”).

68 STRUNK & WHITE, *supra* note 5, at 23 (“Vigorous writing is concise.”).

69 NEUMANN, *supra* note 11, at 217.


71 For example, literature that is read purely for pleasure or its aesthetic appeal may not be subject to this consideration--indeed, readers of fiction sometimes wish a piece could go on longer, just because it is an enjoyable read.

72 NEUMANN, *supra* note 11, at 217.

73 *See supra* note 65.
with regard to paragraphs and whole works: at what point does being more thorough justify lengthening and increasing the “working parts” of a document?

There are no simple answers to these questions. Efficient writing calls for the writer to strike an appropriate balance between two competing interests--on the one hand brevity, and on the other hand thoroughness. And in striking this balance, the legal writer needs to take into account the context of the writing, that is, the purpose of the document, and what the intended audience wants and needs. But a good rule of thumb is that the legal writer should err on the side of brevity, and risk saying too little rather than too much. As William Zinsser puts it: “Readers should always feel that you know more about your subject than you’ve put in writing.”

III. GREAT LEGAL WRITING IS ENGAGING

Great legal writing is clear and concise--almost no one disputes that. But there is more to it than just those two qualities. Writing must also engage the reader in order to be effective. Just as a memorandum or brief cannot accomplish its objective if the reader cannot understand it, so too it cannot readily accomplish its objective if the reader loses interest and either puts the document aside or reads it half-heartedly. In either event, the ability of the writer to explain or persuade is compromised.

A. The Importance of Engaging the Reader

Lord Denning, the famous British jurist, described the importance of engaging the reader as follows:

No matter how sound your reasoning, if it is presented in a dull and turgid setting, your hearers--or your readers--will turn aside. They will not stop to listen. They will flick over the pages. But if it is presented in a lively and attractive setting, they will sit up and take notice. They will listen as if spellbound. They will read you with engrossment.

So writing should not be considered first-rate writing, no matter how clear and concise it is, if it does not stir the interest of the intended audience.

74 ZINSSER, supra note 48, at 269.

75 Arguably this rationale would not apply with respect to transactional drafting, since the purpose of a contract is to memorialize the intent of the parties, rather than to persuade or explain. Thus, engagement is not a significant value with respect to transactional drafting. Nevertheless, a well-styled contract that engages the reader is still superior (other things being equal) to a lifeless and ponderous contract from the perspective of writing style. Therefore, even in the context of contracts, I would argue that engagement is an essential quality of the best writing, even if its value in that context may not be sufficient to justify its cost in the eyes of most clients.


77 ZINSSER, supra note 48, at 5 (“Good writing has an aliveness that keeps the reader reading from one paragraph to the next”).
To appreciate the importance of engagement as an essential quality of great legal writing, consider the following paragraph:

*Our client is Bill Smith. Smith has filed a lawsuit in federal court. It is a personal injury case. Smith was watching a softball game. Smith got hit with a softball. He was injured. He suffered a concussion. Smith received treatment at Methodist hospital. He now seeks damages. He claims to have mental and physical injuries. Smith doesn’t know if he is entitled to damages for mental injuries. He wants us to find out. This memo addresses that issue.*

This paragraph is unquestionably clear and concise, but it would be a stretch to call it good writing. Why? Well, because the style is tedious and monotonous. It is the writing equivalent of the children’s song “Mary had a Little lamb”: simple and straightforward, but lacking any stylistic depth that would make it interesting. If you were a judge and had to suffer through a steady diet of such briefs, you might want to jump from the top of the courthouse.

Compare that paragraph to the following excerpt from Justice Brandeis’s concurrence in *Whitney v. California*[^78]:

> Those who won our independence by revolution were not cowards. They did not fear political change. They did not exalt order at the cost of liberty. To courageous, self-reliant men, with confidence in the power of free and fearless reasoning applied through the process of popular government, no danger flowing from speech can be deemed clear and present, unless the incidence of the evil apprehended is so imminent that it may fall before there is opportunity for full discussion. If there is time to expose through discussion the falsehood and fallacies, to avert the evil by processes of education, the remedy to be applied is more speech, not enforced silence. Only an emergency can justify repression. Such must be the rule if authority is to be reconciled with freedom. Such, in my opinion, is the command of the Constitution.

The Brandeis excerpt, like my earlier example, is unquestionably clear and concise. But it also commands the reader’s attention. It is crisp and powerful and makes the reader want to keep reading[^79]. It encourages the reader to internalize the material and incorporate it into the reader’s own thinking (by agreeing with it, disagreeing with it, re-constituting it into something different, etc.). Writing like this that is engaging ignites the reader’s own creative process and invites the reader to develop an interactive relationship with the text. It is this quality that separates truly good legal writing from merely competent legal writing. For the legal writer’s objective, whether it is to explain or persuade, is much more easily accomplished if the audience is receptive and attentive to the writer’s message.

[^78]: 274 U.S. 357, 377 (1927).

[^79]: As one commentator puts it, good writing is not just clear and concise, it also “sings.” Phillip Frost, *Plain Language in Transition*, MICHIGAN B. J., Aug, 2005, at 46.
B. The Components of Engagement

What then is it that makes writing engaging to the reader? On this point, the scholarly literature is fairly extensive. One common theme is the writer’s use of varied sentence structure. Writing (such as that in the first excerpt above) that is overly repetitive in its syntax gets tedious. Conversely, writing that has appropriate variation in the length and pattern of the sentences has a natural flow that helps to maintain the reader’s interest, in the same way that variation in speech patterns enlivens conversation. The same is true at the levels of individual words and paragraphs: varying paragraph length and using a more expressive vocabulary adds character and interest to one’s writing.

Of course, formal linguistic qualities such as sentence structure, the length of sentences and paragraphs, and word choice are not the only determinants of engaging writing. Other, more subtle factors also help to engage the reader. The writer’s voice, for example, contributes significantly to the allure of writing. If the writing style seems stilted, overly casual, or artificial, the writer’s ability to connect with the reader is diminished. Law students sometimes appear to emulate the style they see in casebooks when they first try to write a legal memoranda and briefs. Apparently they get the idea that this is the way lawyers are supposed to write. But the result is writing that is artificial-sounding and lifeless. Other students come to law school having learned to write in a pompous, intellectual style that they apparently picked up from their exposure to academic writing. Superficially it sounds “intelligent,” but it is ponderous and dense, using the passive voice, stilted constructions, and a lot of bloated words to say very little. It is the antithesis of “plain language.”

One reason these types of writing fail to engage the reader is that they employ an inauthentic voice. The writer is trying to communicate in a way that seems artificial to the reader. The reader can’t get a feel for who the person behind the writing is, and for that reason does not feel drawn into a dialogue with the writer. A writer who has yet to find an authentic voice tends to produce tepid prose. It is not necessarily bad; it just lacks character and

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80 OATES & ENQUIST, supra note 8, at 598 (“variety in sentence length helps create an interesting and varied pace”); BOUCHOUX, supra note 15, at 104 (“[Y]ou do not want a project filled with sentences of approximately the same length. Such writing would be tedious to read.”); WYDICK, supra note 11, at 69-70 (“To keep the reader’s interest, you need variety in sentence construction”).

81 For this reason I take issue with the advice of certain commentators who set out an overly simplified writing style as a model for lawyers to emulate. See, e.g., MARK HERRMANN, THE CURMUDGEON’S GUIDE TO PRACTICING LAW 1-8 (2006). Such writing may be clear, but it can also be torturous. Nevertheless, in partial defense of these commentators, I will say that relatively few first-year law students I have seen err on the side of simplicity in their writing. Much more common is a wordy, bloated writing style that is full of clutter. And I have had some success referring particularly verbose students to the Herrmann’s book to remedy this problem. What I tell them, which seems to work well, is to endeavor to strike a happy medium between the style of writing they see that book and their current writing style.

82 SCALIA & GARNER, supra note 3, at 112.

83 Id. (“With words, ask yourself if there’s a more colorful way to put it.”)

84 For an interesting book-length treatment of the topic of voice, see TOM ROMANO, CRAFTING AUTHENTIC VOICE (2004).
individuality. J.B. White, one of the principle figures in the law and literature movement, describes the development of the writer’s voice as central to the enterprise of being a lawyer:

Law, as you can see, is for me a kind of writing, at its heart less of an interpretive process than a compositional one. The central task of the lawyer from this point of view is to give herself a voice of her own, a voice that at once expresses her own mind at work at its best and as a lawyer, a voice at once individual and professional.85

It is difficult to define the concept of voice.86 One writer describes it as follows: “When I talk about voice, I mean written words that carry with them the sense that someone has actually written them. Not a committee, not a computer: a single human being. Writing with voice has the same quirky cadence that makes human speech so impossible to resist listening to.”87 At bottom it seems to refer to a style that comes naturally to the writer, so that a glimmer of the writer’s personality peaks out through the written word. A writer’s voice, in other words, lets the reader see that there is a real person behind the text.88 Consider, for example, Justice Holmes infamous pronouncement in favor of forced sterilization in Buck v. Bell:89

It is better for all the world, if instead of waiting to execute degenerate offspring for crime, or to let them starve for their imbecility, society can prevent those who are manifestly unfit from continuing their kind. The principle that sustains compulsory vaccination is broad enough to cover cutting the Fallopian tubes. Three generations of imbeciles are enough.

The reasoning and result of the decision may be open to question, but is there any question as to the identity of its author? Holmes’ commanding presence comes through loud and clear, and the power of his voice may explain in part why only one member of the Court dissented from such a dubious holding.

Occasionally, as in a work of fiction, the writer may make effective use of a voice that is not the writer’s own, but rather a character the writer wants the reader to identify with. Chief Justice Roberts’ rather amusing dissent in Pennsylvania v. Dunlap,90 for example, illustrates this technique. For the most part, however, the effective voice in legal writing is the writer’s own. It


86 See J. Christopher Rideout, Voice, Self and Person in Legal Writing, 15 LEG. WRIT. 67, 74-78 (2009) (providing a brief history of the concept of voice and describing the difficulties in defining the concept).

87 RALPH FLETCHER, WHAT A WRITER NEEDS 68 (1993).

88 See ZINSSER, supra note 48, at 25 (“But whatever your age, be yourself when you write.”).

89 274 U.S. 200, 207 (1927) (citation omitted).

90 See Pennsylvania v. Dunlap, 129 S.Ct. 448 (2008) (discussing the facts from the point of view of the arresting officer in deciding whether the officer acted with probable cause in making an arrest). This case also provides a good example of the effective use of humor in legal writing. For a good analysis of the Chief Justice’s writing style in Dunlap, including the appropriateness of its humorous tone, see Melissa H. Weresh, Chief Justice John Roberts’ Blog-Style Dissenting Opinion Garners Mixed Reviews, IOWA LAWYER, Dec. 2008, at 12.
is not precisely the same as the way the writer would normally speak. But it does reflect a style that comes naturally to the writer, not a style that the writer mimics or assumes for effect.\(^{91}\) William Zinsser describes that type of individual style as follows:

Think of [voice] as a creative act: the expressing of who you are. Relax and say what you want to say. And since style is who you are, you only need to be true to yourself to find it gradually emerging from under he accumulated clutter and debris, growing more distinctive every day. Perhaps the style won’t solidify for years as your style, your voice. Just as it takes time to find yourself as a person, it takes time to find yourself as a stylist…. \(^{92}\)

Another, somewhat related trait that can make writing engaging is the writer’s ability to incorporate humor into writing.\(^{93}\) In proper doses and in the right context, levity can add to the writer’s ability to engage the audience. The occasional use of humor in the appropriate context makes the writing more engaging because, among other things, it reveals a part of the writer’s personality. In that way it is similar to an authentic voice. The judicious use of humor also provides rest stops for the reader, allowing the reader to take periodic respite while processing the writer’s message. And it tends to make the experience of reading more entertaining (assuming the reader has a sense of humor), which alone makes it easier for the writer to hold the reader’s interest.

Humor can be particularly effective when it is used to soften the blow of an unpopular message. Consider, for example, Judge Cardozo’s opinion in *Murphy v. Steeplechase Amusement Company*.\(^{94}\) There the New York Court of Appeals held that the assumption-of-risk doctrine prevented recovery by a young man injured on an amusement ride aptly named “the Flopper.” Stated Cardozo:

One who takes part in such a sport accepts the dangers that inhere in it so far as they are obvious and necessary, just as a fencer accepts the risk of a thrust by his antagonist or a spectator at a ball game the chance of contact with the ball. The antics of the clown are not the paces of the cloistered cleric. The rough and boisterous joke, the horseplay of the crowd, evokes its own guffaws, but they are not the pleasures of tranquility. The plaintiff was not seeking a retreat for meditation. Visitors were tumbling about the belt to the merriment of onlookers when he made his choice to join them. He took the chance of a like fate, with whatever damage to his body might ensue from such a fall. The timorous may stay at home.

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\(^{91}\) Brian Garner suggests that a writer’s natural voice resembles the writer’s spoken voice, and that a skillful writer needs to develop a good ear for how his writing sounds in order to develop a natural voice. He also offers several tips on how the writer can enhance the natural, “spoken” quality of her writing. *See* BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH 48-50 (2001).

\(^{92}\) *See* ZINSSER, *supra* note 48, at 25.


\(^{94}\) 166 N.E. 173, 174 (1929) (citations omitted).
By using a bit of tongue-in-cheek humor to suggest that a vigorous young man who elects to jump on a ride called “the Flopper” might reasonably expect to have his body flopped about, Cardozo makes the application of an otherwise harsh doctrine seem more palatable to the reader. The humorous tone undermines the reader’s natural sympathies for the injured plaintiff and invites the reader to conclude that the plaintiff voluntarily assumed the risk of injury. This type of humor is what William Zinsser refers to as the “secret weapon” of the nonfiction writer. “It’s secret,” he claims, “because so few writers realize that humor is often their best tool—and sometimes their only tool—for making an important point.”

Of course, contextual considerations are important when it comes to humor. At times the subject matter at issue may make humor inappropriate or even in bad taste. Some commentators, in fact, think that it should be avoided altogether in legal writing because it too often backfires by trivializing serious matters. So the legal writer should carefully weigh the advantages and disadvantages of employing humor, and use it in legal documents only with considerable discretion.

Another important component of engaging writing is the writer’s ability to tell a compelling story. Outside of a purely academic setting, the law is inherently tied up with events in the lives of real people. Briefs and memoranda do not just concern arcane legal concepts; rather, they concern the problems and challenges people face in their everyday lives, individually or collectively. And when people discuss these problems and challenges, they do so by telling stories. As J.B. White puts it: “The story is the most basic way we have of organizing our experience and claiming meaning for it. We start telling the stories of our lives as soon as we have language and we keep it up until we die.” So the legal writer needs to be able to tell stories effectively in order for the reader to process legal information in a meaningful way.

Judge Hand’s opinion in Sheldon v. Metro-Goldwyn Pictures Corp. provides a good example of the effective use of storytelling in legal writing. In that opinion, the court awarded injunctive relief as well as compensatory damages to the authors of a play who had brought a copyright infringement action against a movie producer. Judge Hand’s opinion first tells the

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95 ZINSSER, supra note 48, at 207.

96 See Note, Judicial Humor: A Laughing Matter?, 41 HASTINGS L. J. 175 (1989) (lamenting the excessive and inappropriate use of humor in judicial opinions).


98 See ZINSSER, supra note 48, at 261-262 (“Narrative--good old-fashioned storytelling--is what should pull your readers along without their noticing the tug.”). For a good overview on why storytelling is effective and how to construct a compelling story, see Richard K. NEUMANN, JR. & SHEILA SIMON, LEGAL WRITING 199-204 (2008).

99 See Kenneth D. Chestek, The Plot Thickens: The Appellate Brief as Story, 14 LEG. WRIT. 127, 130 (2008) (“Law, and the legal system, should be about people….It is a tool to enrich people’s lives. So why do legal briefs focus so much on the abstract law and overlook the people?”).

100 JAMES BOYD WHITE, HERACLES’ BOW 169 (1985).

101 81 F.2d 49 (2d Cir. 1936).
historical story that provides the basis for the plot in both the play and the movie--the story of a young woman named Madeleine Smith who faced trial in Scotland in 1857 for allegedly poisoning her lover with a cup of arsenic-laden hot chocolate. The opinion then goes into significant detail comparing the specific plots and dramatic techniques of the play and the movie. It also discusses the plot of a contemporaneous novel--again based upon the story of Madeleine Smith--which the defendant movie-producer claimed the movie was based upon. (The movie-producer had purchased the rights to the novel but not the play.) After summarizing all three stories in a lively manner worthy of a novelist, Judge Hand succinctly concludes that “if the picture was not an infringement of the play, there can be none short of taking the dialogue.”

Too many legal writers recite factual material in a dry, mechanical way, as if the “facts” were merely data points rather than stories about real people. But in doing so, these writers lose a powerful persuasive tool. For a growing body of literature indicates that most people, including judges, make decisions more readily on the basis of stories that they can relate to their own experiences than they do through argument, statistics, or logic.

As Judge Hand’s opinion in Sheldon illustrates, a legal writer’s ability to incorporate narrative techniques from the realm of fiction into an appropriate legal document can significantly enhance the writer’s ability to engage the reader. And thus the legal writer who can effectively blend legal analysis with narrative life gains a decided advantage over the legal writer who focuses on legal arguments and the dry recitations of facts.

102 Id. at 56.

103 See, e.g., W. LANCE BENNETT & MARTHA S. FELDMAN, RECONSTRUCTING REALITY IN THE COURTROOM: JUSTICE AND JUDGMENT IN AMERICAN CULTURE (1981) (using studies of jury trials to argue that jurors rely primarily on stories told by the witnesses and lawyers to process and organize information and to assess the credibility of the parties’ competing claims); STEVEN LUBET, NOTHING BUT THE TRUTH: WHY LAWYERS DON’T, CAN’T AND SHOULDN’T HAVE TO TELL THE WHOLE TRUTH 1 (2002) (“narrative has proven to be the most successful way to persuade the fact finder”); Linda H. Edwards, The Convergence of Analogical and Dialectic Imaginations in Legal Discourse, 20 LEG. STUDIES FORUM 7 (1996) (arguing that narrative is an essential component of our thinking about legal rules and principles); Kenneth D. Chestek, Judging by the Numbers: An Empirical Study of the Power of Story, 7 J.A.L.W.D. 1 (2010) (presenting empirical evidence that judges prefer briefs that stress narrative); Brian J. Foley & Ruth Anne Robbins, Fiction 101: A Primer For Lawyers On How To Use Fiction Writing Techniques To Write Persuasive Fact Sections, 32 RUTGERS L. J. 459 (2001) (discussing the benefits of storytelling for persuasion and explaining the how to incorporate the techniques of fiction writing to tell stories in briefs); Elizabeth Farjans & Mary R. Falk, Untold Stories: Restoring Narrative to Pleading Practice, 15 LEG. WRIT. 3 (2009) (arguing that storytelling can enhance the effectiveness of pleadings such as complaints). For a good overview of the scholarly literature on storytelling and the reasons why people are persuaded through stories see J. Christopher Rideout, Storytelling, Narrative Rationality, and Legal Persuasion, 14 LEG. WRIT. 53 (2008).


105 Storytelling is particularly effective, according to some recent works on narrative theory, when it taps into the literary myths and legends (e.g., the heroic quest) that are deeply embedded in our cultural thinking. See, e.g., Ruth Anne Robbins, Harry Potter, Ruby Slippers and Merlin: Telling the Client’s Story Using Characters and Paradigms of the Archetypal Hero’s Journey, 29 SEATTLE U. L. REV. 767 (2006); Linda H. Edwards, Once Upon a Time in Law: Myth, Metaphor & Authority, __ TENN. L. REV. ___ (2010).
Other factors besides those discussed above also contribute to the quality of engagement. For example certain literary and rhetorical devices that go back to the classical rhetoricians (such as the use of metaphor and literary allusions) can enhance the writer’s ability to engage the audience. I will not discuss these further here, but there are some good summaries in the legal writing literature for those who are interested in reading further on the topic.¹⁰⁶

C. Engagement and the Classical Modes of Persuasion

It is helpful in evaluating what makes legal writing engaging to consider briefly the three famous categories of classical rhetoric-- ethos, pathos and logos. For while these three concepts are not directly concerned with writing style,¹⁰⁷ they nevertheless have a definite bearing on the question of what makes legal writing engaging. This is particularly true as regards persuasive legal writing, which is closely related to rhetoric.¹⁰⁸

Aristotle, probably the principal architect of classical rhetoric, described rhetoric as “the faculty of observing in any given case the available means of persuasion.”¹⁰⁹ He then identified ethos, pathos, and logos as the three essential “modes of persuasion.”¹¹⁰ In simple terms, ethos involves establishing credibility with the audience, pathos involves influencing the emotions of the audience, and logos involves through the use of rational argument.¹¹¹

Of the three concepts, logos is probably the least relevant to writing style, since it goes principally to substance rather than style. It is true that a brief or memo that is logical and makes sense to the reader will more likely accomplish its objective (whether that is descriptive or persuasive) than a document that is fuzzy in its reasoning. And it is also true that faulty logic in writing--to the extent the reader senses it--can detract from the reader’s ability to engage with the writer. But it is nevertheless possible to communicate in a style that is engaging but illogical. In fact, that is essentially why Plato and Socrates took issue with the Sophists: they claimed that the Sophists were only concerned about being persuasive and not about being correct.¹¹² So logos, I

¹⁰⁶ For a good overview of these devices, see OATES & ENQUIST, supra note 8, at 591-604. For an in-depth discussion of metaphors, literary allusions, and other so-called rhetorical figures of speech that have their roots in the classical age, see SMITH, supra note 104, at195-340.

¹⁰⁷ In fact, for Aristotle they were only tangentially relevant to writing, as he was primarily concerned with “the modes of persuasion furnished by the spoken word.….” ARISTOTLE, RHETORIC, reprinted in POETICS AND RHETORIC 105 (W. Rhys Roberts, trans., Barnes & Noble 2005) (c. 335-330, B.C.E.).


¹⁰⁹ ARISTOTLE, supra note 107, at 105.

¹¹⁰ Id. at 104-109.

¹¹¹ For a general overview of these concepts, see SMITH, supra note 104, at 10-14.

would argue, pertains primarily to truth value rather than writing style (in the same way that accuracy is concerned with truth value rather than writing style), though admittedly the line between style and substance can be somewhat porous. Simply put, logos engages the reader because the substance of the argument is compelling. For that reason, it relies on the quality of clarity rather than the quality of engagement, since writing will not be capable of persuading through the force of logic if the logic is obscured by unclear writing.

The other two modes of persuasion relate more directly to the quality of engaging writing. Ethos engages the reader because it makes the reader more inclined to accept the writer’s message. Engaging writing invites the reader to join the author in a collaborative intellectual endeavor. And readers will be more inclined to enter join in a collaborative intellectual endeavor with a writer they respect and trust than with a less credible authority. For that reason, as one commentator puts it, “persuasive discourse depends as much on the advocate’s character and credibility as it does on the logic of the argument and the emotional content of the case.” Part of what gives makes a writer credible, of course, has nothing to do with the writing. The writer’s general reputation goes a long way toward establishing a sense of ethos. But the way the writer communicates the message certainly affects the writer’s credibility as well, particularly if the reader gets the sense from the writing that the writer can be trusted.

Writing in a manner that enhances the writer’s credibility is important to the writer’s ability to persuade the reader. In a discussion with the faculty at the University of Michigan Law School in the fall of 2008, Justice Anthony Kennedy, in response to a question I posed

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113 See supra footnote 27.

114 Even though the line can be porous, there is, nevertheless, a meaningful distinction to be drawn between style and substance. Great ideas sometimes come in the form of ponderous prose (think of Immanuel Kant). Conversely, well-written (i.e., clear, concise, and engaging) prose can be persuasive even though the author is knowingly disingenuous about the correctness of the argument (e.g., the Sophists). Therefore style and substance, though highly correlated in most writing, cannot be identical or inseparable qualities. Indeed, demagoguery would not be possible if there were no meaningful distinction between style and substance, since by definition the demagogue relies on a compelling style to camouflage specious arguments.

115 See SMITH, supra note 104, at 96 (logos in the legal writing context refers to “efforts to persuade a legal audience based on the application of established legal authorities (such as statutes and cases) to the issue at hand.”).

116 Id. at 13 (“The more credibility the speaker or writer has, the more receptive the audience will be”).


118 SMITH, supra note 104, at 124.

119 Id. at 126 (“Arguably the most important character trait for legal writers to project to their readers is truthfulness”).

120 On the importance of ethos to persuasion and the ways in which writing techniques affect it, see Smith, supra note 104, at 123-191.
about what he thought was the most important trait of legal writing, stressed the primacy of maintaining credibility as a legal writer. He went on to discuss how exaggerations, loose metaphors and analogies, strained readings of cases, and similar flaws that undermine the legal writer’s credibility are what bother him the most in some of the briefs he reads. And he said that he admonishes his clerks first and foremost to avoid these potential pitfalls in the writing they do for him.

Of the three classical modes of persuasion, the concept of pathos is probably the most important with respect to the writer’s ability to engage the reader. It plays an important role, for example, in making Justice Brandeis’s concurrence in Whitney v. California so powerful.\textsuperscript{121} Brandeis’s references\textsuperscript{122} to the founding fathers as “courageous, self-reliant men” and as “[t]hose who won our independence by revolution,” and his liberal use of emotive words such as “free men,” “liberty,” and “democracy” help to persuade the reader by evoking feelings of patriotism and civic pride. Of course, a lawyer employing pathos has to be careful not to overdo it. Blatant emotional appeals in a document such as an appellate brief can be counterproductive if they make the judges feel like they are being manipulated.\textsuperscript{123} But the judicious use of pathos in a brief—even an appellate brief\textsuperscript{124}—can make it more compelling, particularly when the brief appeals to the judge’s sense of justice and fairness.\textsuperscript{125} And while it is primarily the nature of the facts (or more accurately, the character of the parties’ stories) that affects the reader’s emotional response, the manner in which the writer tells the client’s story is important as well.\textsuperscript{126} As with the use of humor in legal writing, it is important for the legal writer to carefully evaluate the context of a document in determining whether to employ pathos. This means that the writer should look to the purpose of the document, as well as the needs, interests, and background of the intended audience. For example, one commentator has argued that pathos is more effective in cases where the law is reasonably subject to interpretation than in cases where the law is clear-cut and can easily be applied to the facts.\textsuperscript{127} Likewise, pathos is generally not

\textsuperscript{121} See note 78 and accompanying text.

\textsuperscript{122} See 274 U.S. at 375-378.


\textsuperscript{124} See John Shepherd & Jordan B. Cherrick, Advocacy and Emotion, 3 J.A.L.W.D 154, 161-164 (2006); Chestek, supra note 93.

\textsuperscript{125} SCALIA & GARNER, supra note 3, at 26-27.

\textsuperscript{126} See SMITH, supra note 104, at 105 (“Undoubtedly, the most effective way for an advocate to evoke emotions based on the facts of the matter is to present the facts in the context of a compelling story”); Shepherd & Cherrick, supra note 124, at 156-158 (“The emotions that underlie human conflict are contained in the facts or ‘story’ of your case.”); Robbins, supra note 105, at 771 (“any decent trial lawyer already knows that storytelling is a critical part of effective advocacy”).

\textsuperscript{127} See SMITH, supra note 104, at 103 (“If the law on a legal issue and its application to the matter at hand are clear, the emotional facts and values implicated by the matter will be less significant in the decision-making process….If, on the other hand, the law on a legal issue or its application to the matter at hand is unclear, then pathos will play a significant role in the decision-making process.”).
appropriate where the central purpose of the document is to convey information, as in an office memorandum. To be sure, a good memorandum should inform the reader whether the facts of the case are likely to have an emotional impact on the jury or the judge, so that the lawyer or client reading the memo can make a rational assessment of potential damages. But it is not the purpose of an advisory memo to stir up the passions of the reader through the use of pathos; that would likely be counterproductive if the goal is to enable the decision-maker to calmly and rationally assess the options. So while a memo does need to evaluate the potential role pathos will play in a case, it should not itself employ pathos to stir an emotional response in its intended audience.

D. Engagement and Clarity

In a perfect world, there would be no conflicts between the various goals of writing. But as we saw in the discussion of clarity and conciseness, this is not always the case in the real world, where writers sometimes have to try to balance among competing interests. One such balancing act involves the relationship between clarity and engagement. Some of the attributes of clarity discussed in Section I can conflict with the attributes of engagement discussed in this section, and as a result, clarity and engagement are sometimes at odds. Repetition, for example, is a device that writers sometimes use to make sure that their message is clear to the reader. Yet it can also make writing less engaging (and less concise) because the writer gets bored hearing the same message repeatedly. Likewise, the use of simple sentences and plain words is an important part of ensuring that writing is understandable. But on the other hand, one component of engaging writing is variation in linguistic patterns, such as sentence structure and word use.

Certain narrative techniques that make writing engaging can also impede clarity. Consider, for example, how writers present sequences of events. The simplest and most straightforward way to present facts is chronologically; when the facts are presented in this manner, the story is very easy to follow. But good writers (particularly fiction writers) sometimes present stories in a non-linear fashion (i.e., out of chronological sequence) in order to emphasize certain facts and create an interesting narrative. Think, for example, of the movie Pulp Fiction, where Quentin Tarantino divides the story into a number of discrete scenes, but then presents the storyline in a non-linear fashion. The result is an interesting and compelling story. By challenging the viewer to figure out exactly what is happening and when, Tarantino adds intrigue to the plot and keeps the audience on its toes. But while the technique helps to make the movie engaging, it also detracts somewhat from the clarity of the plot. If you are like me, you probably had to watch the movie several times to piece it all together chronologically. So when presenting narrative, the storyteller walks a fine line between boring the audience with a simple chronological presentation of the facts, and providing a more complicated and interesting

128 BRONSTEEN, supra note 11, at 132.

129 LECLERQUE, supra note 16, at 52 (“[R]epetition results in lengthy documents and uninteresting reading”).

130 See supra notes 16, 17 and accompanying text.

131 See supra notes 80, 83 and accompanying text.

132 For a more detailed discussion of this narrative technique, see FAJANS, supra note 67, at 200-205.
narrative account that may at the same time cause some confusion. The trick, of course, is to find the happy medium.

The same is true for the qualities of clarity and engagement generally. Sometimes the legal writer will have to strike an appropriate balance between engagement and clarity. And in doing so, the writer will need to look to the context of the document. It is more important to make the writing engaging in a persuasive brief, for example, than in an office memo, where the principal goal is merely to convey information. When the two qualities do conflict, the legal writer should generally err on the side of clarity. For as noted in Section I, a document cannot accomplish its objective if the reader cannot understand what the writer is trying to say.

But this does not mean that we should only focus on clarity and conciseness. It would be a mistake to allow our justifiable aversion to legalese and turgid legal prose push us into reactionary mode where legal writing completely abandons stylistic interest in the name of clarity. There is a middle ground, and we need not write like middle school students in order to ensure that our writing is clear. Writing that is engaging maintains the reader’s attention. And that attention is important if a document is going to accomplish its objective.

IV. GREAT LEGAL WRITING IS ELEGANT

Writing that is clear, concise, and engaging is unquestionably good writing. Yet there is one other rather elusive quality that distinguishes the very best writing from the merely good. The best writing is often described as being “beautifully written.” Think, for example, of a Shakespearean sonnet, or one of Emerson’s essays. This quality, which I will refer to here as elegance, is different from the quality of engagement discussed in the previous section. A document, such as an exciting piece of pulp fiction, can be written in a highly engaging style and command the reader’s attention but still not be considered a beautiful or elegant piece of writing.

What distinguishes the quality of elegance from the quality of engagement is that elegance is aesthetic in nature. As Cicero said of great oratory, “[o]ne thing there will certainly be, which is beauty written.”

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133 Id. at 395 (“Uncertainty of meaning often creates rich and complex layering in fiction, but it produces costly and time-consuming litigation in legal documents, especially rule-making documents.”).

134 See supra notes 7, 8 and accompanying text.

135 See GARNER, supra note 36, at 40.

136 Id. at 46 (stressing the importance of writing style and quoting Voltaire for the proposition that “[e]very style is good save that which bores.”).

137 Nor, as I am using it, is it synonymous with eloquence, which is more closely related to the quality of engagement discussed in the previous section than to elegance, even though some commentators use the term eloquence more broadly to encompass aspects of both elegance and engagement. See, e.g., OATES & ENQUIST, supra note 8, at 593 (“Eloquent writing…is more than clear and energetic: it is memorable, striking, even poetic because the reader has paid attention to the sound, rhythm, and imagery of language.”). But strictly speaking, eloquence is not concerned with the aesthetic. Rather, it entails persuasiveness, forcefulness, and fluency. See 1 THE SHORTER OXFORD ENGLISH DICTIONARY 808 (5th ed. 2002) (defining eloquence as “the fluent, forceful, and apt use of language”); WEBSTER’S COLLEGIATE DICTIONARY 375 (11th ed. 2003) (defining eloquence as “the quality of forceful or persuasive expressiveness”).

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those who speak well will exhibit as their own; a graceful and elegant style, distinguished by a peculiar artifice and polish.”

Elegance gives the best writing an artistic quality that transcends its functional purposes, in the same way that the value of a beautiful object such as a vase transcends its function as a vessel. Elegance adds value to writing for the same reason that beauty is valuable in any human endeavor. Beauty lifts the spirits and gives form to mankind’s essential creative nature. The noted psychologist Carl Seashore observed that “[t]he pursuit of beauty is one of the most universal and most persistent efforts of mankind in all ages and all cultures.” Likewise, George Santayana, the well-known 20th-century philosopher, described the pursuit and appreciation of beauty as a fundamental and pervasive human drive, and an integral part of human nature:

In all products of human industry we notice the keenness with which the eye is attracted to the mere appearance of things: great sacrifices of time and labor are made to it in the most vulgar manufactures; nor does man select his dwelling, his clothes, or his companions without reference to their effect on his aesthetic senses. Of late we have even learned that the forms of many animals are due to the survival by sexual selection of the colours and forms most attractive to the eye. There must therefore be in our nature a very radical and wide-spread tendency to observe beauty, and to value it. No account of the principles of the mind can be at all adequate that passes over so conspicuous a faculty.

It should not be surprising, therefore, that we would value beauty in writing, just as we do in all of our creative endeavors.

But even if we grant that literature and perhaps even some works of prose can be beautiful or elegant, and that elegance contributes to their value, is there really such a thing as a beautifully written brief or legal opinion? And even if elegance is attainable in legal writing, it is really a worthy goal in that context, given the utilitarian nature of the profession? After all, we lawyers write documents to solve problems, not to entertain our audiences or create great works of literature.

These are certainly worthy questions. Yet I maintain that elegance in legal writing, while certainly not commonplace, is attainable, and that it has intrinsic value. For it seems to me that the quality of elegance, while not essential to good legal writing in the way clarity, conciseness, and engagement are, is nevertheless a higher-order quality that characterizes the finest legal writing.

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138 Cicero, On the Character of the Orator, in Cicero on Oratory and Orators 19 (J.S. Watson, trans., 1878) (c. 55 B.C.E.).

139 Consider Keats’ tribute to the intrinsic value of one such comely vessel in his Ode on a Grecian Urn, reprinted in The Oxford Book of English Verse (Arthur Quiller-Couch, ed., 1919).


Consider, for example, Justice Jackson’s opinion in *West Virginia Board of Education v. Barnette*.

In that case, the Court upheld an injunction preventing enforcement of a state regulation requiring school children to salute the American flag. Writing for the majority, Justice Jackson paints a stark picture of the dangers inherent in state-coerced nationalism and the repression of dissenting views:

> Struggles to enforce uniformity of sentiment in support of some end thought essential to their time and country have been waged by many good as well as evil men. Nationalism is a relatively recent phenomenon but at other times and places the ends have been racial or territorial security, and particular plans for saving souls. As first and moderate methods to attain unity have failed, those bent on its accomplishment must resort to ever-increasing severity. As governmental pressure toward unity becomes greater, so strife becomes more bitter as to whose unity it shall be. Probably no deeper division of our people could proceed from any provocation than from finding it necessary to choose what doctrine and whose program public educational officials shall compel youth to unite in embracing. Ultimate futility of such attempts to compel coherence is the lesson of every such effort, from the Roman drive to stamp out Christianity as a disturber of its pagan unity, the Inquisition, as a means to religious and dynastic unity, the Siberian exiles as a means to Russian unity, down to the fast failing efforts of our present totalitarian enemies. Those who begin coercive elimination of dissent find themselves terminating dissenters. Compulsory unification of opinion achieves only the unanimity of the graveyard.

Or consider Justice Brennan’s opinion in *Texas v. Johnson*, another famous case involving the American flag. The issue there was whether flag-burning was constitutionally protected speech. The Court held that it was. Writing for the majority, Justice Brennan delivers a powerful defense of free speech:

> We are fortified in today’s conclusion by our conviction that forbidding criminal punishment for conduct such as Johnson’s will not endanger the special role played by our flag or the feelings it inspires….We are tempted to say, in fact, that the flag’s deservedly cherished place in our community will be strengthened, not weakened, by our holding today. Our decision is a reaffirmation of the principles of freedom and inclusiveness that the flag best reflects, and of the conviction that our toleration of criticism such as Johnson’s is a sign and source of our strength….The way to preserve the flag’s special role is not to punish those who feel differently about these matters. It is to persuade them that they are wrong….And precisely because it is our flag that is involved, one’s response to the flag burner may exploit the uniquely persuasive power of the flag itself. We can imagine no more appropriate response to burning a flag than waving one’s own, no better way to counter a flag burner’s message than by saluting the flag that burns, no surer means of preserving the dignity even of the flag that burned than by--as

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142 319 U.S. 624 (1943).

143 Id. at 640-41.

144 491 U.S. 397 (1989).
one witness here did—according its remains a respectful burial. We do not consecrate the flag by punishing its desecration, for in doing so we dilute the freedom that this cherished emblem represents.\textsuperscript{145}

Brandeis and Jackson are widely regarded as exceptional writers. And the excerpts set out above unquestionably exemplify writing that is clear, concise, and engaging. But what really sets these opinions apart as models of great legal writing, I think, is the elegant manner in which they are written. There is an artistic quality to the prose that is hard to analyze but easy to appreciate.\textsuperscript{146} They read more like literary works than legal documents.\textsuperscript{147} You find yourself wanting to read them more than once, not because you don’t understand them the first time, but because you admire the craftsmanship of the writing.

Such opinions, it seems to me, demonstrate that elegance in legal writing is attainable, and that it is a worthy goal, at least with respect to certain types of legal writing.\textsuperscript{148} After all, writing is a creative endeavor, and creativity by its very nature opens up the possibility of artistry. As J.B. White puts it: “For me the law is an art, a way of making something new out of existing materials—an art of speaking and writing.”\textsuperscript{149}

Of course, the legal writer needs to take the context of a given document into account in order to determine whether elegance is an appropriate goal for that document. For while it is not particularly hard to appreciate the value of elegance in a Supreme Court opinion on a matter of considerable social significance, justifying the quest for elegance in a typical office memo is another matter. In that context, the goal is simply to convey information in an expeditious manner in order to help the client make a wise decision. Generally, the client is not interested in funding a literary work and does not want to spend extra money to enable an associate to produce a memo that is elegant. So long as the memo is clear and concise, that is really all the client requires. Therefore, with respect to documents such as legal memoranda and contracts, the quality of elegance must as a practical matter give way to more practical considerations, such as cost.

On the other hand, a lawyer does not need not to consciously stunt a natural aptitude for elegant prose. My point is simply that the writer should consider the context of the document (or more specifically, the purpose of the document and the interests and needs of the audience) in

\textsuperscript{145} Id. at 419-20.

\textsuperscript{146} Or as Strunk & White put it: “Who can say confidently what ignites a certain combination of words, causing them to explode in the mind? Who knows why certain notes in music are capable of stirring the listener deeply, though the same notes slightly rearranged are impotent? These are high mysteries.” STRUNK & WHITE, supra note 5, at 66.

\textsuperscript{147} For a comprehensive discussion of the relationship between legal opinions and literature, see RICHARD A. POSNER, Judicial Opinions as Literature, in LAW AND LITERATURE 329 (3d ed. 2009).

\textsuperscript{148} See DERNBACH, supra note 11, at 191 (“The law is literary profession; legal writing should and often does approach the level of good literature. Many judicial opinions, for example, are remembered not only for their ideas but also for the way in which the ideas are expressed.”).

\textsuperscript{149} JAMES BOYD WHITE, THE LEGAL IMAGINATION xiv (Univ. Chi. Press, abr. ed. 1985).
determining whether to spend time revising the document to make it elegant. In most situations, the answer will be no, for monetary reasons. On occasion, though--say for a brief to the Supreme Court--the context may warrant an effort on the part of a particularly talented legal writer to imbue the brief with a bit of artistry. If nothing else, taking the opportunity to express one’s creativity can make the practice of law a more meaningful and rewarding profession.

But beyond this, elegance may make writing more persuasive. As discussed above, elegance is a pervasive human quest. And even in such seemingly unlikely fields as physics and mathematics, scholars look to elegance as an important criterion for evaluating their fields’ greatest discoveries. As the physicist Hans Albert Einstein once observed of his famous father: “He had a character more like that of an artist than a scientist as we usually think of them. For instance, the highest praise for a good theory or a good piece of work was not that it was correct or that it was exact but that it was beautiful.” So if elegance can make a scientific or mathematical theory more compelling, is it really a stretch to think that it may make a legal brief more compelling?

It is beyond the scope of this article to analyze precisely what it is that makes writing elegant. Ever since Plato, philosophers have expounded on the nature of beauty, yet it remains an elusive concept. It makes sense to me, however, to look to poetry for guidance as to what makes writing engaging, for it is poetry that we most often associate with beautiful writing. Thus we may find that some of the traits that we normally associate with poetry contribute also to elegance in prose: traits such as the rhythm of the sentences, the way the various words sound to us (e.g., by virtue of literary devices such as rhyme, alliteration, and onomatopoeia), and the imagery writing conjures up in our minds through its use of metaphor and vivid language.

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150 See supra notes 140,141 and accompanying text.

151 See, e.g., A. Zee, FEARFUL SYMMETRY: THE SEARCH FOR BEAUTY IN MODERN PHYSICS 3 (2007) (“The reader may perhaps think of physics as a precise and predictive science and not as a subject fit for aesthetic contemplation. But in fact, aesthetics has become a driving force in contemporary physics.”); IT MUST BE BEAUTIFUL: GREAT EQUATIONS OF MODERN SCIENCE ix-xvi (Graham Farmelo, ed., 2002) (describing how some great scientists such as Einstein and Dirac have refused to accept theories that could not be expressed as beautiful equations); H. E. HUNTLEY, THE DIVINE PROPORTION: A STUDY IN MATHEMATICAL BEAUTY 75-76 (1970) (“That the feeling for beauty, however, can produce a mental ferment and generate new ideas in mathematics, and can serve as a guide to truth is an affirmation that many high ranking mathematicians endorse.”).

152 Quoted in JAMES WILLIAM MCALLISTER, BEAUTY AND REVOLUTION IN SCIENCE 96 (1996).

153 The mathematicians and scientists who write on this topic tend to view elegance as encompassing simplicity, unity, and symmetry. See, e.g., Zee, supra note 151, at 7, 8-21. Arguably, this scientific and mathematical notion of elegance could have a bearing on contract drafting. One could make a reasonable case that a contract that is simple and symmetrical, yet at the same time precise and comprehensive enough to capture the parties’ intent, is elegant in the same way that a scientific or mathematical theory is elegant.

154 For a brief overview of the history of aesthetics and a summary of more recent developments in the field, see Peg Zeglin Brand, Symposium: Beauty Matters, 57 J. AESTHETICS & ART CRIT. 1-10 (1999). For a more comprehensive survey of the field, see W. TATARKIEW, J. HARRELL, C. BARRETT & D. PETSCH, HISTORY OF AESTHETICS (2005).

155 I am grateful to Linda Edwards for her suggestions as to what makes writing elegant.
But even if we cannot analyze with any degree of precision the quality of elegance in writing or figure out how exactly to acquire it, we can expose ourselves to writing that is elegant. And that itself may be the best learning tool.\textsuperscript{156} For even if elegance in writing proves to be more of a natural gift than a developed skill,\textsuperscript{157} those who possess it--as with any natural gift--can most effectively develop it by continually practicing their craft.\textsuperscript{158}

V. Context and Competing Interests

Throughout this discussion about the fundamental qualities of legal writing, I have repeatedly touched upon two recurring themes: (1) the need for the writer to balance among competing interests, and (2) the need for the writer to evaluate the context in which the writing occurs.\textsuperscript{159} This section discusses in more detail the importance of these two considerations.

My first claim is that the legal writer needs to take competing interests into account. This means recognizing that the legal writer’s objectives sometimes conflict, and when this happens, the writer needs to strike an appropriate balance between them. I have already discussed some of these conflicts at length. In section I, for example, I discussed how the objective of clarity sometimes requires the legal writer to choose between the use of plain-language and the use of more precise technical terms.\textsuperscript{160} In section II, I discussed how brevity needs to be balanced against thoroughness in order for writing to be concise. And in section III, I discussed how some of the factors that make writing engaging, such as the use of varied sentence structure and non-linear storylines, may sometimes impede clarity. Conflicts such as these are not uncommon in legal writing. And they force legal writers to make difficult choices--choices about which conventional writing advice provides little or no guidance.

\textsuperscript{156} See SCALIA & GARNER, supra note 3, at 61-64 (observing that one of the best ways to learn how to write well is to read great writing, including writing outside the field of law); ZINSSER, supra note 48, at 34 (“Make a habit of reading what is being written today and what was written by earlier masters. Writing is learned by imitation. If anyone asked me how I learned to write, I’d say I learned by reading the men and women who were doing the kind of writing I wanted to do and trying to figure out how they did it. But cultivate the best models.”).

\textsuperscript{157} Cicero seems to have thought this about elegant oratory. See CICERO, supra note 138, at 34 (“nature and genius, in the first place, contribute most aid to speaking”).

\textsuperscript{158} An interesting question is whether elegance is best fostered by exposure to elegant legal writing, to other types of elegant writing, or to some combination of the two. In an interview with Bryan Garner, Judge Frank Easterbrook recommended that students of legal writing read great fiction authors such as Hemmingway and Faulkner, as well as good prose, such as articles in The Atlantic or Commentary. See GARNER, supra note 36, at 16-17.

\textsuperscript{159} For the most part, these considerations do not receive much attention in the legal writing literature. But there are some commentators who stress the importance of context. See, e.g., ENQUIST & OATES, supra note 16, at 1, 5; LECLERQUE, supra note 16, at 50; CALLEROS, supra note 6, at 7. For a thorough discussion of the importance of context, including the document’s purpose and the nature of the intended audience, see CHARROW, supra note 16, at 95-139.

\textsuperscript{160} Alternatively, if precision is itself regarded as a fundamental quality, then the writer has to strike a fair balance between clarity (which is achieved in part through plain language) and precision. See supra note 29.
The other overarching consideration the legal writer needs to take into account is the context in which the writing occurs. Context involves two related considerations. The first is the purpose for which a document is written.\textsuperscript{161} What is appropriate for one purpose may not be appropriate for another. For example, a brief, which seeks to persuade, may emphasize different factors (such as pathos) than a legal memorandum, which is primarily concerned with conveying information. The second aspect of context involves consideration of the needs, interests, and background of the intended audience.\textsuperscript{162} What is appropriate for one type of audience may not be appropriate for another. What constitutes “plain language,” for example, depends in large part on the background knowledge of the intended audience.\textsuperscript{163}

At times, evaluating the context of a document may be complicated because a document may have more than one purpose, and there may be more than one intended audience. The latter scenario can be particularly troublesome, since the interests, needs, and backgrounds of the different audiences may not be compatible. An associate may write an office memorandum for a partner on a technical legal matter, for example, only to learn that the partner intends to send a copy to a relatively unsophisticated client. The associate then faces a dilemma with respect to how technical the language of the memorandum should be. In those types of situations, the legal writer either has prioritize one intended audiences over the other(s), or try to find a reasonable accommodation\textsuperscript{164} that will satisfy both audiences. (For example, the writer may elect to use simpler language that is accessible to both audiences,\textsuperscript{165} or the writer may elect to define the technical terms in the document for the benefit of the less sophisticated audience.\textsuperscript{166})

Contextual considerations are important for several reasons. First, carefully evaluating the context of a document enables the legal writer to effectively strike an appropriate balance among competing interests when conflicts arise among the writer’s objectives.\textsuperscript{167} When deciding whether to use a technical term to achieve greater precision, for example, or to vary the sentence structure to make the writing more engaging, the writer should look to the purpose of the document and the nature of the intended audience. Technical terms and more complicated constructions that are appropriate in a brief to the U.S. Supreme Court are not likely to be

\textsuperscript{161} CHARROW, supra note 16, at 95.

\textsuperscript{162} Id. at 107. Considering the nature of the audience also includes considering possible differences between cultures as to their understanding of good writing. For example, ideas as to what makes a communication clear may vary among different cultures. See R. Kaplan, Cultural Thought Patterns, 16 LANGUAGE LEARNING 1 (1966). A legal writer whose audience is multi-cultural needs to take these contextual considerations into account as well.

\textsuperscript{163} See Section I(B).

\textsuperscript{164} For a more extensive discussion on how the legal writer can reach a reasonable accommodation when the intended audiences are incompatible, see CHARROW, supra note 16, at 110-114.

\textsuperscript{165} Id. at 110 (“It is a good idea start with the premise that you should design your document for the audience that is least likely to understand it; that way, you will encompass all of your audiences.”).

\textsuperscript{166} SCHULTZ & SIRICO, supra note 15, at 95 (advocating the use of definitions for technical legal terms when such terms are unclear to the reader).

\textsuperscript{167} See CALLEROS, supra note 6, at 7 (“In every document you should adapt your writing style to achieve the purpose of the document and to suit the needs of the intended audience.”).
appropriate in a letter to a legally unsophisticated client, and vise versa. Likewise, a brief accompanying a motion for extension of time will rarely necessitate the complexity of an appellate brief. So in every instance where the objectives of the writer potentially come into conflict, the writer must try to strike an appropriate balance among the competing interests. And this requires careful consideration of the context of the document.

Context also affects choices the legal writer must make in light of the writer’s limited time and the client’s limited resources. As discussed in section IV, it is generally not cost-effective for a legal writer to expend additional time (and therefore resources) trying to make a document such as a legal memorandum elegant. Most clients simply do not want to pay for that luxury. And the same is sometimes true with regard to the quality of engagement. An engaging contract may be a better piece of writing, other things being equal, than a contract that is merely clear and concise. But would a corporate counsel want to pay for that improvement? My guess is no, assuming that the improved style had no substantive effect on the document. So the legal writer needs to evaluate the context of a document, not just to balance among competing interests, but also to analyze appropriately the costs and benefits of any stylistic improvements to the document.

Finally, contextual considerations are important in legal writing because context bears directly on a document’s ability to fulfill its intended purpose(s). Legal writing does not take place in a vacuum. It is an intrinsically social activity, and the legal writer puts pen to paper in order to accomplish a specific objective. For example, the legal writer may write a letter to opposing counsel in an attempt to intimidate the opposing party into settlement. Or the legal writer may write a brief in hopes of convincing the presiding judge in a case that a certain litigation position is correct. Or the legal writer may write a memorandum for a client in order to urge the client to follow a particular course of action. In each of these situations, the objective of the document is to prompt a certain response on the part of the intended reader. And if the document is not reasonably calculated to prompt such a response, then it not likely to be an effective document, no matter how well written it might otherwise be.

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168 I am grateful to J.B. White for bringing this point to my attention.

169 Whether the document does in fact accomplish its purpose may depend in part on matters outside of the writer’s control. For example, the presiding judge may fall ill, and a different judge with different predilections may end up reading the brief and making the decision. So it wouldn’t be fair to evaluate the quality of the document just by looking at the actual results. The reasonably calculated test seems to me to be a fairer way to assess whether the writer appropriately evaluated the context of the writing.

170 One could argue that a document’s being reasonably calculated to accomplish its intended purpose is necessary to its being a well-written document. But I’m inclined to think that it is not. Consider, for example, a clear, concise, and engaging letter that is intended to intimidate the opposing party into settlement, but fails to do so because its tone is too friendly. Is it a badly written letter as a result? It may not have been an effective letter in that context, but I don’t think it would be fair to say that it was poorly written merely because it was not reasonably calculated to achieve its purpose. Likewise, if a brief is not persuasive because it doesn’t address a judge’s peculiar predilections (e.g., it relies on legislative history), that doesn’t necessarily mean that it wasn’t a well-written brief. It just wasn’t an effective or appropriate brief to submit to that particular judge. So while a document’s being reasonably calculated to fulfill its intended purpose is important in legal writing, I do not think that it should be regarded as an essential quality of great legal writing.
Context is critical here, for it is by carefully evaluating a document’s context that the legal writer is able to determine whether the document is likely to accomplish its objective. By giving careful attention to the purpose of the document and to what the intended audience needs and wants (e.g., in order to be persuaded), the legal writer can tailor the document so that its tone and content are in keeping with those needs and wants. Suppose, for example, that a litigator is writing a brief to a federal district court judge on an issue of statutory interpretation. Suppose also that the litigator’s principal argument is based on legislative history, even though the judge has exhibited a well known aversion to the use of legislative history in statutory interpretation (this could just as well be a stylistic preference, such as an aversion to footnotes in a brief). In that situation, the litigator’s failure to consider the needs and desires of the intended audience plainly detracts from the brief’s ability to fulfill its objective of persuading the judge. And that makes it an ineffective brief. So carefully assessing the context of a document is essential in order for the writer to craft the document in such a way that it is likely to fulfill its intended purpose.

By and large, the scholarly literature has given short shrift to considerations of context in legal writing. And it has almost completely ignored the need for the writer to balance among the writer’s competing interests. Yet as this section demonstrates, it is only by giving due regard to these important considerations that the legal writer can optimize the essential qualities of legal writing.

CONCLUSION

My goal in writing this article has been to start a conversation about the nature of excellence in legal writing. I have attempted to do that by outlining a comprehensive account of what it is that distinguishes great legal writing from ordinary legal writing. I have attempted to analyze, in other words, the essential qualities of great legal writing. I do not hold out this account as the final word on the subject. Instead, I put it forward as a starting point for further analysis.

I have argued that there are four essential qualities to great legal writing: clarity, conciseness, engagement, and elegance. All other traits that we commonly associate with excellence in writing, it seems to me, can ultimately be reduced to one or more of these four essential qualities. The first three qualities are discussed at length in the existing literature, though not in a systematic fashion. The last--elegance--has received virtually no attention in the writing literature. Yet it is this quality, I argue, that is the hallmark of the very best writing in the field.

A recurring theme of this article has been the need for the writer to carefully evaluate the context of a given document. At times, the legal writer’s objectives may conflict, and the skillful writer is the one who can strike an appropriate balance among the competing interests. In order to do so, the writer must carefully evaluate the needs, knowledge, and other peculiarities of the intended audience, as well as the purpose of the document in question. Contextual

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171 For example, it would be interesting to explore further whether elegance is an essential quality of the best writing in contexts other than judicial opinions (e.g., Supreme Court briefs).

172 A possible fifth quality, precision, I have treated as an aspect of clarity, though a reasonable argument could be made that it is an independent quality. See supra note 28.
considerations are also important because they help the writer determine whether and to what extent the qualities of engagement and elegance are appropriate in a given document, and because they help to ensure that a document is reasonably calculated to fulfill its objective.

Legal writers often face difficult decisions when they write, decisions that depend heavily upon the context of the writing. Because the context of each document is unique, and because individual judgment is required in order to make these decisions, it will never be possible to generate formulas or algorithms for great writing. As Strunk and White put it:

There is no satisfactory explanation of style, no infallible guide to good writing, no assurance that a person who thinks clearly will be able to write clearly, no key that unlocks the door, no inflexible rule by which writers must steer their course. Writers will often find themselves steering by stars that are disturbingly in motion.¹⁷³

As a result of this indeterminacy, general prescriptions such as “use plain language” or “write in a clear and concise manner” can provide only limited guidance to the writer because they gloss over the difficult choices confronting the writer. Yet it is the challenge of navigating among these choices that enables the writer to speak in an individual voice.

Legal writing is not creative writing: the legal writer is constrained by certain conventional expectations of the profession. And the legal writer must always keep in mind that stylistic considerations should never be allowed to impede clarity of expression or distract the reader from the intended message, since that would defeat the purpose of the writing. But at the same time, the legal writer need not aspire to boredom. Even within the confines of legal writing, there are opportunities for creativity and individual expression. And the legal writer who takes advantage of such opportunities both enriches the profession and enhances the writer’s own sense of personal fulfillment.

¹⁷³ Strunk & White, supra note 5, at 66.