

## The Lawyer as Professional Writer

Brandon J. Harrison\*

**Lawyers are professional writers.** If you practice law in Arkansas or anywhere else in the world, then you are by any practical definition a professional writer. Accept it or not, it's true. Arkansas Governor Mike Beebe told a packed room during the most recent Arkansas Bar Association's annual meeting that lawyers are professional communicators. Governor Beebe's remarks were spoken to encourage—no, admonish is the better word—his audience to stand up for Arkansas and argue for the merits of what our State has accomplished, and what it will accomplish in the future. I nodded in agreement because I liked the point the Governor made and because his theme echoed an idea that has percolated in my mind for a few years now. Lawyers are professional communicators. We should take this fact seriously. Today, I concentrate on the written word.

More than two decades ago, in the *Harvard Law Review*, Steven Stark voiced his concern in plain, if not caustic, terms:

If you don't need a weatherman to know which way the wind blows, you don't need a literary critic to know how badly most legal prose is written. You need only turn to any page of most legal briefs, judicial opinions, or law review articles to find convoluted sentences, tortuous phrasing, and boring passages filled with passive verbs.<sup>1</sup>

I disagree with some points Stark made in his article, *Why Lawyers Can't Write*. For example, I don't believe that lawyers, as a professional class, intentionally use “doublespeak” and “jargon” to “convince the world of [our] occupational

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1. Steven Stark, *Why Lawyers Can't Write*, 97 HARV. L. REV. 1389, 1389 (1984).

importance, which leads to payment for services.”<sup>2</sup> Nor do I believe that “[e]very time lawyers confound their clients with a case citation, a ‘heretofore,’ or an ‘in the instant case,’ they are letting everyone know that they possess something the non-legal world does not.”<sup>3</sup> Yet, Stark is by no means alone in his general criticism. And his main point, which is that lawyers should write better, hit home.<sup>4</sup>

A longtime, non-lawyer friend of mine voiced a similar complaint to me as we discussed the law one day when I was in law school. Many people think lawyers need to communicate better than we often do. The problem of cloudy communication exists because too few lawyers view themselves as professional writers—professionals as important as any respected journalist, novelist, critic, or any other non-lawyer who writes professionally.

Goaded by Stark’s concern, and taking a cue from Arkansas’s chief executive, I say here and now that Arkansas lawyers are some of the best in the nation. We should write like it—at least more consistently so. Lawyers are, after all, professional communicators. And with this responsibility comes the duty to improve how we use the written and spoken word. Concentrating on the written word, I will give you some general thoughts and mention some books and concrete steps that have helped me improve my professional-writing skills.

Do step onto the road to improvement. Do not, however, become overly concerned about the speed of your progress. Positive change will come. The writing authorities I mention will help you progress. But if you expect to become significantly better without dedicated effort, then you will likely be disappointed. Where to start our romp through the world of professional self-improvement? Let’s begin with the concept of

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2. *Id.*

3. *Id.*

4. *See id.* While reading an article written by a former law clerk for a sitting circuit judge on the Eighth Circuit, I stumbled across a different piece that Steven Stark wrote. The title of Stark’s piece says it all: *Law Schools Must Teach Writing as a Discrete Skill*. *See* Michael Duvall, *When is Oral Argument Important? A Judicial Clerk’s View of the Debate*, 9 J. APP. PRAC. & PROCESS 121, 122 n.6 (2007) (citing Steven Stark, *Law Schools Must Teach Writing as a Discrete Skill*, LEGALTIMES, Sept. 19, 1983, at 16). This coincidence made me look into Stark’s affiliation with the legal profession and his obvious interest in writing. He taught legal writing at Harvard Law School for a number of years and wrote a book on the subject. *See* STEVEN D. STARK, WRITING TO WIN (1999).

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“writer’s voice” because, to me, it’s overall the most important and difficult concept to address.

**Develop and hone your professional writer’s voice.** “You cannot taste a work of prose. It has no color and it makes no sound. Its shape is without significance.”<sup>5</sup> That is what writer Louis Menand spoke to me years ago as I read an introduction he wrote to a collection of essays. I have never forgotten the impact that these few sentences made on me. Menand’s opening lines left me with the hallmark of good writing—I call it “reader envy.” Good writing reverberates, stimulating your neural networks in a way that you take notice and remember it. Your own voice, I mean your professional-writer’s voice, can be just as influential if you develop and hone it. As you apply some time-tested advice on writing, your professional-writer’s voice will emerge.

What steps should a lawyer take to improve his or her writing? A few come to mind. First, any writer must work to use strong and fresh nouns and verbs. Second, you must bridge sentence A with sentence B, paragraph C with paragraph D, page one with page two, and so on, as seamlessly and completely as possible. Inject your own personality into this mix as you go along. The nouns and verbs you choose to use, and how you create your transitions, are the pillars upon which your writer’s voice will rest.

Though we’ll not settle any debate on what particulars definitively make up a “writer’s voice,” some additional points that touch this topic are mentioned by many writers. In addition to using fresh and strong nouns and verbs you should avoid wonderclout—a thing that is showy but worthless.<sup>6</sup> Worthless prose is wasteful prose. This is certainly true when your audience is a busy judge or justice, for instance. The time-tested mantra to make every word do meaningful work cannot be topped. But don’t sandblast your brief clean of every turn of phrase. They help create and define your writer’s voice. Don’t

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5. Louis Menand, *Introduction* to *THE BEST AMERICAN ESSAYS* xiv, xiv (Robert Atwan et al. eds., 2004).

6. I credit a man—perhaps the only one—who read the entire *Oxford English Dictionary* in one year for teaching me this word. See AMMON SHEA, *READING THE OED: ONE MAN, ONE YEAR, 21,730 PAGES* 200 (2008). Do not include “wonderclout” in a trial-court or appellate-court brief, unless you want the court to “keck” as it reads your work. *Id.* at 103.

take my word for it. Patricia Wald, a former chief judge for the D.C. Circuit, wrote that “[t]he well-turned phrase in a brief can capture a judge’s attention, which tends to wane after 60,000 words of legalese; the surprising allusion can set her thinking along different lines.”<sup>7</sup> Just keep in mind that lawyers necessarily need a voice that speaks with authority and trustworthiness. And one of the best ways to develop such a voice while writing is to ensure that every phrase, sentence, and paragraph does meaningful work. Legal arguments will be more clearly communicated to their intended audience if you stay disciplined while writing. You can, however, remain disciplined and employ words that will give your professional writing new life.

A good editor will help you meet this goal. Of course, the more you write and critically examine your own work the better you will become at self-editing. On complicated or lengthy assignments, however, I suggest that you always ask at least one carefully chosen reader to review and critique your near-final, and final, drafts. Besides writing as concisely as the situation requires, lawyers should avoid mumpsimus—a “stubborn refusal to give up an archaism, especially in speech or language.”<sup>8</sup> More on this later. For now, it suffices to state that the more you purge your legal writing of archaisms, the better off you will be.

The final point I will briefly mention on the topic of a writer’s voice is more abstract. Recalling Menand’s observation that we “cannot taste a work of prose” and that it has “no sound,” I can only partially agree with his statement.<sup>9</sup> I think prose is audible, though not as is Beethoven’s *Piano Concerto No. 4* when played by pianist and orchestra. Yet, being readers ourselves, we lawyers know that prose emits a metaphorical sound. Readers’ eardrums vibrate as they pore over prose, legal or otherwise. Lawyers who ignore this fact will stunt their growth as professional writers. “That sentence sounds too redundant or harsh to my ear,” I have said to myself. “This combination of words is smooth sounding,” is another thought I

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7. Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 21 (1999).

8. SHEA, *supra* note 6, at 121.

9. See Menand, *supra* note 5, at xiv.

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have had at times. I am not telling you anything new. In the future, however, slow down and listen to the sounds that your legal prose projects. And become more conscious of the tempo and rhythm of your writing. Vary these elements. Recall that short words and sentences punch. Longer sentences, even if they meander a bit, tend to pull—hopefully lead—your reader along to some end-point: ditto for paragraph length. Though an occasional long sentence is desirable, be sure to reward the reader at the end. By reward I mean that you should provide at the sentence's end an intriguing or particularly relevant fact. Maybe you end a long sentence with a strong legal point that is calculated to advance your clients' legal interests. You don't want a disappointed reader deciding your client's case.

As you consciously develop and hone the sixth sense your writer's voice will emerge. It will differ in key respects from the next person's voice. This is good. I can make the point no better than Bryan Garner did as he conducted a writing seminar that I once attended; or, perhaps I read the statement in one of his books. Regardless, Garner's advice stuck: "If you write like everyone else, then you sound like no one in particular." I hope we agree that more lawyers should write like someone in particular.

**Legal writing is a serious affair.** It's time for a serious interlude. Here, I address primarily lawyers who have not written and filed many legal papers with our nation's courts or administrative agencies. Do not get carried away as you try to become a clearer, more precise writer—and thinker. Legal writing is undertaken to advance a client's specific interests. This is a solemn task. Grave illness, injury, and death are often the subject of legal disputes. Regardless of the subject matter, parties and opposing counsel must always be treated with respect. Advocate forcefully, but be sensitive to the line of civility. The best legal writers create legal arguments on paper that have the right mix of many ingredients. As one respected appellate lawyer, and therefore writer, once told me, "Don't put too much salt in the oatmeal." I have never forgotten the advice. Tone is crucial. Writing on an important legal matter, even a contentious one, is no license to abandon good manners.

Okay, so the vast majority of legal writing is a serious affair. If done correctly, however, such writing does not have to

be a bore. Chief Justice John Roberts, Jr.'s dissent from the majority's denial of a petition for writ of certiorari in *Pennsylvania v. Dunlap*<sup>10</sup> demonstrates that legal writing need not be ordinary to be appropriate and effective. Chief Justice Roberts began his dissent thus:

North Philly, May 4, 2001. Officer Sean Devlin, Narcotics Strike Force, was working the morning shift. Undercover surveillance. The neighborhood? Tough as a three-dollar steak. Devlin knew. Five years on the beat, nine months with the Strike Force. He'd made fifteen, twenty drug busts in the neighborhood.

Devlin spotted him: a lone man on the corner. Another approached. Quick exchange of words. Cash handed over; small objects handed back. Each man then quickly on his own way. Devlin knew the guy wasn't buying bus tokens. He radioed a description and Officer Stein picked up the buyer. Sure enough: three bags of crack in the guy's pocket. Head downtown and book him. Just another day at the office.<sup>11</sup>

Granted, the Chief Justice has more leeway than we do for obvious reasons. Nonetheless, there is room for you, an advocate who uses the written word, to fly. Chief Justice Roberts's creative presentation of the facts in *Dunlap* makes the point. Many more examples exist. Recall then-Judge Benjamin Cardozo's memorable opening to the Court of Appeals of New York's opinion in *Wood v. Lucy, Lady Duff-Gordon*,<sup>12</sup> where he wrote: "The defendant styles herself 'a creator of fashions.' Her favor helps a sale."<sup>13</sup> I have not forgotten the gist of that opening in nine years. Staying with Judge Cardozo, his deft, if not skeletal, description of the record in *Palsgraf v. Long Island Railroad Co.*<sup>14</sup> is another example of creative, purpose-driven legal writing.<sup>15</sup> More recently, Federal Circuit Judge Randall

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10. 129 S. Ct. 448 (2008).

11. *Id.* at 448 (Roberts, C.J., dissenting).

12. 118 N.E. 214 (N.Y. 1917).

13. *Id.* at 214.

14. 162 N.E. 99 (N.Y. 1928), *reh'g denied*, *Palsgraf v. Long Island R.R. Co.*, 164 N.E. 564 (1928)

15. *See id.* at 162 N.E. 99-101; *see also* JOHN T. NOONAN, JR., *PERSONS & MASKS*

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Rader invoked Einstein in a patent case to help him make a point in dissent.<sup>16</sup> Despite these examples you should still accept—here I am talking primarily to less experienced lawyers—that legal writing is mainly conservative. So if you want to be as effective as possible, never soar too close to the sun. But do get off of the ground.

What do I mean by not flying too high as you write? First, lawyers must avoid using tools that writers in other areas may use appropriately. Some writers may safely use “words with music and *splooosh*,” as Arthur Plotnik notes in *Spunk & Bite*, a book on language and style for the more loosely bound classes of writers.<sup>17</sup> Tradition and her expectations, however, require legal writers to communicate in a more restricted manner. So you must, more often than not, construct and present a statement of facts or a legal argument in dress-down fashion. At other times, because of a case’s context, you have more freedom of style. In short, you must know when to pilot a crop duster versus an acrobat plane. Take the long view as you make this choice. If you are writing an appellate brief, for example, keep in mind that you may one day have to stand before a group of judges and answer to them in person for what you have written on behalf of your client. My general advice here is to write appellate briefs under the presumption that you will have to orally argue your case to the court. The same holds true for trial-court practice. This accountability exercise will help keep your tone in check.

**Choose the right words.** I offer nothing original here. We all know that words are to an attorney as railroad tracks are to a locomotive. But even the most obvious truths need to be repeated. I again turn to legal-writing expert Bryan Garner. In his excellent book, *The Winning Brief*, Garner provides advice

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OF THE LAW: CARDOZO, HOLMES, JEFFERSON, AND WYTHE AS MAKERS OF THE MASKS 111-51 (1976) (discussing in detail the trial-court record and noting how often commentators and courts slighted the actual record as they analyzed *Palsgraf*).

16. See *In re Bilski*, 545 F.3d 943, 1015 (Fed. Cir. 2008) (Rader, J., dissenting). Judge Rader, quoting a statement that he attributed to Einstein, wrote: “We still do not know one thousandth of one percent of what nature has revealed to us.” *Id.*

17. ARTHUR PLOTNIK, *SPUNK & BITE: A WRITER’S GUIDE TO PUNCHIER, MORE ENGAGING LANGUAGE & STYLE* 80, 80 (2005). In the chapter *Words with Music and Splooosh*, Plotnik discusses onomatopoeia and phonesthesia as forms of sound symbolism and writing. See *id.* at 80-85.

on choosing better words that will improve your writing.<sup>18</sup> One tip every lawyer can absorb and immediately use is to choose more precise verbs and nouns.<sup>19</sup> This concept is related to, but not the same as, the one to choose fresh and strong nouns and verbs.<sup>20</sup> New words aren't necessarily more precise words. Since grade school we have all known that nouns and verbs are building blocks—the amino acids—of expressed thought. Yet, too many times when performing our work we forget to use the available nouns and verbs to their fullest potential. As you can, slow down and deliberately set aside your stock nouns and verbs and use new ones that are also more precise than those which you customarily use. You will find through experimentation that other nouns and verbs fit legal writing better than many of those you have been using every day.

Here's a simple example. You can change for the better immediately by restricting your use of “plaintiff” and “defendant” and “appellant” and “appellee.” In fact, Federal Rule of Appellate Procedure 28 instructs attorneys to “minimize use of the terms ‘appellant’ and ‘appellee.’”<sup>21</sup> It's no secret that small changes can produce big results where clarity of communication is concerned. To avoid concluding this paragraph with a dry reference to the Federal Rules of Appellate Procedure, I suggest that you read a delightful piece by Richard Goodman on the broad topic of choosing precise words. Goodman's essay, *In Search of the Exact Word*, can be found in *The Oxford American Writer's Thesaurus*.<sup>22</sup>

Judges, I believe, will thank you for your fresh and precise approach to legal writing. You will not win every trial-related

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18. See generally BRYAN A. GARNER, *THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS* (2d ed. 2004) [hereinafter GARNER, *THE WINNING BRIEF*].

19. *Id.* at 235-37.

20. See *id.* at 226.

21. FED. R. APP. P. 28(d). The full text of Rule 28(d) reads:

In briefs and at oral argument, counsel should minimize use of the terms “appellant” and “appellee.” To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as “the employee,” “the injured person,” “the taxpayer,” “the ship,” “the stevedore.”

FED. R. APP. P. 28(d).

22. Richard Goodman, *In Search of the Exact Word*, in *THE OXFORD AMERICAN WRITER'S THESAURUS* ix-xv (2004).

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motion or the merits of every appeal just because your writing has improved. Jurists have higher concerns than rewarding the best legal writer with a notch on his writing desk. But as a lawyer improves his ability to present facts and legal arguments, he will qualitatively improve his chances of persuading a court or administrative agency to decide a matter in accord with a client's best interests. Control what you can while in the scriptorium—this is the primary goal of a professional writer.

As you more carefully consider which nouns and verbs to use while drafting legal papers, opposing counsel will not necessarily applaud your better-writing efforts; but that's a compliment in disguise. I fidget at my desk when I read a legal paper written by an "adversary" who has carefully chosen and combined words. The combinations matter. H<sub>2</sub>O is not H<sub>2</sub>SO<sub>4</sub>. Do not, however, think that the combinations of words that are calculated to dissolve your opponents' arguments come effortlessly. Sometimes they will, more often they will not. I am encouraged frequently by an exchange between an interviewer and Ernest Hemingway, which Professor Joseph Trimble includes in his must-read book, *Writing with Style: Conversations on the Art of Writing*.<sup>23</sup> Here is the colloquy as it appears in an epigraph to the chapter, *Revising*, halfway through Professor Trimble's gem:

Interviewer: *How much rewriting do you do?*

Hemingway: *It depends. I rewrote the ending of Farewell to Arms, the last page of it, thirty-nine times before I was satisfied.*

Interviewer: *Was there some technical problem there? What was it that had stumped you?*

Hemingway: *Getting the words right.*<sup>24</sup>

"[T]he last page of it" is a phrase to key on.<sup>25</sup> Granted, clients don't want to pay us, their professional writers, to rewrite one page of text thirty-nine times. They shouldn't have to either. Further, lawyers are busy people. We often write under pressing time demands from various sources. As the Honorable John W.

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23. JOSEPH R. TRIMBLE, *WRITING WITH STYLE: CONVERSATIONS ON THE ART OF WRITING* (2d ed. 2000).

24. *Id.* at 99.

25. *See id.*

Davis observed, “The bar is continuously besought to speak with an eye on the clock and to write with a cramped pen.”<sup>26</sup> Alas, practicing lawyers must strike the balance between cost and quality. Hemingway’s ultimate point, however, rings true enough to be absorbed and heeded: careful revisions are part of good writing. Indeed, the process of revising is how most every person, save the occasional literary savant, is ultimately able to choose the right words and put them in the best order. The result of revising is that thoughts are expressed clearly enough so that they cannot be reasonably misunderstood. Revisions allow us to build effective conceptual bridges between sentences, paragraphs, pages, and the conclusion that the court or administrative agency should do this or that for a client.

Above all, stop pulling words from the legalese fondue pot. Such words drip a false sophistication across your legal prose. If you don’t think excising legalese matters, then you are mistaken. Circuit Judge Morris S. Arnold, who has judged on the Eighth Circuit for seventeen years, has no taste for legal airs: “I hate legalese. It’s to be avoided at all costs. There’s too much of it. There’s too much jargon.”<sup>27</sup> Judge Arnold’s point is joined by a chorus of respected jurists and attorneys.<sup>28</sup> I’m not overly concerned with an occasional use of an *ad hoc*, a *post hoc*, or a *per se*. But do consciously keep even these terms to a minimum; and use the terms correctly when you write them. That said, I’ll repeat that you should favor simple, Anglo-Saxon words over Latin words.

If you need a real-world example to be convinced that this seemingly mundane choice of favoring an English over a Latin term matters, I have one. The Eighth Circuit not long ago expressly noted an attorney’s use of “post hoc.”<sup>29</sup> After mentioning the term’s use the court wrote, “We assume that Hillstrom means after-the-fact rationales.”<sup>30</sup> Now, I don’t want to overstate this example’s importance. And any one of us could have been on the receiving end of that footnote comment, which

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26. Hon. John W. Davis, *The Argument of an Appeal*, 26 A.B.A. J. 895, 895 (1940), reprinted in 3 J. APP. PRAC. & PROCESS 745, 746 (2001).

27. Bryan A. Garner, *Steeling Yourself Against Legalese*, in GARNER ON LANGUAGE AND WRITING 308 (2009) (quoting Eighth Circuit Judge Morris S. Arnold).

28. See generally *id.*

29. *Hillstrom v. Kenefick*, 484 F.3d 519, 527 & n.6 (8th Cir. 2007).

30. *Id.*

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to me signaled the court's preference for English rather than Latin. We have all, at one time or another, used too many Latin terms when English equivalents serve just as well. The advice here is that you should do so less often in the future.<sup>31</sup> Simply put, as you avoid using the usual, overused terms, also look for ways to cut out fluff in general, and legalese specifically. Just as "[s]hort prayer penetrates heaven,"<sup>32</sup> legal papers that are just long enough and speak in plain English communicate powerfully.

**To write well is to think clearly.** My memory may be wrong, but I recall Professor Robert Laurence, a talented professor of law who taught at the University of Arkansas School of Law before he retired, telling his Contract Law class one day that the most important class in law school is legal writing. Agree or not, his point is undeniably important. Professor Laurence, himself a careful speaker and writer, appreciated how much words matter to lawyers and that good writing showcases clear thoughts. He consistently communicated this idea to his students. To this end, Professor Laurence exacted from his students an appreciation for careful thought and the precise use of words inside his classroom. (For example, Professor Laurence would quiz a student if he meant "continually" instead of "continuously.") While studying a judicial opinion on contract law that a court had written particularly well and that clearly communicated a legal concept, he told us so—just in case we failed to appreciate good judicial-opinion writing given our inexperience. Many lawyers have had good, even excellent, teachers. But we all know that once you stop exercising intellectual skills they inevitably begin to fade, if not disappear. Good teaching at the law-school level is crucial, but your duty to become a better professional communicator is

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31. Law students and attorneys new to the bar are particularly at risk for using an outdated style of legal writing because they spend, or have recently spent, much of their time reading opinions where Latin terms and archaisms are often used. I recall a point that Phillip Norvell, a professor at the University of Arkansas School of Law who taught me property law as a first-year student, made during class. Professor Norvell told us, as we struggled to understand the old property-law opinions, essentially this: "Note that these opinions were not written for pedagogical purposes." He was correct. Of course, many courts often do write excellent opinions.

32. JAMES GEARY, *GEARY'S GUIDE TO THE WORLD'S GREAT APHORISMS* 221 (2007). According to the book *Geary's Guide to the World's Greatest Aphorisms*, the fourteenth-century saying is attributed to an anonymous English monk. *Id.*

an ongoing responsibility. And part of this duty is to think hard on the legal subject you are writing about and then express clients' arguments with as much clarity and precision as you can muster under the circumstances.

Legal writing that causes you to snap to attention is usually straightforward, simple, and clear. Such writing captures our attention partly because the thought being communicated is cleanly, crisply, and fully received by us readers. Here's a one-sentence example, taken from an Arkansas Court of Appeals concurring opinion: "Not every thief is a burglar."<sup>33</sup> Consider what this single sentence communicates. For those of you who are familiar with logic, formally speaking, here in one sentence is the equivalent of a Venn Diagram, which is a visual representation (using circles) showing how two concepts overlap. A "not every thief is a burglar" diagram would show one circle (thief) overlapping with, but not being wholly subsumed within, the second circle (burglar). My point is that with some effort and practice, you can communicate important legal ideas in an economical manner—and in sentences that resonate after the judge or justice has closed your brief. This is all that a lawyer can be expected to achieve through legal writing. Well, I'll also place on the short list the ability to evoke some degree of reader envy in opposing counsel as he or she reads a statement of the case, statement of the facts, or argument.

**Architecture. Architecture. Architecture.** The concepts of "clear writing equals clear thinking" and "architecture" are mirror images. Let's consider the concept of sentence building, paragraph building, and overall legal-argument building. The best legal writer I personally know is, among other things, a master architect. Strive to become a master architect. The overall effect of clean architectural lines in writing can be stated in one word—continuity. Here is Professor Trimble on this key aspect of all writing: "Good writers are sticklers for continuity. They won't let themselves write a sentence that isn't clearly

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33. *Mathis v. State*, 2009 Ark. App. 181, at 9, \_\_\_ S.W.3d \_\_\_, \_\_\_ (Marshall, J., concurring). If the citation style used for *Mathis* slowed you down, please read Arkansas Supreme Court and Arkansas Court of Appeals Rule 5-2 (as amended in 2009), or Brandon J. Harrison, *Extra! Extra! Arkansas's High Court Announces Two Changes That Will Affect Thousands of Attorneys*, THE ARKANSAS LAWYER, Summer 2009, at 26-27, 50.

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connected to the ones immediately preceding and following it. They want their prose to flow, and they know this is the only way to achieve that beautiful effect.”<sup>34</sup> “But how are these connections to be made,” asks Professor Trimble?<sup>35</sup> The answer, he says, is that the better writer “relies chiefly on a coherent understanding of what he wants to say, a simple style, the occasional repetition of key words, and the careful use of pronouns such as *this* and *that*.”<sup>36</sup> Well put, Professor. Now, here comes Professor Trimble’s memorable summation of what trait marks a good writer: “In manner he resembles a furniture maker who uses interlocking tongues and grooves to do the work of nails and screws.”<sup>37</sup> As Professor Laurence might have asked, “Don’t you wish you had written that sentence?” I do.

Architecture is my weakness, meaning it’s an issue that I have to be continuously mindful of as I write. Outlining and employing writing methods like the Flowers Paradigm help create clear architectural plans.<sup>38</sup> But you must actually use such methods—at least basic outlining—or you risk floundering longer than you otherwise might when building the foundation, walls, and rooms of your legal house. If you are already a master architect, then you are free to focus more on a different part of the writing process. With practice comes proficiency and efficiency. The additional good news is that help is readily available. The writers I mention in this essay are ones whom I have found to be particularly good educators. My next point should be obvious, which is that lawyers should . . . .

**Read good writing.** There are exceptions to every rule, but based on my personal experience and what professional writers, legal and otherwise, have written on the subject, most good writers are forged through diligent, self-directed work over a substantial period of time. If you came out of the box writing well, rejoice. The rest of us have to work hard at it. What does the term “work” mean in this context? On the professional writer’s to-do list should be the task of regularly reading

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34. TRIMBLE, *supra* note 23, at 45.

35. *Id.*

36. *Id.*

37. *Id.*

38. GARNER, THE WINNING BRIEF, *supra* note 18, at 4-8 (citing Betty S. Flowers, *Madman, Architect, Carpenter, Judge: Roles and the Writing Process*, 44 Proceedings of the Conference of College Teachers of English 7-10 (1979)).

publications that consistently produce excellent, or at least very good, prose. Without endorsing any particular publication, *The Economist* and *The New Yorker* are two widely accessible periodicals that consistently publish well-written pieces on diverse subjects. Know, however, that the full-range of books and periodicals to choose from is vast. You can find good writing in a field that personally interests you. The treasure is worth the search. Excellent maps exist. For starters, thumb through Bryan Garner's book *On Language and Writing*, which includes a comprehensive bibliography that is a masterwork in content and categorization.<sup>39</sup> Garner's bibliography presents hundreds of titles, across many genres, to consider as models of writing to read, study—and, yes, emulate—as we strive to become better professional writers.<sup>40</sup>

**Make good writing habitual.** Physiologist, philosopher, and psychologist William James wrote on habit before the turn of the twentieth century, reminding us that “[e]ducation is for behavior, and habits are the stuff of which behavior consists.”<sup>41</sup>

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39. GARNER, ON LANGUAGE AND WRITING, *supra* note 27, at 709-47. Professor Steve Sheppard at the University of Arkansas School of Law has published short summaries of his thoughts on recently published law-related books in *Arkansas Law Notes* the past few years or so. If you enjoy constitutional law and related history as I do, then you should read *M’Culloch v. Maryland: Securing a Nation*. See MARK R. KILLENBECK, *M’CULLOCH V. MARYLAND: SECURING A NATION* (2006). Professor Killenbeck teaches constitutional law and other courses at the University of Arkansas School of Law. As a final example of where to find good writing on legal topics, I’ll mention a periodical named *The Green Bag*, which publishes an annual Almanac and Reader of what its board of advisors deems to be some of the best legal writing of the year. *The Green Bag’s Almanac and Reader* is consistently the best single source of law-related writing to study that I have seen.

40. GARNER, ON LANGUAGE AND WRITING, *supra* note 27, at 709-47.

41. WILLIAM JAMES, *Talks to Teachers*, in WILLIAM JAMES: WRITINGS 1878-1899 751 (1992). If you are interested in James’s life and works, then you should read Robert D. Richardson’s *William James: In the Malestrom of American Modernism*. See generally ROBERT D. RICHARDSON, *WILLIAM JAMES: IN THE MALESTROM OF AMERICAN MODERNISM* (2006). While writing this essay, and remembering that I had cited Professor James in an appellate brief filed with the Arkansas Supreme Court, I decided to see if William James has been mentioned by state or federal courts. Using Westlaw and searching its “All State and Federal Cases” database (using search “William James” w/s “Philosoph!” “Psych!”), I received fourteen citations. According to my search, courts have cited William James as recently as 2006. The list of opinions quoting or referencing William James includes the Fifth Circuit’s opinion in *Oswalt v. Scripto, Inc.*, 616 F.2d 191 (5th Cir. 1980). In *Oswalt*, the court rejected the idea that there was a significant difference between the “know” and “should have known” concepts for the purpose of deciding a jurisdictional question. *Id.* at 200. In doing so, the court wrote, “The philosopher, William James, would have said it is a difference that makes no difference.”

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Set out to educate yourself on how to become a better professional writer; instill good-writing habits. Start today. You will inevitably have to change some current writing-related behaviors that keep you from becoming as good of a professional writer as you can be. But consistent study and practice will make you more proficient and efficient at writing well. Good habits will take root. I guarantee it.

You have likely heard or read somewhere about a writer's early, middle, and late periods of style. The same holds true for many music composers, scientists, and artists. Attorneys are no different. I hope that I write better today than I did when I first began practicing law. There is no good reason why lawyers shouldn't abandon old, less effective and less persuasive writing habits and styles. Many professionals besides lawyers change how they approach their crafts as experience teaches and guides them. I dare say that if you are not consciously trying to improve year-to-year, then you are not doing all that you can to advance your clients' legal interests. Evolve. You're allowed to do so.

**You are also allowed, indeed encouraged, to be interesting.** "It is not unconstitutional to be interesting," advises one federal appellate-court judge.<sup>42</sup> Other jurists have agreed. I join them all. On the other hand, do not start "shoveling smoke" as you try to write in an engaging style.<sup>43</sup> Telling you specifically how to become interesting is not something I will attempt to do—because doing so would be too presumptuous. You have your own life experiences to bring to

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*Id.* at 200 n.12. I also learned that the Second Circuit has approvingly cited James's definition of "religion" in the First Amendment context. *See* *United States v. Sun Myung Moon*, 718 F.2d 1210, 1227 (2d Cir. 1983) (calling William James "the pre-eminent American philosopher" and citing his classic work on religious experience when defining the word "religion"). A dissent written by Circuit Judge Jerome Frank, in *Hentschel v. Baby Bathinette Corp.*, 215 F.2d 102 (2d Cir. 1954), discussed Professor James in the context of his association with the "Metaphysical Club," which was a gathering of noted intellectuals. *Id.* at 108 n.7. The Pulitzer Prize-winning book to read on this particular subject is Louis Menand's *The Metaphysical Club*. *See generally* LOUIS MENAND, *THE METAPHYSICAL CLUB* (2001). Judge Frank was fearless, going well beyond William James. *See Hentschel*, 215 F.2d at 106 n.7. He also mentions the Stoics, Aristotle, Bentham, and physicist Erwin Schrödinger. *Id.* at 106 n.7, 112 n.20.

42. RUGGERO J. ALDISERT, *WINNING ON APPEAL: BETTER BRIEFS AND ORAL ARGUMENT* § 12.3, at 168 (2d ed. 2003).

43. GARNER, *ON LANGUAGE AND WRITING*, *supra* note 27, at 57 (quoting Justice Oliver Wendell Holmes, Jr.).

the writing desk. Believe that you can present your clients' legal matters on paper in a way that can better tell their stories and why the law requires, or at least allows, the court to go your way. Accept that it's cool to be an "interesting" legal writer, and you will have taken the most productive step towards developing your professional-writing skills.

I mentioned at this essay's beginning that one goal was to provide specific, helpful tips on how to write better. So despite the large topic of "interesting" and my prior statement that attempting to tell you specifically how to write in an engaging manner is presumptuous, I will provide a concrete suggestion. Read broadly. Actively look for and read the works of thinkers and writers outside the law on whatever subjects seize your attention and imagination. Non-lawyers can help you make legal points. Yes, immerse yourself in the law—but don't divorce the law from life. I once made a point on memory and consciousness in an appeal before the Arkansas Supreme Court. The case involved an allegedly intoxicated driver and whether an intentional-act exclusion provision in a car-insurance contract was triggered given the driver's acts. I thought Professor William James might have written some applicable words. He had done so, in my opinion, so I quoted him in a brief. James surely did not carry the day. But I do like to think that the quotation jazzed up the argument a bit, thus making at least one small but relevant point more prominent.

Though you must be prudent in doing so, it is wholly proper to draw from experts in other fields to make legal points where law and life intersect. As I read him, Justice Holmes himself thought it inevitable that lawyers and jurists would turn to non-lawyers for guidance.<sup>44</sup> "For the rational study of the law the black-letter man may be the man of the present, but the man of the future is the man of statistics and the master of economics."<sup>45</sup> Justice Cardozo essentially warned that a broad approach to the law is inevitable because the judiciary is necessarily comprised of different types of people: "One judge looks at problems from the point of view of history, another from that of philosophy, another from . . . social utility . . . [and]

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44. See Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARV. L. REV. 457, 468-69 (1897), reprinted in 110 HARV. L. REV. 991, 1000-01 (1997).

45. *Id.* at 469.

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one is timorous of change, another dissatisfied with the present . . .”<sup>46</sup> I stand with giants on the point that the more familiar that lawyers become with extra-legal materials, the more likely they will be able to argue their clients’ cases in a more persuasive, memorable style.

Always be mindful of your case and its broader context before pulling in extra-legal writers and thinkers. In other words, consider carefully whether you are addressing a novel legal issue—or at least a socially important but unsettled one—before you climb upon a giant’s shoulders. Nonetheless, if the Supreme Court of the United States thinks it’s helpful to cite philosopher of science Karl Popper, for example, then I believe lawyers may act similarly.<sup>47</sup> Many courts across America have recognized that non-lawyers can teach lawyers useful information. My brief investigation into the subject of courts quoting and referencing non-lawyers in judicial opinions leads me to conclude that, if used sparingly and appropriately, a lawyer should not hesitate to invoke respected scholars from fields outside the law to help make legal-related points and arguments.

Pickle yourself in a subject other than law for a meaningful length of time and your writing will improve.

We’ve briefly discussed some ways on how to improve the prose style (and inevitably the substance) of an appellate brief, a trial-court brief, an opinion letter, and the like. Now it’s time to *ZOOOOMMM!!* out and cover a different aspect of professional writing: how the document as a whole presents itself to a reader’s eyes.

**Paint with words.** All professional writers understand that the initial visual impression which a document or exhibit presents is almost as important as the text that explains a client’s legal position or argument. So attend to the visual aspects of a client’s legal papers. Excellent and detailed advice on how to do this abounds; I’ll not repeat here what others have already said so well. A few books that I’ve mentioned thus far tell you how to enhance the visual aspect of written work. Garner’s *The Winning Brief* and Professor Trimble’s *Writing With Style* are

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46. BENJAMIN N. CARDOZO, *THE NATURE OF THE JUDICIAL PROCESS* 177 (1921).

47. *Daubert v. Merrell Dow Pharm., Inc.*, 509 U.S. 579, 593 (1993).

examples.<sup>48</sup> Another source that lawyers should know about is a work called *Painting with Print*, written by Ruth Anne Robbins.<sup>49</sup> The article, which is publicly available on the Seventh Circuit's official website, concentrates on how to best present legal documents from a graphic-design standpoint.<sup>50</sup> Attorneys who take seriously the charge to become better writers and presenters of legal documents should read and apply *Painting with Print*. I hope we agree that legal writing done well can make a lasting impression—and is thus worth the effort that is required to create clear, precise, and attention-getting legal prose. I sharply recall where I stood and the day I read an appellate brief, written by a lawyer whose work I had never read before, which immediately persuaded me that I needed to develop a legal-writing style more similar to that which I held in my hands. The brief was devoid of legalese. Legal concepts were stated simply, but not simplistically. There were no usual turns of phrase that many attorneys wear threadbare; nor could any cliché be seen, not even on the horizon. I'm convinced that the brief was noteworthy because it seamlessly integrated every important aspect of what makes any piece of writing memorable, including how the work appeared to the reader's eyes in the sense that Robbins addressed in *Painting with Print*. In short, the brief's author worked in dovetail joints, not screws and nails. You can likewise arrest the attention of future readers of your legal work product. You too can become a legal-writing craftsman.

**Now you know what to do, but will you do it?** An aphorism of which I am fond warns, “a tenth of an inch and Heaven and Earth are set apart.”<sup>51</sup> What an excellent reminder for professional writers! The comparison is imperfect, for the distance between a lawyer who is merely a competent writer of words on paper versus the one who is a highly effective, gripping communicator of stories and legal concepts, is not one

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48. See *supra* notes 18 and 23.

49. Ruth Anne Robbins, *Painting with Print: Incorporating Concepts of Typographic and Layout Design Into the Text of Legal Writing Documents*, 2 J. ASS'N LEGAL WRITING DIRECTORS 108 (2004).

50. The Seventh Circuit's official website is <http://www.ca7.uscourts.gov/> (last visited Nov. 25, 2009).

51. Seng-Ts'an, *On Believing in Mind*, in BUDDHIST SCRIPTURES 171 (Edward Conze trans., 1959).

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inch; nor, thankfully, is it one thousand miles. To help us all bridge the gap, however wide it may be, I have mentioned some ways in which lawyers can improve their writing skills. Work, worry, and study will make good writing easier. Speaking for myself, good writing is not yet second nature, but I know that the gap can be crossed. Begin your own walk today.

I invited William Zinsser, a writer whose classic book *On Writing Well* entertains as it educates, to close the program with the most important point that must be absorbed when discussing professional writing. He accepted, leaving us with the advice to work hard on what is worth improving:

Ultimately . . . good writing rests on craft and always will. I don't know what still newer electronic marvels are waiting just around the corner to make writing twice as easy and twice as fast in the next 25 years. But I do know they won't make writing twice as good. That will still require plain old hard work—clear thinking—and the plain old tools of the English language.<sup>52</sup>

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52. WILLIAM ZINSSER, *ON WRITING WELL: THE CLASSIC GUIDE TO WRITING NONFICTION* xii (25th Anniversary ed. 2001).