

IT'S THE TOOLS OF YOUR TRADE, [WO]MAN! — Justice Scalia

A Summary of Writing Tips from the Justices of the Supreme Court of the United States

In 2006, well-known legal writing authority Bryan Garner began interviewing the Supreme Court Justices for tips on legal writing. Videotapes of those interviews have been available online at www.lawprose.org since they were completed. More recently, however, The Scribes Journal of Legal Writing published and made available full transcripts of those interviews. A long read, but chock full of useful tips and inspiration for what is often a daunting task. I recommend reading each of the eight transcripts in their entirety, but until we all have the extra time, this article is intended to provide a thousand foot view.

Not surprisingly, there were common themes:

Lawyers have an obligation to the profession to cultivate their writing skills

To the extent that lawyers don't write well, to the extent they abuse words, to the extent they use them incorrectly, they are making dull the tools of their trade, which is a terrible thing.

- Justice Scalia

That's the difference between being a professional and not. You have an obligation as an officer of the court, and regardless of the financial realities, you're the one standing up there, not your clients. If you have an obligation, you put in whatever is necessary to get it done and then hope the client will pay for it. A slipshod performance because "I only had so much money I could bill or afford to spend on this brief" is a great disservice to the court.

- Justice Roberts

Lawyers are great at taking complicated things, and that's a lawyer's greatest, greatest virtue, I think to me, is that he is a generalist . . . that's what they're paid to do.

- Justice Breyer

Footnotes are a waste of time

I don't care. I don't read them that closely. If it is important, you put it in the text.

- Justice Thomas

There is no point in using a footnote. Make a decision: Is it relevant and important or not?

- Justice Breyer

On one of Justice Roberts's drafts, Justice Rehnquist circled a lot of things and said, "Let's

put all these things in footnotes." After Justice Roberts complied, he said, "now cut out all the footnotes."

- Justice Roberts

Be brief

I have yet to put down a brief and say, "I wish that had been longer".

- Justice Roberts

Prolivity is probably the worst offense that most unskilled brief-writers are guilty of.

- Justice Scalia

It's the old adage, "If I'd had more time, I would have written less."

- Justice Alito

Bad writing signals poor thought process

You don't have a lot of confidence in the substance if the writing is bad.

- Justice Roberts

I think there is a clear relationship between good, clear writing and good, clear thinking. And if you don't have one, it's very hard to have the other.

- Justice Alito

Falsus in uno, falsus in omnibus. "False in one, false in all." It's the same thing about sloppiness. If you see somebody who has written a sloppy brief, I'm inclined to think this person is a sloppy thinker. It is rare that a person thinks clearly, precisely, carefully and does not write that way. And it's rare that someone who is careful and precise in his thought is sloppy in his writing. So it hurts you. It really hurts you to have ungrammatical, sloppy briefs . . . even typographical errors. It just shows you're not careful.

- Justice Scalia

If someone uses improper grammar, you begin to think, well, maybe the person isn't as careful about his work, or his or her work, as he or she should be if he doesn't speak carefully. Grammar is really quite important.

- Justice Stevens

Avoid legalese

A good test is, if you used the word at a cocktail party, would people look at you funny?

- Justice Scalia

We might think we're saying something

important when we're really not. It can be pretentious.

- Justice Kennedy

If you can say it in plain English, you should.

- Justice Ginsberg

Avoid legal jargon as much as possible. It adds nothing.

- Justice Breyer

Legalese is totally unnecessary.

- Justice Alito

The Justices also remarked on the importance of grammar and, regardless of the "rules", their preferences for purposes of flow and clarity:

"Which" slows you down, "that" just seems to have a better pace to it. You can usually get rid of both of them.

- Justice Roberts

Adverbs are a way for you to qualify, if you don't use them, it forces you to think through the conclusion of your sentence. And it forces you to confront the significance of your word choice, the importance of your diction.

- Justice Kennedy

Viewpoints on the most important part of a brief differed slightly as well:

The most important thing is to be accurate and intellectually honest in your arguments and state them clearly.

- Justice Stevens

The framing of the question is crucial. "Man, that's everything."

- Justice Scalia

I like the summary of the argument. It gives you a preview, "here's what I am going to tell you."

- Justice Thomas

Be scrupulously honest because if a brief-writer is going to slant something or miscite an authority, if the judge spots that one time, the brief will be distrusted – the rest of it.

- Justice Ginsberg

The most important thing in a brief when you state the facts is you must be fair.

- Justice Kennedy

Clarity is necessary, elegance is plus.

- Justice Alito

Writing Tips, continued

Nearly the entire group commented on the extensive outlining process of writing and the numerous rounds of editing. Justice Thomas remarked that “editing is the key to it all” and Justice Ginsberg noted that she goes through “innumerable” drafts—“I try hard, first of all, to write an opinion so that no one will have to read a sentence twice to get what it means.”

Above all, perhaps, the Justices want to know, up front, the key points of your case and why you should win. Justice Thomas encourages lawyers to “just say what you’ve got to say; get it upfront” and in your conclusion, “tell the Court what you want it do to.” Judge Breyer agrees, “[i]n the beginning, I want to see what the question is; and the end, I want to know what the summary is.” Justice Alito finds, in the company of some of the others, including Justice Roberts, that a summary paragraph at the beginning makes for an easier read. The Justices, like Justice Kennedy do not necessarily want lawyers to suppress their personalities, and appreciate context and human interest in briefs, but clarity certainly wins the day on the bench—“I want it clear, and I want it fast. And if possible, I want it elegant.” - Justice Scalia.

The full text of the transcripts is available at:

http://www.scribes.org/sites/default/files/Scribes-Journal_Volume-13_Garner-transcripts.pdf

