Citing New Hampshire Sources

Below are recommended citation forms for New Hampshire specific sources of legal information, including the RSAs, court rules, and legislative history. They are subject to change by the New Hampshire Supreme Court, but they can serve as guidelines should you run into any questions in your legal writing.

New Hampshire Statutes

Cite New Hampshire statutes as they appear in the published RSAs and as follows, for example:

RSA 287:4, I (Supp. 1981)

Note: Chapter (ch.) 287; section (§) 4; and paragraph (par.) I.

Some New Hampshire statutes include both a number and a letter: RSA 357-A. We use a hyphen as opposed to a dash to separate them.

When the paragraph number ends the cite within the text, any punctuation after the paragraph number is not part of the cite except when the paragraph is I. Punctuation after I makes clear that it is a paragraph number and not the letter I. For example: "RSA 287:4, II provides that . . .", but "RSA 287:4, I, provides that . . ."

RSA 281:2, V (Supp. 1981)

RSA 597:1-a (1979 & Supp. 1981)

RSA 88-A:4, II(a)

RSA 464-A:9, III(a)-(d)

RSA 294-A:28, II(b) (Supp. 1981)

RSA 382-A:4-103

RSA 284:16-a to -c ("to" means "inclusive")

RSA 382-A:4-103 to –105

RSA 382-A:4-103, -105 (year) See Bluebook Rule 3.3(b)

RSA 637:2, :3

RSA 637:2-:4

RSA ch. 541, RSA ch. 541-A
In text: RSA chapter 541; RSA chapter 541-A

See RSA 135-C:34 (1996); RSA 171-B:2 (2002)

Laws 1967, ch. 284
Laws 1967, 284:2
PL 144:52 (1926)

Note: The date cited for a statute is the date of the most current copy of the statute's printed version (e.g., the RSA volume and/or the Supplement, for New Hampshire) that contains the statute (or part thereof) in effect at the time of the relevant event. If the legislature amends a statute in one year, but the amendment is not effective until a specific date in the next year, the statute is cited as amended in the first year, not the year of the effective date of the amendment. For example, RSA 265:93-a, III was amended in 2003, but the amendment was effective January 1, 2004. The correct citation is RSA 265:93-a, III (1997) (amended 2003).

Examples:

1. If you are citing a statute that contains multiple paragraphs and only some paragraphs were amended since the last bound volume of the RSA was published, and the entire statute has been reprinted in the supplement, cite the supplement.

e.g., RSA 149-B:10: The most recent bound volume was published in 2005. According to the 2016 supplement, after 2005, paragraph I-a was added to the statute. Because all of RSA 149-B:10 is reprinted in the 2016 supplement, cite only the supplement. RSA 149-B:10 (Supp. 2016).

2. If you are citing one paragraph of a multi-paragraph statute and that paragraph has not been amended since the bound volume was printed, cite only the bound volume for that paragraph.

e.g., because paragraph IV of RSA 149-B:10 has not been amended since 2005, cite that paragraph as follows: RSA 149-B:10, IV (2005).

3. If you are citing a statute that has been entirely amended since the most recent bound volume was published, cite only the most recent supplement.

e.g., RSA 147-B:11-a did not exist when the 2005 bound volume was published. Accordingly, cite that provision as: RSA 147-B:11-a (Supp. 2016).

4. When giving the subsequent history of a statute, use the date on which the legislature amended the statute, not the date on which the amendment became effective.

e.g., RSA 490-D:2, VI was amended in 2013, but the amendment did not take effect until January 1, 2014. If you want to cite the version of RSA 490-D:2, VI that was in effect before January 1, 2014, cite it as RSA 490-D:2, VI (2010) (amended 2013).

5. Abbreviate "effective" as "eff." when used in a citation to refer to the effective date of an amendment.

New Hampshire References

Bar Journal - 6 N.H.B.J. 8 (1994)
House Journal - N.H.H.R. Jour. 210-12 (1973)
Senate Journal - N.H.S. Jour. 210-12 (1973)
Judicial Council Report - N.H. Judicial Council, Fourteenth Biennial Report 22 (1986)
Municipal ordinances - Nashua, N.H., Rev. Ordinances ch. 34, art. 1, § 1 (1973)
New Hampshire Supreme Court Rules - Sup. Ct. R. 7
Superior Court Rules - Super. Ct. R. 7
This form is used for the former Superior Court Rules. They were repealed and replaced in 2013 by:
Superior Court Civil Rules – Super. Ct. Civ. R.
Superior Court Criminal Rules – Super. Ct. Crim. R.
In 2016, the court repealed the Superior Court Criminal Rules and adopted:
New Hampshire Rules of Criminal Procedure - N.H. R. Crim. P.
Superior Court Administrative Rules - Super. Ct. Admin. R.
Superior Court Sentence Review Division Rules - Super. Ct. Sentence Rev. Div. R.
Circuit Court – District Division Rules – Dist. Div. R. 7
Circuit Court – Probate Division Rules – Prob. Div. R. 7
Circuit Court – Family Division Rules – Fam. Div. R. 1.24
Former District Court Rules (prior to 7/1/11) - Dist. Ct. R. 7
Former Probate Court Rules (prior to 7/1/11) - Prob. Ct. R. 7
Former Family Division Rules (prior to 7/1/11) – Fam. Div. R. 1.24
Rules of Evidence - N.H. R. Ev. 803(2); N.H. R. Ev. 803 Reporter's Notes
Code of Administrative Rules - N.H. Admin. R., Emp 503
Rules of Professional Conduct - N.H. R. Prof. Conduct 3.4
New Hampshire Public Utilities Commission Reports - 64 N.H.P.U.C. 112 (1991)

NOTE: The New Hampshire Legislature (Senate and House) are not currently transcribing committee hearings. The following is a citation form that should work. If you use it and find that it does not, please alert the Reporter. The legislative IT team created its own program for the Bill Status program. Accordingly, when they make any change to the program in general, it may affect the viability of the following hyperlink citation form.

Relative to Vehicular Homicide, HB 118, 2015 Session (N.H. 2015), http://www.gen.court.state.nh.us/bill_Status (Apr. 21, 2015 hearing, Remarks of _____, 7:49)

Explanation

Title of bill, number of bill, year of legislative session (State year), website for bill status (date of hearing, speaker who is cited, where to find in recording of hearing)

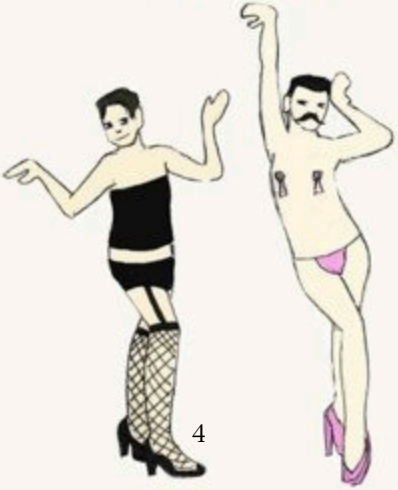
Please note that the words “Statement of Intent” and “committee report” often refer to very different sources of legislative history.

With the Oxford comma:

we invited the strippers, jfk, and stalin.

Without the Oxford comma:

we invited the strippers, jfk and stalin.



United States Court of Appeals
For the First Circuit

No. 16-1901

KEVIN O'CONNOR; CHRISTOPHER O'CONNOR; JAMES ADAM COX; MICHAEL FRASER; ROBERT MCNALLY,

Plaintiffs, Appellants,

v.

OAKHURST DAIRY; DAIRY FARMERS OF AMERICA, INC.,

Defendants, Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF MAINE

[Hon. Nancy Torresen, Chief U.S. District Judge]

Before

Lynch, Lipez, and Barron,
Circuit Judges.

David G. Webbert, with whom Jeffrey Neil Young, Carol J. Garvan, and Johnson, Webbert, and Young, LLP were on brief, for appellants.

David L. Schenberg, with whom Patrick F. Hulla and Ogletree, Deakins, Nash, Smoak and Stewart, P.C. were on brief, for appellees.

March 13, 2017

BARRON, **Circuit Judge**. For want of a comma, we have this case. It arises from a dispute between a Maine dairy company and its delivery drivers, and it concerns the scope of an exemption from Maine's overtime law. 26 M.R.S.A. § 664(3). Specifically, if that exemption used a serial comma to mark off the last of the activities that it lists, then the exemption would clearly encompass an activity that the drivers perform. And, in that event, the drivers would plainly fall within the exemption and thus outside the overtime law's protection. But, as it happens, there is no serial comma to be found in the exemption's list of activities, thus leading to this dispute over whether the drivers fall within the exemption from the overtime law or not.

The District Court concluded that, despite the absent comma, the Maine legislature unambiguously intended for the last term in the exemption's list of activities to identify an exempt activity in its own right. The District Court thus granted summary judgment to the dairy company, as there is no dispute that the drivers do perform that activity. But, we conclude that the exemption's scope is actually not so clear in this regard. And because, under Maine law, ambiguities in the state's wage and hour laws must be construed liberally in order to accomplish their remedial purpose, we adopt the drivers'

narrower reading of the exemption. We therefore reverse the grant of summary judgment and remand for further proceedings.

I.

Maine's wage and hour law is set forth in Chapter 7 of Title 26 of the Maine Revised Statutes. The Maine overtime law is part of the state's wage and hour law.

The overtime law provides that "[a]n employer may not require an employee to work more than 40 hours in any one week unless 1 1/2 times the regular hourly rate is paid for all hours actually worked in excess of 40 hours in that week." 26 M.R.S.A. § 664(3). The overtime law does not separately define the term, "employee." Instead, it relies on the definition of "employee" that the Chapter elsewhere sets forth.

That definition, which applies to the Chapter as a whole, provides that an "employee" is "any individual employed or permitted to work by an employer," id. at § 663(3). However, the definition expressly excludes a few categories of workers who are specifically defined not to be "employee[s]," id. at § 663(3)(A)-(L).

The delivery drivers do not fall within the categories of workers excluded from the definition. They thus are plainly "employees." But some workers who fall within the statutory definition of "employee" nonetheless fall outside the protection of the overtime law due to a series of express exemptions from

that law. The exemption to the overtime law that is in dispute here is Exemption F.

Exemption F covers employees whose work involves the handling -- in one way or another -- of certain, expressly enumerated food products. Specifically, Exemption F states that the protection of the overtime law does not apply to:

> The canning, processing, preserving, freezing, drying, marketing, storing, packing for shipment or distribution of:
> (1) Agricultural produce;
> (2) Meat and fish products; and
> (3) Perishable foods.

26 M.R.S.A. § 664(3)(F). The parties' dispute concerns the meaning of the words "packing for shipment or distribution."

The delivery drivers contend that, in combination, these words refer to the single activity of "packing," whether the "packing" is for "shipment" or for "distribution." The drivers further contend that, although they do handle perishable foods, they do not engage in "packing" them. As a result, the drivers argue that, as employees who fall outside Exemption F, the Maine overtime law protects them.

Oakhurst responds that the disputed words actually refer to two distinct exempt activities, with the first being "packing for shipment" and the second being "distribution." And because the delivery drivers do -- quite obviously -- engage in the "distribution" of dairy products, which are "perishable

foods," Oakhurst contends that the drivers fall within Exemption F and thus outside the overtime law's protection.

The delivery drivers lost this interpretive dispute below. They had filed suit against Oakhurst on May 5, 2014 in the United States District Court for the District of Maine. The suit sought unpaid overtime wages under the federal Fair Labor Standards Act, 29 U.S.C. §§ 201 et seq., and the Maine overtime law, 26 M.R.S.A. § 664(3).[1] The case was referred to a Magistrate Judge, and the parties filed cross-motions for partial summary judgment to resolve their dispute over the scope of Exemption F. After hearings on those motions, the Magistrate Judge ruled that Oakhurst's reading of Exemption F was the better one and recommended granting Oakhurst's motion. The District Court agreed with the Magistrate Judge's recommendation and granted summary judgment for Oakhurst on the ground that "distribution" was a stand-alone exempt activity.[2]

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[1] The delivery drivers also made claims based on other provisions of Maine wage and hour law. 26 M.R.S.A. § 621-A (timely and full payment of wages); id. § 626 (payment of wages after cessation of employment); id. § 626-A (penalties provisions). These claims appear to rise or fall based on the success of the overtime claim, so we do not consider them separately.

[2] After granting Oakhurst's motion for partial summary judgment on the meaning of Exemption F, the District Court dismissed all of plaintiffs' state law claims. At the same time, the federal claims were all dismissed without prejudice. As a result, we have appellate jurisdiction over the District Court's order under 28 U.S.C. § 1291.

The delivery drivers now appeal that ruling. They raise a single legal question: what does the contested phrase in Exemption F mean? Our review on this question of state law interpretation is de novo. See Manchester Sch. Dist. v. Crisman, 306 F.3d 1, 9 (1st Cir. 2002).

II.

The issue before us turns wholly on the meaning of a provision in a Maine statute. We thus first consider whether there are any Maine precedents that construe that provision.

Oakhurst identifies one: the Maine Superior Court's unpublished opinion in Thompson v. Shaw's Supermarkets, Inc., No. Civ. A. CV-02-036, 2002 WL 31045303 (Me. Sup. Ct. Sept. 5, 2002). In that case, the Superior Court ruled that Exemption F "is clear that an exemption exists for the distribution of the three categories of foods," id. at *3, as a matter of both text and purpose, id. at *2.

But, a Superior Court decision construing Maine law would not bind the Maine Law Court, and thus does not bind us. See generally King v. Order of United Commercial Travelers of Am., 333 U.S. 153, 159–62 (1948) (rejecting an unreported state trial court decision as binding on federal courts); Keeley v. Loomis Fargo & Co., 183 F.3d 257, 269 n.9 (3d Cir. 1999) (finding a state trial court decision to be "at most persuasive but nonbinding authority," with the federal court instead

"look[ing] to the plain language of the statute and our own interpretation . . . in predicting how the state supreme court" would rule). Moreover, the Superior Court's decision in Thompson was appealed to the Maine Law Court, which declined to follow the Superior Court's approach and instead decided the case on different grounds altogether. See Thompson v. Shaw's Supermarkets, Inc., 847 A.2d 406, 409 (Me. 2004).

Nevertheless, the reasons that the Superior Court decision in Thompson gave -- even if not adopted by the Maine Law Court -- figure prominently in the arguments that Oakhurst now presents to us on appeal. We thus consider those reasons in the course of our analysis, to which we now turn.

III.

Each party recognizes that, by its bare terms, Exemption F raises questions as to its scope, largely due to the fact that no comma precedes the words "or distribution." But each side also contends that the exemption's text has a latent clarity, at least after one applies various interpretive aids. Each side then goes on to argue that the overtime law's evident purpose and legislative history confirms its preferred reading.

We conclude, however, that Exemption F is ambiguous, even after we take account of the relevant interpretive aids and the law's purpose and legislative history. For that reason, we conclude that, under Maine law, we must construe the

exemption in the narrow manner that the drivers favor, as doing so furthers the overtime law's remedial purposes. See Dir. of Bureau of Labor Standards v. Cormier, 527 A.2d 1297 (Me. 1987). Before explaining our reasons for reaching this conclusion, though, we first need to work our way through the parties' arguments as to why, despite the absent comma, Exemption F is clearer than it looks.

A.

First, the text. See Harrington v. State, 96 A.3d 696, 697–98 (Me. 2014) ("Only if the statute is reasonably susceptible to different interpretations will we look beyond the statutory language . . . ."). In considering it, we do not simply look at the particular word "distribution" in isolation from the exemption as a whole. We instead must take account of certain linguistic conventions -- canons, as they are often called -- that can help us make sense of a word in the context in which it appears. Oakhurst argues that, when we account for these canons here, it is clear that the exemption identifies "distribution" as a stand-alone, exempt activity rather than as an activity that merely modifies the stand-alone, exempt activity of "packing."

Oakhurst relies for its reading in significant part on the rule against surplusage, which instructs that we must give independent meaning to each word in a statute and treat none as

unnecessary. See Stromberg-Carlson Corp. v. State Tax Assessor, 765 A.2d 566, 569 (Me. 2001) ("When construing the language of a statute . . . [w]ords must be given meaning and not treated as meaningless and superfluous."). To make this case, Oakhurst explains that "shipment" and "distribution" are synonyms. For that reason, Oakhurst contends, "distribution" cannot describe a type of "packing," as the word "distribution" would then redundantly perform the role that "shipment" -- as its synonym -- already performs, which is to describe the type of "packing" that is exempt. See Thompson, 2002 WL 31045303 at *2 ("[I]t is not at all clear how packing for shipment would be different from packing for distribution."). By contrast, Oakhurst explains, under its reading, the words "shipment" and "distribution" are not redundant. The first word, "shipment," describes the exempt activity of "packing," while the second, "distribution," describes an exempt activity in its own right.

Oakhurst also relies on another established linguistic convention in pressing its case -- the convention of using a conjunction to mark off the last item on a list. See The Chicago Manual of Style § 6.123 (16th ed. 2010) (providing examples of lists with such conjunctions). Oakhurst notes, rightly, that there is no conjunction before "packing," but that there is one after "shipment" and thus before "distribution." Oakhurst also observes that Maine overtime law contains two

other lists in addition to the one at issue here and that each places a conjunction before the last item. See 26 M.R.S.A. § 664(3) ("The regular hourly rate includes all earnings, bonuses, commissions and other compensation . . ." (emphasis added)); id. at § 664(3)(A) (exempting from overtime law "automobile mechanics, automobile parts clerks, automobile service writers and automobile salespersons as defined in section 663" (emphasis added)).

Oakhurst acknowledges that its reading would be beyond dispute if a comma preceded the word "distribution" and that no comma is there. But, Oakhurst contends, that comma is missing for good reason. Oakhurst points out that the Maine Legislative Drafting Manual expressly instructs that: "when drafting Maine law or rules, don't use a comma between the penultimate and the last item of a series." Maine Legislative Drafting Manual 113 (Legislative Council, Maine State Legislature 2009), http://maine.gov/legis/ros/manual/Draftman2009.pdf ("Drafting Manual"); see also Jacob v. Kippax, 10 A.3d 1159, 1166 (Me. 2011) (invoking the Drafting Manual to help resolve a statutory ambiguity). In fact, Oakhurst notes, Maine statutes invariably omit the serial comma from lists. And this practice reflects a drafting convention that is at least as old as the Maine wage and hour law, even if the drafting manual itself is of more recent vintage. See, e.g., Me. Stat. tit. 26, § 663(3)(G)

(1965) ("processing, canning or packing"); Me. Stat. tit. 26, § 665(1) (1965) ("hours, total earnings and itemized deductions").

B.

If no more could be gleaned from the text, we might be inclined to read Exemption F as Oakhurst does. But, the delivery drivers point out, there is more to consider. And while these other features of the text do not compel the drivers' reading, they do make the exemption's scope unclear, at least as a matter of text alone.

The drivers contend, first, that the inclusion of both "shipment" and "distribution" to describe "packing" results in no redundancy. Those activities, the drivers argue, are each distinct. They contend that "shipment" refers to the outsourcing of the delivery of goods to a third-party carrier for transportation, while "distribution" refers to a seller's in-house transportation of products directly to recipients. And the drivers note that this distinction is, in one form or another, adhered to in dictionary definitions. See New Oxford English American Dictionary 497, 1573-74 (2001); Webster's Third New International Dictionary 666, 2096 (2002).

Consistent with the drivers' contention, Exemption F does use two different words ("shipment" and "distribution") when it is hard to see why, on Oakhurst's reading, the legislature did not simply use just one of them twice. After

all, if "distribution" and "shipment" really do mean the same thing, as Oakhurst contends, then it is odd that the legislature chose to use one of them ("shipment") to describe the activity for which "packing" is done but the other ("distribution") to describe the activity itself.

The drivers' argument that the legislature did not view the words to be interchangeable draws additional support from another Maine statute. That statute clearly lists both "distribution" and "shipment" as if each represents a separate activity in its own right. See 10 M.R.S.A. § 1476 (referring to "manufacture, distribution or shipment"). And because Maine law elsewhere treats "shipment" and "distribution" as if they are separate activities in a list, we do not see why we must assume that the Maine legislature did not treat them that way here as well. After all, the use of these two words to describe "packing" need not be understood to be wasteful. Such usage could simply reflect the legislature's intention to make clear that "packing" is exempt whether done for "shipment" or for "distribution" and not simply when done for just one of those activities.[3]

[3] We also note that there is some reason to think that the distinction between "shipment" and "distribution" is not merely one that only a lawyer could love. Oakhurst's own internal organization chart seems to treat the two as if they are separate activities.

Next, the drivers point to the exemption's grammar. The drivers note that each of the terms in Exemption F that indisputably names an exempt activity -- "canning, processing, preserving," and so forth on through "packing" -- is a gerund. By, contrast, "distribution" is not. And neither is "shipment." In fact, those are the only non-gerund nouns in the exemption, other than the ones that name various foods.

Thus, the drivers argue, in accord with what is known as the parallel usage convention, that "distribution" and "shipment" must be playing the same grammatical role -- and one distinct from the role that the gerunds play. See The Chicago Manual of Style § 5.212 (16th ed. 2010) ("Every element of a parallel series must be a functional match of the others (word, phrase, clause, sentence) and serve the same grammatical function in the sentence (e.g., noun, verb, adjective, adverb)."). In accord with that convention, the drivers read "shipment" and "distribution" each to be objects of the preposition "for" that describes the exempt activity of "packing." And the drivers read the gerunds each to be referring to stand-alone, exempt activities -- "canning, preserving . . . ."

By contrast, in violation of the convention, Oakhurst's reading treats one of the two non-gerunds ("distribution") as if it is performing a distinct grammatical

function from the other ("shipment"), as the latter functions as an object of a preposition while the former does not. And Oakhurst's reading also contravenes the parallel usage convention in another way: it treats a non-gerund (again, "distribution") as if it is performing a role in the list -- naming an exempt activity in its own right -- that gerunds otherwise exclusively perform.[4]

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[4] We note that the other Maine statutory list that uses these same two words -- "distribution" and "shipment" -- does assign each of them the same grammatical function. See 10 M.R.S.A. § 1476(2)(A)(3) (referring to "manufacture, distribution or shipment"). And when the Maine legislature has elsewhere listed the activity of "distribution" alongside other activities that appear in the gerund form, it has used the gerund "distributing." See, e.g., 9 M.R.S.A. § 5003(5) ("for purposes of raising and distributing money"); 10 M.R.S.A. § 9021(1) ("business of manufacturing, brokering, distributing, selling, installing or servicing manufactured housing"); 32 M.R.S.A. § 13702-A(24) ("dispensing, delivering or distributing prescription drugs").

Oakhurst did point out at oral argument that there are provisions of Maine labor law in which a single noun is included at the end of a list predominately comprised of gerunds. But none of the provisions that Oakhurst points to have the unique structure that Exemption F would have under Oakhurst's reading, in which a contested term is grammatically parallel with some list items but not others, and yet is used, as Oakhurst contends, to serve a different grammatical function than the term to which it is parallel. Instead, Oakhurst's examples are of more garden-variety lists. See, e.g., 26 M.R.S.A § 1043(1)(A)(1) (referencing "the raising, shearing, feeding, caring for, training and management of" various animals); id. at § 1043(1)(A)(4) (referencing "hatching or processing of poultry, transportation of poultry; grading of eggs or packing of eggs, transportation of eggs; the processing of any meat product or the transportation of any meat product"). Moreover, the provisions that Oakhurst cites are not ambiguous as to whether the non-gerund terms are in fact stand-alone list items. The

Finally, the delivery drivers circle back to that missing comma. They acknowledge that the drafting manual advises drafters not to use serial commas to set off the final item in a list -- despite the clarity that the inclusion of serial commas would often seem to bring. But the drivers point out that the drafting manual is not dogmatic on that point. The manual also contains a proviso -- "Be careful if an item in the series is modified" -- and then sets out several examples of how lists with modified or otherwise complex terms should be written to avoid the ambiguity that a missing serial comma would otherwise create. See Drafting Manual at 114.

Thus, the drafting manual's seeming -- and, from a judge's point of view, entirely welcome -- distaste for ambiguous lists does suggest a reason to doubt Oakhurst's insistence that the missing comma casts no doubt on its preferred reading. For, as the drivers explain, the drafting manual cannot be read to instruct that the comma should have been omitted here if "distribution" was intended to be the last item in the list. In that event, the serial comma's omission would give rise to just the sort of ambiguity that the manual

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provisions Oakhurst references are unambiguous, so the principle of parallel construction -- an aid to resolving statutory ambiguities -- would never come into play with respect to those provisions.

warns drafters not to create.[5]

Still, the drivers' textual points do not account for what seems to us to be Oakhurst's strongest textual rejoinder: no conjunction precedes "packing." Rather, the only conjunction in the exemption -- "or" -- appears before "distribution." And so, on the drivers' reading, the list is strangely stingy when it comes to conjunctions, as it fails to use one to mark off the

[5] For related reasons, the consistent omission of serial commas in the various other statutory lists that Oakhurst points to is not all that probative. None of Oakhurst's examples are of lists in which the missing comma creates an ambiguity as to what the final list item is. Thus, the omission of the serial comma in those lists does not show the legislature would have omitted the comma in this list, as the omission of the comma from this list does create an ambiguity.

Before leaving our discussion of serial commas, we would be remiss not to note the clarifying virtues of serial commas that other jurisdictions recognize. In fact, guidance on legislative drafting in most other states and in the Congress appears to differ from Maine's when it comes to serial commas. Some state legislative drafting manuals expressly warn that the absence of serial commas can create ambiguity concerning the last item in a list. One analysis notes that only seven states -- including Maine -- either do not require or expressly prohibit the use of the serial comma. See Amy Langenfeld, Capitol Drafting: Legislative Drafting Manuals in the Law School Classroom, 22 Perspectives: Teaching Legal Res. & Writing 141, 143-144 (2014); see also Grace E. Hart, Note, State Legislative Drafting Manuals and Statutory Interpretation, 126 Yale L.J. 438 (2016). Also, drafting conventions of both chambers of the federal Congress warn against omitting the serial comma for the same reason. See U.S. House of Representatives Office of the Legislative Counsel, House Legislative Counsel's Manual on Drafting Style, No. HLC 104-1, § 351 at 58 (1995) (requiring a serial comma to "prevent[] any misreading that the last item is part of the preceding one"); U.S. Senate Office of the Legislative Counsel, Legislative Drafting Manual § 321(c) at 79 (1997) (same language as House Manual).

last listed activity.

To address this anomaly, the drivers cite to Antonin Scalia & Bryan Garner, Reading Law: The Interpretation of Legal Texts (2012), in which the authors observe that "[s]ometimes drafters will omit conjunctions altogether between the enumerated items [in a list]," in a technique called "asyndeton," id. at 119. But those same authors point out that most legislative drafters avoid asyndeton. Id. And, the delivery drivers do not provide any examples of Maine statutes that use this unusual grammatical device. Thus, the drivers' reading of the text is hardly fully satisfying.[6]

IV.

The text has, to be candid, not gotten us very far.

[6] The drivers do also contend that their reading draws support from the noscitur a sociis canon, which "dictates that words grouped in a list should be given related meaning." Dole v. United Steelworkers of Am., 494 U.S. 26, 36 (1990) (citation omitted). In particular, the drivers contend that distribution is a different sort of activity than the others, nearly all of which entail transforming perishable products to less perishable forms -- "canning," "processing," "preserving," "freezing," "drying," and "storing." However, the list of activities also includes "marketing," which Oakhurst argues undercuts the drivers' noscitur a sociis argument. And even if "marketing" does not mean promoting goods or services, as in the case of advertising, and means only "to deal in a market," see Webster's Third New International Dictionary of the English Language 1383 (2002); see also id. (providing additional definitions, including "to go to market to buy or sell" and "to expose for sale in a market"), it is a word that would have at least some potential commonalities with the disputed word, "distribution." For that reason, this canon adds little insight beyond that offered by the parallel usage convention.

We are reluctant to conclude from the text alone that the legislature clearly chose to deploy the nonstandard grammatical device of asyndeton. But we are also reluctant to overlook the seemingly anomalous violation of the parallel usage canon that Oakhurst's reading of the text produces. And so -- there being no comma in place to break the tie -- the text turns out to be no clearer on close inspection than it first appeared. As a result, we turn to the parties' arguments about the exemption's purpose and the legislative history. See Berube v. Rust Eng'g, 668 A.2d 875, 877 (Me. 1995) ("Our purpose in construing a statute is to give effect to the legislative intent as indicated by the statute's plain language, and we examine other indicia of legislative intent, such as its legislative history, only when the plain language is ambiguous.").

A.

Oakhurst contends that the evident purpose of the exemption strongly favors its reading. The whole point of the exemption, Oakhurst asserts (albeit without reference to any directly supportive text or legislative history), is to protect against the distorting effects that the overtime law otherwise might have on employer decisions about how best to ensure perishable foods will not spoil. See O'Connor v. Oakhurst Dairy, No. 2:14-CV-192-NT, 2016 WL 1179252, at *5 (D. Me. Jan. 26, 2016) (Magistrate Judge's conclusion that "the purpose of

the exemption for employees engaged in the production and distribution of perishable foods can only be to achieve the most efficient possible production and delivery given the nature of the product"). And, Oakhurst argues, the risk of spoilage posed by the distribution of perishable food is no less serious than is the risk of spoilage posed by the other activities regarding the handling of such foods to which the exemption clearly does apply.

Oakhurst then goes on to argue that legislative history supports this supposition about what the legislature must have intended in crafting the exemption. Oakhurst points out that the overtime law, which was enacted in 1965, piggybacks on the definition of "employee" set forth in the wage and hour law, which had been enacted four years earlier. Oakhurst then notes that this pre-existing definition of "employee" contained a carve-out that excluded workers involved in the handling of "aquatic forms of animal and vegetable life" but that in all other respects looks a lot like what became Exemption F. In particular, that carve-out applied to workers "employ[ed] in loading, unloading or packing . . . for shipment or in propagating, processing (other than canning), marketing, freezing, curing, storing or distributing" various "aquatic forms of animal and vegetable life." P.L. 1961, ch. 277, § 3(F).

Oakhurst thus argues that Exemption F clearly was intended to expand upon the existing carve-out by adding activities (such as "canning") and goods (namely, meats, vegetables, and "perishable foods" more generally). And, for that reason, Oakhurst contends that it makes no sense to read Exemption F, as the delivers drivers do, to have deleted an activity -- "distributing" -- that the carve-out had included.

B.

We are not so sure. Any analysis of Exemption F that depends upon an assertion about its clear purpose is necessarily somewhat speculative. Nothing in the overtime law's text or legislative history purports to define a clear purpose for the exemption.

Moreover, even if we were to share in Oakhurst's speculation that the legislature included the exemption solely to protect against the possible spoilage of perishable foods rather than for some distinct reason related, perhaps, to the particular dynamics of certain labor markets, we still could not say that it would be arbitrary for the legislature to exempt "packing" but not "distributing" perishable goods. The reason to include "packing" in the exemption is easy enough to conjure. If perishable goods are not packed in a timely fashion, it stands to reason that they may well spoil. Thus, one can imagine the reason to ensure that the overtime law creates no

incentives for employers to delay the packing of such goods. The same logic, however, does not so easily apply to explain the need to exempt the activity of distributing those same goods. Drivers delivering perishable food must often inevitably spend long periods of time on the road to get the goods to their destination. It is thus not at all clear that a legal requirement for employers to pay overtime would affect whether drivers would get the goods to their destination before they spoiled. No matter what delivery drivers are paid for the journey, the trip cannot be made to be shorter than it is.

Of course, this speculation about the effect that a legal requirement to pay overtime may or may not have on increasing the risk of food spoilage is just that. But such speculation does make us cautious about relying on what is only a presumed legislative purpose to generate a firm conclusion about what the legislature must have intended in drafting the exemption.

Moreover, insofar as the legislative history does shed light on that purpose, it hardly supports Oakhurst's account in any clear way. Significantly, Exemption F does not simply copy the language from the carve-out in the 1961 definition of "employee" that bears on whether "distribution" is an exempt activity. Instead, the legislature made some seemingly significant changes to the language of that carve-out -- changes

that Oakhurst overlooks.

The relevant language in the 1961 definition of "employee" reads: "employment in the . . . packing of such products for shipment" and "in . . . distributing" the products. By using two prepositions, "for" and "in," the text of that carve-out clearly separated the activities of packing products for shipment and of distributing those products, with the consequence that each activity was plainly excluded from the definition of "employee." Exemption F, however, deletes the second preposition, "in," and thereby strips the new language of the clarity of the old with respect to whether the activity of "distribution" is a stand-alone exempt activity or not. And Exemption F also changes the word "distributing" to the word "distribution," and thereby makes the activity of "distribution" parallel in usage to "shipment," which, of course, modifies the exempt activity of packing and does not name an exempt activity on its own.

If Oakhurst's understanding of the legislative history were right, then there would have been no reason for the legislature to have made these revisions. After all, these revisions change the old language in ways that only serve to sow doubt as to whether the activity of "distributing" that plainly had been excluded from the definition of "employee" was intended to name a standalone, exempt activity in Exemption F.

Moreover, the legislature actually revised the 1961 definition of "employee" just months after enacting the overtime law and thus Exemption F. And the legislature made that revision in a manner that runs contrary to Oakhurst's account. For while the 1961 version of the definition of "employee" excluded workers engaged in "packing . . . for shipment" and "in . . . distributing" "aquatic animal and vegetable life" products, see Me. Laws 1961, c. 277, § 3(F), the revised version removed the reference to "distributing" altogether, see Me. Laws 1965, c. 410, § 663(3)(G). The result was thus to draw the very distinction between those workers who were engaged in packing products and those workers who were engaged in distributing them that Oakhurst contends we should presume the legislature could not possibly have intended to make in crafting Exemption F.

Of course, Exemption F, unlike this revised version of the carve-out from the definition of "employee," refers not just to "packing," or even just to "packing for shipment." It refers to "packing for shipment or distribution." But if Exemption F is indeed modeled on the 1961 definition of "employee" -- as Oakhurst contends -- then we would expect Exemption F at least to use the gerund form of the word "distribution" in referring to that activity. That is the form that the legislature used in the exemption from the earlier definition of "employee" and that the legislature has used to refer to all the other exempt

activities in Exemption F.

C.

To be clear, none of this evidence is decisive either way. It does highlight, however, the hazards of simply assuming -- on the basis of no more than supposition about what would make sense -- that the legislature could not have intended to craft Exemption F as the drivers contend that the legislature crafted it. Thus, we do not find either the purpose or the legislative history fully clarifying. And so we are back to where we began.

V.

We are not, however, without a means of moving forward. The default rule of construction under Maine law for ambiguous provisions in the state's wage and hour laws is that they "should be liberally construed to further the beneficent purposes for which they are enacted." Dir. of Bureau of Labor Standards v. Cormier, 527 A.2d 1297, 1300 (Me. 1987). The opening of the subchapter of Maine law containing the overtime statute and exemption at issue here declares a clear legislative purpose: "It is the declared public policy of the State of Maine that workers employed in any occupation should receive wages sufficient to provide adequate maintenance and to protect their health, and to be fairly commensurate with the value of the services rendered." 26 M.R.S.A. § 661. Thus, in accord with

Cormier, we must interpret the ambiguity in Exemption F in light of the remedial purpose of Maine's overtime statute. And, when we do, the ambiguity clearly favors the drivers' narrower reading of the exemption.

Oakhurst counters that this default rule of construction does not apply when the question concerns whether a wage and hour law means to create an exemption at all. Rather, Oakhurst argues, the rule applies only when the issue concerns the scope of an exemption that does exist. See, e.g., Marsuq v. Cadete Enters., 807 F.3d 431, 438 (1st Cir. 2015) ("The burden is on the employer to prove an exemption from the FLSA's requirements, and the remedial nature of the statute requires that [its] exemptions be narrowly construed against the employers seeking to assert them." (alteration in original) (citation omitted)); Connelly v. Franklin Mem. Hosp., 1993 Me. Super. LEXIS 243, *3 (Me. Super. Ct. Oct. 1, 1993) ("[An] exemption from overtime pay requirements is construed narrowly, with employers claiming exemption having the burden of proof that employees fit plainly and unmistakably within the exemption."). Thus, Oakhurst contends that the rule has no application here, as the dispute centers on whether "distribution" is exempted, and not what constitutes "distribution."

But we see no basis for so confining the application

of this maxim of Maine law. Cormier did not by terms set forth that limit on the potential application of the rule that it announced. And, in fact, Cormier itself applied the maxim to resolve an ambiguity that did not concern the scope of an exemption at all. Cormier instead applied it to determine whether, for purposes of Maine overtime law, the word "employer" should be construed to treat closely related entities operating under common ownership as a single "employer" under 26 M.R.S.A. § 664(3). 527 A.2d at 1298.

Oakhurst also argues that this default rule of construction applies only when courts apply law to facts and so does not apply to purely legal question about whether "distribution" describes an exempt activity or is an exempt activity that is at issue here. But, in construing "employer," Cormier was not simply making -- as Oakhurst would have it -- a factual judgment as to "whether economic reality and the totality of the factual circumstances supports a finding that multiple companies could be treated as one employer." Rather, Cormier first resolved a purely legal dispute over the meaning of "employer," and it did so with reference to this rule of construction.

Specifically, the defendants in that case were challenging a ruling that various corporate entities and partnership controlled by a single family -- collectively known

as Funtown USA -- constituted a single "employer." 527 A.2d at 1297-99. That designation mattered because it meant that overtime would have to be paid to any employee who worked forty hours a week for Funtown USA as a whole, even if the employee did not work that many hours for any one of Funtown USA's various entities. The defendants contended "that the 'joint employer' concept is foreign to Maine law, and is not set forth or described in any state statute" and thus that "once it is established that the entities are legally distinct and not shams, the inquiry should end." 527 A.2d at 1299.

The Superior Court in Cormier ruled, however, that the term "employer" in the overtime law did encompass the joint-employer concept. Id. And the Maine Law Court agreed, holding that the Superior Court's "balancing of the several factors that resulted in its ultimate conclusion was a logical, coherent and legally sufficient mode of analysis." Id. at 1300. And it was in the course of embracing that legal conclusion regarding the proper resolution of the ambiguous term "employer" that Cormier deployed the canon: "Remedial statutes should be liberally construed to further the beneficent purposes for which they are enacted." Id.

To be sure, once Cormier answered the legal question about the meaning of "employer" under § 664(3), Cormier did go on to apply law to fact. In particular, Cormier analyzed

whether the particular legal entities at issue in the case were in fact properly characterized as constituting a "joint employer" given their ties to one another. Id. at 1301–02. But there is no indication that, in concluding that the various entities that comprised "Funtown USA" were in fact a joint employer, id. at 1297-98, Cormier held that that the rule of liberal construction may be deployed only to resolve questions pertaining to the application of law to fact.

Because Cormier does not state the rule of liberal construction as if it is one that may be used to resolve only some ambiguities in Maine's wage and hour laws, and because Cormier itself applies the rule to resolve a purely legal question, we see no basis for concluding that we are free to ignore this rule of construction in resolving the ambiguity that we confront. Thus, notwithstanding the opacity of the text and legislative history, we do not believe certification of a question regarding the proper resolution of the ambiguity in Exemption F would be the appropriate course. See Maurice v. State Farm Mut. Auto. Ins. Co., 235 F.3d 7, 10 (1st Cir. 2000) ("Our practice . . . has been to refrain from certification of state-law issues when we can discern without difficulty the course that the state's highest court likely would follow."). Rather, in accord with Cormier, we adopt the delivery drivers' reading of the ambiguous phrase in Exemption F, as that reading

furthers the broad remedial purpose of the overtime law, which is to provide overtime pay protection to employees.

Given that the delivery drivers contend that they engage in neither packing for shipment nor packing for distribution, the District Court erred in granting Oakhurst summary judgment as to the meaning of Exemption F. If the drivers engage only in distribution and not in any of the stand-alone activities that Exemption F covers -- a contention about which the Magistrate Judge recognized possible ambiguity -- the drivers fall outside of Exemption F's scope and thus within the protection of the Maine overtime law.

VI.

Accordingly, the District Court's grant of partial summary judgment to Oakhurst is **reversed**.

Eschew, Evade, and/or Eradicate Legalese

Prof. Eugene Volokh, UCLA Law School

Some common clunkers, and their simpler, more readable replacements. The replacements aren't always perfect synonyms, but 90% of the time they're better than the original. **Warning:** Some of these changes also require some grammatical twiddling of other parts of the sentence.

a large number of	many
a number of	some *or* several *or* many *or something more precise*
accord *(verb)*	give
accord respect to	respect
acquire	get
additional	more
additionally	also
adjacent to	next to *or* near
advert to	mention
afforded	given
aforementioned	*often best omitted*
ambit	reach *or* scope
any and all	all
approximately	about
ascertain	find out
assist	help
at present	now
at the place	where
at the present time	now
at this point in time	now *or* currently *or some such*
at this time	now *or* currently *or some such*
attempt *(verb)*	try
because of the fact that	because
cease	stop
cease and desist	stop
circumstances in which	when *or* where
cognizant of	aware of *or* knows
commence	start
conceal	hide

concerning the matter of	about
consensus of opinion	consensus
consequence	result
contiguous to	next to
demonstrate	show
desire	want
despite the fact that	despite *or* though
does not operate to	does not
donate	give
due to the fact that	because
during the course of	during
during the time that	while
echelon	level
elucidate	explain *or perhaps* clarify
endeavor *(verb)*	try
evince	show
excessive number of	too many
exclusively	only
exit *(verb)*	leave
facilitate	help
firstly, secondly, ...	first, second, ...
for the duration of	during *or* while
for the purpose of doing	to do
for the reason that	because
forthwith	immediately
frequently	often
fundamental	basic
has a negative impact	hurts *or* harms
I would argue that / it is arguable that / it could be argued that	*don't say what you'll argue; just argue it*
in a case in which	when *or* where
in accordance with	by *or* under
in an *X* manner	*X*ly, *e.g.,* "hastily" *instead of* "in a hasty manner"
in close proximity	near
in light of the fact that	because *or* given that
in order to	to
in point of fact	in fact *(or omit altogether)*
in reference to	about

in regard to	about
in the course of	during
in the event that	if
indicate	show *or* say *or* mean
individual *(noun)*	person
inquire	ask
is able to	can
is binding on	binds
is desirous of	wants
is dispositive of	disposes of
is unable to	cannot
it has been determined that	*omit*
it is apparent that	clearly *or omit*
it is clear that	clearly *or omit*
it should be noted that	*omit*
locate	find
manner	way
methodology	method
modify	change
negatively affect	hurt *or* harm *or* decrease *or some such*
notify	tell
notwithstanding	despite
null and void	void
numerous	many
objective *(noun)*	goal
observe	see *or* watch
obtain	get
on a number of occasions	often *or* sometimes
on the part of	by
owing to the fact that	because *or* since
period of time	time *or* period
permit	let *or* allow
personnel	people
point in time	time *or* point
portion	part
possess	have
prior to	before
procure	get

provide	give
provided that	if *or* but
provision of law	law
purchase	buy
rate of speed	speed
referred to as	called
remainder	rest
render assistance	help
request *(verb)*	ask
require	need
retain	keep
said *(adjective)*	the *or* this, *e.g.*, "said contract" *can often be changed to* "the contract"
subsequent	later
subsequent to	after
subsequently	after *or* later
substantiate	prove
sufficient	enough
sufficient number of	enough
termination	end *(sometimes)*
the case at bar	this case
the fact that	that
the instant case	this case
the manner in which	how
this case is distinguishable	*all cases are* distinguishable; *what you probably mean is that* this case is different
to the effect that	that
until such time as	until
upon	on
utilize	use
very	*consider omitting*
was aware	knew

Sources: Much e-mail from many people; Joseph Stevens, *Legal Language, Plain and Simple,* Missouri Bar Bulletin, March 1993, at 4. *See also* Bruce Ross-Larson, Edit Yourself (1982).

This article was written for a CLE presentation in 2009
-Andy Schulman

How To Write Better Than Most Lawyers By Writing Like A ~~Fourth~~ Fifth Grader

Andrew R. Schulman, Esq.

Anne Alexis Schulman,
entering Ms. Meideros' Fifth Grade

When we moved into our house, it was new. We were the first owners. The builder, who did an otherwise great job thought it unnecessary to install towel racks and toilet paper holders. Despite my general bad taste I choose nice hardware, purchased a power drill and put holes in the brand new walls. The towel racks were never straight. They were never sturdy. They fell off the wall. Eventually, after making several increasingly large holes I hired a professional for this remarkably "easy" home repair.

People hire lawyers to read, write and analyze. We have no special tools beyond the twenty-six letters of the alphabet and the law library, which is now available to everybody, twenty-four hours a day via Google. But, like my home repair person, we are professionals. People pay us to put the letters of the alphabet in the right order so that the reader can readily understand the facts and the law. We are retained to write clearly, persuasively and creatively in order to help our clients achieve their ends.

Yet most lawyers don't do this. Somewhere between the fifth grade and the bar exam we all learned to write and speak in longwinded legalese. When we are on the receiving end of a mediocre memorandum or brief we find it tiresome to read and a chore to figure out our adversary's points. Our judges do nothing if not read turgid prose all day. We can do better.

* * *

Recognizing that neither law school nor Westlaw prepared me for this CLE, I asked my ten year old daughter to tutor me by giving me some good rules for writing. She gave me the following rules of thumb and I've elaborated on what I believe they mean:

First she told me to "**Grab the reader's attention."** You want to "grab attention" from your judge's otherwise busy life in two different ways. First, you want a strong, organized and *well thought out* first paragraph that will draw the reader into your document. Think of the following first sentences:

> Marley was dead, to begin with. There is no doubt whatever about that. The register of his burial was signed by the clergyman, the clerk, the undertaker, and the chief mourner.
>
> -Charles Dickens, *A Christmas Carol*
>
> * * *
>
> As Gregor Samsa awoke one morning from uneasy dreams he found himself transformed in his bed into a gigantic insect.
>
> -Franz Kafka, *Metamorphisis*
>
> * * *
>
> The issue is, what is chicken? Plaintiff says "chicken" means a young chicken, suitable for broiling and frying. Defendant says "chicken" means any bird of that genus that meets contract specifications on weight and quality, including what it calls "stewing chicken" and plaintiff pejoratively terms "fowl."
>
> -*Figaliment Importing Co., Ltd. v. B.N.S. International Sales Corp.*, 190 F.Supp. 116, 117 (1960) (Friendly, J).

* * *

The cases before us raise questions which go to the roots of our concepts of American criminal jurisprudence: the restraints society must observe consistent with the Federal Constitution in prosecuting individuals for crime. More specifically, we deal with the admissibility of statements obtained from an individual who is subjected to custodial police interrogation and the necessity for procedures which assure that the individual is accorded his privilege under the Fifth Amendment to the Constitution not to be compelled to incriminate himself.[1]

Miranda v. Arizona, 384 U.S. 436, 439 (1966) (Warren, CJ)

* * *

It was a dark and stormy night. It was 8:15 on a weekday evening and the early April snow was sticking to the highway.

-First line from the Statement of Facts in my brief in *State v. Dodds,* N.H. Supreme Court 2008-0308

* * *

John Doe was born in 1961. By 1967—long before he had any choice in the matter—the arc of his life was apparent. At age 5, John Doe knew only that he and his twin brother Mitchell had been born into a large, hardworking family in Belfast, Maine. By age 6, however, he knew that he could only obtain love from his sisters and brothers by becoming their sexual plaything.

-First line from the Statement of Facts in one of a recent sentencing memorandum I filed.

* * *

The individual defendants engaged in a "freeze out" of John Doe. They stripped him of all of the benefits of share ownership. They devoured, and they continue to devour his portion of the corporate pie. They deprived him of more than $1,500,000. They left him without any way to earn a living during the last few years his expected employment. This was done on pretext, in bad faith and with the knowledge that every dollar taken from John Doe would instead be paid to them.

-Second line (ok, yes the actual first line was boring) from the introductory paragraph of an objection I filed to a motion for summary judgment in a civil case.

[1]The first lines of the *Miranda* decision are cited because they grab the reader's attention, not because Chief Justice Warren's second, run on sentence should be emulated.

There is a second, more important way to grab the reader's attention in a legal brief or memorandum. While it is acceptable to do no more than draw the reader into the first page of a novel with the expectation that he will stick around long enough to figure out what the book is about, we don't have that luxury. We need to explain *in the first sentence* why we filed the damn thing in court. We do not completely grab the judge's attention unless we:

(A) Say what we want (e.g. evidence excluded or summary judgment granted or the decision below affirmed); and

(B) Say why we want it (e.g. because the evidence is irrelevant or because the cause of action doesn't exist or because the decision below was a reasonable exercise of discretion).

Thus, in the examples of legal writing above, the strong topic paragraphs were actually included in introductions that explained what the issue was and what relief was requested (or, in the case of the judicial decisions, ordered). Usually I explain what I want in the very first line of a trial court memorandum. For example, the sentencing memorandum that is quoted above actually began with the sentence, "Defendant John Doe submits this memorandum in support of his request for a sentence of imprisonment of 5 to 15 years for attempted murder." That sentence left no doubt about why I filed the document in court or what I wanted the judge to do. Having said that, I was free to proceed with my attention grabbing *second* paragraph. Likewise, the objection in the civil shareholders' dispute, quoted above, began by stating that John Doe objected to the motion for summary judgment and giving the precise grounds for the objection.

My daughter's advice to "grab the reader's attention" is also a guide of what not to do. Why would anyone ever file a motion that begins:

> NOW COMES, petitioner/respondent-in-counterclaim Acme Zenith Apex, Incorporated, by and through its attorneys, Goniff, Fineagle and Fudge, PLLC., and respectfully moves this Honorable Court *in limine* to exclude certain testimony and evidence, described herein, for the reasons set forth below.

That sentence says nothing that is not already apparent from the caption. It is contains only meaningless words ("Now Comes"), obsequious drivel ("respectfully moves this Honorable Court") and unimportant information ("by and through its attorneys, Goniff, Fineagle and Fudge, PLLC."). Worse, it says nothing about why the document was filed in the first place.

My fifth grade daughter and I would instead start our motion with the following sentence:

> Petitioner Acme Zenith Apex, Inc. ("Acme") moves to exclude the testimony of defendant's expert on "lost profits" on the grounds that:
>
> > (a) he is not qualified under N.H.R.Ev. 702 and RSA 516:29-a because he is nothing more than a competitor's sales manager and lacks the training, experience and skills necessary to opine as an expert;
> >
> > (b) his opinion is not grounded on reliable facts as required by N.H.R.Ev. 702 and RSA 516:29-a;
> >
> > (c) his methodology is unsound and therefore inadmissible under the Rule and the Statute;
> >
> > (d) his opinion will be of no help to the jury; and
> >
> > (e) his testimony will be unfairly prejudicial and of no probative value. See, N.H.R.Ev. 403.

This first sentence tells the judge precisely why the motion was filed, what relief is sought and why the party filing the motion thinks he's right. When followed up with an attention grabbing first paragraph in the statement of facts, the judge will be drawn into the document.

* * *

My daughter's next admonition is **"Don't bore the reader."** Our trial court judges see dozens of motions each day. If we want our ideas to get through this all of this clutter, we can't

bore them. Our appellate judges read thousands of pages of briefs each year. If we fail to engage them with our writing, our points may be lost. We cannot afford to make the judge work to understand what we have to say.

On easy way to avoid boring the reader is to use section headings. This can take many forms. In this article, I use elipses in the middle of the page to create visual stopping points for the reader. It tells you that one section of the document has ended and another one will begin shortly.

I often break complicated facts down into chapters, subchapters and sections. Providing this outline helps keep the reader on track and this delays boredom. Thus, my writing often looks like this:

FACTS

I. THIS IS FIRST CHAPTER

A. This is the first subchapter

This is the first section: xxxxx

This is the second section: xxxxx

This is the third section: xxxxx

B. This is the second subchapter

This is the first section: xxxxx

Well, you get the idea. I use chapter headings even with short documents. Chapter headings (and subchapter and section headings) are like the dividers in cafeteria trays. They keep things separate that should be kept separate. Just as the tray divider keeps the mashed potatoes separate from the peas, chapter headings keep each discrete factual and legal argument from blending into the next.

Sometimes, I follow my daughter's advice about not boring the reader to an extreme. I try to be creative (but not crazy). I want the judge to be happy that he or she is reading my motion or brief. I want it to be an enjoyable experience, like reading a good magazine article. Under the banner of "Don't bore the reader," I've done all of the following:

-I've included occasional photographs in the body of the most boring sections of my briefs. Not only is a picture worth a thousand words (at least if the picture is part of the record on appeal or properly authenticated by affidavit in the trial court), but it makes both the page and the case look interesting. Here's a color picture from a brief I filed in a civil case involving the denial of a building permit:

-I've included *occasional*—again, I'm creative but not crazy—citations to popular films, television shows and other works of fiction in addition to more plentiful citations to decisions of

the courts of appeal. As my daughter reminds me, I've cited to what the Wizard told the Scarecrow for the proposition that diplomas are not the only measure of an expert. See, N.H.R.Ev. 702. I've cited to the movie *Hoffa* to underscore what the public understood about the need for ERISA to safeguard pension funds. I've referred to Bleak House by Dickens, to emphasize the long and convoluted procedural history of a case, and I used the Book of Job as the measure of what my client went through before he involuntarily confessed to murder. A word of warning, however: Fun citations such as these carry a lot of argumentative weight only if they follow close on the heels of a tight analysis of the relevant case law.

-In emotional cases that involve complicated facts or nuanced law I have put—in blue ink no less—quotations from famous poems or works of literature at the top or in the middle of the document. I do this because I know that the judge will need to put up with turgid facts or dense legal analysis and I want to make it clear that the case is both *important* and *different*. In the sentencing memorandum quoted above, immediately following the caption, but before any text, on the extreme right side of the page, I included the first section of Langston Hughes' poem, *Raisin In The Sun:*

STATE OF NEW HAMPSHIRE
SUPERIOR COURT

Rockingham, ss.

STATE OF NEW HAMPSHIRE

v.

JOHN DOE

09-S-9999

What happens to a dream
deferred?

Does it dry up
like a raisin in the sun?
Or fester like a sore—

And then run?
Does it stink like rotten meat?
Or crust and sugar over--
like a syrupy sweet?

Maybe it just sags
like a heavy load.

Or does it explode?

-Langston Hughes (1951)

DEFENDANT'S SENTENCING MEMORANDUM

Defendant John Doe submits this sentencing memorandum in support of his request for a sentence of imprisonment for five to fifteen years for attempted murder.

I don't do this often. But if my goal is to convince the judge that my case is *different,* what could be more *different* than placing a poem in blue ink at the top of my memorandum? I am certain that, if nothing else, I got two points across to the judge: First that the case involved something unusual and second (as you can glean from the topic paragraph quoted above) my client's crime needed to be viewed in the context of his life as a whole. Don't bore the reader.

-If the facts are complex and reticulated, I often include a three sentence preface that identifies the central issues in the case and explains that the facts are presented with these issues in mind. This conditions the reader to pay close attention to the factual details that follow because he knows they are included in the brief for a reason. I fear that if I don't say *why* the minutia is important that the reader will simply gloss over the details. On the other hand, if he reader understands that the case is about these details, he won't be bored as he masters them.

-I've spend hours writing and re-writing paragraphs to make them easy to read. It doesn't take much time to list a large quantity of facts. It may take an afternoon to distill them into a few short paragraphs that are as clear as water.

* * *

My daughter told me to "**Write what's important."** Any case involves almost an infinite number of facts. Not all of those facts are important to the issue at hand. We are paid to tell the difference.

Telling the difference—distinguishing between what facts to include and what to leave out of our writing—is never an easy task. If we err on the side of including unnecessary facts we may confuse the reader or, worse, bore the reader to point where he or she starts glossing over our writing. The important facts then get lost in a sea of inconsequential details. On the other hand, if we err on the side of excluding facts of borderline relevance, we may push the judge into thinking that the issue can't be decided in a factual vacuum. Far worse, if we fail to deal with relevant facts that hurt our case, our adversary will bring these facts up and we will lose credibility forever both in the particular case and generally over the course of our careers.

Clearly, if the only issue in the motion is whether the defendant was properly served, you don't need to spend several pages giving a lurid account of the plaintiff's pain and suffering

following his slip and fall. This would only serve to clutter up your document and lead the judge astray from this issue at hand. If you felt it was important for the judge to understand the gravity of the case, you could do so in a single sentence (e.g. "This tort case arises from a slip and fall that left plaintiff Sweet Polly Purebread a quadriplegic at age 25.")

In a summary judgment motion in a tort case, do you want to identify the police officer who measured the tire tracks by name? Or will that do nothing but place an extra and meaningless detail in the reader's mind. The officer's name should no doubt be used if the motion revolves around his reconstruction of the collision. It would likely be better to refer to him as the "responding officer" if his role is not essential to argument.

Is it necessary to provide the entire procedural history of the case? If so, is it necessary to include the precise dates on which events occurred. Or is this information unnecessary to the issues at hand.

How many facts from an eight hour deposition in a commercial dispute should you include in a motion for summary judgment? How many facts from a two week murder trial should find there way into an appellate brief?

The only answer to these questions is the one my daughter gave me: "Write what's important."

* * *

Once you know what topics are relevant, you should follow my daughter's teaching and **"paint a picture in the reader's mind**." I strongly believe that *facts* convince while *adjectives* and generalities do not. Therefore, I approach the factual section of a brief or memorandum the way I imagine the author of a screenplay, or the director of a movie approaches his work. I divide my facts into scenes and I try to make each scene as richly detailed as possible. If I

choose scenes that are relevant to my argument and place only the right details in those scenes I will end up with a convincing set of facts. This scene by scene approach also allows me to deal with the facts that don't help my case by placing them in the best context possible under the circumstances. (Of course, if I choose irrelevant scenes and details that don't move the document forward, I will bore and confuse the reader.)

We are the Francis Ford Coppola of our briefs—when it comes to describing the facts, the most important parts of the job are scene selection, detail selection (or to keep with the movie analogy "script") and point of view (or "camera angle"). I aim for my facts to be as tight and compelling as *The Godfather* or at least *Toy Story III*. To even approach these goals, I know that the most important decisions will always come when the brief is close to complete and it is time to figure out what scenes to leave on the cutting room floor and what, if any, new scenes need to be written.

My memoranda and briefs tend to be long. Every appellate judge I've ever spoken with says, "If you can say something well in 12 pages, don't write 35 pages." I agree with that, but I also think that if you present a compelling, enjoyable and cogent set of facts, your brief can have a lot of pages but and be concise.

One illustration of scene selection will prove the point. In Stanford v. Kentucky, 492 U.S. 361 (1989), Justice Scalia wrote a plurality opinion in favor of allowing the death penalty in the case of a crime committed by a juvenile. Presumably, the state court record was extensive. Here are the scenes and details that Justice Scalia used to describe the crime and the defendant:

> Stanford and his accomplice repeatedly raped and sodomized Poore during and after their commission of a robbery at a gas station where she worked as an attendant. They then drove her to a secluded area near the station, where Stanford shot her pointblank in the face and then in the back of her head. The proceeds from the robbery were roughly 300 cartons of cigarettes, two gallons of fuel, and

> a small amount of cash. A corrections officer testified that petitioner explained the murder as follows:
>
> "'[H]e said, I had to shoot her, [she] lived next door to me and she would recognize me. . . . I guess we could have tied her up or something or beat [her up] . . . and tell her if she tells, we would kill her. . . . Then after he said that, he started laughing.'" 734 S.W.2d 781, 788 (Ky. 1987).

Justice Scalia chose to both (a) describe underlying the crime and (b) spend only a paragraph doing so. Given his position, deciding to describe the offense was an easy editorial decision. Justice Brennan's dissent (which six years later became the court's holding in *Roper v. Simmons*, 543 U.S. 561 (2005)), did not describe the offense at all.

It would have made little sense for Justice Scalia to spend more than a paragraph on these facts. But what a perfect paragraph it was. Why, since Scalia only gave himself a few lines, did he see fit to quote from the trial transcript? Why did he mention the cigarettes and the two gallons of fuel? Why did he leave out other scenes and details within those scenes?

Trial counsel, and likely counsel on appeal in the state court case, had grounds to give a far more detailed account of the rape and murder. The scenes and details in those accounts should have been "storyboarded" in the way that screenplays are written, that is scene by scene. Then the individual scenes should have been written from the point of view that suited the author best. Compare e.g.,

"Stanford shot her pointblank in the face and then in the back of the head" (Scalia's account), with

"She saw the barrel of the handgun, less than an inch away, at point blank range, before Stanford shot her in the face. She likely saw nothing when he shot again in the back of the head." with

"The firearm was discharged twice causing immediate and fatal injuries," with

"He held the pistol in his hands. He raised it. He pointed it at her. She could see the barrel. He pulled the trigger and sent a bullet into her face. Then he shot her again in the back of the head.

* * *

My daughter's final piece of advice is this: **"Remember why you are writing."** We are engaged in *persuasive*, *fact-based* writing. Every letter on the page needs to be placed there with this goal in mind. Nothing extra should be there unless it is required by the rules.

I always keep my intended audience in mind. If I am trying to persuade a state trial judge, for example, I will usually include an appendix of the out-of-state cases I cite (because the Superior Court does not have great access to Westlaw or Lexis). I will also consider the possibility that my ultimate audience may include an appellate court, so I take care to include all of the facts, supported by affidavit, necessary for the record. I cite all of the legal grounds that could form the basis for an appeal, even if I think the trial judge may dismiss one or more of them out of hand.

I try very hard to foster trust on the part of the reader. Therefore, when I cite to authorities I usually provide short parenthetical quotes or otherwise I explain the precise holding. I do this so that the reader will know that I don't include any "loose" citations, unless they are preceded by a "Cf" and followed by an explanation. My facts are usually supported by page and line citations to the underlying sources.

* * *

Good writing takes time. It is rarely spoken into a Dictaphone. It is even more rarely cannibalized from other memoranda. It usually requires some time away from distractions. It *always* requires editing.

* * *

If you take one point away from this essay it should be this: We learned everything that we need to know about writing by time we graduated from fifth grade.

WHAT GREAT WRITERS CAN TEACH LAWYERS AND JUDGES:

Precise, Concise, Simple and Clear

By Douglas E. Abrams*

"Writing," said lawyer Abraham Lincoln in 1859, is "the great invention of the world."[1] From ancient times, the writer's craft has captivated leading figures in literature, non-lawyers who are remembered most often for what they wrote, and not for what they said about how to write. Their commentary about the writing process, however, seems unsurprising because facility with the written language brought recognition in their day and later in history.

Like most other close analogies, analogies between literature and legal writing may be imperfect at their edges. "Literature is not the goal of lawyers," wrote Justice Felix Frankfurter nearly 80 years ago, "though they occasionally attain it."[2] "The law," said Justice Oliver Wendell Holmes even earlier, "is not the place for the artist or the poet."[3]

Despite some imperfections across disciplines, advice from well-known fiction and non-fiction writers can serve lawyers and judges well because law, in its essence, is a literary profession heavily dependent on the written word. There are only two types of writing – good writing and bad writing. As poet (and Massachusetts Bar member) Archibald MacLeish recognized, good legal writing is simply good writing about a legal subject.[4] "[L]awyers would be better off," said MacLeish, "if they stopped thinking of the language of the law as a different language and realized that the art of writing for legal purposes is in no way distinguishable from the art of writing for any other purpose."[5]

As Justices Frankfurter and Holmes intimated, the tone and cadence of non-lawyer writers might vary from those of professionals who write in the law. Variance aside, however, the core aim of any writer, lawyers and judges included, remains constant – to convey ideas through precise, concise, simple, and clear expression.[6] This article presents instruction from master non-lawyer writers about these four characteristics

PRECISION

1. *"The difference between the almost right word and right word is . . . the difference between the lightning and the lightning bug" – Mark Twain.*[7]

When we read personal messages from acquaintances or newspaper columns by writers friendly to our point of view, tolerance may lead us to recast inartful words or sentences in our minds, tacit collaboration that may help cure imprecision. "I know what they really meant to say," we think silently to ourselves, extending a helping hand even if the words on the page did not quite say it.

Readers, however, normally do not throw lawyers and judges such lifelines. Quite the contrary. Legal writing typically faces a "hostile audience," a readership that "will do its best to find the weaknesses in the prose, even perhaps to find ways of turning the words against their intended meaning."[8] Judges and law clerks dissect briefs to test arguments, but only after opponents have tried to make the arguments mean something the writers did not intend. Advocates strain to distinguish language that complicates an appeal or creates a troublesome precedent later on. Parties seeking to evade contractual obligations seek loopholes left by a paragraph, a clause, or even a single word.[9]

The adversary system of civil and criminal justice induces lawyers and judges to strive for the right words and phrases the first time, even when extra care means reviewing drafts line-by-line. Legal writers beset later by a hostile reader's parsing cannot always rely on a second chance to achieve precision.

2. *"The words in prose ought to express the intended meaning, and nothing more" -- Samuel Taylor Coleridge.*[10]

Experienced litigators seek to avoid the predicament of having to ask the court to excuse their missteps by doing them a favor. Lawyers weaken the client's cause when, for example, they miss a deadline, file the wrong paper, or overlook an argument and must summon the court's discretion for an extension of time or permission to amend.

"To condense the diffused light of a page of thought into the luminous flash of a single sentence, is worthy to rank as a prize composition just by itself."

Mark Twain

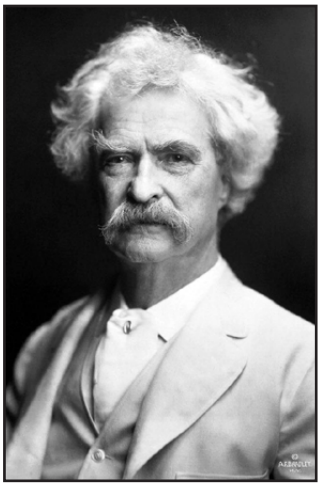


Photo by A.F. Bradley

Lawyers similarly weaken the cause when they must summon the generosity of judges or adversaries to do them a favor by acknowledging what the brief, agreement or other filing "really meant to say."

France's greatest short-story writer Guy de Maupassant was no lawyer, but his advice can remind lawyers that imprecise or otherwise inapt words can affect legal rights and obligations. "Whatever you want to say," he asserted, "there is only one word to express it, only one verb to give it movement, only one adjective to qualify it. You must search for that word, that verb, that adjective, and never be content with an approximation, never resort to tricks, even clever ones, and never have recourse to verbal sleight-of-hand to avoid a difficulty."[11]

Maupassant's directive sets the bar high, perhaps a bit too high because some imprecision is inescapable in language. Justice Frankfurter, a prolific writer as a Harvard law professor before joining the Supreme Court, was right that "[a]nything that is written may present a problem of meaning" because words "seldom attain[] more than approximate precision."[12]

Imprecise tools though words may be, they remain tools nonetheless, sometimes the only tools that lawyers or judges have for stating their position or explaining a decision. Achieving the greatest possible precision remains the reason for meticulous writing and careful editing. Lawyering and judging, like politics, often depend on the "art of the possible,"[13] even as perfection remains unattainable.[14]

CONCISENESS

1. *"Brevity is the soul of wit," and "Men of few words are the best men" – William Shakespeare.*[15]

Perhaps more than any other foundation for precision, preeminent writers often stress conciseness. "Less is more," said British Victorian poet and playwright Robert Browning, wasting no words.[16] "Brevity is in writing what charity is to all the other virtues," said British writer and cleric Sydney Smith (1771-1845). "Righteousness is worth nothing without the one, nor authorship without the other."[17]

Journalist and satirist Ambrose Bierce acidly defined "novel" as "[a] short story padded," and wrote what is probably history's shortest book review, only nine words: "The covers of this book are too far apart."[18] One of the world's greatest short-story writers, Russian Anton Chekhov, understood that "[c]onciseness is the sister of talent."[19]

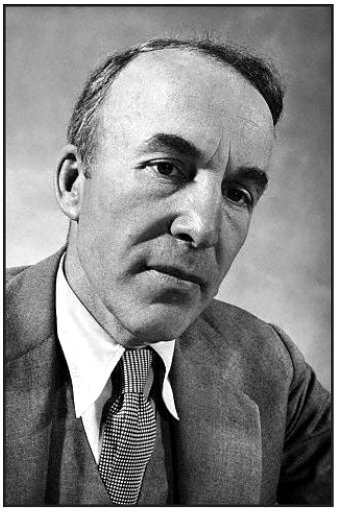
2. *"This report by its very length, defends itself against the risk of being read" – Sir Winston Churchill.*[20]

Conciseness increases the odds that the legal writer will hold the readers' attention to the finish line. "I want the reader to turn the page and keep on turning to the end," said Pulitzer Prize winning historian Barbara W. Tuchman. "This is accomplished only when the narrative moves steadily ahead, not when it comes to a weary standstill, overloaded with every item uncovered in the research."[21]

"There is but one art – to omit!," said Scottish writer Robert Louis Stevenson, who lamented that, "O if I only knew how to omit, I would ask no other knowledge."[22]

Churchill, Tuchman and Stevenson accent the point that where the writer can convey the message efficiently in five pages, the writer risks losing the audience by consuming ten. Readers with a choice may not even start a lengthy document, and weary readers may throw in the towel well before the end.

Talented writers succeed best when professional modesty leads them to recognize, as historian David McCullough puts it, "how many distractions the reader has in life today, how many good reasons there are to put the book down."[23] Distractions in the information age can be personal or professional. Like other Americans, lawyers and judges can choose from thousands of new books each year, plus Internet sources, digital and electronic resources, blogs, and the world's newspapers and magazines available a mouse-click away. Federal and state judicial dockets have increased faster than population growth for most of the past generation or so, limiting judges' patience for overwritten submissions.[24] Judges may sense when they have read enough of a brief, just as counsel researching precedents may grow bored with an overwritten judicial opinion. Counsel may have no choice but to plod through an opponent's unwieldy brief or motion papers, or through unnecessarily verbose legislation or administrative regulations or



"[L]awyers would be better off if they stopped thinking of the language of the law as a different language and realized that the art of writing for legal purposes is in no way distinguishable from the art of writing for any other purpose."

Archibald MacLeish

private agreements, though the writer still risks obscuring important points amid the baggage.

Judges, in particular, can appreciate this short verse by Theodor Geisel ("Dr. Seuss"), who wrote for children, but often with an eye toward the adults: "[T]he writer who breeds/ more words than he needs/ is making a chore/ for the reader who reads./ That's why my belief is/ the briefer the brief is,/ the greater the sigh/ of the reader's relief is."[25]

3. *"I have made this [letter] longer, because I have not had the time to make it shorter" – French writer and mathematician Blaise Pascal.*[26]

As any brief writer knows who has ever tried to present an argument within page limits imposed by court rules, achieving brevity without diminished meaning is no easy chore. Without rules or other formal restraints, verbosity can seem the path of least resistance. British poet, essayist and biographer Samuel Johnson, however, aptly likened "[a] man who uses a great many words to express his meaning" to "a bad marksman who, instead of aiming a single stone at an object, takes up a handful and throws at it in hopes he may hit."[27]

Conciseness demands self-discipline and clear thinking, usually through multiple drafts. Achieving brevity can be particularly hard work nowadays because computers may grease the skids for verbosity, but Johnson was right that "[w]hat is written without effort is in general read without pleasure."[28]

"Not that the story need be long," said transcendentalist writer Henry David Thoreau, "but it will take a long time to make it short."[29] Editing by the writer and others remains central, even though lawyers and judges typically write under time pressures (and, in the lawyer's case, also financial pressures) that might not constrain other writers. "It is not the writing but the rewriting that counts," said Pulitzer Prize winning novelist Willa Cather.[30]

Environmentalist Rachel Carson observed that writing is "largely a matter of application and hard work, of writing and rewriting endlessly until you are satisfied that you have said what you want to say as clearly and simply as possible," a process that meant "many, many revisions" for her.[31] Novelist Ernest Hemingway believed that "easy writing makes hard reading,"[32] and he made no secret that he rewrote the last page of *A Farewell to Arms* 39 times before the words satisfied him.[33]

Carson and Hemingway were not the only eminent writers candid enough to acknowledge publicly the inadequacy of their early drafts. "To be a writer," said Pulitzer Prize winner John Hersey, "is to throw away a great deal, not to be satisfied, to type again, and then again and once more, and over and over.[34]

"Half my life is an act of revision; more than half the act is performed with small changes," wrote novelist and Academy Award winning screenwriter John Irving, who recognizes that writing requires "strict toiling with the language."[35] "I'm not a very good writer, but I'm an excellent rewriter," reported James A. Michener,[36] who could not "recall anything of mine that's ever been printed in less than three drafts."[37]

Dr. Seuss, who wrote for a particularly demanding audience, estimated that "[f]or a 60-page book, I'll probably write 500 pages. . . . I winnow out."[38] The rewards of winnowing may become apparent only with the finished document. "To get the right word in the right place is a rare achievement," said Mark Twain, whom novelist William Dean Howells once called "sole, incomparable, the Lincoln of our literature."[39] "To condense the diffused light of a page of thought into the luminous flash of a single sentence, is worthy to rank as a prize composition just by itself," Twain explained. "Anybody can have ideas – the difficulty is to express them without squandering a quire of paper on an idea that ought to be reduced to one glittering paragraph."[40]

4. *"It is words as with sunbeams—the more condensed, the deeper they burn" – British Romantic poet Robert Southey.*[41]

Concise, precise writing can be the most direct, and thus the most forceful. "When you wish to instruct, be brief; that men's minds take in quickly what you say, learn its lesson, and retain it faithfully," said Ro-

"This report by its very length, defends itself against the risk of being read."

Winston Churchill

man author, orator and politician Marcus Tullius Cicero. "Every word that is unnecessary only pours over the side of a brimming mind."[42]

Eighteenth century British poet Alexander Pope said that "[w]ords are like leaves; and where they most abound, much fruit of sense beneath is rarely found."[43] Pope found "a certain majesty in simplicity"[44] because wordiness breeds imprecision when underbrush shrouds expression.

Does "less" really mean "less"? Not to writer and Nobel Prize winner Elie Wiesel, who says that "even when you cut, you don't."[45] "Writing is not like painting where you add. . . . Writing is more like a sculpture where you remove." "Even those pages you remove somehow remain," says Wiesel, "There is a difference between a book of 200 pages from the very beginning, and a book of 200 pages which is the result of an original 800 pages. The 600 pages are there. Only you don't see them."[46]

The quest for conciseness nonetheless may raise a judgment call for lawyers and judges. Justice Joseph Story, one of the most prolific legal writers in the nation's history, warned that sometimes "[b]revity becomes of itself a source of obscurity."[47] Where full exposition of a legal doctrine, argument or agreement requires extended discussion, conciseness for its own sake may actual breed imprecision and compromise the sound administration of justice or the rights of clients.

5. *"It wasn't by accident that the Gettysburg Address was so short. The laws of prose writing are as immutable as those of flight, of mathematics, of physics" – Ernest Hemingway.*[48]

"History at its best is vicarious experience," said leading 20th century historian Edmund S. Morgan.[49] Sometimes an historical example can help dispel a writer's concern that readers might mistake conciseness for weakness. The "less is more" school profits from recounting President Abraham Lincoln's Gettysburg Address, which he delivered on November 19, 1863 to help dedicate a national cemetery to fallen Civil War soldiers.

Preceding the President to the podium that day was Edward Everett, widely regarded as the greatest American orator of the era, a luminary whose resume included service as U.S. Representative, U.S. Senator, Massachusetts Governor, Minister to Great Britain, Secretary of State, and Harvard University professor and president. After Everett held the podium for more than two hours, Lincoln rose with a masterpiece that took less than two minutes.

Mindful that the nation's newspaper and magazine readers needed a concise, stirring and readily embraceable rationale for wartime perseverance, Lincoln knew that his audience extended beyond the shadows of the cemetery. Indeed, the greatest praise for the Gettysburg Address came not from the President's listeners that November day, but from his readers almost immediately. Ralph Waldo Emerson anticipated the

"There is but one art – to omit! O if I only knew how to omit, I would ask no other knowledge."

Robert Louis Stevenson

verdict of history when he predicted that the President's "brief speech at Gettysburg will not easily be surpassed by words on any recorded occasion."[50] "Perhaps [in] no language, ancient or modern, are any number of words found more touching or eloquent," echoed abolitionist writer Harriet Beecher Stowe.[51]

Everett knew immediately that his interminable oration had bequeathed nothing memorable. "I should be glad," he wrote the President the day after the Gettysburg dedication, " if . . . I came as near the central idea of the occasion in two hours, as you did in two minutes."[52] "My speech will soon be forgotten, yours never will be," the prescient Everett told the President, adding "How gladly would I exchange my 100 pages for your 20 lines."[53]

6. ***"Great is the art of beginning, but greater the art is of ending;/ Many a poem is marred by a superfluous verse" – Henry Wadsworth Longfellow.***[54]

7. ***"Many a poem is marred by a superfluous word" – Henry Wadsworth Longfellow.***[55]

Conciseness begins with a document's broad design and overall structure, but extends to choice of individual words. "The most valuable of all talents is that of never using two words when one will do," said lawyer Thomas Jefferson, who found "[n]o stile of writing . . . so delightful as that which is all pith, which never omits a necessary word, nor uses an unnecessary one."[56]

British writer H.G. Wells concisely stated the case for conciseness: "I write as straight as I can, just as I walk as straight as I can, because that is the best way to get there."[57] British historian and educator Thomas Arnold (1795-1842) introduces the next section of this article. "Brevity and simplicity," Arnold wrote, "are two of the greatest merits which style can have."[58]

SIMPLICITY

1. ***"If you can't explain something simply, you don't understand it well" – attributed to Albert Einstein.***[59]

2. ***"Make everything as simple as possible, but no simpler" – paraphrasing Albert Einstein.***[60]

In more than 300 scientific and 150 non-scientific papers, Einstein sought to explain complex ideas as simply as possible.[61] "Any fool," he said, "can make things bigger, more complex, and more violent. It takes a touch of genius – and a lot of courage – to move in the opposite direction."[62]

English playwright and novelist W. Somerset Maugham offered two secrets of play writing -- "have common sense and . . . stick to the point."[63] For lawyers, common sense recognizes that legal arguments are not always as complex as they first seem. "Out of intense complexities," observed Winston Churchill, "intense simplicities emerge."[64]

On the other hand, simplicity for its own sake can snare unwary legal writers. Where full exposition of a legal doctrine or argument requires extended discussion, over-simplification may impede rather than enhance communication. Lawyers heed Einstein's formula best with the same sound judgment at the keyboard that they would exercise when speaking in the courtroom or other halls of justice.

3. ***"[B]eauty of style and harmony and grace and good rhythm depend on simplicity" – Plato.***[65]

4. ***"The supreme excellence is simplicity" – Edith Wharton.***[66]

Lawyers and judges write best by playing the percentages, which (as Einstein taught) usually points the compass toward simplicity. "Simplicity is the ultimate sophistication," said Leonardo da Vinci, a Renaissance thinker whose writings have survived the centuries.[67] "[T]o be simple is to be great," agreed essayist and poet Ralph Waldo Emerson.[68]

Thomas Jefferson left no doubt about where he stood. "I dislike

"It is not the writing but the rewriting that counts."

Willa Cather

Photo by Van Vechten

the verbose and intricate style of the English statutes," the elderly lawyer wrote a friend in 1817, "and in our [Virginia's] revised code I endeavored to restore it to the simple one of the ancient statutes."[69]

5. *"Any word you have to hunt for in a thesaurus is the wrong word. There are no exceptions to this rule" – Stephen King.*[70]

"One of the really bad things you can do to your writing," King explains, "is to dress up the vocabulary, looking for long words because you're maybe a little bit ashamed of your short ones."[71]

Ernest Hemingway said that he wrote "what I see and what I feel in the best and simplest way I can tell it."[72] Hemingway and William Faulkner went back and forth about the virtues of simplicity in writing. Faulkner once criticized Hemingway, who he said "had no courage, never been known to use a word that might send the reader to the dictionary." "Poor Faulkner," Hemingway responded, "Does he really think big emotions come from big words? He thinks I don't know the ten-dollar words. I know them all right. But there are older and simpler and better words, and those are the ones I use."[73]

Kurt Vonnegut placed himself comfortably in Hemingway's camp: "I wonder now what Ernest Hemingway's dictionary looked like, since he got along so well with dinky words that everybody can spell and truly understand."[74]

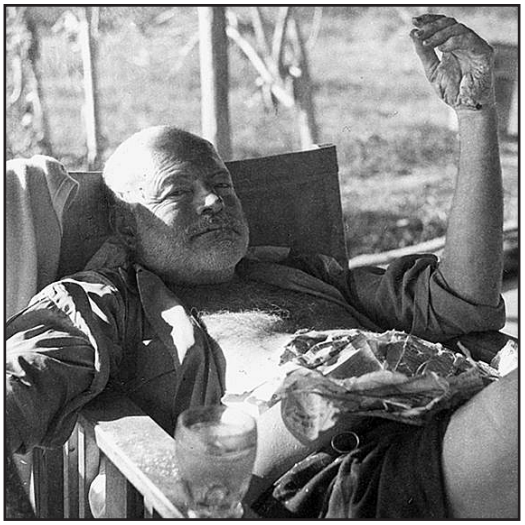
Will Rogers is most remembered as a humorist, but satire about public issues frequently conveys perceptive underlying messages. Rogers wrote more than 4,000 nationally syndicated newspaper columns, and he contributed wisdom about language.[75] His advice resembled Hemingway's and King's: "[H]ere's one good thing about language, there is always a short word for it," Rogers said. "'Course the Greeks have a word for it, the dictionary has a word for it, but I believe in using your own word for it. I love words but I don't like strange ones. You don't understand them, and they don't understand you. Old words is like old friends – you know 'em the minute you see 'em."[76]

6. *"The finest language is mostly made up of simple unimposing words" – British Victorian novelist George Eliot (Mary Ann Evans).*[77]

"Broadly speaking," said Churchill, "the short words are the best, and the old words when short are best of all."[78] "Use the smallest word that does the job," advised essayist and journalist E. B. White.[79]

In a letter to a 12-year-old boy, Mark Twain praised his young correspondent for "us[ing] plain, simple language, short words, and brief sentences. That is the way to write English – it is the modern way and the best way. Stick to it; don't let fluff and flowers and verbosity creep in."[80]

"Where a short word will do," said British writer and theologian Henry Alford (1810-1871), "you always lose by using a long one."[81]



"Easy writing makes hard reading."

Ernest Hemingway

"Elegance of language may not be in the power of all of us," Alford concluded, "but simplicity and straightforwardness are."[82]

CLARITY

1. ***"Have something to say, and say it as clearly as you can. That is the only secret of style" – British poet and writer Matthew Arnold.***[83]

"[T]he first end of a writer," British Poet Laureate and literary critic John Dryden counseled in 1700, is "to be understood.""Everyone who writes strives for the same thing," added poet William Carlos Williams: "To say it swiftly, clearly, to say the hard thing that way, using few words. Not to gum up the paragraph. To know when to quit when you've done."[84]

British writer and poet John Ruskin (1819-1900) found it "excellent discipline for an author to feel that he must say all he has to say in the fewest possible words, or his reader is sure to skip them; and in the plainest possible words, or his reader will certainly misunderstand them."[85]

2. ***"The chief virtue that language can have is clarity, and nothing detracts from it so much as the use of unfamiliar words" – Hippocrates.***[86]

3. ***"Think like a wise man but communicate in the language of the people" – William Butler Yeats.***[87]

"Don't *implement* promises, but *keep* them,"instructed British novelist and essayist C.S. Lewis.[88] "Don't say 'infinitely' when you mean 'very', otherwise you'll have no word left when you want to talk about something really infinite."[89]

"Plain clarity is better than ornate obscurity," advised Mark Twain.[90] "Words in prose," said British Romantic poet and philosopher Samuel Taylor Coleridge, "ought to express the intended meaning; if they attract attention to themselves, it is a fault; in the very best styles you read page after page without noticing the medium."[91]

Coleridge's point is universal. Lawyers and judges normally write best when precision, conciseness, simplicity and clarity craft a style that induces readers to remember the message more than they remember the messenger.

CONCLUSION

Literary figures have long disparaged lawyers' writing as unworthy of emulation. "[D]o not give it to a lawyer's clerk to write," warned Miguel de Cervantes in *Don Quixote*, "for they use a legal hand that Satan himself will not understand."[92] Lawyers, said Jonathan Swift in *Gulliver's Travels*, use "a peculiar cant and jargon of their own that no other mortal can understand, and wherein all their laws are written, which they take special care to multiply; whereby they have wholly confounded the very essence of truth and falsehood, of right and wrong."[93]

In his poem, "The Lawyers Know Too Much," Pulitzer Prize winning writer and poet Carl Sandberg chided "higgling lawyers" for "Too many slippery ifs and buts and howevers, Too much hereinbefore provided whereas, Too many doors to go in and out of."[94] Perhaps, Sandberg's poem mused, a lifetime of unvarnished legalese helps explain "why a hearse horse snickers hauling a lawyer's bones."[95]

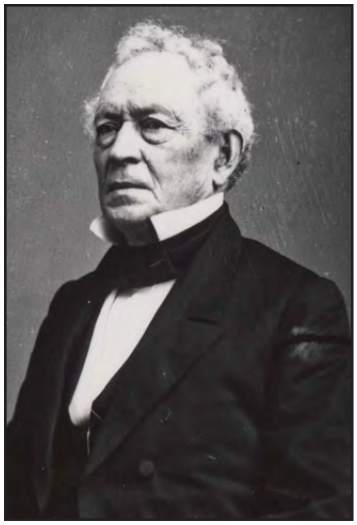
Lawyers who appreciated literary style have expressed similar criticism. Near the end of his life, for example, Thomas Jefferson chastised his fellow lawyers for "making every other word a 'said' or 'aforesaid' and saying everything over two or three times, so that nobody but we of the craft can untwist the diction and find out what it means."[96]

"I quote others in order to better express my own self," explained French Renaissance essayist Michel de Montaigne.[97] In this two-part article, I have quoted from some of history's best-known writers to show how literature can help lawyers and judges achieve what Mark Twain called "the supreme function of language. . . – to convey ideas and emotions."[98]

For lawyers and judges alike, the core aspiration is continually to hone writing skills because, as Hemingway put it, "We are all apprentices in a craft where no one ever becomes a master."[99] "As with all other aspects of the narrative art," says Stephen King, writers "improve with practice, but practice will never make you perfect. Why should it? What fun would that be?"[100]

"My speech will soon be forgotten, yours never will be. How gladly would I exchange my 100 pages for your 20 lines."

Edward Everett, to President Abraham Lincoln. Everett's two-hour oration preceded Lincoln's Gettysburg Address.



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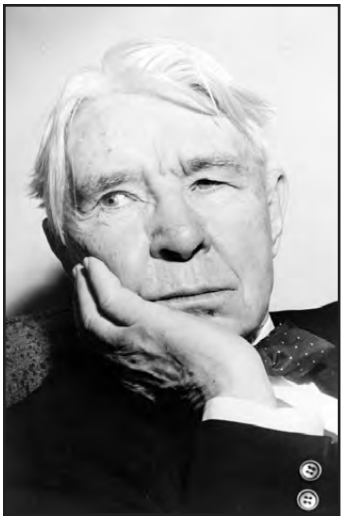

"Too many slippery ifs and buts and howevers,
Too much hereinbefore provided whereas,
Too many doors to go in and out of."

Carl Sandburg, from his poem,
"The Lawyers Know Too Much"

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Author

Douglas E. Abrams, a law professor at the University of Missouri, has written or co-authored five books. Four U.S. Supreme Court decisions have cited his law review articles. This article is reprinted with his permission. It was first published in Precedent, the Missouri Bar Association's quarterly magazine.

Ten Fast Fixes for Better Briefs (By: Mark Attorri & Bill Saturley)

The foremost "fixes" we recommend to strengthen your writing include:

1. **Write in short sentences.** Short, declarative sentences are easier to understand and are much less taxing on the reader than long sentences with lots of subordinate clauses. If a sentence runs on for four or five lines, break it up into shorter sentences.

2. **Eliminate unnecessary words.** For example, change "in order to" to "to." Unnecessary words are distracting and impede the flow of your argument.

3. **Eliminate unnecessary facts.** Include a short, simple statement of every fact that supports your argument, but avoid needless demands on the reader's memory by discussing unnecessary facts.

4. **Begin each paragraph with a topic sentence.** The topic sentence introduces or summarizes the idea you are developing in the body of the paragraph. If you read a lot of U.S. Supreme Court opinions, you'll see that good legal writers always use topic sentences.

5. Avoid long, unnecessary intros to pleadings (e.g., "The Counter-Defendant in Quantum Meruit, by and through its attorneys, XYZ Law Firm, hereby blah, blah, blah [repeat title of pleading, thereby making the Court read, again, something it just read]…"). Get to the point.

6. Use affirmative phrases. Your plea is more effective if you tell your reader what something is, rather than what it is not. "Plaintiff's pleading was not on time" reads less well (and therefore is less powerful) than "Plaintiff's pleading was late." Scan your pleading for every use of the word "not" and ask yourself if an affirmative phrase might be more powerful and useful.

7. Eliminate, or at least diminish, the passive voice. Scan for every use of the words "is", "was", or "be." Try more active words. Say "the rule applies here" rather than "the rule is applicable here"; saying "a temporary injunction was issued by the court" is weaker than saying "the court issued a temporary injunction."

8. Shorten it up. Brevity is the soul of wit, but also power.

9. Read your pleading when you're done. Try reading it aloud. This simple step will save you great embarrassment, as it reveals errors, omissions, and infelicitous phrasing.

10. We repeat this one because it's the most important: **Shorter is better.** State each idea as effectively as you can, and develop it as needed, but avoid repeating it over and over again. (When you think about it, most of the tips we've offered here are really just specific applications of this overarching principle.) Note that often the preferred statement is shorter than the clumsier alternative.

This is a reprint of a CLE article I wrote in 2008
-Andy Schulman

TEN TIPS FOR WRITING A GREAT APPELLATE BRIEF

By Andrew R. Schulman

The darkest moment for any lawyer who must write a brief—indeed, the worst moment for any writer, period—comes just before the first sentence is written. At this moment, the computer screen is blank and so it is likely to remain for many painful minutes or even hours. The screen fills with words. The words are deleted. The screen is blank again and it is at this moment that all of us question whether we will be able to write *any* brief, let alone a great one.

The purpose of this article is to get you through that moment of appellate stage fright so that you will fearlessly write compelling briefs that win the admiration of your clients, your adversaries and the courts. I'm convinced that we learned 90% of what we need to know to write great briefs, even U.S. Supreme Court briefs, by the end of high school. Law school and legal practice have, if anything, dulled the pen and diluted the power of our writing. We need, therefore, to concentrate on the basics and, with this mind, I give you a list of ten tips.

1. Good Writing Takes Time: I have never spent less than thirty hours writing a brief. I may have been trial counsel. There may only be one issue. The transcript may be under 100 pages. The law may clear. It takes me around thirty hours, including formatting and creation of the table of authorities and table of contents. It takes a lot longer when I'm new to the case, when the transcript is voluminous, when the exhibits are dense, when the issues are many and when the law is unclear.

Good writing takes time. Presumably it takes time to write good novels, good screenplays and good musical compositions. Why should it take any less time to write good briefs? Briefs may be written in prose, but prose has its own rhythm and its own symmetry.

Every fact should be *perfectly* supported by a citation to a *specific* page in the record, and it takes time to ensure perfect factual citation. *Every* legal principle should be supported by the best possible citations, and it takes me a lot of time to get this right.

If you scrimp on hours then your brief may get your point across, but it won't sing. It will be read and understood, but it won't be read effortlessly. Your account of the facts and your explanation of the law will be noted, but perhaps more skeptically than necessary.

2. Be A Helpful Salesperson: I hate annoying salespeople. More important, I don't trust them. The car dealer or mattress salesman who tries too hard to get my money—"What can I do to put you in that car today"—rarely succeeds. Such tactics send me searching elsewhere for information. They drive me out of the showroom and I may not return.

On the other hand, a helpful salesperson can guide me through a purchasing decision to the point where he or she becomes my primary source of information. Perhaps, at the end of the day, I don't become a purchaser. But if I trust the salesperson, I'm more inclined to stay in the showroom.

Guess what, we're in sales. We are advocates for our clients' positions. The judges know this; they were advocates before they became judges. But that doesn't mean we can't be trusted. ***My first goal in writing a brief is to be helpful to the court and the clerks. I want them to use my brief, my appendix, my citations to the record, my citations to the law as their primary source of information. I want copies of my briefs to end up dog-eared and coffee stained by the end of the process.***

Like a good salesperson, we are guiding others through a "purchasing" decision. They can get the information they need to make that decision from four sources: (A) The lower court order(s); (B) Our briefs; (C) The other side's briefs; or (D) Their own, independent, review of the

facts and the law. I assume that the first place an appellate court looks for guidance is in the lower court's narrative order, if one exists. The second place should be ***my*** brief. Indeed, ***my*** brief should more helpful than the trial court's order, especially if I am an appellant and the trial court ruled against me.

How do we do this? First, we make sure that every fact, no matter how small, is *perfectly* cited to a specific page or paragraph in the appendix or transcript. The citations *alone* speak to credibility and, when they are checked by the judges and clerks, our credibility is proven rather than undermined.

Second, we put no spin on the facts, at least at the most granular level. We include every "bad fact" along with the "good" ones. Regardless of the ethical issues involved, if you are caught cherry picking the facts, you will be viewed as annoying salesperson rather than as a helpful one. The judge will leave the showroom and pick up the other side's brief. That will be the brief that gets dog-eared and coffee stained. Then, if you prevail it will be despite, rather than because of your hard sales tactics.

We make the facts compel the conclusion that we want the court to "buy" by arranging them in the correct order and the correct manner. Pick up any U.S. Supreme Court decision involving a death penalty case. Invariably, the justice who writes the opinion or dissent favoring affirmance starts his or her opinion with a chilling description of the underlying murder, typically told through the eyes of the victim. Equally invariably, the justice who writes the opinion or dissent favoring reversal begins with a tight factual description of the procedural history of the case, often explaining how the defendant objected time and time again to the precise ruling at issue on appeal. You can be exceedingly honest with the facts and remain an advocate at the same time.

Third, we don't take liberties with our citations to legal authorities. I typically include a lot of parentheticals which describe the precise point for which I cite an authority. I pay great attention to citation signals, so that I never use "see" when what I mean is "cf" or, even, "see e.g." Anybody who checks my citations will know that they are 100% honest. I've seen briefs where this was not true and such briefs won't keep the customer in the showroom.

Fourth, we go one step beyond the rule that says we must cite *controlling, directly adverse authority*. If I cite a number of cases from other jurisdictions, all of which stand for the same proposition, I will throw in a "but see" citation as well, even if its not ethically required. This does not mean that I necessarily include every non-controlling, arguably adverse authority I find. I certainly don't do that. But I include enough in my brief so that when the justices read the opposing brief, or do their own research, they don't say I tried to sneak anything by.

Fifth, we recognize that our judges are all generalists. Most of us focus our practice on one or more areas of substantive law. The justices of the New Hampshire Supreme Court and the First Circuit don't have this luxury. In a single day, they hear commercial disputes, criminal appeals, marital cases, insurance coverage matters, zoning appeals and constitutional challenges. Without being either presumptuous or patronizing, a good brief can help them by explaining the law.

I make sure that every brief I file has a clear description of the standard of review (which is required in the First Circuit by FRAP) along with appropriate case citations. If the standard of review is in doubt, I explain why. While this may be a formality a lot of the time, I think it is helpful to the court.

I make sure that every brief I file has a clear description of the general governing standards that should have been applied by the trial court. Again, this may be a formality in

many cases—judges know the boilerplate test for granting a motion for summary judgment, setting aside a verdict or suppressing evidence resulting from a questionable automobile stop. But in other cases, a concise and clear statement of the general governing standards can actually assist the reader.

I've read briefs which leap to the specific, narrow legal issue in an esoteric area of the law without first explaining the standard of review and the general governing standards. Such briefs require judges to look elsewhere for information. To use my analogy, they have to leave the showroom. Remember that our judges are generalists.

3. Be Concise: Know your audience. You are writing to appellate judges and their clerks. They spend all day, every day, reading. Most of what they read is—I'll go ahead and say it—boring. A lot of what they read is turgid. When they go to sleep, they know that the next morning they will have to start reading this boring, turgid stuff again. Thirty pages of factual nuances concerning your client's boundary dispute or medical history may not be received with unmitigated glee.

If you can say everything that must be said in a twelve page brief, then don't feel the need to make it a thirteen page brief, let alone a thirty-five page one. A short but brilliant brief is no less brilliant because it is short. Nobody remembers the two hour speech that Edward Everett made at Gettysburg in 1863. Yet we can all recite by heart the two minute, 286 word speech by Abraham Lincoln that followed. I've been to a number of CLEs featuring appellate judges and they all say the same thing: Long ≠ Good.

Of course, the reverse is not always true. Some long briefs are very good. I tend to write long briefs. But I try very hard to make my briefs feel shorter than they are, to make them *easy to read* and even, I hope, *enjoyable.* My goal is for a busy judge to forget about the fact that he

or she is reading a brief and instead get transported into the case, much we all get transported into a good novel. While I doubt that I often reach that goal, I strive to be concise, if not always short.

One way to be concise is to exclude completely unnecessary information. Sometimes the names of particular witnesses may be important, but at other times you can keep your writing concise by referring to them by their function, i.e. "the investigating detective" instead of "Manchester Police Detective John Doe," or "the nurse" instead of "Nurse Jane Doe." Is it really important to your appeal that the parties' contract was signed on October 22, 2006? Or that the writ was filed on January 1, 2008? Or that the defendant's vehicle was Chevy Impala? Or that the tort plaintiff's prior accident took place on Second Street? If not, leave them out of the brief. Remember, when you use proper nouns, the reader has more to keep more facts in his head as he digests what you have to say. Therefore, you should use them sparingly.

Another way to be concise is to present your facts in the order and manner most appropriate for the standard of review. For example, if you are appealing the trial court's denial of a directed verdict, then you must present the facts in the light most favorable to the other party. This means that you don't need to go meandering through all of the factual disputes which the jury was asked to resolve. If you wish to note that there was a factual conflict (i.e., if it was a credibility case and your client denied the allegation), say this briefly. By all means, give the court a full sense of the trial, but don't make the court work harder than it must to understand the facts of the case.

When you must present multiple factual conflicts in a complicated case, explain up front why are doing so. In such cases, I often start the *statement of facts* with a brief sentence stating that since the central issue on appeal is "X," a careful review of all of the facts relating to "X" is

necessary. This will be the case if you are in the unfortunate position of appealing a discretionary evidentiary ruling which called for the trial court to balance several factors in light of the evidence presented at trial. However, if you explain *why* you need to present the facts in this manner, you will focus the reader's attention on the important issues in the case.

We walk a tightrope. One the one hand we must describe *all* of the salient facts of the case. On the other hand, we must distill the facts to a concise, readable account and this necessarily entails reducing, rather than reproducing the transcript. Our value to our clients is, in large part, that we know how to boil the facts down without losing a single granular fact that could make a difference on appeal.

4. Never Submit Your Trial Motion Or Objection As Your Appellate Brief: I've been involved in cases where opposing counsel does little more than re-caption his trial court argument and submit it to the appellate court. Almost always—even in cases where summary judgment or some other ruling based on a closed written record is at issue—this is a significant blunder.

First, we usually present the trial court with a different distillation of the facts than the ideal distillation on appeal. We may fight a multi-front war in the trial court and the issues on appeal may be narrower. We may want to focus on issues raised by the trial court in its narrative order. We may want to actually expand on some factual descriptions if our submissions to the trial court were bare boned.

Second, no matter how complete our legal argument was in the trial court, it should be *more* complete on appeal. This is especially the case when dealing with issues of pure law. In the trial court, we can get away with arguing that whatever the right legal rule may be, our client should prevail. On appeal, as explained below, we don't have that luxury.

While you should certainly use your trial court submissions as a starting point, you need to write an entirely new document on appeal. You are writing to a different audience, with different concerns and for a different purpose.

5. When You Are The Appellant, Choose Your Issues Carefully: I was trial counsel in a complicated commercial dispute in which innumerable issues were raised and decided. There were two rounds of cross-motions for summary judgment, choice of law issues, jury instruction issues, evidentiary objections, and motions for directed verdict. When the client instructed me to file a cross-appeal, there was no lack of issues to choose from.

Some lawyers subscribe to the proposition that every arguable issue should be raised on appeal. Perhaps in certain sorts of cases—death penalty appeals come to mind—this makes sense. However, in the ordinary run of cases it is generally better to focus the appellate court's attention on no more than four well briefed issues which, ideally, are in some way related to each other. A brief that gives cursory treatment to ten issues may be worse than no brief at all. Such a brief is likely to result in an opinion that rejects all ten issues in equally cursory fashion. An oversized brief that gives the full appellate treatment to ten issues, if allowed by the court, may induce fatigue rather than keen interest.

More important, rarely do we have a multitude of equally appealing issues. In the typical case, some of the issues that we preserved are much more likely than others to result in reversal. Why should we clutter our briefs with long-shot issues if we have one or two clear cut potential winners?

Once again, our value to our clients is in distilling the case to its core without losing anything important in the process. Law students are asked to spot every issue to show off their

knowledge. We are in the business of picking and choosing issues, which requires *judgment* and not merely knowledge.

One of the most important considerations in issue selection is the standard of review. The standard of review is often dispositive and always central. Issues that are reviewed for an unsustainable exercise of discretion are far more likely to be decided in the trial court's favor than issues that are reviewed *de novo*. We may fiercely believe—perhaps correctly—that the trial judge reached the "wrong" result when he or she balanced a multitude of factors and then made a discretionary ruling based on the totality of the evidence. However, to prevail on appeal, the trial judge must be so "wrong" that the exercise of discretion was unsustainable. In contrast, no deference at all will be given to even the most thoughtful and careful trial court decision on an issue that is reviewed *de novo*.

Another important consideration is the relief that you are seeking. In the case that I discussed above, the same issue was addressed to the trial court in the form of (a) an objection to jury instructions and (b) a motion for a directed verdict. Although the jury instruction issue had a better standard of review, if we were successful on that issue the case would have been reversed for a new trial. The client viewed a new trial as anathema. Therefore, we instead briefed the directed verdict issue despite its nearly insurmountable standard of review. In this instance, we actually preferred the long shot issue.

A third consideration, in state criminal cases, is whether any federal issue should be briefed for the purpose of preserving it for a possible federal habeas petition. I won't dwell on this point, but despite (a) the extremely deferential standard of review in federal habeas cases, see, 18 U.S.C. §2254, and (b) the fact that our State Constitution is often more protective than

the Federal Constitution, sometimes it makes great sense not to waive an issue that could be raised on collateral federal review.

I always include my clients in the discussion over issue selection. Some don't want to be included. Some don't have the head for it. But I want to hear their thoughts before I irrevocably toss preserved issues overboard or, alternatively, choose to brief issues with little likelihood of success. I understand that at the end of the day it is my ethical responsibility to exercise independent judgment in choosing issues. But I also believe that it is impossible to do so in the absence of client consultation. I should add that I've never had a real disagreement with a client over what issues to brief.

6. Avoid Personal Attacks: It is one thing to say that your opponent is wrong. If you are an appellee, that is the purpose of your brief. But it is another thing altogether to take the argument into the sandbox by calling names. That is exactly what happens when you accuse opposing counsel of misrepresenting the facts or the law. *Compare*,

Acceptable Argument	Unacceptable Name Calling
1. Defendant's reliance on Brown v. Board of Education is misplaced; OR, Defendant misapprehends the holding in Brown.	Defendant misrepresents the holding in Brown.
2. Plaintiff's brief ignores three crucial facts.	Plaintiff blatantly attempted to mislead this court by misstating the facts.
3. Respondent's argument is without merit.	Respondent filed a frivolous brief.
4. The flaw in petitioner's argument is…	Petitioner's counsel should know better.

I have listened to a number of appellate judges, from different courts, comment at CLE's about what they don't like to see in a brief. All of them said "personal attacks. You will

embarrass yourself and hurt your credibility if you choose to go into the sandbox. While there may be an exceptional case that disproves this rule, believe me—it's not your case.

7. Use Short Sentences, Short Paragraphs And Plain Language—And ***Never*** Use Legalese: Think Steinbeck. Think Hemingway. Don't think Joyce. Short sentences make our briefs more readable. I use some longer sentences to make sure that the writing is not too staccato. But I try to keep the sentence structure as simple as possible.

I don't always live up to this goal during my first draft. When I edit the brief, however, I usually divide a number of long sentences into two or three smaller ones. Also, I use plain language. In every brief, I use a few more advanced vocabulary words. But most words that I use, except legal terms of art, can be found in an elementary school dictionary.

Short paragraphs tell the reader that he or she can take a break. A good paragraph has no more than four or five separate sentences. A paragraph that takes more than half a page may overtax the reader.

I ***never*** use legalese except when I have to. It is necessary, of course, to use correct and precise legal terminology. An executor is not an administrator and a man whose house was burgled was not "robbed." But when is it necessary to use words such as "herewith" or "hereinafter" or phrases such as "within said time period" or "on or about"? Why would anybody ever say "at this point in time," when what he means to say is "now?" Once again, think Hemingway. Think Steinbeck. Think Scalia.

8. Use Subheadings: The facts and the law need to be chopped up into bite size chunks. To accomplish this we must use Subheadings. A section heading that reads, "Statement of the Facts" is not very helpful. A subheading that reads "The Arrest and Interrogation," or "The Purchase And Sale Agreement" says a lot. Subhearings (and sub-subheadings) can break a

thirty-five page brief down into manageable two page sections. They tell the reader what to expect next. There is a reason that most high school and college textbooks have Sections, Chapters, Subchapters, and sub-subchapters.

9. Read The Rules: The New Hampshire Supreme Court, the First Circuit and all other appellate courts have exacting rules about what must, and must not be in a brief. There are page limits, font restrictions, citation conventions and rules governing the color of the brief. There are specific rules about what sections each brief must have and what documents must be included in the addendum and appendix. Read those rules (a) before you file a notice of appeal; (b) before you file an appearance as an appellee; and (c) again before you start writing your brief. Although this "tip" is so obvious that it is not really a tip at all, you'd be surprised at the number of nonconforming briefs that get filed.

10. Be Creative—You Are The Director Of Your Movie: Appellate briefs are like haiku. They follow very narrow and traditional conventions, yet there is great room for creativity. Although my briefs are generally straight laced, in the past year I've cited *The Wizard Of Oz* and an old Heineken beer advertising slogan. While there is precious little room in a brief for whimsy, a single citation to a non-legal source which follows labored legal argument, may serve to drive the point home. (Of course, while such citations may be argumentative in the best sense of the word, they may also fall flat. You need to be careful before you get that creative. I never file a brief without giving it to two other attorneys to read first.).

In another brief, I included actual images of portions of certain business records that were introduced at trial. This was a white collar embezzlement case involving dense facts. The business records were essential evidence and they were reproduced in the appendix. I thought that using "pictures" to illustrate my brief would (a) break up the dry exposition of turgid,

reticulated facts; (b) focus the court's attention on the most important evidence in the case; and (c) engage the reader.

In a summary judgment motion (albeit not an appellate brief), I used a Venn diagram to illustrate the difference between my interpretation of a statute and my adversary's. In that case, I went so far as to submit *color* copies of the page with the diagram to the court. It made the parties' differences crystal clear in a way that words could simply not do.

I once submitted a Superior Court sentencing memorandum in an attempted murder case (again not an appellate brief) that featured a Langston Hughes Poem on the front page, above the caption of the motion. It was designed to be provocative and it was.

My goal is to be creative without either bending any of the formal rules or otherwise stepping outside the medium of brief writing. I know that I'm writing a legal argument for an appellate court, not a magazine article or blog entry. Yet at the same time, I try very hard to keep the reader engaged, so that reading ***my*** brief will be the best part of his or her day.

Oh…and one more tip…

11. Proofread.

Recommended Resources

- Compiling a New Hampshire Legislative History:
  - http://www.courts.state.nh.us/lawlibrary/nhlegislativehistory.pdf

- A Guide to Appellate Advocacy in New Hampshire by Lisa Wolford, New Hampshire Department of Justice, and Stephanie Hausman, New Hampshire Appellate Defender:
  - https://www.nhbar.org/uploads/pdf/AppellateAdvocacyGuide.pdf

- Briefs filled in the SCOTUS by the US Solicitor General's Office:
  - https://www.justice.gov/osg/supreme-court-briefs

- Better legal writing now: an ABA article by Marie Buckley:
  - http://www.americanbar.org/newsletter/publications/youraba/201112article01.html