

# The Appellate Strategist

INSIGHTS ON APPELLATE ISSUES, TRIAL CONSULTATIONS, AND EVALUATING APPEALS

## **Good Legal Writing Is Just Good Writing - Bryan Garner's SCOTUS Interviews, Part I**

June 14, 2011 by [Kirk Jenkins](#)

In 2006 and 2007, legal writing icon Bryan Garner had an amazing opportunity -- he interviewed eight of the nine then-sitting Justices of the United States Supreme Court on legal writing and appellate advocacy. The videotapes have been posted on Garner's [LawProse site](#) for a while now, but last year, Garner made the Justices' advice even more accessible, reprinting the transcripts in the journal he founded for the American Society of Legal Writers, the [Scribes Journal of Legal Writing](#).

The transcripts have generated quite a lot of buzz around the law blog world, with posts and commentary at [The Wall Street Journal's blog](#), Rebecca Copeland's [Record on Appeal](#), [A Legal Yankee in King Arthur's Court](#), the [Rocky Mountain Appellate Blog](#) and [The Legal Times](#), among many others. Today we begin a four-part series of commentaries on the Garner interviews.

Lawyers are driven, busy people. Sometimes the last thing we want to do on our off hours is read even more. But one of the primary lessons the Justices have to teach us is that there's no special secret to good legal writing; good legal writing is just good writing. As Justice Kennedy said,

"I tell my law clerks, sometimes you can't write anything good because you've never read anything good."

Chief Justice Roberts agreed: "the best teachers of writing are good writers who you read." Many of the Justices mentioned great writers they admire outside of the law. Justice Kennedy reads Hemingway, Shakespeare and Dickens. Justice Ginsburg mentioned the influence of one of her Cornell professors, the great Russian novelist Vladimir Nabokov. Justice Breyer mentioned Montesquieu, Stendahl and Proust.

All writing teachers highlight the importance of editing, and the Justices are no exception. Justice Scalia notes that he revises his own work "over and over again." Justice Thomas argues that "simplicity and clarity" requires "a lot of rounds" of "fairly intense" editing.

Strive for brevity in your legal writing, the Justices advise. Justice Breyer makes the point that a brief which is well below the Court's page limit conveys the author's confidence in his argument: "he thinks he's really got the law on his side because he only took up 30." Chief Justice Roberts tells a story about clerking for Chief Justice Rehnquist. Justice Rehnquist reviewed one of Roberts' draft opinions, and circled material throughout the draft. "Put it all in footnotes," he directed. When Roberts returned the draft to him, Rehnquist told him: "Now cut out all the footnotes." Brevity is a hard lesson for

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lawyers to learn, but the fact is, nearly everything we write would be improved if we cut five percent of the words, just as an exercise in streamlining and simplifying. Then do it again.

All of the Justices have their personal preferences, of course, and as is probably inevitable in a group of nine people, some of them contradict each other. Chief Justice Roberts thinks it's okay to add a few facts to your statement of facts that don't directly bear on the issue if it adds a little human interest. Justice Alito mentions that briefs and draft opinions tend to be full of dates that have no impact on anything. Justice Scalia never reads the summary of argument, but Justice Thomas nearly always does. Justices Scalia and Alito use footnotes; Justice Breyer never has. Justice Kennedy doesn't think sentences should begin with "moreover" or "however" or "but," but Chief Justice Roberts and Justices Breyer and Alito all endorse the practice. Justice Kennedy dislikes nouns that have been turned into verbs – he mentions "tasked" and "impact" and words ending in "-ize" -- and thinks most adverbs can be cut. Justices Kennedy and Scalia both suggest deleting trendy words. But there's one thing all the Justices agreed on -- legalese, particularly Latin, is almost never a good idea. Justice Scalia proposes the cocktail party test -- if you'd get a funny look for saying it at a cocktail party, don't put it in your brief.

Chief Justice Roberts and Justice Alito agreed that bad writing can lose a strong case or win a marginal one. In the final analysis, according to Justices Kennedy and Ginsburg, lawyers are professional writers. As Justice Ginsberg observed:

"I think that law should be a literary profession."

Join us back here tomorrow for Part II of our four-part series on Bryan Garner's SCOTUS interviews in LawProse.