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FOCUS

Clarity in legal writing

WHY IT MATTERS AND HOW TO ACHIEVE IT

What do judges want in legal writing? *Clarity!* That is the advice to lawyers from three U.S. Supreme Court justices. Hon. Elena Kagan: “The most important thing in a brief is clarity.” Hon. Antonin Scalia: Sacrifice “literary elegance, erudition, sophistication of expression if they detract from clarity.” Hon. Ruth Bader Ginsburg: “Lucid, well-ordered writing can contribute immeasurably to a lawyer’s success.”

Do judges respond positively to clear legal writing? “Yes,” says Hon. Murray Cohen (Tex. Court of Appeal): “Good writing is rewarded so automatically that you don’t even think about it.” Hon. William D. Stein (Cal. Court of Appeal) put the matter more forcefully: “If you can’t write, you can’t win.”

Clarity helps busy judges, enhances your credibility

The main reason judges desire clarity in our writing is relentless time pressure. According to the late Ruth Bader Ginsburg, “Readers of legal writing . . . often work under the pressure of a relentless clock.” Indeed, one law and motion judge explained to your authors that time pressure allowed just seven minutes for reading each principal brief. This time pressure hampers the judge’s work, increasing the need for clarity. According to Justice Ginsburg, judges constrained by time pressure “may lack the time to ferret out bright ideas buried in complex sentences, overlong paragraphs, or too many pages. Strong

arguments can escape attention when embedded in dense or Delphic prose.”

Time pressure aggravates the challenges faced by all readers in their attempt to grasp the writer’s train of thought. According to E.B. White, “The reader [is] in serious trouble most of the time, floundering in a swamp, and it [is] the duty of anyone attempting to write English to drain this swamp quickly and get the reader up on dry ground, or at least to throw a rope.” C.S. Lewis agrees: “Writing is like driving sheep down a road. If there is any gate to the left or right, the readers will most certainly go into it.”

Clarity in your writing not only helps the judge, it also enhances your credibility. According to Chief Justice

John Roberts, “your brief writing conveys . . . a sense of your credibility and the care with which you put together your case.” According to Prof. Irving Younger, when a lawyer’s writing is unclear, “the lawyer’s language is a confession of incompetence.”

Clarity’s four ingredients

What qualities create clarity in your writing? Consider these four qualities: brevity; simplicity; continuity; and specificity.

Brevity

Clarity’s first ingredient is brevity. According to Scalia and Garner, “[t]he overarching objective of a brief is to make the court’s job easier. What achieves that objective? *Brevity*.” (Emphasis added.) They add that “[e]very word that is not a help is a hindrance because it distracts. A judge who realizes that a brief is wordy will skim it; one who finds a brief terse and concise will read every word.” Brevity is advocated also by Strunk and White: “Omit needless words.” “This requires . . . that every word tell.” Hon. Harry Pregerson (9th Circuit Court of Appeals) also urges brevity: “Unnecessarily long briefs are counterproductive. They clog a good argument with excess verbiage. They tend to lose their persuasive edge as well as their credibility.” According to writer Isaac Babel, “[y]our language becomes clear and strong, not when you can no longer add, but when you can no longer take away.” William Zinsser, author of *On Writing Well*, also advocates brevity because “[c]lutter blunts the painful edge of truth.” He explains that “[w]riting improves in direct ratio to the number of things we can keep out of it.”

Brevity enhances your credibility. According to Scalia and Garner, “[j]udges often associate the brevity of the brief with the quality of the lawyer. Many judges [believe] good lawyers often come in far below the page limits – and that bad lawyers almost never do.”

How can lawyers achieve brevity? In three ways: Delete words and sentences that are either: (1) unnecessary – adding nothing meaningful; or (2) redundant

– restating a prior point; or (3) implicit – stating what readers have already surmised from prior text.

Consider the improvement in clarity when words and sentences that are unnecessary, redundant, or implicit are deleted from Justice Cardozo’s opening paragraph in *Palsgraf v. Long Island R. Co.* (1928) 162 N.E. 99. (Words added to revise the text after the deletions are in *italics*):

“Plaintiff was standing on a platform of defendant’s railroad ~~after buying a ticket to go to Rockaway Beach, when~~ a train stopped at the station. ~~bound for another place. A man~~ Two men ran forward to catch it. ~~One of the men~~ reached the platform of the car without mishap, though the train was already moving. *He was carrying a package and jumped aboard the car, but seemed unsteady as if about to fall. As two guards helped him board the car, A guard on the car, who had held the door open, reached forward to help him in, and another guard on the platform pushed him from behind. In this act,* the package was dislodged and fell upon the rails. ~~The~~ *It was a package of small size, about fifteen inches long, and was covered by a newspaper. In fact it contained fireworks, but there was* nothing in its appearance ~~gave to give~~ notice of its contents. The fireworks when they fell exploded. The shock of the explosion threw down some scales at the other end of the platform many feet away. The scales struck the plaintiff, causing injuries.” ~~for which she sues.~~

These deletions reduce the paragraph from 182 words to 101 words – shorter by 45%!

Simplicity

Clarity’s second ingredient is simplicity. Simplicity is achieved by reducing sentences, clauses, phrases, and words to their simplest form.

Judges and prominent writers advocate simplicity. As former Judge Alex Kozinski explained in an email to your authors, “simple, direct language is more persuasive than convoluted language. First, simple language is more easily

grasped [and so] forces the writer to focus his thinking and sharpen the argument. Second, abstract language has a tendency to be soft and ambiguous, easily waved aside by someone who is leaning the other way. Simplifying and clarifying is really the essence of advocacy.”

Walt Whitman wrote: “The art of art, the glory of expression is simplicity. Nothing is better than simplicity.” George Bernard Shaw wrote: “In literature the ambition of the novice is to acquire the literary language; the struggle of the adept is to get rid of it.” E.B. White wrote: “The approach to style is by way of plainness, simplicity.”

Justice Holmes’s writing manifested simplicity: “The life of the law has not been logic; it has been experience.” “A page of history is worth a pound of logic.” “The most stringent protection of free speech would not protect a man in falsely shouting ‘fire’ in a theater and causing a panic.”

Simplicity is the trend in legal writing. In 2003, the jury instruction in BAJI 2.21 – “Failure of recollection is common. Innocent misrecollection is not uncommon” – was replaced by a simpler rendition in CACI 107: “People often forget things or make mistakes in what they remember.”

Continuity

Clarity’s third ingredient is continuity – a clear train of thought. Continuity is achieved by writing that links heading to text, paragraph to paragraph, and sentence to sentence. Legal writing is strongest when it marches directly from premise to conclusion without interruption – no gaps and no detours. According to Scalia and Garner, lawyers should “[a]bandon interesting and erudite asides if they sidetrack the drive toward the point you are making.”

Specificity

Clarity’s fourth ingredient is specificity. Specificity is achieved by writing about details, not abstractions. According to Prof. David Lambuth: “If you have a nail to hit, hit it on the head.” As C.S. Lewis explained, “Instead of telling us a thing was ‘terrible,’ describe

it so that we will be terrified. Don't say it was delightful, make us say 'delightful' when we've read the description."

A benefit of writing about specific details is their impact on the reader's emotions. Compare the weakness of this abstract sentence – "The change made the employees discontented" – with the greater power of writing about specific details: "Doubling the workers' production quotas while denying the workers a salary increase made the workers angry."

The more abstract your writing, the more obscure will be your meaning. Consider this abstract sentence from a Ninth Circuit brief: "The duty owing from defendants to plaintiff in the abstract will vary relative to the juxtaposition of the real world environmental encasement of the two sides. The concept of causation would seem less plastic." (*Gottreich v. San Francisco Investment Corp.* (9th Cir. 1977) 552 F.2d 866, 867, fn. 2.) What does it mean?

Refer to specific content when you refer back to a case or statute or a particular element of an argument. Avoid abstract references such as "second prong," "latter factor," "the test in section 6304.5." Pity the judge who must remember or research the meaning of these abstract references. Instead, use specific words that communicate the content you want the reader to recall.

How to achieve clarity at every level

The following strategies will ensure brevity, simplicity, continuity and specificity at every level of your document.

Headings

Assert a complete point, not just a general topic or category, such as "The accident" or "The contract." As Scalia and Garner explain, "Many judges look at [the Table of Contents] first to get a quick overview of the argument. That's one reason you should make your section headings and subheadings full, informative sentences." To ensure your headings are informative, edit them in both the text and the table of contents.

Instead of writing "Brown's recovery," assert that "Brown's recovery was painful and long, requiring 30 months." In headings about legal rulings, state why the ruling was erroneous or proper: "The summary judgment erroneously ignored the expert's declaration on causation."

For brevity, limit headings to two lines.

Paragraphs

For continuity, open paragraphs with a concise topic sentence that recites the specific terms and details asserted in the heading. Then restrict the remainder of the paragraph to supporting the topic sentence with a clear train of thought.

For specificity, illustrate your point with visual evidence – photos, charts, diagrams, lists, tables, and graphs.

Sentences

1. For brevity, limit introductory clauses to four words followed by the subject. Limit sentences to two lines.

2. For continuity, start the new sentence with a word or phrase that connects the prior sentence to the new one. Here are three ways to do it.

(a) Echo link. Start the new sentence with words that echo the prior sentence. *Example:* "Appellant challenges the refusal to instruct on comparative negligence. But comparative negligence is not a defense to an intentional tort."

(b) Pointing words. Start with words that point back to prior text. *Example:* "Defendant complains of rulings denying defendant's motion in limine, excluding defendant's evidence, and rejecting defendant's instructions. But these rulings were not error."

(c) Signals. Start with a word or phrase that highlights the significance of the new sentence.

Examples:

To add: Again, And, Also, Besides, Beyond, Further, In addition, Likewise, Moreover, Next, Too.

To cite authority: According to, As mandated by, As xx teaches, In light of, Under.

To cite a cause: Because, In view of, On account of, Thanks to, Due to, Owing to.

For chronology: State the lapse of time between events: "Six weeks later . . ." Avoid a string of dates. They require the judge to calculate the elapsed time between events.

For a limited concession: Though, Even if, While, Despite, Even conceding.

To conclude: Finally, In sum, To conclude, To summarize.

To contrast: But, Conversely, Despite, Even if, Even so, In contrast, Instead, On the contrary, Still, Though, Yet.

To emphasize: Certainly, Here, Indeed, Indisputably, In fact, In truth, Of course, Without exception/dispute/doubt/question.

To cite an effect or result: So, Thus, Hence, Accordingly, As a result, Therefore, It follows that.

To cite an example: For example, To illustrate, In particular, One instance.

To restate: As noted, In other words, In plain English, More simply, Simply put, This means, That is, To clarify, To rephrase, Put another way.

For similarity: Similarly, Likewise, In the same way, Applying the same rationale, By analogy, For the same reason, In like manner, Likewise.

To summarize: In sum, In short, To summarize, As shown.

3. Put ancillary information (e.g., when or where) in a short phrase at the start.

4. Use a strong subject – a person or thing taking action. Avoid static subjects: "There is..." "It is..." or "The reason is that..."

5. Keep subject, verb, and object close together. Minimize mid-sentence interruptions.

6. Put the sentence's point of emphasis at the end. According to Scalia and Garner, "[i]n phrasing sentences, try to put the punch word at the end. Instead of writing 'She held a knife in her hand,' write 'What she held in her hand was a knife.'" Don't squander the end position on a date, case name, party name, or qualifying phrase – unless that is the point.

7. Avoid introductory clauses that modify a later-mentioned subject.

Readers stumble when they encounter a modifier before they read of the person or thing modified. *Example*: “If not thoroughly prepared [who is not thoroughly prepared?] a witness will give a poor deposition.” *Revision*: “A witness who is not thoroughly prepared will give a poor deposition.”

8. Put modifiers *immediately* next to the noun or verb they modify. Where you put the modifier may change the sentence’s meaning.

Example:

Only he saw the tall officer signal to the first driver.

He only saw the tall officer signal to the first driver.

He saw only the tall officer signal to the first driver.

He saw the tall officer only signal to the first driver.

He saw the tall officer signal only to the first driver.

9. Avoid footnotes. They destroy continuity by forcing judges to stop reading the text and divert their eyes to the bottom of the page and then back up again. Judges will readily tell you they want citations in the text. One federal district court’s standing order warns that footnotes “are to be used sparingly and citations to textual matter shall not be contained in footnotes.” (<http://pdfserver.amlaw.com/ca/Orderstrikingopposition.pdf>.)

Although Bryan Garner recommends putting citations in footnotes to clarify the text, Justice Scalia opposes putting citations in footnotes for a more important reason: “Legal-writing style differs from other writing style . . . because [legal arguments are evaluated] not on the basis of whether they make sense, but on the basis of whether some governing authority said so.”

Judges especially dislike footnotes that expand the argument in the text or refute the opposing party’s argument. According to Scalia and Garner, “Nothing really important to the decision should be in a footnote.”

So the rule is simple: “up or out.” If the point deserves to be in the brief, put it in the text. If not, omit it.

In your authors’ view, the only acceptable use of footnotes is to provide a more comprehensive quotation from a statute, document, or testimony that you excerpted in the text.

Words

Choose the shorter, simpler word. According to George Orwell: “Never use a long word where a short word will do.” Winston Churchill: “Short words are best . . .” Jacques Barzun: “Prefer the short word to the long.”

Use verbs, not nominalizations – phrases built on nouns constructed from verbs by adding a suffix (-tion, -sion, -ing, -ment, -ity, -ence, -ance). The verb is shorter and more vigorous, depicting people taking action. *Examples*: not “placed reliance on” but “relied on”; not “are in violation of” but “violate”; not “make a decision” but “decide.”

Use the same word for the same concept. Using different words for the same point causes the reader to wonder what the significance of the change is, only to conclude disappointedly that it has none.

Avoid a word that has opposite meanings (contronym), especially “sanction,” which means both “punish” and “approve.” Don’t burden the reader with having to dig into the context to discern which meaning you intend.

To preserve your credibility, avoid gender-specific pronouns such as “he, she, him, her, his, hers.” Instead, use one of the following strategies.

1. Delete the pronoun: “Every attorney should read court orders as soon as they are received by him.”

2. Replace the possessive pronoun with an article: “A California attorney should follow court rules in preparing his or her [a] brief.”

3. Pluralize: “California attorneys should follow the California Style Manual in preparing their briefs.”

4. Repeat the noun in place of the pronoun: “A California attorney should

follow the California Style Manual in preparing the attorney’s brief.”

Bryan Garner suggests using plural pronouns such as “they, them, their, themselves,” as in “anybody can see for themselves.” But the lack of agreement between a singular noun and a plural pronoun may be regarded by some judges as a fault, thus damaging your credibility – a risk not worth taking.

Finally, use gender-neutral titles: “chair” for “chairman”; “workers” for “workmen”; “staffed” for “manned”; “drafter” for “draftsman”; executor; heir; poet; actor; waiter; server, etc.

Avoid uncommon acronyms

Judges cannot be expected to readily recognize unfamiliar acronyms because judges are not experts on the facts of your case. Uncommon acronyms unreasonably burden the judge with remembering or researching what the initials stand for. Judges are understandably not fond of this chore.

A real-world example makes the point: “LBE’s complaint more specifically alleges that NRB failed to make an appropriate determination of RPT and TIP conformity to SIP.” A. Kozinski, “The Wrong Stuff,” 1992 Brigham Young University L.R. 325, 328. Judge Kozinski slyly added: “Even if there was a winning argument in the midst of that gobbledygook, it was DOA.”

A respectful tone

A final point (not bearing on clarity) is to maintain the respectful tone that makes you likable. According to Scalia and Garner, “You show yourself to be likable . . . by the lack of harshness and combativeness in your briefing and oral argument, the collegial attitude you display toward opposing counsel, your refusal to take cheap shots or charge misbehavior; your forthright but unassuming manner and bearing at oral argument – and, perhaps above all, your even-tempered good humor.” Scalia and Garner urge lawyers to “[c]ultivate a tone of civility, showing that you are not

blinded by passion. Don't accuse opposing counsel of chicanery or bad faith, even if there is some evidence of it. Your poker-faced public presumption must always be that an adversary has misspoken or has inadvertently erred – not that the adversary has deliberately tried to mislead the court.”

Moreover, criticizing opposing counsel distracts the judge from resolving the issues. As Judge Kozinski writes, when the lawyers are fighting, “[p]retty soon I [find] myself cheering for the lawyers and forg[e]t all about the legal issues.”

Castigating opposing counsel damages your credibility. As Hon. Harry Pregerson writes: “Generally, you injure yourself and your client’s case if, in your brief or at oral argument, you vilify or belittle your opponents or their legal positions. A shrill tone in a brief diminishes its persuasive force. The reader wonders why disparagement is necessary. Is it a device to divert attention from a vulnerable position? If your position is strong and your client’s cause just, there is no need to subject the court to a barrage of abusive argument. This approach is unpleasant, ineffective, and counterproductive.”

As Scalia and Garner explain, “[a]ppealing to judges’ emotions is misguided because it fundamentally mistakes their motivation. Good judges pride themselves on the rationality of their rulings and the suppression of their

personal proclivities, including most especially their emotions. And bad judges want to be regarded as good judges.”

When attorneys succumb to emotion, judges notice and disapprove. For example, in a fee dispute, the appellant called the respondent’s billing practices “exorbitant,” “incredible,” “audacious,” misguided,” “confusing,” “incomprehensible,” “unbelievabl[e],” “haphazard,” “flagrant,” “false and evidence-free,” “shenanigans,” “based on whole-cloth inventions,” an “abuse[of] trust,” and lacking in “logic, reason, or support” for “padded fees.” The California appellate court rejected these “bombastic ad hominem attacks” as violating the court’s standards of “civility and decorum.” (*Norman v. Ross* (2024) 101 Cal.App.5th 617.)

Remember that judges are concerned not only with the correct result in your case, but with sound judicial administration (fair, predictable, economical) and fairness for both the parties and society. Hence, you will earn credibility by showing how the result you seek for your client will promote these broader values.

For brevity, citations for quotes from judges and writing gurus have been omitted. To request those citations, email dan@persuasivewriting.org. References to “Scalia and Garner” are to *Making Your Case: The Art of Persuading Judges* (2008).

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