Set the Right Hedonic Tone to Keep Readers' Interest

By Bryan A. Garner

Every human experience has what psychologists call a "hedonic tone" connected to it—a relative degree of pleasure or displeasure. Reading is no different. There is a hedonic tone associated with your reading this column: Are you comfortable or uncomfortable? Are you happy with the events of the day, or unhappy?

There's nothing that a writer can do about those extraneous matters. But other things go on in the reading experience itself—things that the writer *can* control and that directly affect the reader's hedonic tone. Consider me as a reader, for example. First, though, you should know something about me. I'm typical in many ways (I'm busy and impatient) and atypical in others (I'm a writer, editor, grammarian, and lexicographer, as well as a law professor). My full-time job is training lawyers and judges to handle words more effectively.

Let me give you a play-by-play about how I react to a pile of writing samples from a major law firm.

I have before me five samples from associates at one of the most prestigious law firms in the country—a firm that is widely thought of as the gold standard for litigation counsel. I'm preparing to conduct a series of workshops there. My participants will be mostly associates with two to four years of experience. They have sent me samples of their most polished work product. Here goes.

Sample #1

First up is an opposition to an application for a preliminary injunction. Hovering above some ominous-looking substantive footnotes, the text says that the opponent's purpose in seeking the injunction "is to predatorily hoard a material that it does not own." I am not told, in the first few pages, what that hoarded material is, and I begin to believe that the brief-writer is hiding it (perhaps hoarding it). Skimming to the conclusion doesn't help. So I go back to the opener, which essentially says that the patent is invalid and that the opponent's longed-for preliminary injunction should be denied. But there's nothing concrete here. The writer wants me to keep reading ("as shown below"). I don't really want to. My hedonic tone is jarring.

Sample #2

Next up is a brief in support of a motion to dismiss. The title is in ungainly all-caps, and there's a typo in the middle of it: "DEFENDANT JOSEPH BALDACHER HEALTH CENTER'S MEMORANDUM IN SUPPORT OF ITS MOTION TO DISMISS ROMBERT'S COMPLAINT PURSUANT TO 735 ILCS 5/2-619 AND ALTERATIVE MOTION FOR A MORE PARTICULAR STATEMENT PURSUANT TO 735 ILCS 5/2-612."

That's LOVELY. I know what a struggle I'm in for here. Why do I say that? The writer has no sense of me and my needs. No sense of what might be appealing to my eyes, no sense of how to put words together, and no sense that I dislike jargon.

I persevere through the introduction, which tells me, in the opening sentence, that the plaintiff, Rombert Property Management, "seeks to egregiously bully its nonprofit tenant into providing several times the damages that Rombert would theoretically be entitled to under a ridiculous interpretation of the lease fantastically favorable to the landlord." Those hyperbolic adverbs really set the tone. And the hedonic tone sets my teeth on edge.

All these allegations are to be, as the brief chastely puts it, "described below." But where? I haven't much time, and I'm already stuck at the bottom of page 3. And I have no real idea what the issues are yet.

Sample #3

This is an "overview" memo for two consolidated intellectual-property cases, for which the claim-construction hearings are set four months hence. Here's how one of two patents is explained at the outset of the memo: "The '467 patent, very simply, generally relates to forming normalized relational schema objects representing logical tables extracted from physical database tables, with the assumption that the underlying relational database is in a denormalized form and that a schema object will be created in a normalized logical table, which is a subset of the underlying relational database table, all the logical tables interacting with the mapping process in the same manner as the physical tables."

And that, very simply, is among the most cogent statements in the memo—none of which I understand. I believe, although we're never told, that it has something to do with computers.

I pity the poor judge who must try to make sense of this jargonistic gibberish.

Sample #4

This is a memo that begins promisingly, with a heading: "Executive Summary." But what lies underneath is a series of dense paragraphs—eight of them—extending over four pages. This is the "summary" of an 18-page, single-spaced memo, which analyzes the contracts between two companies and the potential tort

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claims that might result from a security breach in computer systems. The first page continually and insistently undermines the writer's credibility by asserting (I kid you not) that (1) this is not a legal opinion; (2) the initial review has been hasty and cursory and incomplete; (3) Brimsafe, the client, should not rely on the conclusions "herein set forth" because "the requisite information for decision-making is complex and continually evolving"; (4) the law firm has not had the opportunity to review "many pertinent materials, including but not limited to e-mails, correspondence, and other documents relating to the scope of work"; (5) the law firm has not had the opportunity to conduct a full factual investigation of the relationship between Brimsafe and its creditors; (6) the analysis is necessarily neither exhaustive nor complete; (7) no auditors are to read the memo, much less rely on it; and (8) once again, "nothing herein contained constitutes the law firm's legal opinion."

By the bottom of page one, I'm worn out by all the disclaimers. And I wonder how the law firm is going to be able to justify what must be a large fee to generate this 18-page half-baked magnum opus, with one bloated sentence after another—and no real summary at all.

Sample #5

This memo is visually promising because it begins with "Question Presented" immediately followed by "Brief Answer." Excellent. But then the question is distressingly phrased:

> Is a court not likely to deem a specific request for information for the nationality, race, ethnicity, religion, and gender of individuals detained on suspicion of terrorist involvement and colorable immigration violations exempt from Freedom of Information Act disclosure pursuant to Exemption 7(A) or 7(E)?

Dare one read on? Maybe the brief answer will supply the meaning:

> No. It is not likely that a court would find the foiable information sufficiently within either Exemption 7(A) or 7(E), notwithstanding that (1) the information may be considered to have been compiled for law-enforcement or litigation purposes such that it might be argued that it could induce a cognizable detriment to pending or prospective proceedings; and (2) disclosure of the information might arguably, but only tenuously, create a reasonable circumvention of the law.

Wait: can we get the information from the government or not? I'm not sure. The ill-phrased question, in the single-sentence format, begets an ill-phrased answer. I think I might be able, through arduous effort, to extract some meaning from the memo. But I'm not up to the task just now. You do understand, don't you?

So what are we to make of all this hedonic atonality? The samples are pretty typical. Small wonder that judges, clients, and other readers don't expect much when they hear that they're waiting on written communication from the lawyers. "Let's run it by the legal department" is a death-knell in many a corporation. In general, legal readers have come to suspect that whatever comes from the lawyers may well be all but indecipherable. Legal writing, in short, can be lethal reading. ■

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Last Month's Contest

Last month, I invited you to revise current Federal Rule of Evidence 613(a):

> **(a) Examining witness concerning prior statement.** In examining a witness concerning a prior statement made by the witness, whether written or not, the statement need not be shown nor its contents disclosed to the witness at that time, but on request the same shall be shown or disclosed to opposing counsel.

I offered some hints. Try for a more informative heading. Change *concerning*. Change *by the witness* to a possessive. Convert to the active voice by naming a new subject. Convert to two sentences, starting the new one with *But*. And replace *the same* and *shall*.

The winner is Aaron Mead, an assistant prosecuting attorney in Berrien County, who submitted this version:

> **(a) Disclosure of prior statement used to examine witness.** A party examining a witness about the witness's prior statement need not show the statement or disclose its contents to the witness. But the party must show the statement or disclose its contents to opposing counsel upon request.

Compare that version with the restyled version below, which has been tweaked slightly since publication. Incidentally, the title to Rule 613 is "Witness's Prior Statement," so the heading to (a) can refer to *the Statement*.

> **(a) Showing or Disclosing the Statement During Questioning.** When questioning a witness about the witness's prior statement, a party need not show it or disclose its contents to the witness. But the party must, on request, show it or disclose its contents to an opposing party's attorney.

—JK

A New Contest

I'll send a copy of *Lifting the Fog of Legalese: Essays on Plain Language* to the first person who sends me (kimblej@cooley.edu) an "A" revision of the first sentence in current Rule 407. The deadline is January 22.

> When, after an injury or harm allegedly caused by an event, measures are taken that, if taken previously, would have made the injury or harm less likely to occur, evidence of the subsequent measures is not admissible to prove negligence, culpable conduct, a defect in a product, a defect in a product's design, or a need for a warning or instruction.

This time, the challenge will not be to make a series of style improvements, but to cut through and capture the meaning in a clearer, smoother way.