

Conversation with a Brief

By Mark Cooney

The attorney swiveled his chair around to look out his ninth-floor window. The setting sun's last glimmers of light cast an orange glow across the windshields of the few remaining cars parked below. He'd just polished off the second half of a sub sandwich he bought for lunch seven hours earlier. The working draft of an appeal brief sat on his desk behind him, next to some crumbs and an empty coffee mug. The brief was due the next day, but a late-afternoon client meeting had run into early evening, and he was only now getting back to it. He took a deep breath and swiveled back around to face the brief. Assuming the role of diligent editor, he took up his red pen and went to work. After a few moments of reading, he put pen to paper and, with a mighty slash, annihilated a wayward sentence. "Ouch!"

Attorney: What the...? Did you just...?

Brief: Sorry, buddy, but I felt that one. Not that I don't appreciate the edit. In fact, I'm feeling a bit bloated—you know, the way you feel after polishing off the El Grande Beef Burrito down at the Taco Loco. Can you trim a few pages?

Attorney: Trim pages?

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Brief: You don't have to take my word for it. Just ask Justice Antonin Scalia, Third Circuit Judge Ruggero Aldisert, Ninth Circuit Judge Alex Kozinski, Tenth Circuit Judge Carlos Lucero—and the list goes on and on.¹ They've all lamented the glut of glut. Unnecessary length puts off judges. Don't write to the page limit as if it's a goal. Cut me down to my essentials—no excess baggage.

Attorney: Well, it's an important case. But I suppose I might be able to shave some off here and there.

Brief: That's the spirit! And not to be a nag or anything, but I couldn't help noticing that your questions presented are in all capital letters. They're big, imposing blocks of solid caps, and they're *long*. One's 98 words of solid caps. Just *look* at that thing. Do you find that easy to read?

Attorney: But everybody does them that way.

Brief: That's not what I asked you.

Attorney: Well, I just add the word *Whether* to my argument headings to create my questions presented, and the court rules require all caps or boldface type for argument headings in appeal briefs.

Brief: Then choose lower case for both, and bold your argument headings. Those big blocks of all caps are virtually unreadable.² They make your reader's eyes go buggy.

Attorney: Well, I never really thought about it. I guess I could try lower case.

Brief: And don't forget to trim down those questions presented after you switch them to lower case. Legal-writing guru Bryan Garner advises lawyers not to exceed 75 words even when using his multi-sentence "deep issue" style.³ Your questions presented are 98 and 95 words, and they're single sentences. In fact, they're sentence fragments, given your "Whether" style. Couldn't you shoot for something informative but much more readable, say about 50 words?

Attorney: Okay, okay, I'll tighten them up and use lower case. I suppose that will make it a bit easier for the reader.

Brief: Wow! Actually thinking about your reader!

Attorney: Listen, Mr. Sarcasm, I can just shred you if you'd prefer...

Brief: No! I'm sorry! I'll stop!...Except... there is another thing.

Attorney: What *now*?

Brief: Well, in your analysis of the *Jackson v XYZ Corp* case—you know, that important court-of-appeals case that you devote almost a full page to—I see that you describe the parties as *the appellant* and *the appellee*.

Attorney: So?

Brief: Well, don't you hate that when you're reading? You lose track of who's who. You have to stop in mid-thought and

I don't want them to point at me and ask their clerks why some attorneys "don't seem to think about the people who actually have to read these things."

try to remember who the darn *appellee* was. It drives readers nuts. In fact, Federal Rule of Appellate Procedure 28(d) tells lawyers to avoid the terms *appellant* and *appellee* when describing parties. And a number of states, like Alaska, Iowa, South Dakota, Utah, and Washington, have done the same in their rules.⁴ Doesn't that tell you something about what readers think?

Attorney: But how else am I supposed to write it—the *plaintiff* and the *defendant*?

Brief: Well, *the defendant* is informative if you're analyzing an appellate opinion in a criminal case, but the *Jackson* case was a civil suit—age discrimination, right? Try descriptive status words to identify the parties and the other “main characters” in the story. It's more reader-friendly. So how about telling your reader that in *Jackson*, the *employee's supervisor* and *coworkers* said improper things to *the employee*, *the employee* complained to his *employer*, but *the employer* did nothing about it? Isn't that easier to follow?

Attorney: I can see how that might help.

Brief: And another thing...

Attorney: Is there no end?

Brief: You haven't used any topic sentences to help your reader follow the flow of your argument. Your headings help identify the main arguments, but in a bunch of places in the text, you dive into new sub-topics or case discussions without giving any hint of where you're going. If you're switching gears or building on something you've already said, let your reader know with a quick topic sentence. Don't hold your reader in suspense.⁵ Plus, those topic sentences give you a chance to reinforce important points—they're good advocacy tools for the shrewd lawyer.

Attorney: Hey, why do you care so much about all this nit-picky little stuff? What do you want out of this?

Brief: Well, I guess I just want what everyone wants.

Attorney: To win cases?

Brief: No. I just...I just want...to be loved.

Attorney: I'm gonna be sick.

Brief: Hey, buddy, I may be just another brief to you, but this is my one big chance. I don't want to be just another lackluster brief. I don't want the judges to clench me in frustration or roll their eyes in disgust

while reading me. I don't want them to point at me and ask their clerks why some attorneys “don't seem to think about the people who actually have to read these things.” You just file the thing, but I'll have to go into the judges' chambers and listen to the reaction when I'm being read.

Attorney: All right, all right.

Brief: I'm just saying that you should think about the things—even seemingly little things—that will make it easier for your reader to read me. Watch your sentence and paragraph length, strive for clarity—all those little things that add up to a strong, readable... Hey. HEY! What are you doing? Where are you taking me? No. NO! Not the shredder!

Attorney: Relax, I'm just walking you down to the kitchen. I'm gonna need lots of strong coffee while I work on you. I've got a lot more work to do than I thought.

Brief: Just don't put your cup down on me. It leaves those nasty coffee rings.

Attorney: You're really pushing your luck now, pal. ■

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FOOTNOTES

1. Garner, *Justice Scalia shares views on good usage and style*, 35 *Student Lawyer* 10, 11 (January 2007); Aldisert, *Perspective from the bench on the value of clinical appellate training of law students*, 75 *Miss LJ* 645, 645, 646, 651 (2006); Kozinski, *The wrong stuff*, 1992 *BYU LR* 325, 326 (1992); Baldock, Lucero & Mandell-King, *What appellate advocates seek from appellate judges and what appellate judges seek from appellate advocates*, 31 *NM LR* 265, 269 (2001).
2. Painter, *Good writing needs a good look*, *Lawyers Weekly USA* (March 14, 2005); see also Garner, *A Dictionary of Modern Legal Usage* (2d ed 1995), p 130.
3. Garner, *The Redbook* (2d ed), § 22.1(c), p 403.
4. *Alas Stat Ann* § 212(c)(7); *Iowa Code Ann* § 6.14(4); *SD Codified Laws* § 15-26A-63; *Utah Court Rules Ann* § 24(d); *Wash R App Proc* 10.4(e).
5. See Joseph Kimble, *The straight skinny on better judicial opinions*, in *Lifting the Fog of Legalese: Essays on Plain Language* 89, 90-91 (2006).