Notes & Queries

A Prediction: Better Briefs

Thirty years ago, while I was on the state supreme court, I read the appellate record myself and checked the briefs more than once to be sure that all contentions were understood and fully treated. This was supposed to be the way to do my job, and it was satisfying work.

The briefs were not brief. They seldom stated the issue and its disposition so plainly that the language would serve the court in writing an opinion. The brief never conceded anything to the other side. Argument had to be disputatious and exhaustive: nothing was omitted.

Back then, extensive discussion of judicial opinions lent the stamp of scholarship. And the full page limit was used lest earlier termination bespoke weakness. Comprehensive treatment of all conceivable arguments was thought to be required. If the case leaned toward the adversary's position, red herrings would be dragged through the brief to create false scents. This was how it was supposed to be done and what briefs had come to be.

Times are changing. But even as judges have less time to double-check for merit and to entertain scholarly writing off the mark of the appeal, the verbosity of briefs seems to be constant. They still lack focus and they pass by, or even hide, dispositive facts and law.

I predict that radical changes are coming in what judges will demand and in how briefs will be written to meet that demand. Briefs will have to be brief — without any unnecessary recitation of the record or case citations or argument.

Today, judges rarely read the record for themselves. As dockets become more crowded, judges will likely disregard a brief unless there is a well-defined issue of arguable merit, with precise record citation and controlling precedent. The lawyer will have to point to the pages to be read and accurately summarize those pages in the brief. And any lawyer who lapses into loquacity will lose her place in the decision process.

So let the judges get out the word that they want more help and less "argument." And let the lawyers get straight to the point of giving that help. Stop filing briefs that hinder the work of judges. That is *not* what briefs are supposed to do.

— Thomas M. Reavley
Austin, Texas

On Beginning a Court Paper

> "The selection of the starting words should always make the audience want to hear more."[1]
>
> "Start in the very first sentence with the problem in this case. Put it right up front. . . . Don't bury it under a lot of verbiage and preliminaries."[2]

In drafting court papers, litigators routinely waste their openers by repeating, more or less verbatim, the very words of the title, which often consists of four or more lines of verbosity. This peculiar habit has led Kevin McDonald, a Washington, D.C. lawyer, to coin the phrase "hence the title" — the remark that a judge might make after slogging through an opening like this one, in a paper filed by a hypothetical company named Belcom:

PLAINTIFF BELCOM COMPUTER COMPANY, INC.'S OPPOSITION TO DEFENDANT WORLDWIDE TELCO, INC.'S MOTION TO DISMISS OR, IN THE ALTERNATIVE, TO STRIKE PLEADINGS BASED ON PLAINTIFF'S VIOLATION OF THIS COURT'S JUNE 13, 1996 ORDER

TO THE HONORABLE JUDGE OF SAID COURT:

NOW COMES PLAINTIFF BELCOM COMPUTER COMPANY, INC. ("Belcom"), and files this its Opposition to Defendant Worldwide Telco, Inc.'s ("Worldwide's") Motion to Dismiss or, in the Alternative, to Strike Pleadings Based on Plaintiff's Violation of This Court's June 13, 1996 Order ("Worldwide's Motion to Dismiss"), and for its Opposition, Belcom would respectfully show unto this Honorable Court as follows:

[97 words]

This opening plainly does not make the judge want to hear more. Even worse, Belcom's lawyers have now reminded the judge — twice — that Belcom is accused of violating a court order. And they've done nothing to dispel that notion. What's more, the judge knows nothing at all about Belcom's position.

Most judges probably skim over such inane chunks of introductory text. But if a judge paused to consider such an opener, the only conceivable response might be: "Oh, I get it. That's why you used that title up above! Thank you for telling me that this isn't a falsely labeled court paper!"[3]

By devoting the entire opening paragraph to restating the needlessly long title, lawyers waste judges' time and sacrifice a valuable chance for persuasion.

Compare that opening to this alternative one:

> BELCOM'S OPPOSITION TO
> WORLDWIDE'S MOTION TO DISMISS OR STRIKE
>
> Belcom has fully complied with this Court's June 13, 1997 order to amend its complaint. As the order requires, Belcom's amended complaint states specific facts supporting its contention that Worldwide deceived the patent office in applying for the patent at issue, thus rendering the patent invalid. Instead of disputing those facts, Worldwide now seeks drastic relief — asking this Court to dismiss or strike Belcom's invalidity claim. Worldwide's motion should be denied. [80 words]

This beginning is better, both in substance and in style, because it:

- Doesn't repeat Worldwide's contention that Belcom has violated a court order.
- Notes the limited scope of the order and argues that Belcom has complied with it.
- States Belcom's contention that Worldwide deceived the patent office (suggesting that Worldwide has a strong incentive to get this claim dismissed).
- Explains why Belcom opposes the motion.
- Points out the drastic nature of the relief sought.
- Is shorter and easier to read.
- Doesn't merely parrot the title.
- Eliminates legalese — including "Now Comes" and "Said Court."
- Abandons the formulaic practice of defining short forms for papers and names. (In a response to a single motion in a two-party case, no one will be confused by references to "this motion," "Belcom," and "Worldwide.")
- Changes all-capital text to small caps (for the title) and ordinary text (for the rest), thus making the paper more readable.
- Gets rid of underlining, which takes up valuable white space and makes prose ugly and unreadable.

Most litigators can rattle off a hence-the-title opening for any paper, even before they have an inkling of their position. That fact alone reveals that such an opening can't possibly advance a client's cause. And common sense isn't the only reason to swear off the hence-the-title principle and other forms of legalese: most judges prefer plain language.[4]

By replacing formulaic openers with forceful arguments, lawyers can capture the judge's attention, enhance their credibility, and show from the outset why their client should win.

— Beverly Ray Burlingame
Dallas, Texas

1. JEFFREY MCQUAIN, POWER LANGUAGE: GETTING THE MOST OUT OF YOUR WORDS 109 (1996).
2. Nathan L. Hecht, Supreme Court of Texas (as quoted in Bryan A. Garner, *Judges on Effective Writing: The Importance of Plain Language*, 73 MICH. B.J. 326, 326 (1994)).
3. BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS § 73, at 2 (1998).
4. *See State Bar Committee Attacks Legaldegook*, 54 TEX. B.J. 921, 932 (1991).

The Route to Clear Jury Instructions

The suggestions below are for writing jury instructions — for getting the words down in plain language. They do not involve possible reforms in procedure, such as giving preliminary instructions before trial, giving final instructions before closing arguments, using visual aids during instructions, and giving jurors copies of the instructions.[1] Whatever the reforms, the instructions still need to be clear.

1. Each state should, by committee, create a set of standard (pattern) civil and criminal instructions that are written in plain language. Each federal circuit should create a set of plain criminal instructions. In most jurisdictions, this means that the current pattern instructions will have to be revised.

2. The starting point should be a set of fairly generic pattern instructions prepared by a national group — like the Federal Judicial Center's *Pattern Criminal Jury Instructions* (1998). Or the committee could consult a highly regarded set of instructions from another jurisdiction.

3. Above all, the reporter for each committee should be chosen primarily for having a background in communication and plain writing, not for having knowledge of substantive law. At a minimum, a writing expert should be engaged to work with a substantive expert.

4. The writing expert should be familiar with the main body of literature on clear instructions.[2]

5. Each committee member should get a copy of Appendix A to the Federal Judicial Center's *Pattern Criminal Jury Instructions*, which summarizes some important guidelines for improving instructions.

6. The committee members must agree that comprehensibility is equally as important as accuracy. This may require a new attitude among some members.

7. Along the same lines, the committee must be willing to translate opinions and statutes into plain language, instead of slavishly using their exact language.

8. The committee should include lay members.

9. The committee should spot-test its work on members of the public. Even informal testing is better than no testing. The testing should have a target goal — say 70–75% comprehension overall.

10. Instructions shouldn't be drafted or revised by the whole committee, except for minor changes. If a draft instruction is unsatisfactory, the writing expert should revise it.

11. The committee should be willing to innovate. For instance, it should:

- Use contractions.
- Use concrete examples to illustrate how the law applies.
- Use controlled repetition. ("In other words . . . ." "This means that . . . .")
- Use signposting and summarizing techniques. ("Now I want to explain to you about . . . ." "What all this means is that . . . ." "So, to summarize, you must decide whether . . . ." "Let me remind you that . . . .")
- Include charts or other graphics that might be given to the jury.
- Encourage the instructing judge to use language that is case-specific. ("As I explained to you earlier, the defendant, _____, is on trial here because the government has charged that [brief description of the crime]." "During the trial, you've heard the testimony of _____, who is described to us as an expert in _____.")

12. National groups — such as the Federal Judicial Center, the National Center for State Courts, and the American Judicature Society — should conduct studies on the effectiveness of new techniques, or should help to publicize the work of independent researchers.

These efforts will take time and money. But we know two things for sure after 20 years of research: jurors do not understand old-style instructions, and the instructions can be made much clearer through plain-language principles. We are duty-bound to make the effort. Jury instructions are worth it.

— Joseph Kimble
Lansing, Michigan

1. *See generally* NATIONAL CENTER FOR STATE COURTS, JURY TRIAL INNOVATIONS 151-53, 161-82 (G. Thomas Munsterman et al. eds., 1997) (suggesting ways to improve the process of delivering instructions to the jury).

2. *See, e.g.*, AMIRAM ELWORK ET AL., MAKING JURY INSTRUCTIONS UNDERSTANDABLE (1982); FEDERAL JUDICIAL CENTER, PATTERN CRIMINAL JURY INSTRUCTIONS (1988); Robert P. Charrow & Veda R. Charrow, *Making Legal Language Understandable: A Psycholinguistic Study of Jury Instructions*, 79 COLUM. L. REV. 1306 (1979); Shari Seidman Diamond & Judith N. Levy, *Improving Decisions on Death by Revising and Testing Jury Instructions*, 79 JUDICATURE 224 (1996); Symposium, *Making Jury Instructions Comprehensible*, 8 U. BRIDGEPORT L. REV. 279 (1987).

Anything You Say, Officer

If you own a television set, you know the *Miranda* warnings. Indeed, one court has already recognized this axiom and coined a term for it: "Mirandized-by-TV."[1]

But have you ever listened closely to the *Miranda* warnings as they're read on television? (If you've had them read to you in real life, you were probably too flustered to listen closely.) Chances are that the police officer said something like this: "You have the right to remain silent. Anything you say can and will be used against you in a court of law. . . ."

Let's stop right there. What does that second sentence mean? Literally, it means that your statement not only *can* be used against you in court, but also *will* be used against you in court. But this can't be right. What if John Doe, while being interrogated, says, "I didn't kill her — I was out of town on the night of the murder." Will that statement definitely be used against him in court? Of course not. If it's true, it can't be used against him. Or he might not even be prosecuted. The phrase *can and will*, then, is simply inaccurate.

So where does this phrase come from? It's found in the *Miranda* opinion itself. In fact, Chief Justice Warren's majority opinion sets out this part of the self-incrimination warning in three different ways:

- "Prior to any questioning, the person must be warned that he has a right to remain silent, that any statement he does make *may* be used as evidence against him . . . ."[2]
- "The warning of the right to remain silent must be accompanied by the explanation that anything said *can and will* be used against the individual in court."[3]
- "He must be warned prior to any questioning that he has the right to remain silent, that anything he says *can* be used against him in a court of law . . . ."[4]

Of these variations, the first is the most logical. Unfortunately, police officers — whether in the NYPD or on *NYPD Blue* — have latched onto the second, probably because the *can and will* language is mass-produced on "*Miranda* cards," the crib sheets that officers carry and read from when they make arrests.[5]

What difference does all this make? Legally speaking, not much. The Supreme Court has noted elsewhere that *Miranda* warnings need not be "given in the exact form described in that decision"[6] and that "no talismanic incantation [is] required to satisfy its strictures."[7] And other courts have consistently upheld formulations besides *can and will*, including *can* (by itself), *may*, *might*, and *could*.[8]

Still, police officers who care about language and logic should swear off *can and will*. And at the very least, Hollywood scribes should consider themselves duly warned.

— David W. Schultz
Dallas, Texas

1. *See* Commonwealth v. Crowley, 634 A.2d 826, 828 (Pa. Commw. Ct. 1993).
2. Miranda v. Arizona, 384 U.S. 436, 444 (1966) (emphasis added).
3. *Id.* at 469 (emphasis added).
4. *Id.* at 479 (emphasis added).
5. *See* Paul G. Cassell & Bret S. Hayman, *Police Interrogation in the 1990s*, 43 UCLA L. REV. 839, 888 (1996) (reprinting a *Miranda* card).
6. Duckworth v. Eagan, 492 U.S. 195, 202 (1989).
7. California v. Prysock, 453 U.S. 355, 359 (1981).
8. *See* WAYNE R. LAFAVE & JEROLD H. ISRAEL, CRIMINAL PROCEDURE § 6.8(a), at 333 (2d ed. 1992).

More Dictionary Reprints

In our last volume, we noted 11 historical law dictionaries reprinted by Fred B. Rothman & Co. and the Lawbook Exchange. This is an important service to law libraries everywhere. This note supplements the list with still more reprints of valuable lexicographic sources.

Fred B. Rothman & Co.
(Littleton, Colo.)

- W.J. Byrne, *A Dictionary of English Law* (1923) (reprinted 1991).
- J.W. Jones, *A Translation of All the Greek, Latin, Italian, and French Quotations Which Occur in Blackstone's Commentaries* (1823) (reprinted 1993).
- Stewart Rapalje & Robert L. Lawrence, *A Dictionary of American and English Law*, 2 vols. (1883) (reprinted 1997).
- Frederic Jesup Stimson, *A Concise Law Dictionary* (Harvey Cortlandt Voorhees ed., 1911) (reprinted 1987).

Lawbook Exchange
(Union, N.J.)

- William C. Anderson, *A Dictionary of Law* (1889) (reprinted 1996).
- Thomas Tayler, *The Law Glossary* (1856) (reprinted 1995).

William S. Hein & Co.
(Buffalo, N.Y.)

- John Bouvier, *Law Dictionary and Concise Encyclopedia*, 3 vols. (Francis Rawle ed., 3d ed. 1914) (reprinted 1984).

— Bryan A. Garner
Dallas, Texas