Appellate Defenders, Inc.

Going in Style

Arthur Martin

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GOING IN STYLE (#1): On Citations

Appearance matters. No appellate attorney would attend oral argument wearing gym clothes. Even though we expect our cases to be judged on their merits, we know an unprofessional appearance can damage our credibility, which can lessen the impact of our arguments. The same principle applies to the briefs we file with the court.

In this occasional series, we will review elements of style in California appellate briefing. Many of the topics will not be guided by specific rules, but are left to the preference of practitioners. ADI's goal is not to ensure every brief filed in the Fourth District looks the same, but to ensure appellate practitioners know what is required, are aware of their discretionary choices, and make those choices with the goal of a consistent, professional presentation most likely to advance the interests of their clients.

In legal writing, unlike some other venues, the point of style is not to stand out or demonstrate a unique personality, but to make a brief easy to read and avoid distractions while hopefully being engaging and persuasive. Aesthetics matter to the extent they move toward these goals, and also demonstrate professionalism. What a brief looks like can make a difference in how it is perceived. A lack of consistency suggests an inattention to detail that can make the reader less trusting of the arguments.

We'll start with citations. According to California Rules of Court, rule 1.200, citations to cases and other authorities "must be in the style established by either the *California Style Manual* [*sic*] or *The Bluebook: A Uniform System of Citation* [*sic*], at the option of the party filing the document." (Notably, rule 1.200 italicizes the titles of the two manuals, although the Style Manual, which the rules are supposed to follow, calls for book titles to be non-italicized. (Cal. Style Manual (4th ed. 2000) §§ 3:10, 3:13, pp. 103, 105.) Everyone makes mistakes once in a while!)

Every appellate practitioner in California should have a copy of the California Style Manual (4th ed. 2000), the "yellow book," which is subtitled A Handbook of Legal Style for California Courts and Lawyers. The Fourth Edition was

published in 2000 by the California Supreme Court, written by Edward Jessen, then the official Reporter of Decisions for the Supreme Court and Courts of Appeal. So while citations are not required to adhere to the principles in the California Style Manual, its provenance in the Supreme Court should make it the default for briefs filed in California appellate courts.

Case Citations

We see a lot of briefs at ADI, and almost every one follows the California Style Manual when it comes to basic case citations, for example: *People v. Prettyman* (1996) 14 Cal.4th 248, 266; *People v. Dawson* (1997) 60 Cal.App.4th 534, 544.

This form contrasts with the Bluebook style, which prefers underlining in legal documents, puts the year at the end, and includes spaces in the name of the specific reporter: People v. Prettyman, 14 Cal. 4th 148, 266 (1996); People v. Dawson, 60 Cal. App. 4th 534, 544 (1997).

Even though either style is acceptable under the rules, there seems to be no good reason to use the Bluebook form. It looks antiquated and a bit flabby with the extra spaces. More importantly, California courts don't use Bluebook style in their opinions, so it will likely stick out in a way that is more discordant and distracting than stylish.

One issue that often comes up in citations in the California style is the appearance of superscripts, as in the "th" in 14 Cal.4th 248. Superscripting in a case citation is incorrect, as looking at published cases and the Style Manual demonstrates. Many word processors default to superscript – 1st, 2nd, 3rd, etc. The issue does not come up when we cite to Cal.2d or Cal.3d, but does with 4th and 5th. The solution is to turn off automatic superscripting in your word processor's auto-correct options. (Or alternatively, one can type "14 Cal.4h 248" and then go back and add the "t.")

One never needs superscript in a brief, except for footnote numbers, including in a date, such as July 25th. (See Cal. Style Manual, *supra*, § 4:29, p. 142.) Superscripts are tiny and relatively hard to read – they are basically good for

nothing but footnotes. If there ever is another specific need to use them (for example, in the name of a business), one can apply superscript formatting to specific text. But generally, superscript should not be used and never in the names of case reporters. So find your auto-correct options and turn them off if you haven't already! (Turning off automatic superscripts should not affect the format of footnote numbers.)

The Style Manual's rules for subsequent citations – *supra*, *id*., and *ibid*. – are relatively straightforward. (§ 1.2.)

When using *supra* for subsequent citations to a case, one can even use strategic inconsistency. Either of the following, including or omitting the opinion's inception page, is acceptable under the rules: *People v. Prettyman*, *supra*, 14 Cal.4th 248, 288, or *People v. Prettyman*, *supra*, 14 Cal.4th at page 288. Abbreviate "page" as "p." if citation is in parentheses. (Cal. Style Manual, *supra*, § 1:2[B], p. 7.)

The Style Manual notes with apparent approval that "[s]ome authors prefer mixing the 'at page' and inception/point page styles within a lengthy document to periodically provide the inception page throughout." (Cal. Style Manual, *supra*, § 1:2[B], p. 7.) That is a convenience to readers, who are not required to scroll through a number of preceding pages to find the inception page.

Within the same paragraph one can also omit *supra* and cite to a shortened case name, e.g.: *Prettyman*, at page 269. (Cal. Style Manual, *supra*, § 1:2[C], p. 7.)

We do see some misuse of *id*. and *ibid*. These signals are properly used to refer only to an *immediately preceding* case or publication that has already been mentioned *in the same paragraph*. (Cal. Style Manual, *supra*, §§ 1:2[C], p. 7, 3:1[D], p. 92.) In other words, one is not supposed to "*id*." to the last case in the previous paragraph even if there is no intervening authority. Instead, the first time a previously cited case is mentioned in a paragraph it should be in *supra* form, even if it was just cited in the previous paragraph.

One should be careful not to use *id.* and *ibid.* if there are intervening citations or if the previous citation was a string citation with two or more cases. Although one would assume the reference is the last case in the string, the clarity of a *supra* cite will keep the reader from wondering.

Record citations

We cite the record – the Clerk's Transcript and the Reporter's Transcript – in almost every appellate brief. The 4th edition of the California Style Manual does not address citations to the record on appeal and the other main way to look for style guidance, looking at court opinions, doesn't work because opinions don't generally cite to the record on appeal. So this is an area where appellate practitioners have choices to make, with the key being simplicity of use for the reader and consistency. Here are two common forms: 4 R.T. p. 643 and 4RT 643.

Although our audience of research attorneys and appellate justices make it not necessary, it can make authorial sense for the first cite to spell out "Reporter's [or "Clerk's"] Transcript." Thus: 4 Reporter's Transcript [R.T.] p. 643. Another approach is to use a footnote to spell out record abbreviations the first time they appear. These footnotes can then serve as an easy-to-find "key" to the various volume abbreviations.

With a multi-volume record, including the volume number is important, and required by California Rules of Court, rule 8.204(a)(1)(C). Remember that ease of use for the reader is key. If she has to look at two or more volumes to find which one contains the page cited to, the writer has made the reader's life harder for no good reason.

Ease of use for the reader is also why string cites to the record at the end of a paragraph are not good practice. (See, e.g., *Nazari v. Ayrapetyan* (2009) 171 Cal.App.4th 690, 694, fn. 1.) String cites force a reader who wants to see a specific point in the record to search through multiple pages. Avoid making the reader wonder if it would be difficult to go to the record to verify the point you are making. Build trust with accurate, specific citations to the record. This does not mean a good sentence in a Statement of Facts might not cite to

multiple pages in the record. But that is different from citing multiple pages in the record to support multiple sentences. Unless the previous sentence(s) in a brief are relying on exactly the same page or two, each sentence should have a record cite, even if the cites are repetitive. That shows the reader that the writer is being both meticulous and respectful of his attention.

Finally, is it appropriate to use *id*. and *ibid*. as a citation to the record if the citation is identical to the previous? There is apparently no clear answer to this, but the principle of making things easy on the reader suggests they should *not* be used for record citations. *Id*. and *ibid*. are intended to shorten citations, and record citations are already relatively short. "*Id*. at p. 317" is actually longer than "2RT 317." Using the actual record citation keeps the reader's eyes moving through your text, rather than back and forth on the page to see what *id*. or *ibid*. is referring to. Plus, the fact that most briefs do not use *id*. and *ibid*. for record citations means when they do appear, it stands out in a possibly distracting way.

Citing other authorities

The Style Manual has citation forms for too many types of authority to go through here, but it is always good to check when citing materials like treatises, books, newspapers, etc.

Citations to websites should include the title of the page, the Internet address, and the date the site was viewed. (See Cal. Style Manual, *supra*, § 3:15, p. 109.) Here is an example from an appellate opinion in a civil case:

> At the same time, by giving effect to such provisions courts will be empowering licensors to sell licensees a pig in a poke, a phrase dating back to an apparently widespread medieval confidence trick. (See Brewer, Dictionary of Phrase and Fable (1898) <http://www.bartleby.com/81/13246.html> [as of Aug. 12, 2009]; Wikipedia, The Free Encyclopedia <http://en.wikipedia.org/wiki/Pig-in-a-poke> [as of Aug. 12, 2009].)

One thing to note is that web or email addresses should not be hyphenated or otherwise broken up. Although it can produce an uneven look, the best practice is to copy and paste the exact website address into the brief. That way a reader can copy and paste from the brief into a web browser and go straight to the cited page.

Conclusion

Making citations in a consistent, approved style is a basic building block of a professional appellate brief. In most situations, following the California Style Manual is the key.

If you have comments, questions, or suggestions about citations or other aspects of style in appellate briefs for California courts, email Art Martin at abm@adi-sandiego.com.

GOING IN STYLE (#2): ON TYPOGRAPHY, PART 1

The first column in this series addressed citations in appellate briefs. Since citation forms are mostly covered by guidelines in the California Style Manual (4th ed. 2000), that topic was relatively straightforward.

Now, for the next two issues, we head into the less-charted territory of typography, "the visual component of the written word," as defined in Matthew Butterick's Typography for Lawyers: Essential Tools for Polished & Persuasive Documents (2nd ed. 2015) page 20. The bottom line is that typographic decisions matter and appellate attorneys should recognize and make typographic decisions based on readability, not habit or even tradition.

Matthew Butterick is a typographer-turned-lawyer whose expert opinions have influenced the Formatting Guidelines of the Second District Court of Appeal. His book provides a window into the "visual components of the written word," specifically type composition, text formatting, and (to be addressed in a subsequent column) page layout. As one might expect, Butterick has an argument for why we should care about typography, which I will cite (Butterick, *supra*, at pp. 23–28) and restate: the heart of our work as appellate attorneys is making points and arguments in writing – communication in written form. The visual component of a text is part of communication in written form. What a text looks like can make reading easier or harder, can help or hinder the goal of getting our points and arguments across in a persuasive way. (See also Ruth Anne Robbins, *Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents* (2004) 2 J. Assoc. of Legal Writing Directors 108, 111–113 ["Visual effects . . . are as critical an element of persuasion as proper grammar and adherence to the rules of court and citation form"].)

Which is not say there is one way to which we all must adhere in typographic matters. Butterick provides a lot of emphatic 'should dos,' and Robbins frames her advice as "grounded in science," but if there are no court rules on point, the decisions are ultimately up to the individual writer. The point here is to encourage awareness of the decisions to be made and provide some context for making informed decisions, keeping in mind the basic principle that "[t]ypography is *for the benefit of the reader*, not the writer." (Butterick, *supra*, at p. 21 [italics in original].)

TYPE COMPOSITION

"Type composition" concerns what you can put on the page with the keyboard. (Butterick, *supra*, at p. 37.) Butterick discusses many specific points under this heading. We'll look at four.

• Quotation marks

I tend to be skeptical of experts telling me how I should do things, but reading Typography for Lawyers has led me to reconsider a couple of long-time practices. For instance, I have always preferred straight quotation marks to curly or "smart" quotes. Straight quotes seem admirably utilitarian while curly ones strike me as unnecessarily fancy. I also don't like handing over control to decide which marks go where to the word processing program. As it happens, this is the very first topic of Butterick's chapter on Type Composition and it contains one of his more emphatic 'shoulds': "*Curly quotes* are the quotation marks used in good typography. . . . [S]traight quotes should never, ever appear in your documents." (Butterick, *supra*, at pp. 38–39 [italics in original].) Butterick says "curly quotes are more legible on the page and match other characters better" and, given the easy use of curly quotes in word processing programs, "straight quotes are one of the most grievous and inept typographic errors." (*Id*. at p. 39.) Yikes. I have switched to curly quotes. I still don't like them, but if they make

reading easier and straight quotes can be considered grievously inept, I can't justify sticking with a mere preference.[1]

Note that inch and foot marks (as in 5'10") should look like straight quotes. If you use WordPerfect, the program automatically makes an apostrophe or quote mark typed after a number into the proper straight form for feet or inches. In Word or LibreOffice (a free, open-source Word equivalent), one can type an apostrophe or quote mark, which appears curly, then Ctrl-z (the "undo" command), and the curly mark will change into the inch or foot symbol.

• Emphasis

Butterick is a hard "no" on underlining: "It's ugly and it makes text harder to read." (Butterick, *supra*, at p. 74.) Use bold or italic for emphasis, but not too much and not together. (*Id*. at p. 81.) Psychological research on legibility suggests **bold** text is the most effective way to create emphasis. (*Robbins*, *supra*, at p. 119.)

• Hyphens and dashes

Butterick helpfully clarifies the distinctions between hyphens, en-dashes, and em-dashes. (Butterick, *supra*, at pp. 46–47.) A hyphen — located on the key to the right of the zero — is punctuation for a word split onto the next line, some multipart words, and phrasal adjectives when required for clarity (e.g., 'five-dollar bills' versus 'five dollar bills'). En-dashes, a bit longer than hyphens, are for a range of values (e.g., 100–114) or a connection between words (California–Oregon border). Em-dashes are about twice long as en-dashes; they are "used to make a break between parts of a sentence . . . when a comma is too

[1] To switch between smart and straight quotes in Word Perfect, click on the Tools menu, select QuickCorrect, and then check or uncheck the boxes under the SmartQuotes tab.
In Word, access the straight or smart quote option by clicking File, Options, Proofing, AutoCorrect Options, and then the AutoFormat As You Type tab.

weak, but a colon, semicolon, or pair of parentheses is too strong." (Butterick, *supra*, at p. 47.) Em-dashes can have spaces before and after or not. (*Ibid*.)

Typing en- and em-dashes is easy in WordPerfect — two consecutive hyphens creates an en-dash, three an em-dash. This works whether you have spaces before and after or not. There is a bit less control in Word. Two hyphens without a space before and after creates an em-dash; two hyphens with spaces before and after creates an en-dash. Thus, in Word, if you want no spaces around an en-dash (e.g. for a number range) or spaces around an em-dash, you have to back up and add or remove spaces.

● Sentence spacing

Here's Butterick on the most tribal type composition issue: "**Always put exactly one space between sentences.** Or more generally: put exactly one space after any punctuation." (Butterick, *supra*, at p. 41 [bold in original].) As to the many dissenters in the legal profession, Butterick asserts expert authority on this point: "[O]ne space is the well-settled custom of professional typographers. You don't need to like it. You only need to accept it." (*Ibid*.) You don't, of course, as Butterick acknowledges: "If you'd rather rely on personal taste, I can't stop you. But personal taste doesn't repeal the rule. . . . [and] readers won't detect the difference between a principled departure from convention and willful ignorance." (*Id*. at p. 43.)

The experts explain that two spaces made sense in the typewriter days when every letter took up the same space ("monospace" type). That gave words a spread-out look that two spaces between sentences balanced. (See Robbins, *supra*, at p. 129.) With the "proportional space" fonts we use these days, words aren't spread out so the extra space is superfluous, disrupts the balance of white space, and can create distracting rivers of white space down a page. (Butterick, *supra*, at p.

41.) Butterick's mantra is look at a book or magazine or newspaper. If they aren't using two spaces, why are attorneys? A counterargument might note that an appellate brief is none of those things. Notably, the California Courts of Appeal and Supreme Court continue to use two spaces between sentences in their slip opinions, although the official reporters (remember those?) use just one.

At this point, notwithstanding the typographic experts, whether one uses one or two spaces after a sentence remains a personal preference. Personally, I think one space looks better. My suggestion is to consider both and use what you think looks better (as opposed to continuing to do what you've always done based on what someone told you should be done and is now an embodied habit built into your fingers [typographically, that's not a good enough reason!]).

TEXT FORMATTING

Text formatting involves "the appearance of characters and text." (Butterick, *supra*, at p. 15.) This includes fonts, about which Butterick, a font designer, has much to say, as well as other topics for brief writers to consider.

• All capital text

For instance, Butterick discourages the use of all capital text except for headers shorter than one line (e.g., TABLE OF AUTHORITIES). (Butterick, *supra*, at pp. 82–83.) According to the experts, using all caps for longer text, such as argument headings, is counterproductive. While presumably intended to emphasize importance, the lack of visual variation in all caps text leads readers to skim rather than absorb the communication. (*Id*. at p. 83.) Robbins, *supra*, at page 115, cites readability studies and makes the same point in a subsection she titles, "Stop screaming at me in rectangles: Why all capital letters just don't work."

● Title case/initial capitals

In his section on headings, Butterick makes another assertion that could be controversial among appellate attorneys: "Always Avoid Title Case, Because Your Headings Aren't Titles." (Butterick, *supra*, at p. 91.) Title case is the same as initial capitals, with a capital for the first letter of every major word. Bryan Garner also recommends against initial caps/title case. (Bryan Garner, The Winning Brief (2nd ed. 2015) p. 318–323). Title case takes a reader's eyes up and down in a way that can detract from comprehension. Butterick suggests highlighting headings by using bold text and/or a slightly larger font size. (Butterick, *supra*, at p. 91.)

● Mixing fonts

For more contrast, Butterick and Robbins both endorse the option of using of a wholly different font for headings. (Butterick, *supra*, at pp. 109–110; Robbins, *supra*, at pp. 127–128.) Robbins recommends a serif font for the body of the text and a sans serif font for headings, as in this article. (Robbins, *supra*, at pp. 127–128.) Butterick is okay with mixing serif fonts, but discourages the use of more than two in any case. (Butterick, *supra*, at pp. 109–110.) Butterick notes that "[m]ixing fonts is like mixing patterned shirts and ties . . . . Some people have a knack for it; some don't." (*Id.* at p. 109.) I prefer not to be typographically experimental in my briefs and will continue to use just one font, Century Schoolbook, all the way through. But I have stopped using all caps for my argument headings and switched to one-point larger, bold sentence case (with only the first word and proper nouns capitalized).

● Font size

Butterick and Robbins both tell us 10 to 12 point fonts are the easiest to read. (Butterick, *supra*, at p. 86; Robbins, *supra*, at pp. 121–122.) California Rules of Court, rule 8.204(b)(4), says "the font size [used in

an appellate brief], including footnotes, must not be smaller than 13-point." (The Rules erroneously use an en-dash rather than a hyphen in "13-point" — everybody makes mistakes!) But different fonts look different at different sizes:

> Compare this sentence typed in different sizes of Times New Roman and Century Schoolbook. (12-point Times New Roman.)
>
> Compare this sentence typed in different sizes of Times New Roman and Century Schoolbook. (12-point Century Schoolbook.)
>
> Compare this sentence typed in different sizes of Times New Roman and Century Schoolbook. (13-point Times New Roman.)
>
> Compare this sentence typed in different sizes of Times New Roman and Century Schoolbook. (13-point Century Schoolbook.)

To me, 13-point Century Schoolbook looks elementary school big, although it is acceptable within the rules. 12-point Century Schoolbook and 13-point Times New Roman are close enough in size that my use of the former has yet to be deemed in violation of rule 8.204(b)(4).

● Font selection

When it comes to font selection, font designer Butterick predictably has some strong opinions. His main advice is to eschew the "system fonts" that are built into word processing programs and pay for professionally designed fonts, although he grants that some system fonts are "generally tolerable." (Butterick, *supra*, at pp. 78–79, 113–115.) On the other hand, he dislikes Arial more than Comic Sans. Arial, he writes, "is merely a bland, zero-calorie Helvetica substitute." (*Id*. at p. 80.) Butterick is also critical of Times New Roman, which he sees as "not a font choice so much as the absence of a font choice, like the blackness of space is not a color. To look at Times New Roman is to gaze into the void." (*Id*. at p. 119.) From Butterick's typographer perspective, "the main issue" with Arial and Times New Roman is overuse, which makes them "permanently associated with the work of

people who will never care about typography." (*Id*. at p. 80.) Notably, the Second District Court of Appeal's Formatting Guidelines (not rules) state, "Do not use Times New Roman." Among the system fonts Butterick finds tolerable are, for sans serif, Franklin Gothic and Helvetica, and, with serifs, Century Schoolbook and Garamond. (See the complete list at Butterick, *supra*, p. 79.)

Under California Rules of Court, rule 8.204(b)(2) and (3), "any conventional font may be used . . . . The font style must be roman." "Roman" style just means the basic font is upright as opposed to angled. All the conventional fonts are roman, so the brief writer has to make a choice. Typography for Lawyers has several pages of font examples and commentary. (Butterick, *supra*, at pp. 116–128.) Ultimately, Butterick writes, "We can — and should — use pragmatic considerations to narrow down the space of possibilities. But when it's time to choose from among those possibilities, there's some art, humanity, and expressiveness to it. Just as no one can tell you the best opening sentence for your brief, no one can tell you the best font for that brief either." (*Id*. at p. 111.) If you have not already made an explicit choice of font, I suggest saving an old brief as a test file, "selecting all" (Ctrl-a), and then trying a few different fonts to see what you like best. Asking others what they think can be helpful too. My only recommendation is to avoid using something so unusual or stylized that the reader is compelled to ponder the choice of font rather than the points being made.

CONCLUSION

No one expects appellate attorneys to be typography experts, or to incorporate every bit of typography expert opinion. But hopefully you are convinced that (1) how your briefs look matters, and (2) with a bit of awareness, it's not too hard to make them look typographically sophisticated. Next time we will review some principles of page layout,

how text looks on the page. (If you have thoughts to share on typography or other elements of style in brief writing, send an email to abm@adi-sandiego.com.)

GOING IN STYLE (#3): ON TYPOGRAPHY, PART 2

Typography is "the visual component of the written word." (Matthew Butterick, Typography for Lawyers: Essential Tools for Polished & Persuasive Documents (2nd ed. 2015) p. 20.) As discussed in the previous issue of this series, typography is a subtle but significant aspect of every brief we file, with the capacity to improve persuasiveness by making reading easier and demonstrating professionalism through attention to detail. While there are few hard rules in brief typography, there are many areas that call for practitioners' consideration and consistency. The previous issue addressed two aspects of typography — type composition and text formatting. Here we will take up a third — page layout.

PAGE LAYOUT

Page layout is the way text looks on the page, including the amount of white space. The California Rules of Court impose a single page layout requirement: rule 8.204(b)(6)[1] requires margins of 1.5" on left and right sides, 1" top and bottom. Other than that, brief writers have decisions to make.

• Line spacing

Line spacing, the vertical distance between lines of text, must be a minimum 1.5 lines. (Rule 8.204(b)(5).) Although experts generally say something slightly less than 1.5-spaced lines is best for reading, it depends on how long the lines are. (See Ruth Anne Robbins, *Painting with print: Incorporating concepts of typographic and layout design into the text of legal writing documents* (2004) 2 J. Assoc. of Legal Writing Directors 108, 123–124.) In an appellate brief with 1.5" margins on an 8.5 x 11" page,1.5-spaced lines, which is what the

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1 Citations to rules refer to the California Rules of Court.

Attorney General's office uses, can feel a little crowded. For now, I am sticking with double-spacing in briefs, which remains standard. (This document follows Butterick's recommendation to use "proportional line spacing" set between 120 and 145 percent, 140 percent in this case. [See Butterick, *supra*, at pp. 137–138.][2])

Even with double-spacing, some briefs have a "crowded" look with no space between major sections. This may have originated with the Attorney General's respondent briefing, but it's not the best typographic practice. (See, e.g., Butterick, *supra*, at p. 156.) Adding some breathing space — a line or two or a page break between sections of a brief — makes reading feel less oppressive, more like a thoughtful walk than a crowded race to the end. Butterick compares white space between sections to a dramatic pause in speech: "You draw a listener's attention through contrast." (*Ibid.*) If a sub-heading is within a few lines of the bottom of a page, consider using a hard page break (Ctrl-Enter) to move it to the top of the next page. I do the same with an argument heading if it would be more than half-way down the page.

Sometimes page numbers in footers can be uncomfortably close to the last line of text on the page. You can create some space by adding another line to the footer: put the cursor before the page number and press the Enter key. (You might have to do this on page 1 to ensure it happens all the way through the document, or page 2 if you "suppress" the page number on the cover, which must *be* page 1, under Rule 8.204(b)(7), but does not have to bear the page number.)

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2 Proportional line spacing is easy in LibreOffice, the free open source program used to prepare this document. But, as Butterick notes, it is complicated in Word and WordPerfect, requiring translating proportions into inches. (Butterick, *supra*, at pp. 138-139.)

• **Paragraphs**

Paragraphs are distinguished either by a space above, as in this document, or, as is typical of an appellate brief, a new line and a first-line indent. Unless one is using single-spacing between lines, use of both is redundant.

Butterick encourages using paragraph formatting to get a properly-sized first-line indent and does not approve of the use of a tab. (Butterick, *supra*, at p. 135.) Garner seems okay with a tab indent as long at it's not "the puzzlingly common double-indent." (Bryan Garner, The Winning Brief (2nd ed. 2015) p. 316.) A tab continues to look fine to me, and it's easy, so that's what I do in my briefs.

• **Justification**

Another choice a brief writer has to make is whether blocks of text are "left-aligned" or "fully-justified." In justified text, both left and right edges of a paragraph are aligned. Most books are justified; many newspapers and magazines use a mix of justified and left-aligned. (Butterick, *supra*, at p. 134.) Robbins reports that experts say left-aligned is easier to read "because there is no adjustment needed to word spacing and because 'the resulting "ragged" right margin adds variety and interest to the page without interfering with legibility.'" (Robbins, *supra*, at p. 130.) Justification can create odd, distracting spacing between words, and the uniformity on the right edge makes it a bit harder to move one's eyes to the next line.

Butterick says the choice of left-aligned or justified paragraphs is a matter of personal preference. (Butterick, *supra*, at p. 134.) He prefers left-aligned text for work produced on word processors because their simplified versions of the mathematical process required for

justification do not consistently produce good-looking results — "[l]eft aligning is more reliable." (*Ibid*.) Slip opinions in California courts use left-aligned text. If you prefer to justify, use your program's hyphenation feature, and check your paragraphs for too much white space and words that look too close together. If you prefer not to think too much about it, use left-aligned. It almost always looks fine.

- **Centered text**

Centered text should mostly be limited to major section headings (e.g., "Statement of Facts"). If centered text is more than one line, use a hard return (Enter key) to create balance. Compare these two centered texts:

Appeal from the Superior Court of California for the County of San Bernardino

Appeal from the Superior Court of California
for the County of San Bernardino

To me, the second one reads better and looks more professional; the first one seems 'unconsidered.' In this case, consideration is awareness of the ability to make it look better and then making a line break at a good spot. (And for perfect centering, delete any blank spaces at the beginning and end of every line.)

- **Argument organization**

How to organize arguments on the page is another area of authorial discretion, calling for consideration and consistency. Most of us still use some version of the standard outline structure:

I.

A.

1.

a.

Butterick recommends using no more than two indentations, no matter the number of heading levels. (Butterick, *supra*, at p. 91.) Garner advocates no indenting at all, with the headings for all levels of the outline placed flush left. (Garner, *supra* at pp. 309–310.)

Butterick proposes an alternative to the standard outline form from technical writing: tiered numbers.

1. Primary heading
    1.1 Secondary heading
    1.2 Another secondary heading
        1.2.1 Tertiary heading
        1.2.2 Another tertiary heading
2. Another primary heading

Butterick considers tiered numbers clearer and more navigable, making it easier for a reader to know where she is in an argument. (Butterick, *supra*, at pp. 106–107.) I have seen briefs from a few panel attorneys using tiered numbers. I will consider changing, but am not there yet.

CONCLUSION

That concludes our review of typographic principles and practices. Remember, typography is *for the reader* and making reading easier means your arguments are more likely to persuade. Every brief writer should make considered typographic choices and then apply them consistently. Butterick notes that issues of typography are best solved not logically, but visually. (Butterick, *supra*, at p. 169.) So try different options on test pages, print them, and consider their relative readability. Asking for others' reactions can be helpful as well. Once you have decided on a well-considered, readable template, you can apply it consistently and put aside typographic issues if they don't interest you. But, again, a bit of attention to typography can make a significant difference in the professional appearance of appellate briefs

and petitions. (Feel free to share thoughts by emailing abm@adi-sandiego.com.)

DOES "APPLIED LEGAL STORYTELLING" APPLY TO APPELLATE DEFENSE BRIEFS?

ART MARTIN
STAFF ATTORNEY, APPELLATE DEFENDERS

As appellate lawyers, most of us think of ourselves as writers and take pride in clear, engaging writing that, theoretically at least, leads readers to agree with the conclusions of our arguments. Being in the trenches with deadlines to meet and bills to pay, most of us don't have time to keep up with the academic work seeking to advance the "art and science" of legal writing. But academics sometimes produce insights that can add value to our work.

For instance, the modern "plain English" movement started in law schools in the 1970s and has become the norm, with impacts on the drafting of codes, regulations, and contracts, as well as appellate briefs and opinions. (See, e.g., Peter Tiersma, *The Plain English Movement*, <http://www.languageandlaw.org/PLAINENGLISH.HTM> (as of November 8, 2021).) The CALCRIM jury instructions, first produced in 2005, were the result of an "eight-year effort address[ing] a need for instructions written in plain English . . . reflect[ing] a belief that sound communication takes into account the audience to which it is addressed." (Carol Corrigan, Preface (2005), CALCRIM: Judicial Council of California, Criminal Jury Instruction (Fall 2014 ed.).) Whether consciously avoiding archaic language or just aiming at clear writing, most brief writers these days avoid legalisms like "aforesaid," "to wit," or officious use of the words "said" and "such." These words may still sound like

legal writing, but most writers recognize that if they do not add meaning or clarity, there is no good reason to use them. It seems fair to say that the basic insight of the "plain English" movement has infiltrated and improved legal writing.

This essay looks at another, more recent movement among legal writing professors called "Applied Legal Storytelling" to see if it includes insights that can improve appellate brief writing. Applied legal storytelling does seem to qualify as a "movement," at least within academia, with biennial conferences since 2007 and dozens of journal articles debating what it means and advocating ways of doing it. (See J. Christopher Rideout, *Applied Legal Storytelling: A Bibliography* (2015) 12 Legal Communication & Rhetoric: JALWD 247, 248.) One of the asserted goals of applied legal storytelling is "to help lawyers serve their clients through the use of story." (Ruth Anne Robbins, *An Introduction to This Volume and to Applied Legal Storytelling* (2008) 14 Legal Writing: J. Legal Writing Inst. 1 , 5.) The question here is whether legal storytelling can actually help appellate defenders craft more effective briefs.

THE LAW PROFESSORS' APPLIED LEGAL STORYTELLING

A story is a structure for delivering information. Advocates for legal storytelling propose that "[i]f we think of appellate briefs as stories instead of pieces of technical writing, [they would] be more interesting and therefore more persuasive[.]" (Kenneth D. Chestek, *The Plot Thickens: Appellate Brief as Story* (2008) 14 Legal Writing: J. Legal Writing Inst. 127, 131.)

According to Chestek, "the DNA of persuasion" in an appellate brief is formed by "the dual strands of rule-based reasoning and narrative-based reasoning." (Chestek, *The Plot Thickens*, *supra*, at p. 137.) Rule-based arguments *justify* the party's desired conclusion; norm-based arguments *motivate* the reader to reach that conclusion. Motivating arguments are made through "narrative reasoning" – seeking to carry readers to a preferred conclusion through something like a "story." (Kenneth D. Chestek, *Competing Stories: A Case Study of the Role of Narrative Reasoning in Judicial Decisions* (2012) 9 Legal Communication & Rhetoric: JALWD, 99, 102.) Chestek defines a story as "[a] character-based and descriptive telling of a character's efforts, over time, to overcome obstacles and achieve a goal." (*Ibid.*) "The attraction of narrative," writes Professor Steven Winter, "is that it corresponds more closely to the manner in which the human mind makes sense of experience than does the conventional, abstracted rhetoric of law." (Steven L. Winter, *The Cognitive Dimension of the Agony Between Legal Power and Narrative Meaning* (1989) 87 Mich. L. Rev. 2225, 2228.)

Christopher Rideout identifies three "psychologically persuasive properties of narrative": coherence, correspondence, and fidelity. (Christopher Rideout, *Storytelling, Narrative Rationality, and Legal Persuasion* (2008) 14 Legal Writing: J. Legal Writing Inst. 53, 55 & fn. 13.) For Rideout, narrative coherence comprises "internal consistency, how well the parts of the story fit together, and completeness, how adequate the sum total of the parts of the story seems." (*Id.* at p. 64.) Obviously, to be plausible, the parts of a "legal story" must be consistent with each other and the larger context, e.g., the record on appeal and the applicable law. (*Id.* at

p. 65.) But even an internally consistent story can be unpersuasive if it fails to address obvious or expected aspects of the case; if the story structure is incomplete, the process of narrative inference breaks down. (*Ibid.*)

Narrative correspondence concerns a story's relation to what a reader "knows about what typically happens in the world and not contradicting that knowledge." (*Rideout*, *supra*, *Storytelling*, at p. 66.) A narrative is plausible, and potentially persuasive, to the extent it bears a structural correspondence to one or more of a set of "stock stories" or scripts – standard models for human action – that readers already understand as part of "stored social knowledge." (*Id.* at pp. 67-68.) "The advocate's task is to successfully match the [legal] story to the appropriate stock story." (*Id.* at p. 69.)

The third psychologically persuasive aspect of narrative discussed by Rideout is not structural but substantive. A narrative's "fidelity" is the extent to which its components ring true with the reader's sense of reality and thereby provide good reasons for belief or action. (*Rideout*, *supra*, *Storytelling*, at pp. 69-70.) "Good reasons" are "the driving force behind narrative fidelity." (*Id.* at p. 72.) Such reasons are normative, not logical. What count as good reasons will depend on the audience, and specifically on norms "embedded in the forms of life of the community in which the storyteller and listener find themselves." (*Id.* at pp. 72-73.) The ability to construct a narrative drawing on and deploying embedded norms is crucial because "[i]n choosing between competing stories, we not only pass judgment on the competing narratives, but in that act define ourselves." (*Id.* at p. 73.) An

appellate opinion "not only offers a legal argument to support its holding, but also locates that argument within an implicit narrative framework about what kind of people we are and what kind of world we might inhabit." (*Id.* at p. 77.) Thus, from an applied legal storytelling standpoint, the general goal of an appellate defense lawyer is to craft a narrative that will lead two or three appellate justices to "define themselves" and the world we want to live in through the reversal of the result of a trial. Easy, right?[1]

LEGAL STORYTELLING IN CRIMINAL APPEALS

The goal of an appeal is the best possible result for the client. That requires getting two or three appellate court justices to agree that the case calls for a conclusion in our client's interest. Our best shot at making that happen requires writing a persuasive brief that moves readers to our preferred conclusion. Persuasive, moving briefs are *written for the reader*. So to get the best possible result for our clients, we write briefs for the people

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1 Other aspects of the applied legal storytelling paradigm seem less helpful in a criminal appeal. For instance, Ruth Anne Robbins invokes the heroic archetypes identified by Carl Jung and Joseph Campbell and asserts that "the use of the metaphoric hero's journey provides one potential and powerful option in the arsenal of lawyers' persuasive techniques." (Ruth Anne Robbins, *Harry Potter, Ruby Slippers and Merlin: Telling the Client's Story Using the Characters and Paradigm of the Archetypal Hero's Journey* (2006) 29 Seattle U. L. Rev. 767, 769.) One can delve into this in some detail in Professor Robbins's article, but picking from the 12 hero types and focusing on the hero's journey doesn't strike me as a helpful approach to criminal appeals. (If you look into it and disagree, let me know.)

reading them at the Court of Appeal. And according to the legal writing professors, the most persuasive, moving briefs employ a storytelling structure.

To some extent the standard criminal appellate brief already includes an implicit narrative structure. A basic story structure involves a plot in which one or more characters has one or more goals that must be achieved by overcoming one or more obstacles. This structure will rarely apply to just the statement of facts section in a criminal appeal, which necessarily includes the facts leading to the conviction the appeal seeks to overturn. Rather, an effective narrative structure binds the whole brief together, including the facts and the arguments: "the plot line is necessarily contained within the argument section because it is only there the conflict can reach resolution (an essential element of a satisfying story)." (Chestek, *The Plot Thickens*, *supra*, at p. 132.) In effect, the statements of the case and facts provide the *setting* of the conviction and the conviction is the problem for our client/character to overcome. The obstacles are the rulings or other errors challenged on appeal. The arguments lay down a path to get around the obstacles to a resolution – justice done. This means the basic "plot" or master narrative in a typical criminal appellate brief is something like:

> "the client had a trial and was convicted, but this conviction does not serve the ends of justice because XYZ; the reviewing court can now resolve the issue and restore justice by reversing the conviction."

Our appellate briefing often has this "stock story" built in. In Rideout's terms, this story has "correspondence" because it fits in

the regular reality of a criminal appellate defense; it's what the Court of Appeal sees all the time; the general story and its defense-friendly result is plausible (even if not, unfortunately, likely).

In writing briefs, we should always be striving for what Rideout calls "coherence" – internal consistency with the parts of the brief fitting together into a whole that lacks holes. An introduction summarizing what the case is about – the convictions and issues on appeal – can help produce this kind of coherence in a brief on a macro level. Within the brief, the statements of the case and facts provide the first part of the brief's narrative – specifically "what happened," what led (procedurally and factually) to the convictions at issue. The second part of the narrative, the argument, explains what went wrong with what happened and how the reviewing court can fix it. The arguments should be explicitly rooted in the first part of the narrative, but use the law to take the narrative to a new place where justice can be done with a reversal. According to Rideout (*Storytelling*, at pp. 65-66.), this kind of narrative 'wholeness' is part of what makes a story move people, which is generally what we are trying to do with our briefs: guide the justices through the facts and the law to a place where reversal makes sense. When the statements and arguments are treated as two parts of one narrative whole, the writer will avoid dreary repetitions of facts in the argument and the reader is more likely to stay engaged.

Rideout's third "psychologically persuasive property of narrative" is "fidelity," the extent to which a story accords with the reader's sense of reality and thereby provides good reasons for belief or

action. (*Rideout*, *supra*, *Storytelling*, at pp. 69-70.) So, again, the typical plot of the appellate brief's "stock story" is:

> (a) appellant was convicted;
> (b) that conviction is not just; and
> (c) the appellate court can now redeem justice by following appellant's arguments and reversing the conviction.

This plot involves "narrative reasoning" because it "evaluates a litigant's story against cultural narratives and the moral values and themes these narratives encode." (Linda H. Edwards, *The Convergence of Analogical and Dialectic Imaginations in Legal Discourse*, 20 Leg. Stud. Forum 7, 11, fn. 9 (1996).)

In most cases, it seems to me, appellate defenders are invoking the master narrative that we aspire to live in a just society, and more specifically the value embedded in that narrative that *only fair trials can result in just convictions*. We reasonably presume these principles are part the "form of life" shared with our readers at the Court of Appeal. The question is whether we can get them to agree with our argument about what constitutes justice and a fair trial in the case at hand. If we achieve narrative fidelity, our brief as whole will "ring true" and (theoretically) motivate our readers to find that a reversal of the conviction is what makes sense to them and constitutes justice in the world as they understand it.

One issue an appellate defender faces in crafting a narrative that will motivate an appellate court justice to reverse a conviction is how to frame the aggrieved party in whose interest the court is being encouraged to finish the story with a reversal. In the ideal

case the appellant is sympathetic enough to present as a wronged individual human being whom appellate justices will want to help as an actual individual person – that is probably the most moving, meaningful kind of story in a criminal appeal. In many cases, though, fidelity to the appellate court justices' "form of life" – making the kind of narrative sense that will motivate them to reverse a conviction – calls for framing *justice itself* as the aggrieved party; *justice itself* needs the court's narrative-concluding reversal to set the world right. Obviously, the best framework will depend on the facts of the case and client.

A real issue of identity may create the most sympathetic "individual human being" defendant in a criminal appeal. You don't want to be melodramatic in such a case, but you can set up the story so the reviewing court gets to step in and ensure a real person is not subject to a miscarriage of justice. As appellate attorneys, we usually cannot argue the client is actually innocent (which is rarely provable on appeal), but in the right cases we can keep that subtext near the surface as we emphasize the lack of certainty and holes in the evidence, point out the prosecutor's need to rely on speculation, and raise the specter of the criminal law's worst outcome – a defendant (this particular person!) being convicted for a crime s/he didn't commit. These emphases can be effective in prejudice arguments (involving, e.g., instructional or evidentiary issues), as well as those challenging the sufficiency of the evidence. In either case, the story should reveal the conviction is problematic, not good enough, and in need of a just resolution the court can provide.

Even in cases without an identity issue, some clients can evoke varying degrees of sympathy. Was the result of the trial out of sync with the individual person's culpability? Did the prosecutor overcharge the case? Was the defendant a minor player swept into a situation by association with more culpable people? These are not legal arguments, but can provide narrative context for arguments and motivate a resolution; applying the law in a way that balances the culpability of a sympathetic appellant is a good story.

Of course, in many criminal appeals, relying on sympathy for the client is not likely to be the best strategy for motivating justices on the Court of Appeal to reverse a conviction. Often a brief can be best framed as a still-incomplete story about the justice system itself, a story the reviewing court can now resolve. When a trial goes wrong, justice itself is a bereaved party. A storytelling-style brief sets up the court to "do justice" by ensuring the government is being held to the standards required by the rule of law. This story fits well within the cultural narrative that we live in a just society and the courts of appeal are there to make sure things don't go wrong. A thematic subtext of this story is: "The people of the state of California cannot be proud of this conviction, but happily the reviewing court is now in a position to restore justice."

As with sympathy for the client, how hard one pushes a "do justice" narrative should be tempered to the case and issues at hand. Not all acts in defense of justice have the same narrative intensity. If you oversell, the story can come across like a sales job and fidelity is lost.

Here is an example where a toned-down "do justice" narrative seemed appropriate: an LWOP murder case with horror movie facts, a rape special circumstance, and, based on the state of the evidence, zero room to argue prejudice. The only argument on appeal was that the sentences on separate rape and elder abuse charges had to be stayed under Penal Code section 654; that would take 22 years off the 23-year determinate term to be served prior to the LWOP. Here the story was less about a dramatic need to "ensure justice" than about the trial court's sentencing error leaving a lingering hole in the government's prosecution. By remanding the case for resentencing to stay the improperly imposed terms, the Court of Appeal was acting less to uphold fundamental principles of law than to help the trial court fix its error and close the file. The result was the same – the unauthorized consecutive terms were removed from the client's sentence – but the justices could see themselves as helping the justice system get it right rather than doing something positive for the particular defendant.

One notable quality of the storytelling framework is that it compels primary consideration of the reader. In a brief, this means bringing the reader along a narrative path to the point where s/he becomes the one who can resolve the story with a denouement that "does justice." Again, we often use this framing even if we haven't been thinking of it as "storytelling." But there are other kinds of briefs, including those taking what I call shotgun, diagnostic, and logic hammer approaches.

A shotgun brief puts everything out there hoping something will hit. Shotgun briefs typically include pages of possibly-applicable

law, repeated recitation of crucial facts, and repetitive, perfunctory prejudice arguments. The briefs get the issues before the court, but resist focused reading and typically have minimal persuasive effect. The path to reversal depends on the court sifting through the pile and writing the story of a reversed conviction itself – which definitely happens at times.

Another type of appellate brief has a "diagnostic" framing, like a doctor presenting a clinical explanation of the case's condition, diagnosis, and cure. (This may be what all arguments will be like if appellate defenders are ever replaced by artificial intelligence.) The diagnostic approach can make sense in some cases, say, with terrible facts or flagrant or minor errors the court is sure to correct – these are circumstances where the best strategy can be "get in, make the necessary points, get out." Generally, issues requiring prejudice call for more persuasion than a dry doctor's diagnosis, but you deal with the case you have.

A logic hammer argument is not even really intended to persuade, but to logically channel the court into the desired result. The issue is presented as a logical operation that necessarily flows to the desired reversal regardless of the subjective agency of readers: "here are the facts and here is the relevant law; applying the relevant law to these facts requires the conviction be reversed." Logical operations do not depend on persuasion, but the compulsion of necessary inferences. And there are issues for which a no-persuasion, logic hammer argument will definitely work, but only because any argument would work. For instance if an appellant was convicted of both a crime and a lesser included offense of that crime, say kidnapping

for carjacking and kidnapping, the lesser included offense "must" in fact be reversed. Appellant's brief does not have to persuade the court, just point out the error that occurred. So here, one can legitmately set up the argument like a logical proof that leaves the court no option but to accede to appellant's lawful demands. Or, rather than wield such a rhetorical hammer, the brief can act as a guide through the facts and law, leaving the reader at a decision-making threshold with only one possibility. Either framing will result in reversal of the lesser included offense and is a valid choice, but a "getting the law right" story framework guides the readers to the conclusion rather than pushing or dragging them there.

CONCLUSION

There seem to be some good reasons to use a storytelling framework in an appellate brief. It directs the writer's focus to the reader and the imperative to move that reader while providing some guidance for how to do that – a narrative with coherence, correspondence, and fidelity. A story framework can help keep the parts and whole of the brief coherent, the way the C-R-A-C structure (conclusion-rule-analysis-conclusion) can for arguments. (See Chestek, *The Plot Thickens*, *supra*, at pp. 162-166.) On the other hand, the academic literature does not establish that storytelling-style briefs are ultimately more successful at winning reversals than other approaches. Much of the time, it seems to me, the issue wins the case, not the briefing of the issue. (It's not rare for an opinion reversing a conviction to rely on its own reasoning rather than the specifics of the appellant's argument.) But from a writing standpoint, some framework is better than none, and one drawing on the power of

narrative to move people seems like a reasonable choice since our fundamental goal – the client's interest – requires our briefs to move people.

What do you think? Share thoughts by email to abm@adi-sandiego.com.