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The first week of every new year, I can barely find a place to stand in the exercise room at the athletic club I belong to. By Valentine's Day, you can shoot a cannon off in the room and not hit anyone. The club is practically deserted. A similar phenomenon occurred in California regarding the adoption of Bryan Garner's suggestion that appellate judges put citations in footnotes.

In October 2000, 90 of the 100 appellate and supreme court justices of California were attending their annual appellate institute when Bryan Garner lectured on judicial writing and proposed dropping citations into footnotes. Garner was persuasive and when he announced his "altar call" through a show of hands of judges that were willing to change, I, along with a clear majority of those present, indicated that we were. Yet, a year after that institute only five of us have adopted Garner's suggestion. I believe I know why.

While it has been worth doing, Garner's suggestion has been more burdensome to implement than he let on. Since it calls for improvement of a writing style that is working satisfactorily rather than correcting an erroneous way of doing things, many colleagues sympathetic to his suggestion have simply declined to make the effort. Not only has it required me to spend more time on the mechanics of my writing, it has also required me to secure the cooperation of colleagues, research attorneys, and legal assistants. The effort has been substantial.

I do not share Judge Posner's view that Garner is advocating that judges strive to write in a style that will entice lay readers to read judicial opinions. What Garner champions is a style that can be read without unnecessary distractions. This is an outcome that is useful to lawyers and lay persons alike, and especially to litigants who are profoundly affected by the opinions we write.

Litigants are interested in more than the result of a decision. They are also concerned about the underlying reasons for it. I have discussed the matter with members of the California Academy of Appellate Lawyers. Their experience has largely been that their clients carefully read judicial opinions. Civil litigants know the positions they are taking in their appeal and read the opinion to confirm that the court has understood and addressed their position. Business and institutional litigants carefully read the opinion to gauge whether to change similar practices. Criminal appellants are similarly diligent about reading the opinion, both because of their confinement and because of their continued interest in filing new actions that may lead to their release.

Accordingly, litigants and other lay persons affected by judicial opinions should be one of the several types of readers that judges write for. Without compromising the content of an opinion, a judge can and should make stylistic adjustments that assist both lawyer and lay person alike to understand the reason for a decision. Logical organization, clarity, complete coverage, and avoidance of repetition and superfluous matter can and should be accomplished in a style that is appealing to anyone reading the opinion.

I have spent years mastering the technique of setting forth legal rules without having to identify the source of the rule in the sentence itself. I do this by placing the formal citation at the end of the sentence or in parentheses within the sentence. It is a legal shorthand or code I am used to and is a style lawyers are familiar with. As Garner eloquently points out, however, the convenience of this shorthand comes with a price. It interrupts and distracts the reader from the sentence itself. If a judge identifies the court and name of the opinion whenever it is important for the reader to know it, a formal citation plugged into or tacked onto a sentence becomes superfluous. Lawyers have little trouble overcoming these interruptions because they have learned to ignore the citation except when the text implies that identification of the authority is significant to what is being said. Litigants and other lay readers seldom have such training and are more distracted by the style. If it is important for the reader to know the identity of the authority supporting the stated rule, then the more effective and powerful way of doing this is to name the authority in the sentence. If it is not important, then a better place for the reference is the bottom of the page where the coded citation does not detract from the sentence.

Skillfully weaving the name of a court and case into a sentence is not as easily done as Garner implies. This is a style of writing that I had only occasionally used in instances where the trailing formal citation doesn't adequately differentiate between courts or decisions. Garner's style has required me to learn techniques for seamlessly identifying authority within a sentence. The tried and true style championed by Justice Posner does so as a matter of course, albeit in a distracting way.

Another consequence of adopting Garner's style is that the use of quotations tends to be awkward. Putting the name of the quoted case in the sentence is often unsatisfactory, while failing to do so forces the reader to bob their head down to a footnote to learn the source of the quote. I have found, however, that weaning myself of the practice of pasting quotations into my opinions is improving my writing and sharpening my understanding of the rules I am applying. It forces me to put the rule into my own words and consequently take a closer look at its meaning and relevance to my analysis.

The published opinions focused on by Garner and Justice Posner in their articles are representative of a very small segment of the writing a judge of an intermediate court of appeal produces. Most opinions of an appellate judge are unpublished and apply established legal analysis to recurring factual contexts. Seldom is it necessary or desirable to confirm that sister appellate districts have concurred with such principles. Nor is it necessary or desirable to trace the legal lineage of the time-worn analysis used to resolve such appeals.

In such opinions I am primarily engaged in correcting a misapprehension by litigants and their lawyers regarding the legal rules that apply, rather than resolving a novel question of

law. Here is where Garner's suggested style is the most effective. Since the identity of the familiar authority relied on in such opinions is of marginal interest to the reader, its inclusion in the body of the opinion merely interrupts the flow of the sentence rather than contributes to an understanding of it.

I was not able to adopt Garner's suggestion unilaterally. In 2000, California's appellate judges authored, on average, 147 written opinions and concurred or dissented in another 297. In addition, we participate in the summary disposition of hundreds of other matters that do not require a comprehensive statement of reasons for our decision. This cannot be accomplished without the willing assistance of fellow judges, as well as research attorneys, legal assistants, and other support staff that read, edit, and critique, take responsibility for summarizing lengthy records, prepare initial draft opinions, and check and cross-check drafts for mechanical and procedural error. Busy appellate courts operate collegially in the truest sense of the term. Judges, research attorneys, and legal assistants have had to accommodate my change in style. In some cases they have had to change the style of their writing.

The most important readers of my opinions are the colleagues assigned with me to decide the appeal. The volume of material I send to them to read during the year is huge and they are accustomed to reading it in the traditional format preferred by Justice Posner. Having heard Garner's presentation, they were not opposed to me giving the suggestion a try. I knew, however, that opposition would build if they found themselves routinely bobbing their heads to the bottom of the page in search of the authority I was referring to. I have had to be careful to identify the source of quoted material in the body of the sentence and otherwise do so when prominent identification of the authority is desirable. I have had no complaints from my colleagues. Alas, I have made no converts either.

A far more difficult constituency to appeal to was the research attorneys of the court. They not only have to read material formatted in the new style, but also have to write in the new style when preparing draft opinions for my use. Here in California each appellate judge is assigned two research attorneys who work only for that judge. Both of my lawyers loyally acquiesced to my decision to change, one less reluctantly than the other. One year later, one of them is still merely "going along" with the change, while the other has embraced it and is now convinced his writing has improved because of it. Changes of this nature are of inordinate importance to career research attorneys. Requiring these two professional writers to change their writing style in such a profound way could have easily led to one or both of them leaving my chambers. This is a risk that you take in making such a demand.

The research attorneys on our central staff were even less enthusiastic about my decision. These attorneys write for me only occasionally and did not welcome the prospect of learning a new writing style for the benefit of someone they only infrequently interacted with. I was sympathetic and offered to continue receiving their drafts in the traditional style. When their drafts reached my chambers, my legal assistant would then drop the citations into footnotes before forwarding the drafts to me. I then made any necessary changes to the text. The court's principal attorney who supervises the central staff has since unilaterally directed the attorneys to adopt Garner's style for the drafts sent to me. These attorneys, however, simply do not use Garner's style frequently enough to get good at it. Substantial additional editing is still required.

The group most receptive to my decision to change turned out to be the support staff responsible for cite checking my opinions. This group includes my legal assistant and the central staff secretaries. I have been told that cite checking citations listed in a series of footnotes is noticeably easier than searching for them throughout the text.

Adjusting to Garner's style is still a work in progress for me. My staff and I are gradually getting better at using it. It continues to be worth the effort since I remain convinced that Garner's style leads to clearer and more concise writing at a time when the judiciary is legitimately criticized for writing that is unnecessarily long and difficult to read.

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