UT LAW CLE | THE UNIVERSITY OF TEXAS SCHOOL OF LAW

PRESENTED AT

19th Annual Advanced Texas Administrative Law Seminar

September 17-18, 2024

Austin, TX

Readable Legal Writing

Wayne Schiess

Author Contact Information:
Wayne Schiess
University of Texas School of Law
Austin, TX
wschiess@law.utexas.edu
512.232.1333

Readable Legal Writing—Supported by Research

Wayne Schiess

Research on Persuasive Legal Writing

When I first learned about persuasive legal writing, the advice was simple: avoid lying, follow the rules, reduce errors. Today, we have science. Now, many authors are publishing research studies that try to define persuasive legal writing scientifically. I summarize three here.

Brady Coleman and Quy Phung assembled a database of U.S. Supreme Court briefs filed from 1970 to 2004 and performed some calculations: they used the Flesch Reading Ease Scale, which assigns a readability score from zero (extremely difficult) to 100 (very easy); they also used the Flesch-Kincaid Grade Level, which assigns a number representing the years of education the reader would need to read the text comfortably (12 = high school graduate, 16 = college, etc.)

Their data show that U.S. Supreme Court briefs are becoming more readable. During the period of their study they found that

- the Argument section's readability increased from 33 to 39.
- the Argument section's grade level moved from 15 to 12.
- the Statement of Facts grade level moved from 14 to 13.[1]

I'm not willing to believe that these briefs became "simpler" because the writers got dumber. Instead, I think lawyers are learning that readable briefs are more persuasive.

In another study, Shaun Spencer and Adam Feldman reviewed 654 summary judgment motions—trial briefs. They scored the briefs with 50 readability measures, assessing word difficulty as well as syllable, letter, and sentence counts, and they produced a readability score for each brief.

After controlling for multiple factors, internal and external to the briefs, the authors found that a brief's readability was significantly correlated with success at summary judgment. Meaning: *the easier your brief is to read, the more likely it is that you'll win*. The correlation was even stronger in federal court than in state court.

Specifically, if the moving party's brief was significantly less readable than nonmoving party's brief, the moving party had only a 42% chance of winning. But if the moving party's brief was significantly more readable than the nonmoving party's brief, it had an 85% chance of winning.[2]

I should mention that you can assess the readability and grade level of your own writing. In Microsoft Word, go to File and select Options and then Proofing. Check

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[1] Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. App. Prac. & Process 75, 98, 99 (2010).

[2] Shaun B. Spencer & Adam Feldman, *Words Count: The Empirical Relationship Between Brief Writing and Summary Judgment Success*, 22 J. Leg. Writing Inst. 61, 94 (2018).

the box for "Show Readability Statistics." Now, after a spell-check, you'll see a display that includes your Reading Ease score and grade level.

Finally, lawyers and legal-writing teachers have long believed that stories are persuasive, and now there's evidence to prove it. This legal-writing expert, Kenneth Chestek, sent briefs written for a fictional case to 95 judges, clerks, staff attorneys, practitioners, and law professors.

Each reviewer received two briefs. In one brief, the argument had a narrative component—characters who encounter an obstacle and seek to overcome it—plus the legal argument. The other brief advocated for the same party but with only the legal argument; it had no narrative component. The author's data showed that 64% found the narrative briefs more persuasive.[3] That's a solid, nearly two-thirds majority in favor of story.

You probably knew this already, but now there's science: when you need to write persuasively, science tells you to write readably and tell a story.

Two More Studies

The first study scored nearly every merits brief submitted to the U.S. Supreme Court from 1969 to 2004 using four readability-assessment tools,[4] two of which are described here.

The Flesch Reading Ease Scale uses sentence and word length to assess readability and assigns a score: zero to 30 is "very difficult," while 90 to 100 is "very easy," and 60 is "plain English."[5] The Flesch-Kincaid Grade Level reports the number of years of formal education a reader needs in order to understand the text: 12 means a high-school graduate, 16 means a college graduate, and 19 means a law-school graduate.

For the time period assessed, U.S. Supreme Court briefs averaged a Flesch Reading Ease score of 35 (difficult) and a Flesch-Kincaid Grade Level of 14 (sophomore in college).

Also, during that time period, the grade level of Facts sections moved from 15 to 12—becoming simpler. The grade level of Argument sections moved from 14 to 13—again, becoming simpler. And the readability score for Argument sections moved from 33 to 39—becoming more readable.[6]

What does this trend to simpler, more-readable writing mean? Does it represent "the dumbing of America"? Should we conclude that even Supreme Court advocates are incapable of writing complex, sophisticated prose?

No. Given the high caliber of attorneys writing briefs to the Supreme Court, I draw a different conclusion. These advocates understand that a readable brief, written

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[3] Kenneth Chestek, *Judging by the Numbers: An Empirical Study of the Power of Story*, 7 J. Assn. Legal Writing Directors 1, 19 (Fall 2010).

[4] Brady Coleman & Quy Phung, *The Language of Supreme Court Briefs: A Large-Scale Quantitative Investigation*, 11 J. App. Prac. & Process 75, 76 (2010).

[5] Rudolf Flesch, *How to Write Plain English* 25 (1979).

[6] Coleman & Phung at 98, 99 (numbers rounded).

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First appeared as part of the conference materials for the
19th Annual Advanced Texas Administrative Law Seminar session
"Readable Legal Writing"