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Research on Legal Writing

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I was speaking at a meeting of appellate lawyers and was asked a question something like this:

- Are there any empirical studies showing that the quality of the writing in a brief will help win the appeal?

Over time, the answer has evolved from *no* to *kind of* to *yes*! And new research is occurring all the time.

Research on intensifiers

This research is contained in a study of the use of intensifiers (*very, clearly, obviously, and the like*) in appellate briefs.¹ The authors state, correctly, that many experts on legal writing recommend against intensifiers and especially against overusing them. The authors decided to measure intensifier use against outcomes—does using more intensifiers in a brief increase the likelihood of winning?

No.

Their research showed that using intensifiers frequently in a brief, particularly a brief for the appellant, is usually associated with a statistically significant increase in adverse outcomes for the party using the intensifiers. The authors point out that they could not establish a causal connection—they couldn't prove it was the intensifiers that caused the briefs to lose—but the correlation is interesting.²

Readability measured with 2 tools

Another article, by the same authors, reports on a study of the readability of appellate briefs. The authors measured briefs according to the Flesch Reading Ease scale—a scale of zero to 100 that measures average word length and average sentence length, with “plain English” defined as a score of at least 60. (The briefs in the study tended to score in the low-to-mid 30s on the scale.) The authors measured readability scores against outcomes—does having a higher (better) readability score increase the likelihood of winning?

No.

¹ Lance N. Long & William F. Christensen, *Clearly, Using Intensifiers Is Very Bad—Or Is It?* 45 Idaho L. Rev. 171 (2008).

² *Id.* at 180.

Shorter sentences and smaller words won't necessarily win. The authors found no statistically significant relationship between the readability score of a brief and its success.³

Readability measured with 2 tools; some “conflicting” research results

Here are two studies of appellate-brief writing that reached different conclusions and call for different explanations.

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 the 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 as simply as possible given the complex subject matter, will be more persuasive and engaging. It's a good reminder for all legal writers.

³ Lance N. Long & William F. Christensen, *Does the Readability of Your Brief Affect Your Chance of Winning an Appeal?—An Analysis of Readability in Appellate Briefs and Its Correlation with Success on Appeal*, 12 J. App. Prac. & Proc. 145, 147 (2011).

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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