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A WORD OF INTRODUCTION: *U.S. SUPREME COURT BRIEF WRITING STYLE GUIDE*

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Should appearances matter? In principle, no. We should not judge a book by its cover or a person by his or her physical attractiveness. Likewise, one supposes, a judge should not assess a brief differently depending on whether it is written in Courier (ugly) or New Century Schoolbook (lovely). So what can be less useful than a guide to appellate brief writing that is, at bottom, about appearances?

Yet my *U.S. Supreme Court Brief Writing Style Guide* is about little else. It provides no advice on the types of legal arguments that are effective in the Supreme Court. And it provides only occasional advice on how to write a convincing appellate brief. Most of the *Style Guide* is instead devoted to matters such as how properly to cite a Supreme Court case (cite only the official U.S. Reporter) and how the Opinions Below section should read. Why did I bother?

The answer, of course, is that appearances do matter. A job applicant should not show up for an interview wearing a t-shirt and ripped jeans. A male attorney appearing in court ought to wear a tie. When we bungle how we present ourselves, we are judged harshly—and for good reason. Sloppy, inappropriate attire is a sign. It tells us that the person is too green to know what's appropriate and didn't care enough to find out.

Legal briefs are judged—to an extent—the same way. Judge Wald noted in these pages almost 20 years ago that "you cannot imagine how disquieting it is to find several spelling or grammatical errors in an otherwise competent brief. It makes the

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judge go back to square one in evaluating the counsel."[1] I wrote the *Style Guide* to address a related flaw in too many Supreme Court briefs I had read: the failure to abide by the Court's unwritten rules and customs.

At bottom, it's about establishing credibility. A court is more likely to accept your characterization of the facts and your explanation of the law if you have earned its trust. Time and again, judges and experienced practitioners have told me that nothing is more important for an advocate then establishing credibility with the court. That is especially true for repeat players—such as the group of attorneys with whom I work, members of state attorney general offices.

So how do you establish and maintain credibility? To loosely paraphrase Chief Justice Roberts, the way to earn trust is to act trustworthy.[2] That means being scrupulously honest and accurate; not misstating the facts or the law; not exaggerating or omitting key matters; treating the court, opposing counsel, and court personnel with courtesy; and communicating with the court—in writing and orally—in a temperate, reasoned tone.[3]

It also means avoiding typos, using proper citation form, and doing the other myriad small things that make a brief look just right. Justice Scalia explained why judges care about that:

> There's a maxim in evidence law or criminal law or whatever: *falsus in uno, falsus in omnibus*. If you show that a witness lied about one thing, the jury can assume that he lied about everything. False in one, false in all. It's the same thing about sloppiness. If you see somebody who has written a sloppy brief, I'm inclined to think this person is a sloppy thinker. It is rare that a person thinks clearly, precisely, carefully and does not write that way. And contrariwise, it's rare that someone who is careful and precise in his thought is sloppy in his writing. So it hurts

1. Patricia M. Wald, *19 Tips from 19 Years on the Appellate Bench*, 1 J. APP. PRAC. & PROCESS 7, 22 (1999).

2. *See* Parents Involved in Community Schools v. Seattle School Dist. No. 1 v. Jefferson Cnty. Bd. of Educ., 551 U.S. 701, 748 (2007) (Roberts, C.J.) ("The way to stop discrimination on the basis of race is to stop discriminating on the basis of race.").

3. *See* Theodore B. Olson, *Ten Important Considerations for Supreme Court Advocacy*, 44 LITIGATION 12, 13–14 (2018).

> you. It really hurts you to have ungrammatical, sloppy briefs.[4]

It also hurts you to write a brief that fails to conform to the Court's unwritten rules and customs. To return to an earlier example, in most courts the proper way to cite *Roe v. Wade* is *Roe v. Wade*, 410 U.S. 113, 93 S. Ct. 705, 35 L. Ed. 2d 147 (1973). In the Supreme Court, the proper citation form is *Roe v. Wade*, 410 U.S. 113 (1973). If your Supreme Court brief uses the former citation, every Justice and law clerk who reads the brief will immediately react negatively. Every one of them will think, "This person doesn't know how we do things up here." Worse, every one of them will think, "This person didn't have the good sense to go on the web and look at how the Solicitor General's office or other regular practitioners here write their briefs."

Will the Court deny your cert petition simply because it used the wrong citation form for Supreme Court decisions? Of course not. But it puts you behind the eight ball. It's one knock against your credibility. And there are a hundred other similar ways you can lose credibility points that the *Style Guide* walks through.

Instead of having a Statement of the Case that describes both the factual and procedural backgrounds (usually in that order), you might without the *Style Guide*'s advice follow many lower courts' practice of having a Statement of the Case (describing its procedural history) followed by a Statement of the Facts. You might italicize the codes and reporters in statutory and case citations—as they do in New Jersey state courts, but not the U.S. Supreme Court. You might cite the decision under review by citing the federal reporter rather than the cert petition appendix. There are even ways to mess up the cover page. (If I see another lawyer put his or her state bar number on it, I'll scream.) But of course you won't make these greenhorn mistakes if you adopt the Supreme Court style outlined in the *Style Guide*.

After more than two decades working on Supreme Court cases as Supreme Court Counsel for the National Association of

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4. Bryan Garner, *Justice Antonin Scalia*, 13 SCRIBES J. LEG. WRITING 51, 71 (2010) (transcribing Mr. Garner's interview of Justice Scalia).

Attorneys General, it seemed time to put this all down on paper. It began as a list of pet peeves. (For goodness sake, don't write your Questions Presented in all caps!) With time, it became a comprehensive walk through the different sections of Supreme Court briefs. All the while, its focus remained on style, not substance.

Earning credibility can be difficult. No one *wants* to acknowledge that a recent precedent supports the other side's position. Our fingers resist typing the bad but relevant fact that makes our client look less appealing. Adhering to a court's brief writing customs and practices is—or ought to be—the *easy* way to gain credibility.

Newcomers to Supreme Court practice already start at a disadvantage. A modern Supreme Court bar has emerged, whose members possess "years of advocacy experience before the Court, settled expertise in the workings of the Court, and in-depth knowledge of the concerns and predilections of the individual Justices."[5] They have also built up a large store of credibility with the Court.

The first-timer must earn the Court's trust and respect one page at a time, one brief at a time. Mostly, she will do so by writing well-organized, cogently reasoned, even-toned documents. But she will also do so by making each sentence and each page look the right way. That means no typos, no grammatical errors, and adopting the Supreme Court's distinctive style customs. I hope the *Style Guide* helps appellate attorneys accomplish that task.

5. Richard J. Lazarus, *Advocacy Matters Before and Within the Supreme Court: Transforming the Court by Transforming the Bar*, 96 GEO. L. J. 1487, 1525 (2008); *see also* John G. Roberts, Jr., *Oral Advocacy and the Re-emergence of a Supreme Court Bar*, 30 J. SUP. CT. HIST. 68 (2005).