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The Future of Appellate Advocacy

Bryan A. Garner

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The Future of Appellate Advocacy

Bryan A. Garner*

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INTRODUCTION

PROFESSOR MORIARTY: Good afternoon, everyone. I'm Jane Moriarty, and I have the pleasure of being the afternoon moderator, as well as having the distinct pleasure of introducing our keynote speaker.

We are thrilled that Professor Garner could join us, and we're really honored he took time out of his schedule—let me tell you, you can't imagine the schedule he keeps—to join us at Duquesne Law School. For those of us who love law, language, and advocacy, which is everyone in this room, this is a very special day.

I first met Bryan Garner about 20 years ago. I was a practicing lawyer at a firm, and we had hired Professor Garner as a consultant.

I was asked to write him a very short letter, so I dashed off four sentences. It took four and a half hours—because what could be more intimidating than writing to the best, most highly regarded legal writer in America? Professor Garner, however, was incredibly gracious, informative, helpful, and so very impressive, as you will see today.

I also had the pleasure of serving as a contributing author of *Black's Law Dictionary*, for which Professor Garner is the outstanding editor in chief. It is only in a room like this that I can hold up my dictionary with my name embossed in gold letters and feel the waves of energy in the room. As everyone is saying, we are geeks,

* Distinguished Research Professor of Law, Southern Methodist University Dedman School of Law; president, LawProse Inc. This article is adapted from the author's October 8, 2015 presentation at Duquesne University.

but we are very cool geeks. And now we have bling. But enough about me. Let's get to Professor Garner.

Bryan Garner graduated from the University of Texas in 1980, when he was seven—yes, that was a joke—where he was elected to Phi Beta Kappa. He also received his law degree from the University of Texas and served as an editor on the law review. And he clerked for the Honorable Thomas M. Reavley of the Fifth Circuit Court of Appeals. Over the last several decades, he has been a law professor both at his alma mater and at Southern Methodist University, where he is Distinguished Research Professor of Law.

More of you know him for what he writes and what he says when he speaks. He's the author of several exceptionally well-known books on legal writing, grammar, and appellate advocacy. To name just a few, *Garner's Modern English Usage*; *The Winning Brief*; *The Winning Oral Argument*; *The Elements of Legal Style*; and two books written with Justice Antonin Scalia of the Supreme Court of the United States, entitled *Making Your Case: The Art of Persuading Judges* and *Reading Law: The Art of Interpreting Legal Texts*. And let's not forget the ever-popular *Rules of Golf in Plain English*. That, too, is Professor Garner's.

In addition, he has received numerous awards including the 2015 Exemplary Legal Writing, *Green Bag Almanac*, for *Black's Law Dictionary*, the tenth edition; the 2010 Burton Award, Legal Writing Author of the Decade; and a 2005 Lifetime Achievement Award from the Center for Plain Language. And again, that is only the beginning of the awards.

Professor Garner has served as the chief drafting consultant to the Judicial Conference of the United States, specifically to the Standing Committee on Rules of Practice and Procedure, which we've been talking about all morning, and worked for the last several years as the chief consultant on the large-scale restyling project with which we are all so familiar. And as I mentioned before, he is, of course, the editor in chief of *Black's Law Dictionary*, the most authoritative resource to which we all turn.

For decades, Professor Garner has influenced the way we think about law, language, and advocacy. He moves us away from obfuscation and gears us toward powerful, clear writing. He continues to have an enormous impact—not only on how we write, but on how we conceptualize law and advocacy—by teaching us to be effective by trying to be helpful to the reader.

For several decades, he has cast a strong beacon of light for legal writers by showing a clearer way forward. It is now up to us to follow that lead.

I hope you will join me in welcoming Professor Bryan Garner.

PROFESSOR GARNER: Thank you, Professor Moriarty. I'm going to avoid the lectern now and maybe for good—for reasons that will become clear in a moment.

When I'm trying to teach lawyers to write effective briefs, powerful briefs, I feel a little bit like a golf professional in Fritzville. Let me explain.

When I was a boy, I played a lot of competitive golf—a lot of tournament golf with my brother Brad. He and I would go all around Texas playing in tournaments. One of my rivals was Stanley Fritz. (I've fictionalized the name only slightly.) Stanley's father had the most curious golf swing. There's a way to hit a golf ball and hit it well, but Mr. Fritz didn't use it: he had the most distinctive swing ever.

He stood with his right thumb underneath the club and his legs absolutely stiff. You're not supposed to do that, but Mr. Fritz had spent 35 years hitting the golf ball that way. And then he would pick up the club—jerk it straight up—exactly what you're not supposed to do. Then he would bring the club straight down in an almost vertical motion and jab the clubhead into the turf itself—only sometimes hitting the ball.

I saw a golf professional, our local professional, tell him, "Mr. Fritz, if you'll lower the left shoulder a little bit, bend your knees slightly, and try gripping the club like so, try bringing it back low to the ground, and then sweep the ball off the tee. That's the way you're going to be able to hit the golf ball well." But Mr. Fritz—no, no, no. Every time he would stand at the ball, it was in a duffer's pose. His club would jerk up and come straight down with a thud. At impact, his left foot would come off the ground. The swing was essentially that way every time—unbelievable.

Now, the Garner family has always been preoccupied with technique, whether in golf or in other skills. My brother ended up being a flute professor. He goes around the world teaching flutists how to play the flute. I teach lawyers how to write.

Imagine with me a town called Fritzville, where there are ten golf courses—five municipal courses and five private country clubs—and everybody in Fritzville swings like Mr. Fritz.

In the Fritzville city championship, anybody who tries to hit the ball properly is immediately disqualified. No, you can't lower your shoulder—you've got to swing the club the Fritz way, with the vertical chopping motion. By local rule, that's the way you must hit a golf ball in Fritzville.

So what does this have to do with writing? Well, I'm analogizing the condition of legal writers to that of other professional nonfiction writers.

Lawyers are the most highly paid professional writers in the world, and I'm saying that I feel like a golf pro in Fritzville with a student telling me, "Look, I want to play golf well. I want to do really well competitively. But you must teach me to hit the ball with my same basic swing. Please don't change my swing." Well, you can't do that. It doesn't work. Certain techniques are necessary to hit the ball well.

I say lawyers essentially live in Fritzville. But I have three proposals that would get us on the train out of there.

PROPOSAL #1: THE DEEP ISSUE

The first proposal: Advocates should use deep issues—that is, multisentence issue statements culminating in a question mark by the 75th word. The one-sentence issue should be banned.

Subproposal 1A: Courts should adopt an appellate rule both requiring and demonstrating deep issues. (Without examples in the rules, lawyers won't know what to do.)

Subproposal 1B: Courts should change appellate rules to require what the United States Supreme Court requires: the questions presented should be the very first thing that appears after the caption of the case. Justice William Brennan is responsible for that feature in the U.S. Supreme Court Rules. Through his reform in the early 1970s, the Supreme Court Rules have required that when you open a Supreme Court brief, the first thing you see is the question presented.

Subproposal 1C: Moot-court programs should begin penalizing all one-sentence issue statements—and doubly penalizing those that begin with the word *Whether*. Those should be banished.

Now let's talk about why. The issues in a given case are the most important things. What do judges do? They decide issues. What's the issue? Any reasonable judge wants to know immediately upon picking up a brief what the question to be decided is. I'm going to ask you to become a judge for a moment and think about the typical judge's reading life.

A couple of years ago, I was teaching judicial-opinion writing in a certain Midwestern state, and the judges told me to my horror about their "warehousing" problem. I said, "Warehousing problem? What's the problem?" Well, some of their predecessors had gotten far behind in deciding appeals in the intermediate courts. So now,

once the clerk's office has all the briefs, they get banded together, put in a box, and sent to a warehouse for 18 months. No one looks at the briefs for 18 months. They're that badly backlogged because of their predecessors. Shocking.

So I want you to assume for a moment that you're a judge with such a backlog and you're trying to get caught up to speed on your docket. Have a look at Figure 1. It's scary. Obviously, a terroristic psychopath wrote this brief. Isn't it interesting how lawyers in appeals like to telegraph to the reader immediately, "I have no idea what I'm doing. I just don't know. I have no taste. I have no judgment. But I hope you'll believe me." Even before you read a word, this page proclaims the writer's ineptitude.

Look at the first issue: "Whether the court of appeals erred in concluding that the root cause analysis team ('RCA Team'), which was created by and operates under the guidelines of the RCA policy"—What are you talking about?—"did not qualify as a medical review committee pursuant to N.C.G.S. . . ." I don't know what you're talking about.

I have no idea what this is about, but this is a typical issue—incomprehensible. I don't know what it means. Lawyers, sadly, are in the habit of doing this. Almost every brief in this country has early sentences that are incomprehensible until you read much further—and these incomprehensible sentences appear especially in issue statements.

You can't possibly understand what that issue means until you read the whole middle of the brief. That's incompetent exposition. If you were to subscribe to a newsmagazine and then realize that every article begins with some early sentences that are incomprehensible ("Keep reading. Keep reading. It will come together for you later."), you would cancel your subscription. You couldn't read that. You wouldn't want to.

I'll tell you what: I don't think we can decide this first case just now. We're going to take it under advisement—or maybe send it back to the warehouse.

Let's go to the next one.

Figure 2: "Did the Michigan Court of Appeals correctly hold that the Michigan Tax Tribunal has the authority to order the waiver of interest in a tax tribunal proceeding?" I don't know. What are you talking about? I have no idea.

By the way, it says the Michigan Court of Appeals said yes. I don't believe that either. I do not believe the Michigan Court of Appeals said that the Michigan Court of Appeals correctly held something. "We're holding this, and we have correctly held it." I don't

No. 513PA13 TWENTY-FOURTH DISTRICT

SUPREME COURT OF NORTH CAROLINA

Gina Keller,)	
)	
Plaintiff)	
)	
v.)	
)	
Sarah Ratcliff, M.D., Carolina)	<u>From Polk County</u>
Reconstructive, P.C.,)	No. COA12-2582
Vincent Cross, M.D., Polk)	
Associated Anesthesiologists, P.A.,)	
Wendy Hatch, John David, and)	
Polk County Hospital)	
System, Inc.,)	
)	
Defendants.)	
)	

DEFENDANTS-APPELLANTS JOHN DAVID, WENDY HATCH, AND
POLK COUNTY HOSPITAL SYSTEM, INC.'S NEW BRIEF

ISSUES PRESENTED

- I. WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT THE ROOT CAUSE ANALYSIS TEAM (“RCA TEAM”), WHICH WAS CREATED BY AND OPERATES UNDER THE GUIDELINES OF THE RCA POLICY, DID NOT QUALIFY AS A MEDICAL REVIEW COMMITTEE PURSUANT TO N.C.G.S. § 131E-76(5)(c)?

- II. WHETHER THE COURT OF APPEALS ERRED IN CONCLUDING THAT DOCUMENTS PRODUCED AND CONSIDERED BY THE RCA TEAM DURING THE PEER REVIEW PROCESS, INCLUDING THE RCA REPORT AND QUALITY CARE CONTROL (“QCC”) REPORTS, WERE NOT PRIVILEGED PURSUANT TO N.C.G.S. § 131E-95?

Figure 1

Like all the examples reproduced here, this is a precise replica of how the issue statements looked in the brief as filed. Note how the all-caps style on the bottom half of the page induces you to avert your eyes. You must overcome a strong resistance to read the most important information on this page.

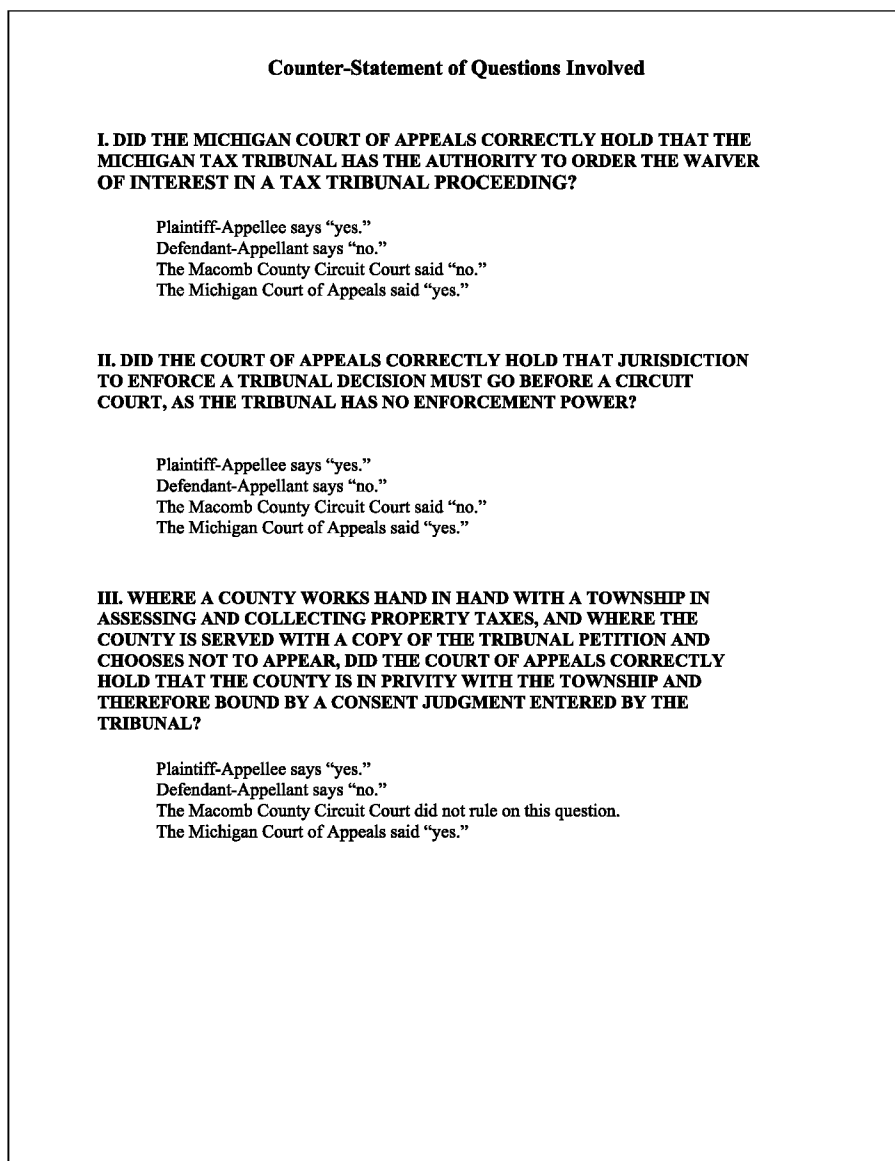


Figure 2

Again, the all-caps text is off-putting and relatively unreadable. The first eight words of the first two issue statements have no valuable information—and because those two statements start with the last thing done in the litigation, they are in reverse chronological order. The third is typographically impenetrable and chronologically jumbled.

think that's correct. I don't think we can decide this case just now. There are so many others pressing on us.

Let's try to find a case that we *can* decide.

Figure 3: "May the Michigan legislature constitutionally enact a statute which creates a lawmaking reckless driving causing death a 15 . . ." What is this talking about? I have no idea.

Oh, it was only when my wife looked at this page and said, "Bryan, there's actually supposed to be a space there: 'a *law making* reckless driving causing death.'" I thought it was a typo at first: "death to a 15-year old." But no: "death a 15." "Death a 15-year felony." I'm having a hard time reading this. I'm having a hard time taking the writer seriously.

Let's get to B [in Fig. 3], "creating a lesser." I'm sorry. What? This isn't even grammatically parallel to A. I shouldn't be so bothered by this, but I am.

By the way, should lawyers be required to make their grammar parallel? Surely not. It's way beneath their pay grade. No. Just as NBA players don't have to know how to dribble. Dribbling is a low-level activity. These are really highly paid athletes. They shouldn't have to be bothered with such basics as dribbling, should they? They want to play basketball at a high level and be the best in the world. Do lawyers need to know how to punctuate? Nah, it's beneath their pay grade.

And C [still Fig. 3]—I have no idea what this is saying. It looks as if it's about a lesser-included offense, but there's a reference to a *lessor*—no *lessee* in sight. Let's find another page. We're trying to move our docket along a little bit.

Figure 4: Oh dear. Well, let's look at the first issue. My goodness. There are only two jurisdictions in which Courier font is required. Again, this reeks of "I have no judgment. I have no taste. I have egg dripping down the side of my face from breakfast this morning, but please take me seriously." It's a little bit difficult, actually.

"Whether the Court of Appeals and the Superior Court were correct in concluding the Agricultural . . ." "In concluding the Agricultural?" They concluded the Agricultural Commission? They wrapped up the Commission? They concluded it. I think this author is a *that*-bigot. *That*-bigots don't write well. They don't care that *that* is necessary. People who are *that*-bigots, I'm sure they're the same people who park over wheelchair-access ramps. They have no concern for others.

Okay [still Fig. 4]: ". . . Erred in its conclusion of law 3(B)"—What are you talking about?—"that the petitioner did not demonstrate . . ." Wait a second. "Erred in its conclusion of law 3(B) that

STATEMENT OF QUESTION PRESENTED

MAY THE MICHIGAN LEGISLATURE CONSTITUTIONALLY ENACT A STATUTE WHICH:

- A. CREATES A LAWMAKING RECKLESS DRIVING CAUSING DEATH A 15 YEAR FELONY, WHICH SIMULTANEOUSLY
- B. CREATING A LESSER, INCLUDED MISDEMEANOR MOVING VIOLATION CAUSING DEATH AND
- C. DICTATES THAT IN A PROSECUTION FOR THE FORMER, GREATER OFFENSE, THE JURY SHALL NOT BE INSTRUCTED ON THE LATTER, LESSOR, INCLUDED OFFENSE?

- **DOES THE ABOVE LEGISLATIVE SCHEME VIOLATE THE MICHIGAN CONSTITUTION, AS SET FORTH IN THE DOCTRINE OF SEPARATION OF POWERS?**
Defendant Jeffries answers "yes"
The Court of Appeals answers "yes"
- **DOES THE ABOVE LEGISLATION UNCONSTITUTIONALLY DERIVE A DEFENDANT OF THE RIGHT TO TRIAL BY JURY ON ALL ESSENTIAL ELEMENTS OF THE CHARGED CRIME?**
Defendant Jeffries answers "yes"
The Court of Appeals answers "yes"
- **IS THE CRIME OF MOVING VIOLATION CAUSING DEATH A LESSER INCLUDED OFFENSE OF THE CRIME OF RECKLESS DRIVING CAUSING DEATH?**
Defendant Jeffries answers "yes"
The Court of Appeals answers "yes"
The People answer "yes"

Figure 3

Here we have an unappealing page that is hard to figure out—and it becomes even harder the more closely you read it. There are three questions (A, B, C) and then three bulleted questions about those three questions. There are typos throughout.

NO. 392A13 FIFTH JUDICIAL DISTRICT

SUPREME COURT OF NORTH CAROLINA

JAMES HOMEOWNERS, INC. :
 Petitioner-Appellee, :
 :
 v. :
 :
 NORTH CAROLINA AGRICULTURAL AND : From New Hanover County
 FORESTRY AWARENESS COMMISSION, : File No.: 08 CVS 7236
 Respondent-Appellant :

PETITIONER-APPELLEE'S NEW BRIEF

ISSUES PRESENTED

1. WHETHER THE COURT OF APPEALS AND THE SUPERIOR COURT WERE CORRECT IN CONCLUDING THE AGRICULTURAL AND FORESTRY AWARENESS COMMISSION ("AFAC") ERRED IN ITS CONCLUSION OF LAW 3(B) THAT THE PETITIONER DID NOT DEMONSTRATE THAT STRICT APPLICATION 15A NCAC 7H.1705 (a) (7) WOULD RESULT IN AN UNNECESSARY HARDSHIP TO THE JAMES PROPERTY?

2. WHETHER THE COURT OF APPEALS AND THE SUPERIOR COURT WERE CORRECT IN CONCLUDING THE AFAC ERRED IN ITS CONCLUSION OF LAW 6 THAT THE PETITIONERS DID NOT MEET THE FOURTH REQUIREMENT OF A VARIANCE REQUEST THAT THE GRANTING OF THE VARIANCE IS CONSISTENT WITH THE SPIRIT, PURPOSE AND INTENT OF THE RULES, STANDARDS OR ORDER; WILL SECURE PUBLIC SAFETY AND WELFARE; WILL PRESERVE SUBSTANTIAL JUSTICE?

3. WHETHER THE SUPERIOR COURT WAS CORRECT IN CONCLUDING THE AFAC'S DECISION WAS NOT SUPPORTED BY SUBSTANTIAL EVIDENCE AND IN CONCLUDING THERE WAS SUBSTANTIAL EVIDENCE TO GRANT THE VARIANCE?

Figure 4

So many things about this page are repellent that it's hard to know where to begin. It's hard to fathom why some judicial readers have a feeling of nostalgia when they encounter a Courier typeface. Notice the unsightly effect of justifying the right margin with this nonproportional typeface.

the Petitioner did not demonstrate that strict application 15A . . .”—What are you talking about?—“would result in an unnecessary . . .” I have no idea. I don’t know. This is going to require a lot further study.

You might say, “Bryan, you’re just a lazy reader.” Well, guess what: all readers are. All readers are selfish. They like things made easy for them.

Let’s go to Figure 5.

I’m scared already. Look how strangely the page is laid out. “Did the trial court properly grant Jersey’s summary judgment motion on Xuxu’s equitable bill of review where the evidence conclusively . . .” I’m going to have to get back to this one. I’m trying to find a case I can decide.

Let’s go to the next one.

Figure 6: “Whether the Grommets met their burden of establishing that the parties’ arbitration agreement was unenforceable because of an alleged . . .” I don’t know. I have no idea. What are you talking about? We’re supposed to read on.

Do you know what lawyers do? Lawyers treat their readers—judges, mainly, and law clerks—as paid readers. “Look, Judge, you’re a paid civil servant. It’s your job to read the stuff that I file. It’s not my job to make it interesting to you or even comprehensible. You figure out what it’s all about. It’s your job, Judge.” That’s very rude. It’s also very unskillful.

The second issue: “Even if the parties’ agreed-upon arbitrator . . .” Okay. I’m stopping. Why are you using an en-dash there instead of a hyphen? That should be a hyphen. It’s a phrasal adjective. I shouldn’t be worried about this. Here’s somebody using an en-dash, which should be for a span of numbers or years, where it should be a hyphen. I shouldn’t be thinking about this, but I’m thinking about it.

“Even if the parties’ arbitrator were unavailable . . .” Stop right there. This is the present subjunctive. This should not be the present subjunctive. It should be past historical, “was unavailable”: even if he was, in fact, unavailable. If it’s going to be subjunctive, it should be past subjunctive: even if the parties’ agreed-upon arbitrator had been unavailable. I’m finding it harder to get into the sentence because I’m hung up on this weird mixed use of the subjunctive.

By the way, should lawyers have to know how to use the subjunctive mood? Apparently not. I mean, it’s kind of low-level stuff.

ISSUES PRESENTED

1. Did the trial court properly grant Jersey's summary judgment motion on Xuxu's equitable bill of review where the evidence conclusively established the following facts:

- i. Xuxu voluntarily appeared in the underlying proceeding by filing an answer to Jersey's petition,
- ii. Xuxu thereafter participated in the underlying proceeding;
- iii. Xuxu was ordered to obtain counsel or face default because of its pro se appearance;
- iv. Xuxu disregarded the order;
- v. Xuxu timely received notice of the trial setting;
- vi. Xuxu received a default judgment for its disregard of the trial court's warning;
- vii. Xuxu timely received notice of the final judgment against Xuxu in the underlying case; and
- viii. Xuxu neither moved for new trial nor appealed the final judgment.

2. Did the Court of Appeals err in concluding that the trial court was not required to consider Xuxu's First Amended Petition in the bill of review proceeding because it was filed (i) *after* the hearing on Jersey's motion, (ii) *without* leave of court, and (iii) *without* Xuxu asking for leave of court?

Figure 5

Somebody has made a great many poor choices here—in style, in content, and in presentation. The “issues” are incomprehensible until much else has been read, and they may well remain incomprehensible even after that.

Issues Presented**Issue Presented Number One:**

Whether the Grommets met their burden of establishing that the parties' arbitration agreement was unenforceable because of an alleged impossibility of performance?

Issue Presented Number Two:

Even if the parties' agreed-upon arbitrator were unavailable, did the trial court err in denying Jones' motion to compel arbitration when the trial court had (1) the option to sever the allegedly invalid arbitration provision and enforce the remainder of the parties' agreement to arbitrate, and (2) the duty under the Texas and Federal Arbitration Acts to appoint a substitute arbitrator?

Issue Presented Number Three:

Did the trial court commit a clear abuse of discretion correctable by mandamus when it invalidated the parties' arbitration agreement merely because the parties' agreed-upon arbitrator is allegedly unavailable?

Figure 6

By comparison with Figures 1–5, this one looks promising. At least the page has been laid out attractively. But the one-sentence issues are little if any help to the reader.

I'm finding it very difficult to get through these issues, though. I'm just trying to get my mind around them. Let's look at another brief.

Figure 7: "Where an out-of-state plaintiff alleges that an out-of-state defendant committed an out-of-state tort resulting in an out-of-state injury, can the defendant be subject to specific personal jurisdiction in Texas based on the plaintiff's allegation that the defendant partially *planned* the out-of-state tort?" I don't know. I don't think so, but I'm not sure. I don't know what happened or where anybody was when it did.

The next case, Figure 8: "Did the trial court err in ruling that the Ocean View Good Jobs Ordinance is void as to"—What are you talking about?—"as to employers and employees conducting business within the boundaries of Ocean View International Airport in the absence of substantial evidence and findings by the trial"—What are you talking about?—"by the trial court as to whether any portion of the Ordinance would 'interfer[e] with respect to the operation of' the airport so as to be proscribed?" I have no idea. What does this mean? I pity the judges who are having to review briefs like this. What in the world is this talking about?

What's the most important part of a brief? The issues, the questions presented. Should we make them comprehensible? Lawyers don't seem to think so. I'm not just selectively pointing out horrific examples. My third-year law student who found all these examples from 2014 briefs said that this is all she could find.

Again, I'm just a judge trying to get on top of my docket. I'm just trying to find a place to start.

Figure 9, No. 1: "Whether an insurer which" Okay. I shouldn't stop here. I'm stopping again. In American English, we differentiate between restrictive and nonrestrictive relative pronouns. I shouldn't stop on the *which*. I'm stopped. I'm going to try to read past it.

Lawyers say, "Look. Look at the substance. Don't get caught up on these little things." But it's like a person showing somebody the view from a bay window: "Look at the grand view. Look at the mountains." But there's something rubbed all over the glass. "What is that stuff? Did you rub it there? What *is* that?" "No, no, no. Don't focus on that. Look at the mountains, the beautiful—" "But *what* is that stuff on the glass?"

Okay. "Whether an insurer which refused to provide for the defense of its insured notwithstanding its obligations to do so under the applicable policy, is" Okay. You don't put a comma between

ISSUES PRESENTED

- I. Where an out-of-state plaintiff alleges that an out-of-state defendant committed an out-of-state tort resulting in an out-of-state injury, can the defendant be subject to specific personal jurisdiction in Texas based on the plaintiff's allegation that the defendant partially planned the out-of-state tort in Texas? (*Part I of the Argument*)
- II. Can a trial court exercise specific personal jurisdiction over an out-of-state defendant based merely on the plaintiff's conclusory allegation that the defendant's Texas contacts will be important to the litigation, where conducting the required legal analysis of the plaintiff's claims would demonstrate that the defendant's alleged Texas contacts are not substantially connected to the operative facts of the litigation? (*Part II of the Argument*)
- III. Applying correct legal principles of personal jurisdiction, should this Court render judgment dismissing the Draco Defendants for lack of personal jurisdiction? (*Part II of the Argument*)
- IV. Alternatively, should this Court reverse the trial court's order denying the Draco Defendants' special appearance when:
 - A. The Court of Appeals relied on speculative implied findings that are not clearly supported by evidence even though the trial court's special appearance ruling is based on a paper record rather than live witness testimony, an issue raised but not decided by this Court in *Moncrief Oil International Inc. v. OAO Gazprom*, 414 S.W.3d 142, 150 n.4 (Tex. 2013)? (*Part IV.A of the Argument*)
 - B. Nucola failed to plead jurisdictional facts by pleading globally or *en masse* that the "Draco Defendants," as a group, had certain contacts with Texas, rather than separately identifying the contacts that each particular defendant is alleged to have with Texas, attempting to cure this pleading defect only by dumping into the record 4,000 pages of documents that it alleged, without specificity, show each defendant's individual contacts with Texas? (*Part IV.B of the Argument*)

Figure 7

This intimidating page contains a *lot* of information packed into single sentences. Try reading it. You'll almost certainly feel driven to look somewhere else. Although the lawyer complains about conclusory allegations, the page is full of them.

parties agree that this case warrants direct review pursuant to RAP 4.2(a)(4), because it involves fundamental and urgent issues of broad public import which require a prompt and ultimate determination. *See* Committee's Statement of Grounds for Direct Review, filed January 15, 2014; City of Ocean View's Statement of Grounds for Direct Review, filed January 22, 2014; Respondents' answers to statements of grounds for direct review, filed January 28 and 29, 2014. The Committee seeks accelerated review, and has requested the matter be heard on the earliest possible date during the Court's Spring Term. *See* Motion for Accelerated Review, filed herewith.

II. ASSIGNMENTS OF ERROR

1. Did the trial court err in ruling that the Ocean View Good Jobs Ordinance, SMC 7.45, is void as to employers and employees conducting business within the boundaries of Ocean View International Airport in the absence of substantial evidence and findings by the trial court as to whether any portion of the Ordinance would "interfer[e] with respect to the operation of" the airport so as to be proscribed by RCW 14.08.330?
2. Did the trial court err in ruling that the Ocean View Good Jobs Ordinance, SMC 7.45, is inapplicable and void as to employers and employees conducting business within the boundaries of Ocean View International Airport because it is proscribed by RCW 14.08.330?
3. Did the trial court err in ruling that the anti-retaliation provisions of the Ocean View Good Jobs Ordinance, SMC 7.45.090(A) and (B), are preempted because they impose "supplemental sanctions" on employers for violations of the National Labor Relations Act?

Figure 8

This set of three issues might lead you to conclude that the rhetorical mismatches complained of throughout this piece derive simply from my conviction that the "questions presented" or "assignments of error" should be fully understandable if the judicial reader flips straight to them. Obviously not everybody shares that view. Something preceded the "II" here—namely "I." But believe me, a careful reading of "I" doesn't make "II" any more enlightening with this particular brief. It almost never does.

STATEMENT OF JURISDICTION

Jurisdiction lies over Guarantee's Appeal pursuant to CPLR § 5601(a), as the Order represented a final determination, with respect to which two justices dissented on questions of law in favor of Guarantee. (R363-84.)

Jurisdiction lies over G3/OPOG's Cross-Appeal pursuant to the Court of Appeals' grant of leave to appeal, per its order dated June 7, 2012 (R387). See CPLR § 5602(a)(1)(i).

QUESTIONS PRESENTED

1. Whether an insurer which refused to provide for the defense of its insured notwithstanding its obligations to do so under the applicable policy, is liable for a default judgment obtained on covered claims, where the claims as alleged involved no factual assertions which brought them within any exclusion and where circumstances, subsequently asserted by the carrier in defending against an action pursuant to Insurance Law § 3420, that would have given rise to exclusions, could have been raised in defense of the claims against the insured, but were not?

The Appellate Division held yes.

2. Whether an exclusion from an insurance indemnity obligation of claims based upon the insured's status as officer, director or shareholder of an entity, is triggered when such status is not the basis for a claim against the insured

Figure 9

The first issue here is a single sentence fragment of 88 words. It's a fragment because it's a direct question phrased as an indirect question (beginning with *whether*) but ending with a question mark. The main clause has three primary subordinate clauses hanging off it (the first two beginning with *where*, the last beginning with *but* [three words from the end]). The first subordinate clause has one clause embedded within it, and the second one has two.

a noun clause and the verb. There should be no comma there. I shouldn't be focusing on this, but I can't help it.

“. . . [I]s liable for a default judgment obtained on covered claims, where the claims as alleged involved no factual assertions which” I can't read this. Did nobody edit this brief? “. . . [B]rought them within any exclusion and where circumstances,”—there should be no comma there—“subsequently” I'm finding it very difficult to read this.

Let's find a case that we can decide. I just want to find a case where I can understand the issue from reading it, and I can understand none of the ones so far.

Let's go to Figure 10. Here's a statement of the issues. What is that monolith of words? Oh my gosh. That's scary. At least they didn't put it in all caps. I'm going to have to take this one under advisement.

Let's try the next one, Figure 11.

“Whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 violate the Public Employee Retirement System Investment Act . . . (‘PERSIA’), because they purported to permit or require the County not to pay its entire Annual” I don't know. What are you talking about? I have no idea.

How about Figure 12?

“Does New York State Educational Law Section 3020(1), when read as a whole and when read in the context of its legislative history, permit continued use of an alternative process of grievance and arbitration”—I'm not actually familiar with 3020(1)—“for certain disciplinary matters involving teachers, when the alternative disciplinary procedures were collectively bargained for between the Rhinebeck City School District and the Rhinebeck Teachers Association prior to” I don't know. We can't resolve this one. We're going to have to get back to this one and dig into the brief. We'll set it aside for now, until I can find a good 45 minutes to try to understand the question.

I spent a year doing that as Judge Reavley's law clerk. Every brief I saw was something like the ones we've just seen. That was 1984–1985. I was troubled by it. I was disgusted by the fact that everybody was bringing issues that were incomprehensible unless you read 50 pages to understand the issue. It was very wasteful. They were wasting my time as a law clerk. They were wasting Judge Reavley's time. It's very difficult for a judge to write a good judicial opinion when the state of the briefing is this way.

ISSUES PRESENTED

Municipalities, like CPS, are unique political bodies with the power to engage in private, proprietary functions. As a result, for more than 130 years, Texas has withheld immunity from suit from municipalities in suits, including those based in contract, that arise out of a municipality's performance of proprietary functions.

The instant case arises out of CPS's refusal to pay Backhose its contractual retainage of \$4.1 million for services relation to CPS's operation and maintenance of a public utility, a proprietary function. CPS never disputed the services were fully performed more than eight years ago in 2007 by Backhose when it demanded payment of its retainage. Despite these facts, CPS filed two separate pleas to the jurisdiction to deny Backhose its right to the retainage in four years of litigation and appeals since 2011.

The second interlocutory appeal between Backhose and CPS in this case presents the following issues for decision by this Court:

- 1) Does CPS enjoy immunity from suit against Backhose's claim for attorney's fees even though this suit arises out of CPS's performance of a proprietary function as a public utility?
- 2) Did this Court's opinion in *Tooke v. City of Mexia*, 197 S.W.3d 325 (Tex. 2006) grant municipalities immunity from suit when they enter into contracts and thereby abrogate the proprietary function doctrine and impliedly overrule *Gates v. City of Dallas*, 704 S.W.2d 737 (Tex. 1986) and *Boiles v. City of Abilene*, 276 S.W.2d 922 (Tex. Civ. App.—Eastland 1955, writ ref'd)?
- 3) Does a court's proprietary-governmental function analysis regarding a municipality's immunity from suit in a particular case focus on the nature of the municipality's relationship with the State of Texas or on the particular claims asserted by a plaintiff?
- 4) Was dismissal of Backhose's attorney's fees claim premature or otherwise improper due to a lack of discovery into CPS's pleadings that may have waived immunity from suit?

Figure 10

The judge who turns to the "issues presented" for an easy introduction to the case is sure to feel thwarted by this page of monolithic type.

COUNTER-STATEMENT OF QUESTIONS PRESENTED

Whether the Court of Appeals erred in holding that provisions of Wayne County Enrolled Ordinance 2010-514 violate the Public Employee Retirement System Investment Act, MCL 38.1132 et seq (“PERSIA”), because they purported to permit or require:

- the County not to pay its entire Annual Required Contribution (ARC)
- the Trustees to move dedicated Inflation Equity Fund trust assets out of the IEF reserve for a purpose other than distribution of 13th checks;
- the use of IEF trust funds to offset the County’s ARC, in violation of the exclusive benefit rule, and
- the Trustees to engage in a transaction for the benefit of the County for less than adequate consideration, in violation of the prohibited transaction rule?

The Court of Appeals says no.

The Retirement System says no.

Whether any constitution, statute, or charter provision gives the County the power to direct the movement of trust funds from the Retirement System’s IEF reserve?

The Court of Appeals says no.

The Retirement System says no.

Whether the County’s failure to pay its ARC violates the Michigan Constitution’s Pension Clause, Const 1963, art 9, §24?

The Court of Appeals did not answer the question.

The Retirement System says yes.

Figure 11

Here we have the traditional *whether*-issue with four bulleted points embedded within it, all preceding the question mark. By the third line, two statutes have been cited, and the reader, almost certainly knowing neither of them, is expected to read on regardless.

JURISDICTION

The Court of Appeals has jurisdiction over this appeal pursuant to the rules of this Court, and pursuant to New York CPLR § 5602(a)(1)(i) because the action originated in Monroe County Supreme Court, and this appeal is from unanimous order of the Appellate Division, Fourth Department, which finally determined the action and is not appealable as of right.

QUESTION PRESENTED FOR REVIEW BY THIS COURT

Does New York State Education Law Section 3020(1), when read as a whole and when read in the context of its legislative history, permit continued use of an alternative process of grievance and arbitration for certain disciplinary matters involving teachers, when the alternative disciplinary procedures were collectively bargained for between the Rhinebeck City School District and the Rhinebeck Teachers Association prior to September 1, 1994, and have remained unaltered by renegotiation?

PROCEDURAL HISTORY

This motion arises out of a CPLR Article 78 petition filed by Roxanne Hardt (hereinafter “Hardt”) in Monroe County Supreme Court, in which Hardt sought to annul discipline, in the form of a thirty-day suspension, imposed against

Figure 12

Again, the issue immediately presents us with an unfamiliar code number, asking us to understand the statute as a whole, together with its legislative history—when we don’t even know what it is. This typifies the poor exposition of obscurantist issue statements.

So in 1985, having finished my clerkship, I thought that there must be a better way. Surely a legal problem can be stated so that people can actually understand it. This quest for such a method took me on a seven-year odyssey to try to find a better way of stating a legal problem. I studied all the literature on legal issues. Finally, I developed a method.

I realized that the *whether*-issue in a single sentence is often devoid of facts. A lot of people write issue statements that say, “Whether the trial court erred in issuing its injunction dated August 26, 2015.” I don’t know. What do you think? I don’t know. I need some facts. I must read more.

How do you state a legal problem so that a first-time reader instantly gets it? It’s called a deep issue. It’s a multisentence issue statement culminating in a question mark by the 75th word—never more than 75 words—with law and facts woven in.

The first one I ever framed I had some help with from a wonderful Michigan law professor, the late Frank Cooper. His son, Ed Cooper, still teaches at Michigan. But the great Frank Cooper wrote an *ABA Journal* article in 1953 in which he talked about all the common failings of legal issues.

Frank Cooper cited what he thought was the ideal legal issue. It was a one-sentence issue beginning with *Whether*. Here is the issue statement that he praised in 1953 in the *ABA Journal*:

Whether an alien, born in Bohemia, then a part of the Austro-Hungarian Empire, in 1905, who later became a Czecho-Slovakian citizen when the place of his birth was included in that country after World War I and who, after the Munich Pact of 1938 while in the United States, petitioned to be and was recognized as a German citizen is [Finally, we reach the verb!] now a citizen or subject of an enemy country within the meaning of the Alien Enemy Act of 1798, despite the reoccupation of the territory of his birth and former residence by Czechoslovakia.

Hey, Frank Cooper says that’s perfect. Well, he had a point that it’s good. But it struck me as a young man in my mid-twenties that there had to be a better way. Because I’m also a grammarian, I care a lot about syntax.

You know, the problem with that issue statement is that there are ten imbedded phrases between the subject and the verb. What if we unpacked that sentence, put it into separate sentences, and then posed the question at the end? The same issue. It’s called a deep issue.

This was the first deep issue I ever framed. I did it in 1992. Here it is:

Under the Enemy Alien Act of 1798, German citizens are considered enemy aliens. In 1905, Richl was born in Bohemia, which was then part of the Austro-Hungarian empire. After World War I, his birthplace became known as Czechoslovakia, and Richl became a Czechoslovakian citizen. After the Munich Pact of 1938, while Richl was in the United States, he petitioned to be and was recognized as a German citizen. Should he be considered an enemy alien?

It's the same issue unpacked. Put it in a few shorter sentences, put it in chronological order, and suddenly it becomes more comprehensible. It's called a deep issue. It's a multisentence issue statement culminating in a question mark by the 75th word, with law and facts woven in.

Now, you may be thinking, "Oh, but Bryan, there's a rule. You have to begin issues with the word *Whether*, and it's got to be put into a single sentence fragment." No, it doesn't.

Let's look at some examples of deep issues, and here I will ask Professor Moriarty to be my helper. In *The Winning Brief*, Tip #12, I've collected dozens of them. Professor Moriarty, let's say I'm a judge trying to get caught up on my docket. Choose any issue on page 98.

PROFESSOR MORIARTY: For a criminal-sentencing enhancement to be constitutional, the enhancement must be either found by the jury or admitted by the defendant. At Smith's sentencing, the government conceded that Smith's three-level-organizer sentencing enhancement was neither found by the jury nor admitted by Smith—yet the court imposed it anyway. Is Smith entitled to resentencing without the enhancement?

PROFESSOR GARNER: I think he is. I have just decided that. But no . . . I'm a careful judge. Now I know what I'm looking for in the brief. I just want to confirm that that's right. I think I'm just about ready to decide. Isn't it lovely being able to decide questions like this?

Let's have another. Any one you like.

PROFESSOR MORIARTY: The Fair Housing Act requires housing providers to make reasonable accommodations in any pet policy when a disabled person needs the assistance of a service animal.

Mary Anderson, an intellectually disabled tenant, has a medically prescribed emotional-support dog. The landlord threatened to evict Mary because her dog exceeded his pet policy's height-and-weight limits. Has he violated the Act?

PROFESSOR GARNER: I think he has. I'm about ready to hold that he has violated it. But as a judge, I say, "Wait." I just want to be sure. I want to confirm in the brief that this is correct. I want to see your citations to the record. I'm just about ready to decide this one. Hey, I'm getting caught up on my docket.

Let's go to the next page. Any one you would like, Professor Moriarty.

PROFESSOR MORIARTY: Under Louisiana law, a corporation must include all debt in its corporate-franchise tax base. Louisiana's highest court has long held that an advance is not debt if the borrower is not obligated to repay it. Bayou Boats receives advances on its corporate-owned life-insurance policies, but it has no obligation to repay them. Must Bayou Boats include the advances as debt in its tax base?

PROFESSOR GARNER: I don't think so. I'm just about ready to decide that one. Hey, we're clearing off the docket pretty quickly.

By the way, do you know how many lawyers would take 12 pages to say what that issue says in 67 words? Do you think it becomes more powerful over 12 pages? I don't think so. That very question becomes obscure when you spread over 12 pages what you can say in 67 words.

Do you know what the most important thing about the deep issue is? The 75-word limit. I discovered this when I was first developing the deep issue. I was experimenting. I was writing lots of deep issues. I was doing judicial-writing seminars, and I was beleaguering the judges in a way—on coffee breaks. I would say, "Judge, would you have a look at this issue?"

If it was 93 words, the judge would say, "You know, Bryan, I'm trying to get some coffee right now. I'll have a look at it before the day is out." Okay. But if it was 72 words, the judge would say, "Sure" and be willing to embark on it then and there. There's something about the bulkiness of long issue statements. They're off-putting. By distilling the issue into 75 or fewer words, you're making it easier for the reader.

Also, having done thousands of them, I've found that you can always frame an issue within 75 words. I haven't found otherwise

in any examples, and that's why I provided so many dozens of examples in *The Winning Brief*.

One more, Professor Moriarty. Any issue you would like.

PROFESSOR MORIARTY: The Eleventh Amendment immunizes states and their “alter egos” from federal lawsuits. The Supreme Court defines “alter egos” as those entities whose judgments must be paid from the state’s treasury because they are substantially controlled by the state. Here, Transport’s enabling statute prohibits judgments against it from being paid from the state treasury—and the state has only limited control over Transport. Does Transport enjoy Eleventh Amendment immunity from suit?

PROFESSOR GARNER: Well, I think we have seen enough illustrations of how this works. I propose that we replace Pennsylvania Rule of Appellate Procedure 21.16(a) with Figure 13, a model court rule.

A PENNSYLVANIA SUPREME COURT JUSTICE: It shall be taken under advisement. [*Laughter.*]

PROFESSOR GARNER: Excellent. It shall be taken under advisement.

So let’s look at Figure 13. There’s a court rule. You would elicit better issue statements from lawyers and pro se litigants alike. The examples are a necessary part of the rule. People have to know what to do—how to do it.

PROPOSAL #2: FOOTNOTED CITATIONS

My second proposal: If we’re serious about making legal writing better, we must clean up the cluttered text itself by more widely adopting footnoted citations. We should ban parentheticals from citations, except in footnotes. We should discuss leading cases in the text—and there should be no doubt about the age and authority of our precedents. Readers should never have to skip up and down on the page to look at footnotes. *Nothing* should appear there except bibliographic numbers etc.

What’s the problem with citations in the body? Well, let’s say you’re a judge. Again, a beleaguered judge. You’ve got way too much reading material.

Take a look at Figure 14. Oh my gosh. This is all quotations pasted together with citations. You know, if you don’t like writing,

Model Rule for Issue Statements in Briefs

Rule 28. Briefs

- (a) **Appellant's Brief.** The appellant's brief must contain, under appropriate headings and in the order indicated:
- (1) a statement of the issues presented for review, with no other information on the page, expressed in this form:
 - (A) each issue must include dispassionately phrased legal and factual premises in separate sentences, leading up to the final sentence ending with a question mark;
 - (B) no citations should appear within the issues presented;
 - (C) the facts included in the issue must be concise and chronological;
 - (D) no single issue presented may exceed 75 words;
 - (E) no issue may begin with *whether* or be phrased in a single sentence; and
 - (F) if two or more issues are presented, each should be prefaced with a concise, neutral heading, which does not count toward the 75-word limit;
 - (G) the issues presented should be modeled on these examples:
 - Federal circuit courts may hear and rule on final orders only. Summary-judgment orders granting foreclosure are not considered final orders. Wilson has appealed the trial court's grant of summary judgment on First Bank's foreclosure count. Is that appeal properly before this court?
 - For a criminal-sentencing enhancement to be constitutional, the enhancement must be either found by the jury or admitted by the defendant. At Smith's sentencing, the Government conceded that Smith's three-level-organizer sentencing enhancement was neither found by the jury nor admitted by Smith—yet the Court imposed it anyway. Is Smith entitled to resentencing without the enhancement?
 - At trial, the chief prosecutor mentioned in closing that Jeffries had decided to represent himself at trial—a statement that Jeffries did not object to at the time or in his motion for new trial. On appeal, Jeffries raises the objection for the first time. Did he properly preserve this complaint for appellate review?

Figure 13

This is my model rule for questions presented in appellate briefs. It would help appellate judges elicit better work product from the lawyers who appear before them. The exemplars in (G) are necessary illustrations if the bar is to understand what is expected. The appellee's brief must contain its own issue statement, presumably with premises differing from those in the appellant's, but otherwise following the same requirements.

- (4) Affected by other error of law;
- (5) Unsupported by substantial evidence admissible under G.S. 150B-29(a), 150B-30, or 150B-31 in view of the entire record as submitted; or
- (6) Arbitrary, capricious, or an abuse of discretion.

N.C.G.S. § 150B-51 (b) (2012).

An appellate court reviewing a superior court order regarding an agency decision “examines the trial court’s order for error of law. The process has been described as a two-fold task: (1) determining whether the trial court exercised the appropriate scope of review and, if appropriate, (2) deciding whether the court did so properly.” ACT-UP Triange v. Comm’n for Health Servs., 345 N.C. 699, 706, 483 S.E.2d 388, 392 (1997). The standard of review to be employed by the court on judicial review of an agency decision depends on the particular issues presented by the parties. Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998), *aff’d*, 350 N.C. 83, 511 S.E.2d 639 (1999). The reviewing court may be required to utilize both the “whole record” and the “de novo” standards of review, when reviewing an agency decision, if warranted by the nature of the issues raised. Skinner v. North Carolina Dept. Of Correction, 154 N.C. App. 270, 572 S.E.2d 184 (2002).

A *de novo* standard of review applies to claims that an agency violated a constitutional provision, was in excess of statutory authority, made a decision upon unlawful procedure or made some other error of law. Moore v. Charlotte-Mecklenburg Bd. of Educ., 185 N.C. App. 566, 649 S.E.2d 410 (2007). Similarly,

Figure 14

The middles of briefs often contain page after page of text resembling this. Many in our profession have simply become inured to it. Notice that the average case citation occupies two full lines.

judicial review of whether an agency decision was based on an error of law requires *de novo* review. Hodgkins v. North Carolina Real Estate Com'n, 130 N.C. App. 626, 504 S.E.2d 789 (1998); see Associated Mechanical Contractors, Inc. V. Payne, 342 N.C. 825, 467 S.E.2d 398 (1996) (applying *de novo* review to statutory interpretation); Matter of Darryl Burke Chevrolet, Inc., 131 N.C. App. 31, 505 S.E.2d 581 (1998) (statutory construction is *de novo*), *aff'd*, 350 N.C. 83, 511 S.E.2d 639 (1999).

In a *de novo* review, the court considers the matter anew and freely substitutes its own judgment for that of the Commission. In re Appeal of the Greens of Pine Glen Ltd. P'ship, 356 N.C. 642, 646-47, 576 S.E.2d 316, 319 (2003). "De novo review" requires the court to consider a question anew, as if not considered or decided by the agency previously, and to make its own findings of fact and conclusions of law rather than relying upon those made by the agency. R.J. Reynolds Tobacco Co. V. North Carolina Dept. Of Environment & Natural Resources, 148 N.C. App. 610, 560 S.E.2d 163 (2002).

When the issue on appeal is whether the agency's decision was supported by substantial evidence or whether the agency's decision was arbitrary and capricious, the reviewing court must apply the "whole record" test. ACT-UP Triangle, 345 N.C. at 706, 483 S.E.2d at 392; Associated Mechanical Contractors v. Payne, 342 N.C. 825, 832, 467 S.E.2d 398, 401 (1996); Powell v. North Carolina Dept. Transportation, 347 N.C. 614, 623, 499 S.E.2d 180, 185 (1998). The "whole record" test requires the

Figure 14 (*cont'd*)

Does anybody actually read these sentences or consult these cases? Or is this just boilerplate filler on the standard of review? Notice, again, the ugliness of the Courier typeface and the typewriting-throwback effect of the underlining (as opposed to italics).

law is the place to be. Of all literary professions, this is the place to be because just two sentences will fill up a page if you bulk them up with citations. This example continues like this not for just 2 pages, but for 50. And you're reading this stuff day in and day out. Lawyers get accustomed to it.

And Figure 15: Well, the reason we put citations up in the body is so people can plainly see where we've made *Bluebook* errors, as in not abbreviating *Management* and *Property*.

And by the way, at the bottom of the first page and over to the second is a one-sentence paragraph. The sentence has 13 words—only 13 words, just one independent clause—and all those citations. And those of you who are law students know very well that this was the most irksome thing when you began law school: learning what to do with all those mid-text citations.

Do you remember, in your first two weeks of law school, reading a sentence that said, “An employer is not responsible for the acting agent who's acting outside the scope and course of his employment. See *Flom v. Baumgartner*, 92 Pa. 46 . . .,” and asking yourself, “Am I going to have to remember this?” And you learn in your first two weeks of law school that no, you don't have to remember that. You don't even have to read it. That's why we put it there. You're just supposed to skip over that stuff. It just means there's some support for the preceding sentence.

Imagine a world in which you can actually *read* every word on the page and still know what the authority is. Imagine a world where people actually write, “Three years ago in *Flom v. Baumgartner*, the Pennsylvania Supreme Court held that so and so.” You know that *Flom* is the leading case. You know it's three years old. You know it's the Supreme Court of Pennsylvania. You don't know the volume number and page number where it appears. You probably don't need to know that on your first read. But you know where to find it when you do need to know.

Imagine not having to waste mental power by skipping over all this nonsubstantive stuff—which is exactly what lawyers have to do now. Lawyers tell me all the time, “I want to write really well. Just show me how I can do that with citations in the body. I will try.”

But trying to write well with citations in the body is like trying to become a PGA-class golfer in Fritzville. You're handicapped in what you can do. Guess what? Lawyers aren't writing paragraphs. They're not writing *real* paragraphs. Your seventh-grade teacher would flunk you for the kinds of nonparagraphs that lawyers are writing.

D. Texas Courts Reject XuXu's nullity argument.

Texas courts have rejected XuXu's formalistic approach, *See, e.g., GQ Enterprises Corp. V. Rajami*, No. 015-12-0353-CV, 2014 WL 215200 (Tex. App.–Dallas, May 22, 2014, no pet.) (mem. op.) (holding trial court did not abuse its discretion in defaulting *pro se* corporate defendant after warning it to retain counsel or face default); *Simmons, Jannace & Stagg, L.L.P. v. The Buzbee Law Firm*, 324 S.W.3d 833 (Tex. App.–Houston [14th Dist.] 2010, no pet.) (Brown J) (dismissing *pro se* partnership's appeal after warning it to retain counsel or face dismissal of appeal); and *Forrest Property Management, Inc. V. McGinnis*, No. 10-10-00273-CV, 2010 WL 4572384 (Tex. App.–Waco, Nov. 2010, no pet.) (same).

E. The Majority of Other Jurisdictions Reject XuXu's Nullity Argument.

Although a few states have adopted XuXu's formalistic approach, *see, e.g., State ex rel. commission on Unauthorized Practice of Law v. Tyler*, 811 N.W.678, 681 & n.3 (Neb. 2012); *Nerri v. Adu Gyanfi*, 613 S.E.2d 429, 430 (Va. 2005); *Davenport v. Lee*, 72 S.W.3d 85, 93094 (Ark. 2002); *Black v. Baptist Medical Center*, 575 So.2d 1087, 1088 (Ala. 1991); and *Stevens v. Jas. A. Smith Lumber Co.*, 222 N.W. 665, 666 (S.D. 1929), others have rejected it, *see, e.g.,*

Figure 15

Does this qualify as legal argument? Does it even qualify as prose writing? What sort of grade would it get from a seventh-grade English teacher? Almost everything about the passage bespeaks poor judgment.

Torrey v. Leesburg Regional Medical Center, 769 So.2d 1040, 1041 (Fla. 2000) (complaint signed by unlicensed attorney is an amendable defect and not a nullity); *H & H Development, LLC v. Ramlow*, 272 P.3d 657, 662–63 (Mont. 2012) (*pro se* complaint filed by limited liability company not a nullity and subject to cure); *Save Our Creeks v. City of Brooklyn Park*, 699 N.W.2d 307, 308 (Minn. 2005) (same); *Boydston v. Strole Development Co.*, 969 P.2d 653, 656 (Ariz. 1998) (*en blanc*) (same); *Richardson v. Dodson*, 832 S.W.2d 888, 889–90 (Ky. 1992) (same); *North Carolina Nat'l Bank v. Virginia Carolina Builders*, 299 S.E.2d 629 (N.C. 1983) (same); and *Applebaum v. Rush University Medical Center*, 899 N.E.2d 262, 429 (Ill. 2008) (rule should only be invoked when there is no other alternative remedy).

Every federal circuit court confronted with XuXu's argument has rejected it. See *In re IFC Credit Corp.*, 663 F.3d at 317 (bankruptcy petition signed by corporation's non-lawyer president was not a "nullity" that would render bankruptcy proceedings "void"); *Memon v. Allied Domecq QSR*, 385 F.3d 871, 873–74 (5th Cir. 2004) (district court's dismissal of corporation's uncounseled complaint without prior warning that corporations could not proceed *pro se* was abuse of discretion); *Harrison v. Wahatoyas, LLC*, 253 F.3d 552, 557 (10th Cir. 2001) (court had jurisdiction over

Figure 15 (*cont'd*)

Did you know that this is the most controversial topic in legal writing today? It made the front page of *The New York Times*.¹ Judge Posner has debated me on the point.² Justice Scalia has debated me on the point.³ Both fared about the same.

Here's Figure 16: an opinion by the beloved Justice Stevens. Look at the left-hand side. You see I'm not making this stuff up.

Let's change our analogy from golf to swimming. Let's say you go to a swimming instructor and say, "I want to learn competitive swimming. But I must always wear a three-piece suit while swimming, if you don't mind. No. It's a rule. I've got to wear a three-piece suit while swimming. But I want to be a competitive swimmer." Well, good luck.

We're professional writers of nonfiction. Who's going to read this stuff? Judges, other lawyers, law students—even laypeople. Look how you could read it. You could read every word with my revision in the right-hand column [Fig. 16].

By the way, the idea that the left column of Figure 16 is easier to read on a tablet or computer screen is pure folderol. There's nothing about on-screen reading that makes in-line citations preferable. They're as ghastly on the screen as they are on the page.

Okay. So the question is presented. My motion is that we subordinate all citations. Aristotle defined rhetoric as the art of amplification and diminution. You amplify certain things on the page. You diminish certain other things on the page.

What is the most important stuff in Figure 16? The substance. In the left column, the least important information is getting the most visual impact—the numbers, the citational stuff that carries no meaning at all as compared with the ideas and the arguments and the points that you're making.

This is a highly controversial proposition. It's hard for me to believe that it is, but again, I feel as if I'm trying to teach golf in Fritzville.

1. See William Glaberson, *Legal Citations on Trial in Innovation v. Tradition*, N.Y. TIMES, July 8, 2001, at 1.

2. See Bryan A. Garner, *Clearing the Cobwebs from Judicial Opinions*, 38 CT. REV. 4 (2001); Richard A. Posner, *Against Footnotes*, 38 CT. REV. 24 (2001); Bryan A. Garner, *Afterword*, 38 CT. REV. 28 (2001); see also Rodney Davis, *No Longer Speaking in Code*, 38 CT. REV. 26 (2001).

3. See Antonin Scalia & Bryan A. Garner, MAKING YOUR CASE: THE ART OF PERSUADING JUDGES 132–35 (2008).

ORIGINAL VERSION

Excerpt from *Cooper Indus. v. Leatherman Tool*,
121 S.Ct. 1678, 1684-85 (2001) (per Stevens, J.).

Despite the broad discretion that States possess with respect to the imposition of criminal penalties and punitive damages, the Due Process Clause of the Fourteenth Amendment to the Federal Constitution imposes substantive limits on that discretion. That Clause makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972) (*per curiam*). The Due Process Clause of its own force also prohibits the States from imposing "grossly excessive" punishments on tortfeasors, *Gore*, 517 U.S., at 562, 116 S.Ct. 1589; *TXO Production Corp.*, 509 U.S. 443, 453-455, 113 S.Ct. 2711, 126 L.Ed.2d 366 (1993) (plurality opinion).

The Court has enforced those limits in cases involving deprivations of life, *Enmund v. Florida*, 485 U.S. 782, 787, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death is not "a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (opinion of White, J.) (sentence of death is "grossly disproportionate" and excessive punishment for the crime of rape); deprivations of liberty, *Solem v. Helm*, 463 U.S. at 279, 103 S.Ct. 3001 (life imprisonment without the possibility of parole for nonviolent felonies is "significantly disproportionate"); and deprivations of property, *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (punitive forfeiture of \$357,144 for violating reporting requirement was "grossly disproportional" to the gravity of the offense); *Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589 (\$2 million punitive damages award for failing to advise customers of minor pre-delivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional).

In these cases, the constitutional violations were predicated on judicial determinations that the punishments were "grossly disproportional to the gravity of . . . defendant[s] offense[s]." *Bajakajian*, 524 U.S., at 334, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 303, 103 S.Ct. 3001; *Coker*, 433 U.S., at 592, 97 S.Ct. 2861 (opinion of White, J.). We have recognized that the relevant constitutional line is "inherently imprecise," *Bajakajian*, 524 U.S., at 336, 118 S.Ct. 2028, rather than one "marked by a simple mathematical formula," *Gore*, 517 U.S., at 582, 116 S.Ct. 1589. But in deciding whether that line has been crossed, we have focused on the same general criteria: the degree of the defendant's reprehensibility or culpability, see e.g., *Bajakajian*, 524 U.S., at 337, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 575-580, 116 S.Ct. 1589; *Solem*, 463 U.S., at 290-291, 103 S.Ct. 3001; *Enmund*, 485 U.S., at 798, 102 S.Ct. 3368; *Coker*, 433 U.S., at 598, 97 S.Ct. 2861 (opinion of White, J.); the relationship between the penalty and the harm to the victim caused by the defendant's actions, see *Bajakajian*, 524 U.S., at 339, 118 S.Ct. 2028; see also *Gore*,

REVISED WITH CITATIONS IN FOOTNOTES

Edited Version of *Cooper Indus. v. Leatherman Tool*,
121 S.Ct. 1678, 1684-85 (2001).

The States have broad discretion to impose criminal penalties and punitive damages. But that discretion is substantively limited by the Due Process Clause of the Fourteenth Amendment to the Federal Constitution. It prohibits the States from imposing "grossly excessive" punishments on tortfeasors.¹ And it makes the Eighth Amendment's prohibition against excessive fines and cruel and unusual punishments applicable to the States.² The Court has enforced those limits in cases involving deprivations of life,³ liberty,⁴ and property.⁵ The Due Process Clause is violated if a levied punishment is "grossly disproportional to the gravity of . . . defendant[s] offense[s]."⁶ Instead of an explicit formula applicable to all cases,⁷ we examine objective criteria to decide whether a penalty is grossly disproportionate. We must consider (1) the degree of the defendant's reprehensibility or culpability,⁸ (2) the relationship between the penalty and the harm to the victim caused by the defendant's actions,⁹ and (3) the sanctions imposed in other cases for comparable misconduct.¹⁰ Each criterion must be examined independently.¹¹

1. *Gore*, 517 U.S., at 562, 116 S.Ct. 1589; *TXO Production Corp.*, 509 U.S. 443, 453-455, 113 S.Ct. 2711, 126 L.Ed.2d 366 (1993) (plurality opinion).
2. *Furman v. Georgia*, 408 U.S. 238, 92 S.Ct. 2726, 33 L.Ed. 346 (1972) (*per curiam*).
3. *Enmund v. Florida*, 485 U.S. 782, 787, 801, 102 S.Ct. 3368, 73 L.Ed.2d 1140 (1982) (death is not "a valid penalty under the Eighth and Fourteenth Amendments for one who neither took life, attempted to take life, nor intended to take life"); *Coker v. Georgia*, 433 U.S. 584, 592, 97 S.Ct. 2861, 53 L.Ed.2d 982 (1977) (opinion of White, J.) (sentence of death is "grossly disproportionate" and excessive punishment for the crime of rape).
4. *Solem v. Helm*, 463 U.S. at 279, 103 S.Ct. 3001 (life imprisonment without the possibility of parole for nonviolent felonies is "significantly disproportionate").
5. *United States v. Bajakajian*, 524 U.S. 321, 324, 118 S.Ct. 2028, 141 L.Ed.2d 314 (1998) (punitive forfeiture of \$357,144 for violating reporting requirement was "grossly disproportional" to the gravity of the offense); *Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589 (\$2 million punitive damages award for failing to advise customers of minor pre-delivery repairs to new automobiles was "grossly excessive" and therefore unconstitutional).
6. *Bajakajian*, 524 U.S., at 334, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 585-586, 116 S.Ct. 1589; *Solem*, 463 U.S., at 303, 103 S.Ct. 3001; *Coker*, 433 U.S., at 592, 97 S.Ct. 2861 (opinion of White, J.).
7. *Bajakajian*, 524 U.S., at 336, 118 S.Ct. 2028 (noting inherent imprecision of measuring excessiveness); *Gore*, 517 U.S., at 582, 116 S.Ct. 1589 (acknowledging disproportionality is not "marked by a simple mathematical formula").
8. See, e.g., *Bajakajian*, 524 U.S., at 337, 118 S.Ct. 2028; see also *Gore*, 517 U.S., at 575-580, 116 S.Ct. 1589; *Solem*, 463 U.S., at

Figure 16

In the days of typewriters, the legal profession became inured to the type of clogged prose you see in the left column. The advent of computers exacerbated the problem with the ease of the copy-paste function, aggravated still further by the ease with which cases can be located with ready-made parentheticals to displace actual prose. Hampered by a perceived obligation to encumber their writing with citations coupled with parentheticals, both lawyers and judges themselves struggle to compose coherent paragraphs. Note how much more efficiently ideas are conveyed by the right-hand column.

PROPOSAL #3: POINT HEADINGS

After the issue statements at the beginning of a brief, the most important thing in a brief is the point headings. They are prominent throughout the middle part of the writing.

Proposal 3: Lawyers everywhere should adopt the U.S. Solicitor General's standards for point headings:

- complete sentences of 15–30 words (only in the argument section);
- down-style typesetting—no initial caps or all caps; and
- progression from major to minor premises, followed by points in rebuttal.

Let's look at some tables of contents from briefs around the country: look at Figure 17. Stipulate that the issue statements were worthless to us in this brief. Instead, let's look at the table of contents. Oh dear. Boy, they're really making this hard.

Many judges have told me that the most shocking thing is how difficult it is to decipher or excavate the arguments of counsel. The argument shouldn't require any excavation at all. The lawyer should be putting it in high relief right here.

Let's try another. Look at Figure 18. Oh dear. That's the way it prints out. That's what the judges are seeing.

Next: Figure 19. Now, I shouldn't be caught up on the fact that lawyers are trying to do initial capitals. Yes that's bad. But here they're doing initial capitals incorrectly. There's a rule about initial capitals: all style manuals say that even if you're doing initial capitals, you must lowercase prepositions, articles, and conjunctions of four or fewer letters.⁴ In other words, if you're going to do initial caps, you have to know your parts of speech. But this one is capitalizing *the*. And why am I focusing on that? I just can't help it. I'm sorry, but it's hard to find a table of contents that doesn't have these kinds of capitalization errors.

And here's something else—underlining. Underlining is a relic of the typewriter era, when it meant “I would have italicized this if I could, but I couldn't.” That's what underlining means. I find it very difficult to look at that page.

Also, look at how you've got (a), (b), and (c). Points (a) and (b) are phrases, but then (c) is a complete sentence. I don't know what

4. THE BLUEBOOK: A UNIFORM SYSTEM OF CITATION R. 8(a), at 91 (Columbia Law Review Ass'n et al. eds., 20th ed. 2015); BRYAN A. GARNER, THE WINNING BRIEF 430–37 (3d ed. 2014); BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE § 2.10, at 67–68 (3d ed. 2013).

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Figure 17

Could a table of contents be any less enlightening than this one?

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Figure 18

Who knows what happened at the law office to cause this? Granted that it would have been bad even without the typographic glitch on the first line of the point heading. That weird problem might lead court personnel to dub this the “Unabomber Brief.”

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Figure 19

Many odd judgments have gone into the production of this page—one poor decision after another: the margins, the length of the indents, the capitalizing (with initial capitalization attempted but incorrectly executed), the underlining, the uneven right margin, and the lack of parallelism in (a), (b), and (c).

that's all about. Are (a) and (b) less important than (c)? They should all be parallel constructions—all phrases or all sentences.

Next: Figure 20. Oh dear, all caps and boldface throughout. Yesterday Justice Todd told me over dinner, "When I see a lawyer using all caps, I just assume that the lawyer's shouting at me, shrieking at me." It's also hard to read when the heading is more than a few words long. Let's move on.

Figure 21: Oh dear. Well now, why would I get caught up on matters of form? The first point heading is trying to do initial capitals but doing them incorrectly because *this* and *that* should be capitalized. It's doing them incorrectly. But notice as well that the writer gave up even trying on Propositions of Law 2 and 3: no initial capping. Now, why should I be so focused on form? I don't know. Maybe it's just a turn of mind. But if I'm so distracted from the substance of this brief, maybe the judge will be as well. Next.

Look at Figure 22. Oh dear. This is a terrorist, I think. It's amazing the number of point headings and issue statements that look like ransom notes. It's scary. Let's keep moving.

Figure 23: This one is bunched up and unsightly. Justice Scalia looked at that Point II, "The appellate division failed to consider the legislative history of," and said, "Well good for them. Good for them."

By the way, even in jurisdictions where you do use legislative history, we generally look at it only in cases of ambiguity. But here, Point I says that the statute is absolutely clear on its face. Point II is, oh, they failed to look at—what are you talking about? Do you even know the law of your jurisdiction?

Okay. Let's go on to Figure 24. Oh, man. Well, this is somebody who knows how to full-justify and therefore doesn't mind creating huge potholes in the middle of a line.

By the way, look at Matthew Butterick's book *Typography for Lawyers*. It's full of wise advice about typography. But you hope your opponents don't. The nice thing about having adversaries producing briefs that look like this is the number of briefs that immediately tell the judge, "I have no idea what I'm doing, Judge. I don't know how I was even admitted to the Bar."

Did you notice the typos? There is one each in IV(a) and (b). If you do point headings like this, at least nobody's going to notice your typos because nobody's going to be trying to read your headings in the first place. They'll just move on. So will we.

Now to Figure 25. Kentucky has a weird rule. They put all the citations not only mid-text, but also in the middle of the table of contents. Every case cited. Oh dear. Next!

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Figure 20

By comparison with its predecessors, this table of contents isn't looking so bad. But it isn't well done—what with the all-caps text and the boldfacing throughout. The phrasing of the point headings is also poor, each one ending unemphatically with a statutory citation.

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Figure 21

This page reeks of eccentricity. In any event, it says nothing illuminating about the lawsuit. Mostly the page makes you wonder about the lawyer and his or her background. What leads to this kind of work product?

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Figure 22

Frightening, isn't it?

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Figure 22 (cont'd)

The widow/orphan control is important even in the table of contents. But the formatting of the first line of the page is the least of the problems. Note the typos.

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Figure 23

Compared with the others, this table of contents looks fairly “normal.” At least we can actually read it. But the content seems off: Point I is plain meaning; Point II is a failure to look at legislative history, which normally doesn’t come into play unless there’s an ambiguity. The points don’t jibe as well as they might.

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Figure 24

Just as you turned to this page, your colleague on the bench called to say that the legislature has approved an early-retirement plan for judges. You're eligible. If you took it, you would no longer be staring at stuff like this ten hours a day. Mighty tempting.

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Figure 24 (cont'd)

Go back to the preceding page and try counting the typos in this table of contents. It isn't easy to focus closely on such ill-designed pages.

INTRODUCTION

This is an ordinary medical malpractice case with an extraordinary opinion from The Court of Appeals. Tiberius Winfrey, MD, is a radiologist accused of misreading CT scans. The trial court entered judgment based on the jury’s finding that Dr. Winfrey did not breach the standard of care in his treatment of Appellee’s Decedent, Lilith Timothy.

STATEMENT CONCERNING ORAL ARGUMENT

The Court has indicated that no oral argument will be heard in this matter. However, Dr. Winfrey respectfully requests that, if the Court reconsiders the issue, he be granted oral argument regarding the issues he brings before the Court. Counsel for Dr. Winfrey believes that oral argument would assist the Court in sorting through the extensive trial record and complex issues, many of which are issues of first impression, especially the issue of negligent credentialing, before the Court.

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Figure 25

We hardly know what happened here—except that the intermediate appellate court has disturbed a jury verdict. The complaints are presented in a conclusory way here. Notice that the initial caps make the points hard to read. They force you to avert your eyes.

<i>Clephas v. Garlock</i> , 168 S.W.3d 389 (Ky.App.2004)	22
<i>Clark v. Commonwealth</i> , 223 S.W.3d 90 (Ky.2007)	22
<i>Commonwealth v. English</i> , 993 S.W.2d 941 (Ky.1999)	22
<i>Kuprion v. Fitzgerald</i> , 888 S.W.2d 679 (Ky.1994)	22
<i>Cherry v. Cherry</i> , 634 S.W.2d 423 (Ky.1982)	22
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<i>Jones & Granger v. Jonson</i> , 788 So.2d 381 (Fla.App. 1 Dist.2001)	22
<i>Gross v. Commonwealth</i> , 648 S.W.2d 853 (Ky.1983)	22
<i>Davis v. Fischer Single Family Homes, Ltd.</i> , 231 S.W.3d 767 (Ky.App.2007)	22
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<i>Morrow v. Stivers</i> , 836 S.W.2d 424 (Ky.App.1992)	27, 28
<i>Reece v. Nationwide Mutual Ins. Co.</i> , 217 S.W.3d 226 (Ky.2007)	27, 28

Figure 25 (cont’d)

If a local rule requires you to intersperse citations within the table of contents, then of course you must do it. Even so, you must proofread. This page (like most of the other replicas) contains several errors in form.

Look at Figure 26. Here we're talking about ransom notes. And that's the actual margin of the brief, half an inch—a third of an inch on the left side—so we could squeeze more words on the page.

Well, how should point headings be done?

Get a load of this: Figures 27 and 28. They're tables of contents from briefs prepared by the U.S. Solicitor General's Office, and they're works of art. They're equivalent to performances by the Pittsburgh Symphony Orchestra, a great symphony orchestra, or the Guarneri Quartet. They're virtuoso performances. They're the equivalent of Bono singing with U2 on *Songs of Innocence*, the acoustic track. They're equivalent to a round of golf played by Jordan Spieth.

It's a beautiful thing about the SG's Office: they know how to do point headings. Figures 27 and 28 are SG tables of contents reproduced in the third edition of my book *The Winning Brief*. The shaded boxes explaining aspects of the headings are my own. I'm not really encouraging you to file a brief with shaded boxes explaining the positioning of your major and minor premises. Those boxes are for pedagogical purposes only. But please do notice how rational and altogether pleasing the pages appear to be in Figures 27 and 28.

Figure 29 is a set of point headings by a prosecutor's office—not very good. They are redone according to SG style in Figure 30, with a deep issue as the question presented. That's how it ought to be done.

LEAVING FRITZVILLE

So I'm suggesting that if we're going to take a train from Fritzville, and we're going to be no longer on the fritz as professional writers, we need to understand how to state a legal problem in a way that people can actually comprehend in one reading.

We must remove the numerical pollution from our prose. Citations have gotten longer and longer. Parentheticals make it worse and worse. Who came up with parentheticals? *Bluebook* editors. And where do the *Bluebook* editors—law-review students—put *their* citations? In footnotes, and parentheticals are fine there. *The Bluebook* is destroying advocacy for practitioners by encouraging so many parentheticals.

Finally, we need to know a thing or two about how to do point headings. Lawyers should know to compose them early on in the writing process, to make them down-style (without initial capitals), and to ensure that the propositions hold together and form a solid edifice of argument.

As a whole, the profession doesn't know and doesn't do any of these things very well, so I suggest that we all hop on the first train out of Fritzville.

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Figure 26

Have you concluded by now that point headings and tables of contents are only haphazardly taught—or not taught at all—in law schools? I think that conclusion is quite correct. One advantage of the typical table of contents is that its form tends to hide the typos strewn throughout.

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Jurisdiction		1
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Argument:		
The United States provides a prisoner with adequate notice of an administrative forfeiture proceeding by sending written notice of the proceeding by certified mail addressed to the prisoner at the prison where he is incarcerated.	←	12
A. The Due Process Clause requires notice reasonably calculated, under the circumstances, to apprise a claimant of the forfeiture proceeding.	←	14
B. The government’s practice of sending a prison inmate written notice of forfeiture proceedings by certified mail addressed to the prison where the inmate is incarcerated is a reasonable means of informing the inmate of the proceeding.	←	15
C. Petitioner’s conjecture that prisons receive inmate mail, but do not deliver it to inmates, is unfounded.		21
D. Petitioner’s proposed rule that the government must prove actual receipt of notice finds no support in this Court’s decisions and is not warranted by petitioner’s policy justifications.		25
E. Petitioner is mistaken in claiming that inadequate notice would render a forfeiture “void” and entitle him to return of forfeited property.		34
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Unnumbered umbrella heading

Major premise

Minor premise

Refuting points

Figure 27

This orderly progression of propositions is sheer perfection. The points in refutation come toward the end of the middle part of the brief.

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Argument:	
The United States did not take petitioner’s property.	15
A. Any incremental flooding of petitioner’s floodplain lands caused by the Corps’ operational decisions was not a taking because it was temporary.	16
1. This Court has consistently held that temporary flooding of riparian lands is not a taking.	16
(a) The court of appeals applied a test developed and settled by this Court nearly a century ago.	16
(b) This Court’s flooding cases are foundational and have generated substantial-reliance interests.	22
(c) This Court’s distinction between temporary and permanent flooding is sound and practical.	28
(d) Petitioner’s arguments for abandoning this Court’s approach to temporary flooding are unpersuasive. ...	30
2. Any incremental flooding resulting from each of the Corps’ separate operational determinations was temporary.	33
B. Even if the temporary nature of the flooding here does not defeat petitioner’s claim, other factors establish that the United States did not take petitioner’s property.	37
1. A takings claim based on flooding of private lands downriver of a government project would be subject to an ad hoc factual analysis, not a per se analysis.	37
2. The circumstances of this case weigh strongly against finding a taking.	42

Unnumbered umbrella heading

Major premise

Buttressing subpremises

Refuting point

Minor premise

Major premise

Minor premise

Figure 28

Considerable artistry goes into fitting propositions together in this way. As you can imagine, those point headings cannot be an afterthought. They must be carefully plotted before the brief is written—though, admittedly, refined and adjusted as the body of the brief is developed.

<div style="border: 1px solid black; padding: 2px; display: inline-block;"> Buttressing of factual and policy points </div>	(a) As a riparian owner of floodplain lands, petitioner could have only limited expectations about the timing and volume of water flows on the River.	42
	(b) Flood control, like other government responses to forces of nature, permissibly adjusts the benefits and burdens of water to serve the public good.	44
	(c) The operation of the Dam resulted in, at most, incrementally longer flooding on petitioner’s lands. . .	46
	(d) The effect of the deviations on petitioner’s lands was limited in time, was highly indirect, and reflected only consequential damage.	52
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Figure 28 (cont'd)

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Figure 29

This prosecutor’s brief suffers from many of the shortcomings we’ve examined throughout this talk—in both style and content.

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<p style="margin-left: 40px;">A defendant who lies to a court about a personal circumstance cannot benefit from that lie after it is discovered. Because courts must warn noncitizen defendants that a guilty plea could lead to deportation, the judge asked Hunter directly whether he was an American citizen. Because Hunter falsely said yes, the judge did not warn him, accepted his guilty plea, and convicted him. May Hunter now benefit from his lie to vacate his conviction?</p>	
Statement of Facts.....	3
<p style="margin-left: 40px;">The Bail Hearing.....</p>	
<p style="margin-left: 40px;">The Plea Proceeding</p>	
<p style="margin-left: 40px;">The Sentencing Proceeding.....</p>	
Argument	5
<p style="margin-left: 40px;">Hunter’s misrepresentation of his citizenship status caused the plea court not to warn of deportation—an omission that Hunter cannot now benefit from.</p>	
<p style="margin-left: 40px;">A. <i>Peque</i> waives a defendant’s need to object at trial to preserve error if the judge should have “instantly” known from the record to warn the noncitizen defendant that conviction would result in deportation. Hunter lied about his citizenship status, knowing that deportation would follow, and pleaded guilty.</p>	
<p style="margin-left: 40px;">B. Hunter cannot use his lie about his citizenship to vacate his Plea, claiming ignorance of the consequence.</p>	
<p style="margin-left: 40px;">C. <i>Peque</i> announced a new rule that should be applied prospectively, not retroactively.....</p>	
	12

Figure 30

This table of contents is a makeover of Figure 29. Notice that (1) the deep issue (precisely 75 words) is presented in full here; (2) between the topical headings “Argument” and “Conclusion,” only full-sentence point headings appear; (3) topical headings (in phrases) are set in initial capitals, while point headings (full sentences) are set down-style; and (4) the remade table of contents alone gives a pretty full picture and highly understandable view of the case—so much so that a judge might be inclined to rule from reading it alone.

1. Federal retroactivity analysis is improper because the <i>Peque</i> court analyzed the due-process issue here using New York statutes and caselaw and rested its holding on that legal foundation.	14
2. <i>Peque</i> is considered new law under <i>Pepper-Mitchell</i> 's retroactivity analysis because it overturns established precedent and represents a sharp departure from longstanding jurisprudence.	16
3. <i>Peque</i> concerns a collateral matter (deportation) and does not affect the question of guilt or innocence at all, which should end the <i>Pepper-Mitchell</i> analysis.	17
D. The trial judge's failure to warn Hunter that a conviction would result in his deportation could not have prejudiced Hunter's case because he already knew that before he lied about his citizenship.	20
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Figure 30 (cont'd)

