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Carl S. Kaplan

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# THE JOURNAL OF APPELLATE PRACTICE AND PROCESS

BOOK REVIEW

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TEN ITEMS OR LESS: A REFLECTION ON THE THIRD  
EDITION OF BRYAN GARNER'S *THE WINNING BRIEF*

Carl S. Kaplan\*

## WHAT GOT ME THINKING

The other day I took some of my students from a criminal appeals brief-writing class to drop in on a trial. It's always good to get the students' heads out of the cold records they're reading and let them see and savor knockabout scenes from a real case. And we hit the jackpot: a mother on trial for killing her son, a sickly boy on lots of different medications, by giving him a fatal dose of at least fifty pills while they were staying at a fancy midtown hotel. The defense, according to newspaper accounts I had read, was extreme emotional disturbance. The mother admitted that she had killed her son, and said she tried to kill herself. But she did it because she was convinced that death was the only way to keep her son from the boy's father—a man she believed had sexually abused the child. The prosecutor's cross-examination, of which we saw a portion, focused on the methodical acts that preceded the apparent murder.

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\*Carl S. Kaplan is senior appellate counsel at the Center for Appellate Litigation, a New York City-based public interest law firm that represents indigents on criminal appeals, and lecturer in law at Columbia Law School.

The next day I read a story in *The New York Times* about that cross-examination, and lingered over one of the reporter's sentences:

She said she dropped 10 pills at a time into Jude's mouth and had him wash them down with water—a familiar bedtime ritual for him.<sup>1</sup>

That's a wonderful sentence, I thought. I wish my students could write a statement of facts filled with sentences like that. I wish *I* could write like that all the time. Why was it so good?

And then I heard Bryan Garner in my ear: It's a good sentence because it's concise, clear, and vivid. It's in the active voice. The words are short, mostly one or two syllables. Nouns and verbs, not adjectives and adverbs, predominate. The verbs are punchy—she “dropped” the pills into the boy's mouth and had him “wash” them down with water. And that em dash—it sets off the last clause with flair.

Reading the latest iteration of Garner's *The Winning Brief*<sup>2</sup> will do that to you. The book clicks on a light and reveals the building blocks of good writing. But that's no surprise.

### WHAT GARNER SAYS

Garner, as many lawyers and judges know, is perhaps the leading writer, teacher, editor, and evangelist for the plain style in legal writing—simple, clean, direct, and forceful. He is president of LawProse, which offers legal writing workshops and CLE courses. As a consulting editor, he has tweaked or massaged thousands of briefs into better shape. He has written a number of other books about style and usage,<sup>3</sup> and is editor in chief of Black's Law Dictionary. He has interviewed some 180 state and federal judges, including nine justices of the Supreme

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1. James C. McKinley Jr., *Challenges to Mother's Defense for Killing Son* 163 N.Y. Times A21 (Oct. 11, 2014).

2. Bryan A. Garner, *The Winning Brief: 100 Tips for Persuasive Briefing in Trial and Appellate Courts* (3d ed., Oxford U. Press 2014).

3. See e.g. Bryan A. Garner, *Garner's Dictionary of Legal Usage* (3d ed., Oxford U. Press 2011); Bryan A. Garner, *Garner's Modern American Usage* (3d ed., Oxford U. Press 2009); Bryan A. Garner, *The Elements of Legal Style* (2d ed., Oxford U. Press 2002).

Court of the United States, to better understand what makes a brief good or bad. He has co-authored two books with Justice Antonin Scalia,<sup>4</sup> and was admired by the novelist David Foster Wallace.<sup>5</sup> He is a word man without peer, and his usage and grammar rules are gospel.

This new third edition of *The Winning Brief* (700 pages), is an expanded and revised version of the second edition (459 pages), which built on the first edition (390 pages), published back in 1996. The latest volume follows the previous books' tried and true formula (Garner would scratch the cliché) of offering 100 mini tips for writing a brief, with each tip's explanatory nugget of three or four paragraphs sandwiched between colorful "Quotable Quotes" from writing authorities<sup>6</sup> and examples of dos and don'ts. He also condensed some material to make room for nine new tips, refreshed examples throughout, and added a helpful summary checklist at the end of each tip chapter. All aspects of thinking about and writing a brief are covered, from Garner's recommended mulling, outlining, drafting, and editing process (which he calls Madman-Architect-Carpenter-Judge), to tone, sentence structure, word choice, page layout, and the elements of persuasion.

Garner makes big demands (Tip 7: Organize your argument dialectically, anticipating and rebutting counterarguments) and small ones (Tip 20: Begin each paragraph with a topic sentence).<sup>7</sup> His voice is peppery, with all the charm of a thwack on the head. He warns in the new version of Tip 1 (Know thy reader), for example, that judges are busy and impatient, yet acknowledges that when they pick up a brief, it's with a sense of hope that it will show the right stuff.<sup>8</sup> But that expectation will be scotched when they encounter

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4. Antonin Scalia & Bryan A. Garner, *Reading Law: The Interpretation of Legal Texts* (West 2012); Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* (Thomson West 2008).

5. David Foster Wallace, *Tense Present: Democracy, English, and the Wars over Usage* 302 Harper's 39 (Apr. 2001).

6. Garner, *supra* n. 2, at xiv (noting that Garner selected those quotations only after spending eighteen months in "wide reading and close study" of the 6,500 books that "deal with writing and rhetoric" in the 36,000-volume LawProse library).

7. *Id.* at 55–59; 155–60.

8. *Id.* at 4–5.

carelessness (typos, poor citation form); vagueness (airy assertions that aren't concretely supported, raising the suspicion that you don't really understand the problem yourself); the indiscriminate inclusion of facts, without distinguishing vital details from incidental ones; and needless repetition.<sup>9</sup>

And he continues in this no-nonsense manner right through to Tip 100 (Remember the importance of ethos), at which point he reminds the reader that “whatever you write reflects who you are and how your mind operates.”<sup>10</sup>

Given this volume's heft, the reader may long for a thin book from Garner. Perhaps when he's about to sheathe his editing pencil and read full time for pleasure, he'll consider publishing a volume of fewer than 100 pages—a distillation of a dozen or so indispensable rules that young lawyers can gulp in one sitting. Until then, however, *The Winning Brief* does its best to carry out the explicit premise on which it rests—that students, young lawyers, and even seasoned advocates can improve their writing by reading and using it. “Think of [the book] as 100 tutorials,” Garner suggests. “Most tips take no more than five minutes to read. If you read tips a few at a time, you'll come to know the book—really know it. Then, as you gain seniority in the profession, you can train your juniors.”<sup>11</sup>

#### WHAT ELSE WE NEED

The flaw in this book's premise is that it's hard to learn how to write merely by studying and absorbing the lessons of a writer's guidebook, even a superb one like this. I was a journalist in a previous career, and that stint showed me that you learn to write best in an apprenticeship. You start off writing poor stuff—passive, redundant, vague—and your editor growls, tells you what's wrong, and throws the story back at you. It is by making efforts under round after round of criticism that you learn to write cleanly and love a simple declarative sentence.

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9. *Id.* at 5.

10. *Id.* at 697.

11. *Id.* at xv.

Most journalists would say the same thing, I think.<sup>12</sup> And Garner himself seems to acknowledge that the master-and-apprentice model is still important because he continues to teach his writing seminar around the country.

Of course, some people are naturals and the apprentice rules don't apply to them. (I see this in only one out of every ten students.) And some lawyers are lucky; they've had their work edited, a line at a time, by talented senior lawyers or judges. But many legal writers get little or no proper editorial grinding—and the courts don't grade or edit papers.

### WHAT ABOUT A NEW APPROACH?

Journalists face the same risks of verbosity, muddiness, repetition, and slackness as lawyers do. But they have an advantage over lawyers: tight word counts. They are instructed by their editors to turn in 700 to 800 words for that news story about the trial; 1,200 to 1,500 words for the Sunday think piece about the election; 200 words for that short zoo item earmarked for the front page. Newspaper editors don't give their charges the option of writing “two to fifteen pages,” or “under thirty pages,” in the hope that the piece will come in shipshape and tight.<sup>13</sup> Instead, they impose tough word counts from above. That's the best way to shape, sharpen, and focus a writer's work.

Short of hiring former journalists to teach clear writing in one-to-one law-school tutorials (alas, there would be plenty of reporters and editors available, owing to job cuts in newsrooms across the country), I have a suggestion to improve lawyers'

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12. See e.g. H.L. Mencken, *Newspaper Days* 15–16 (Alfred A. Knopf 1941) (describing one of his first editors: “Whenever I made a mess of a story, which was certainly often enough, he summoned me to his desk and pointed out my blunders. When I came in with a difficult story, confused and puzzled, he gave me quick and clear directions, and they always straightened me out.”).

13. And yet my editor for this book review—trained, obviously, as a lawyer—fell prey to just that indefinite approach. Email from Nancy Bellhouse May, Editor, *J. App. Prac. & Process*, to Author, *Re: The Journal of Appellate Practice and Process* (Sept. 23, 2014, 8:00 p.m. CDT) (noting that a “short” review of “about five pages” would be acceptable, as would a “longer” review of “anywhere from ten to 20 pages,” and noting as well that a review of “medium” length, covering “between four and ten pages” would also work).

written work that goes beyond reading and studying even Garner's guide: Enforce shorter briefs.

It's almost a truism that shorter briefs are better briefs, though certainly some appellate cases require extensive analysis. And so many of Garner's tips trumpet the virtues of brevity; it's the main thrust of his book:

Tip 32: Slash unnecessary words;

Tip 39: Eliminate throat-clearing phrases;

Tip 47: Save syllables. Shoot for one-syllable words when possible;

Tip 82: Don't overparticularize. Mention only details that illuminate or add interest; and

Tip 92: Strive to halve your page limits.<sup>14</sup>

And Garner has included in this edition a wonderful snippet from Judge Aldisert, who said that he had read some 630,000 pages of appellate briefs during his career, and that "[p]robably about 400,000 of these pages were unnecessary."<sup>15</sup> He refers as well to Judge Gee, who "diagnosed the most common literary disease afflicting legal writers: the bewildering inability to winnow important from unimportant facts."<sup>16</sup> Of course both judges were right. Shorter briefs gain in clarity and force. To meet a word limit when there is no chance of filing a longer brief, the author must drop secondary issues, improve organization, toss extraneous detail, refrain from over-analysis

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14. Garner, *supra* n. 2, at 251–55, 279–82, 321–23, 547–52, 615–26. Of course the first of these tips echoes Professor Strunk's famous dictum: "Omit needless words." William Strunk, Jr. & E.B. White, *The Elements of Style* xiii–xiv (3d ed. Macmillan Publ. Co. 1979); cf. Mark Twain, *Fenimore Cooper's Literary Offenses*, in Mark Twain, *Collected Tales, Sketches, Speeches, & Essays 1891–1910* at 180, 182 (Louis J. Budd ed., Lib. of Am. 1992) (encouraging writers to "eschew surplusage").

15. Garner, *supra* n. 2, at 615 (quoting Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Arguments* 198 (NITA 1992)).

16. *Id.* at 548 (citing Thomas Gibbs Gee, *A Few of Wisdom's Idiosyncrasies and a Few of Ignorance's: A Judicial Style Sheet*, 1 *Scribes J. Leg. Writing* 55, 57 (1990)).

of cases, and lift foginess. But unable to resist the attraction of the immaterial, many lawyers and judges fail to write tight.

I'm as guilty as anyone. My appeal briefs sometimes run a patience-trying fifty or sixty pages. I know better. Yet the counter-forces to brevity are strong. Supervisors, clients, and colleagues often suggest—or even insist—that I add arguments that are just strong enough to pass the laugh test, so I give in. And sometimes when I'm on a tight deadline, I won't have time to write short: I'll write out my notes at length, get enmeshed in cases I've read, even show off my research. If I don't have the time to think clearly about an issue, I'll dodge, clear my throat, and never get to the damn point.

The federal courts of appeals currently have a 14,000-word limit on main briefs,<sup>17</sup> which, depending on various layout factors, translates to about sixty pages. And the state appellate court in which I practice imposes the same cap.<sup>18</sup> This is too generous a limit. Appellate courts might instead consider taking advantage of the wisdom behind those ten-items-or-less checkout lanes at the supermarket.<sup>19</sup> A customer can buy a lot of groceries and wait in a slow-moving line, or buy nine items and zip through the express line. The ten-item sign is a nudge,<sup>20</sup> one that encourages selective shopping by actively discouraging a

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17. Fed. R. App. P. 32(a)(7) (LEXIS Sept. 27, 2014). A proposed revision to the Federal Rules of Appellate Procedure would trim the federal appellate brief length to 12,500 words, effective December 1, 2016. That modest word cut would restore the maximum length of main briefs to about fifty pages—the same maximum page length in operation around 1998, when the rule was amended to replace maximum page length with maximum word count. See Jud. Conf. of the U.S., *Preliminary Draft—Proposed Amendments to the Federal Rules of Appellate, Bankruptcy, Civil, and Criminal Procedure*, <http://www.uscourts.gov/uscourts/rules/preliminary-draft-proposed-amendments.pdf> (Aug. 2014) (accessed Oct. 24, 2014; copy on file with Journal of Appellate Practice and Process).

18. N.Y. S. Ct. App. Div., 1st Jud. Dept., R. P. §600.10.1(d)(i). An electronic copy of the rule is available at <http://www.courts.state.ny.us/courts/AD1/Practice&Procedures/rules.shtml#600.10> (accessed Oct. 27, 2014; copy on file with Journal of Appellate Practice & Process).

19. I know of course that we English majors are supposed to prefer “ten items or fewer,” see e.g. J.C. Duffy, Cartoon, *What can I say? I was an English major*, 84 *New Yorker* 60 (July 28, 2008) (showing a cashier who has modified his ten-items sign by scrawling in “fewer” for “less”), but as the express-lane sign at the grocery on Columbia’s undergraduate campus used to say, “[w]ho are we to ignore tradition?”

20. See e.g. Cass R. Sunstein, *Why Nudge? The Politics of Libertarian Paternalism* (Yale U. Press 2014) (taking the position that choice architecture should be helpful rather than harmful).

basket containing eleven, twelve, or maybe thirteen items. By the same token, courts could keep their existing caps for most briefs, but could amend their rules to provide that principal briefs of fewer than twenty-six pages would get speedier consideration.

Let appellate advocates craft those twenty-five-pagers for their clients, and we'll see if the writing improves, the judges suffer less, and the clients are happy with appeals that are more quickly resolved. My guess is that a fast-lane rule would do more to improve the quality of appellate briefs than anything else . . . with the possible exception of the lawyer sitting at one end of a log and Bryan Garner sitting at the other.

