

## This Is Writing

*There are these two young fish swimming along, and they happen to meet an older fish swimming the other way, who nods at them and says, "Morning, boys. How's the water?" And the two young fish swim on for a bit, and then eventually one of them looks over at the other and goes, "What the hell is water?"*

—David Foster Wallace, *This Is Water*

*"[E]very form is to be seen as it actually is with right discernment as: 'This is not mine. This is not my self. This is not what I am.'"*

—The Buddha to his son, Rahula

Who are you as a writer? Who are you trying to be? Do you even know if you are trying to be something? If you are like me, you probably began your path as a lawyer consciously or unconsciously adopting styles and personas from those around you, or from long-gone writers in case books. Eventually you may have found yourself writing a particular way with little thought or awareness as to why. Or you may have simply been forced—perhaps you still are—to write a particular way. Why those ways? Why not a different way?

In recent years I have experienced the piercing irony of having my writing edited into styles that I have deliberately tried to leave behind. It has led me to reflect on those styles, as well as the path I think I am on. Here is what I think I have learned.

**Playing dress up.** My first exposure to "legal writing" was cases in case books, not briefs. Many of the cases are old with meandering sentences and antiquated expressions. There is a vaguely Victorian, Mr. Burns-ish ornamentation at times. Like many, I tried it on. It's like those dress-up photo places in tourist traps with hats, garters, and little revolvers. Pretty soon, I had an array of new finery—"furthermore," "therefore," "however," "to the contrary," "former," "latter," semicolons, long dashes, and so forth. I remember feeling like I started sentences thrusting an index finger in the air like in David's "Death of Socrates." And those sentences frequently began, "However," or "To the contrary."

**Being a robot.** It turned out that I wasn't supposed to write like what I read in case books. I was supposed to write in active voice, and issues were to be analyzed in IRAC (Issue, Rule, Analysis, Conclusion). And I was to keep it short and functional with answers up front, recognizing the ever-so-busy and distracted nature of senior lawyers, who loathed attempts by youngsters at being cute. They were generally fine, though, with lots of "howevers."

I hated it. It led me to just copy forms. Give me an old memo or brief, and I would empty out the details and plug in new ones. To the extent I understood acceptable style, it was whatever conventions were followed in whatever sample was provided. Many tired style choices persist for no better reason. (E.g., the staying power of writing the name of a trial court brief or heading in ALLCAPS, even if it is several lines long, is stunning.)

**The high, angry style.** I got more experience and confidence, and eventually I got a bit more freedom to write as I wanted, most likely because my writing and thinking had improved. After clerking, and heavily influenced by others, I became attached to what I now call the "high, angry style." The style is *high* because it tends to embrace favorite linguistic baubles of the dress-up days. It is not casual or conversational. It is very much a written style. It is angry because it purports to have sincere irritation with the other side. Sometimes it can be

rather word drunk in calling out the other side, what with their inane, absurd, and asinine assertions and ubiquitous obfuscations. For a time, I thought it clever to work in classy words like "plethora" or "lacuna." Words like "inapposite" were "ineluctable" because there was a sense that someone who says "ineluctable" is just a little better than someone who says "inevitable."

The high, angry style also loves adverbs as the throbbing pulse of its contempt for the other side's legal vandalism. Certainly ... clearly ... plainly ... totally ... beating ... like ... a human ... heart ... absolutely ... ineluctably. In ever so many ways, it is over the top. Consciously or not, the high, angry style believes cases are won through rhetorical point scoring and attitude, usually exhibited by awesome put-downs of the opponent. And the awesomeness of a put-down is judged not only by its logic, but by its dazzling use of the handed-down ornamentation of the legal profession. When done poorly, alas, it is dreadfully cliché, as night follows day, with a Scylla and Charybdis here, a knight errant there, and slippery slopes going wee, wee, wee, wee all the way home to the wolf that comes as a wolf.

When done well . . . honestly, these days it rarely seems done well to me. It almost always feels cliché. Yet lots of good lawyers use the high, angry style. I still lapse into it (or get forced into it). But the style is so pervasive that it is not noteworthy (and, of course, the anger is almost never sincere), and the "high" nature of the style is a lot stuffier and readerunfriendly than the writer probably realizes. Worst of all, it is self-absorbed and writerfocused.

**The Garner years.** I read, wrote, and edited a lot of briefs when I was in the U.S. Attorney's Office, and I also began to teach legal writing at the National Advocacy Center. We gave every student Bryan Garner's *The Winning Brief*, and in order to teach legal writing, finally became a student of it. Reading and revising lots of briefs convinced me that (1) the stilted, angry style has become a default legal persona, and (2) most briefs are a long way from being reader friendly.

Garner convinced me that the keys to reader friendliness—at a high level—are getting to the point, being logical in presenting both facts and law, scrubbing out useless detail, and writing in a conversational style. I became an evangelist. When I was in a position to dictate style, I mandated introductions, chronological facts, no ALLCAPS, minimal block quotes and footnotes, always leading with the statutory text, syllogistic reasoning, and so on.

Much tougher, though, was getting people to write in a conversational style because the lack of conversational style has become the water most lawyers don't see. As Garner says, "[i]n written American English, the unfortunate tendency has long been to reach for the formal word that is widely known." For example, in briefs, everything is always "stated." No one ever "says" anything. We are "of assistance," and rarely "help." We "reside" places, as opposed to "living" there. "Drunk" people are "inebriated." "Cash" is "currency." Briefs are littered with words that one rarely uses in conversation (e.g., "subsequently"). We're used to it and treat the tedium that comes with it as unavoidable. For many, it is what legal writing is supposed to sound like.

I embraced the easy, structural elements of Garner's advice right away. But I still work at being genuinely conversational—using words I would naturally speak—and being reader focused. The most common edits I see, though, are injections of the high, angry style and more formality, usually in transitions. Clients frequently like angry because the client is upset or the client equates aggression with being skillful or to them the high, angry style is just what briefs are supposed to sound like. Also, clients (and junior lawyers) tend to think that their case, their problems, and their angry briefs stand out, which they rarely do. As for formality, many lawyers think it's not legal writing if the next paragraph doesn't begin with a "Moreover" or "Furthermore" or some other three-plus-syllable or multi-word transition mumble. Garner calls them "throat clearing phrases." They are also typically ornamental hand-me-downs.

Of course, a person can attempt to be the embodiment of Garnerian wisdom and write briefs that scream, "Look at me! I'm the best student of the latest trend in legal writing!" I've been that person, too. But if I am focused on myself and how I look, then I am not reader-focused, which means I'm not actually getting the point of all that useful advice.

**Where does it all lead?** I think the skillful path is to get over one's self and focus as much as possible on the reader, making things easy for the reader to understand and trust, and making things persuasive *for the reader*. Not for myself, the client, or some generic reader scoring rhetorical style points. Every stylistic choice—to the extent your superiors and the client permit it—can and should be judged according to whether it is reader-friendly and reader-focused. Conversely, any choice that is mostly about me and my desire to look clever or own a particular word, point, section, or brief should be suspect.

A reader-focused, ego-checked orientation is beneficial for many reasons. First, there can be no serious dispute that the reader should be the focus, though some may think that dazzling the reader is part of that. Second, removing my ego as much as possible helps me cope with editing. Some edits are misguided, but all edits are the responses of a reader. I need to remember that, no matter how much I like my own choices. Third, if I have to accept the changes anyhow, then I have to learn how to skillfully accept that reality. It helps if I remember that the brief is not me and shouldn't be about me. Acceptance may sound like resignation or despair, but it's not. It's all the ego and pride that lead to unhappiness and despair.

Of course, some may see other paths. Instead of removing one's self and focusing on the reader, the path could be some Maslowian self-actualization. I create a life with just the house, car, family, hobbies, and writing style that perfectly embody *me*. At the end, a brief could say, "Respectfully, this brief has been an Eric Wolff experience." Or some may think, "I'm going to reside somewhere in the middle, between angry and non-angry, formal and casual, conventional and hip." There are worse places to be, but the desire not to stand out or be different is its own type of self-absorption. And it's not reader-focused or aimed at persuading the reader.

So I will ask again because I think it can be helpful in evaluating your writing: Who are you as a writer? Who are you trying to be? Do you even know if you are trying to be something? Is it all about you? How's the water?

This has been an Eric Wolff experience. ©

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