



BRIEFLY

Eric J. Magnuson



Lisa L. Beane

How not to yell at court

By Eric J. Magnuson and Lisa L. Beane
Special to Minnesota Lawyer

Writers like emphasis. And legal writers really like it. They want to make sure their most important points stand out for the reader. Often they think the audience won't read carefully enough to pick up the most important points unless they are flagged in some way. So if **bold** is good, **bold and italics** must be better, and the best is surely **BOLD, ITALICS AND ALL CAPS**.

Not so fast. Readers have a different view: They want things to be clean, simple, and easy to read, and they don't want to be left with the impression that the writer is yelling at them.

Other columns have appeared in this space on subjects such as writing for screen reading, and why bullet points are good but long blocks of text are bad. See, e.g., Luke Hasskamp and Ryan Marth, "Briefly: Preparing an appealing brief in the digital age," *Minn. Lawyer* (Aug. 17, 2017). But regardless of whether you're writing for an audience that will read on a screen or on paper, some considerations of clean style and etiquette are universal.

Some of us are natural writers. Others have to work at it. But we can all be technically proficient writers. Beyond *The Bluebook*, many resources exist that provide guidance on a variety of writing-related subjects, from technical issues such as capitalization and citation to more substantive ones like structuring your arguments or distinguishing authorities. Readers of this column are likely familiar with essential guides like Strunk & White and the *Chicago Manual of Style*, as well as books by Bryan Garner and Ross Guberman, all of which are indispensable resources for legal writers. We also commend to you the newly published volume by Random House's copy chief—Benjamin Dreyer, *Dreyer's English: An Utterly Correct Guide to Clarity and Style* (2019)—which contains many useful tips for crafting clearer, more concise prose.

Here are some technical writing questions we have considered recently, the answers to which may help to eliminate distractions in your writing and make your brief easier to read, and ultimately more persuasive, without yelling.

When should you use all caps, bold, italics, or other forms of emphasis, and should you ever use them together? This is the question that launched this particular essay.

Emphasis in any form must be used sparingly to be effective. As the late Justice Antonin Scalia and Bryan Garner pointed out, "[W]hen too much is emphasized, nothing is." Scalia & Garner, *Making Your Case: The Art of Persuading Judges* 122 (2008). Ideally, writers should strive to construct sentences in a way that makes additional emphasis unnecessary. But when you do need to emphasize a word or phrase to get your point across, italics is best. See Scalia & Garner, *Making Your Case*, at 122; *The Bluebook: A Uniform System of Citation* 90 (20th ed. 2015). Using all-caps or bold—or combining italics with one or both of these—risks coming across as condescending, at best, or as shouting at your

audience, at worst. Neither outcome will enhance the persuasiveness of your brief.

How should headings be written, and how should they be capitalized? This is a biggie. Some lawyers think that court rules require all caps and underlining for headings. Not so. The appellate rules, state and federal, are agnostic on the subject. They leave the choice to the writer.

Fortunately, there are some guideposts to inform your decision. We think the best rule of thumb is that each section heading and subheading in the argument section of a brief should be a complete sentence that succinctly states your position on the issue addressed. This approach is widely recommended by accomplished advocates. For example, in their book *Making Your Case: The Art of Persuading Judges*, Scalia and Garner observe that section headings stating your position on an issue help show the reader where you're going with your argument, which adds clarity. A good heading alerts the reader to what follows, like a topic sentence in a well-written paragraph.

Ideally, the table of contents in your brief (which has all the section headings collected in one place) should tell a story that is easy to follow. Using complete sentences that succinctly summarize your argument as section headings can go a long way toward making your table of contents into an overview of your entire argument.

Ross Guberman suggests assessing the quality of your headings and subheadings according to the following test: "Could a judge skim your headings and subheadings and know why you win?" Ross Guberman, *Point Made: How to Write Like the Nation's Top Advocates* 75 (2011). This approach not only creates an initial roadmap of your argument to ground the reader, but it also serves as a convenient tool for judges, who read thousands of pages in preparation for a court sitting, to quickly remind themselves of your key points in the few minutes before oral argument. We know some judges who will start by reading the tables of contents of all of the briefs, so they know what to expect when they read each brief.

Now for a point we suspect some readers will find controversial: full-sentence section headings should never be in all-caps or all-initial caps (or title case). To be sure, there are sources that suggest all-caps for main headings and all-initial caps for subheadings, see, e.g., Gerald Lebovits, *Getting to the Point: Pointers About Point Headings*, *NYSBA Journal*, Jan. 2010, at 53, available at <http://ssrn.com/abstract=1540879>, and the Seventh Circuit gives examples of main headings using all-initial caps in making the point that all-caps should never be used, see U.S. Court of Appeals for the 7th Circuit, *Requirements and Suggestions for Typography in Briefs and Other Papers*, <http://www.ca7.uscourts.gov/forms/type.pdf> (last visited Feb. 4, 2019).

But we think the large number of authors who recommend capitalizing only those words that would be capitalized in text have the better of this argument. See, e.g., Guberman, *Point Made*, at 76-77 (giving examples); Scalia & Garner, *Making Your Case*, at 109 (same); Savannah Blackwell, *Legal Writing Tip: Make Your Headings and Subheadings Full Sentences*, *Legal by the Bay* (Feb. 21,



FILE PHOTO

The late Justice Antonin Scalia, pictured, and co-author Bryan Garner pointed out, "[W]hen too much is emphasized, nothing is."

2017), <https://blog.sfbar.org/2017/02/21/legal-writing-tip-make-your-headings-and-subheadings-full-sentences/>. Although title-case or all-initial caps text is well suited to the titles of books and articles and may be appropriate for shorter headings that are less than a full sentence, it is poorly suited to longer text like complete sentences. Sentence-case text is most natural and easiest to read, which makes it the clear choice for full sentence headings, especially since those sentences appear together in your table of contents. The Office of the Solicitor General uses sentence-case text for headings in the briefs it files in the U.S. Supreme Court (you can find copies of that Office's briefs from 1985 to the present at <https://www.justice.gov/osg/supreme-court-briefs>)—if sentence case is good enough for the S.G.'s office, it's good enough for us.

When do you capitalize terms like "court," "plaintiff," and "appellant"? Young lawyers in particular, and legal administrative assistants seem to have a passion for capitalizing anything that refers to a court or a pleading. But that is not what the Bluebook says, and it does not make much sense.

Party designations like plaintiff, defendant, appellant, or respondent generally should be capitalized only when used in lieu of a person or party's proper name, *vix.* — "Appellant argues that the suit was commenced within the statute of limitations, but the district court found as a fact that was not so." The better practice, when possible, is to use the party's name, or a shortened form of it. Judges read many briefs, and they can easily start to run together when every case appears to be Appellant v. Respondent. See Fed. R. App. P. 28(d): **References to Parties**. In briefs and at oral argument, counsel should minimize use of the terms "appellant" and "appellee." To make briefs clear, counsel should use the parties' actual names or the designations used in the lower court or agency proceeding, or such descriptive terms as "the employee," "the injured person," "the taxpayer," "the ship," or "the stevedore." When you are referring to the

parties in another case, however, those terms should not be capitalized—i.e., "In the *Jones* case, the court rejected the appellant's argument that . . ."

The term "court" has some specific rules on capitalization. According to the editors of *The Bluebook*, capitalize "Court" only when referring to the court that will receive your document, when naming a court in full (such as, the United States District Court for the District of Minnesota), or when referring to the United States Supreme Court. *The Bluebook: A Uniform System of Citation* 9, 92-93 (20th ed. 2015). In an appellate brief, do not capitalize the term "district court" when describing the proceedings below—i.e., "The district court granted Respondent's motion for summary judgment, and Appellant now seeks this Court's review."

When do you capitalize "order," "motion," and other similar terms? As a general rule, terms such as these should not be capitalized. Rare exception should be made when using title case for the caption or title of a court document—for example, Defendant Acme Corp.'s Memorandum of Law in Support of Motion for Summary Judgment, or Order Granting Plaintiff Smith's Motion for Default Judgment—or when referring to a document filed in the same case by its formal title. *The Bluebook: A Uniform System of Citation* 10 (20th ed. 2015). But in the text of a brief, there is usually no reason to capitalize these terms, and your prose will be easier to read if you don't.

Although these may seem like overly technical or nitpicky points, you can probably also recall reading documents in which emphasis was overused or words seemed to be capitalized without rhyme or reason. As a reader, seemingly random capitalization is distracting and overemphasis can come across as condescending at best, and at worst, as reflective of sloppy writing.

The bottom line is that we all want to write something our audiences can read with ease, and without being distracted by the written equivalent of verbal "ums," "ahs," and "likes." Following these suggestions, we hope, will be a helpful step in that direction.