BRIEF WRITING AND ORAL ARGUMENT IN APPELLATE PRACTICE

by

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On August 3, 1995, Mycroft Megachip Corp. and Franco-Midland Hardware Co. entered into a ten-year lease by which respondent leased office space at 221-B Fulton Avenue, in the City of White Plains, County of Westchester, State of New York. Respondent is an entity duly incorporated under the laws of the State of Delaware, with its principal offices in the City of Yonkers, in the County of Westchester, State of New York. Because of the fact that the transaction took place in the County of Westchester, the location of the demised premises, venue was lodged and this action was heretofore commenced in Supreme Court, Westchester County, State of New York.

In the spring of 1999, difficulties arose, giving rise to the claims that form the basis for the commencement of the instant action. It is alleged that the lease was wrongfully breached, culminating in the subject petition, brought on by order to show cause, signed by Hon. James Armitage, a Justice of the Supreme Court, dated November 3, 1999.

In an affidavit of B. Adelbert Gruner, dated December 15, 1999, counsel argued that the provisions of the lease were ambiguous and should therefore be construed against the draftsman of the lease. On January 25, 1999, Supreme Court granted partial summary judgment. The Appellate Division reversed, concluding that there were questions of fact, based on the doctrine set forth in 67 Wall St. Co. v Franklin Natl. Bank (37 NY2d 245, 249).

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This narrative leaves the reader confused and frustrated.

1. Who is the landlord and who is the tenant? The phrase "leased office space" is ambiguous. Landlords lease or rent space; so do tenants.

2. "Respondent leased" adds to the confusion. In certain proceedings the parties are referred to as petitioner and respondent. If the petitioner wins at the first level, petitioner becomes the respondent on appeal to the Appellate Division. If the Appellate Division reverses, the parties switch designations and respondent at the Appellate Division is the appellant at the Court of Appeals. Here, the reader can't tell who is the respondent. On an appeal, if someone is merely called "respondent," we are uncertain as to who won below, and who is appealing. Here, because we are still uncertain of who is the landlord and who is the tenant, the references to respondent are all the more bewildering. In some jurisdictions, there are appellants and appellees. We are not that fortunate; we have appellants and respondents. Because of the potential for confusion, "respondent" belongs on Susan McCloskey's list of bad words.

3. Who is claiming a breach of the lease? "The lease was breached" is in the passive voice, and we cannot tell.

4. "Counsel argued" or "it is alleged" are unhelpful phrases that frustrate the reader. Counsel for whom? Who is alleging? Subject to appropriate exceptions, it is clearest to refer to the party's name or to "the bank" or "the Town Board," or "the wife." In criminal cases, "the defendant" and "the People" are the best designations.

5. "Supreme Court granted partial summary judgment." Who sought it? Summary judgment for what? And to whom?

- It is better to say drafter than draftsman.
- All the talk about place of incorporation and venue is irrelevant and distracting.
- Check the dates. January 25, 1999, is obviously wrong. The decision cannot precede the motion.

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ls *rewritten:*

On August 3, 1995, Mycroft Megachip, as landlord, entered into a ten-year lease vith Franco-Midland Hardware Co., as tenant, for the rental of office space at 221-B :ulton Avenue in White Plains. Claiming that Franco-Midland breached the lease by ;ubletting the premises to a third party, Mycroft brought this proceeding to evict Franco-Midland and obtain damages for the breach. Citing 67 Wall St. Co. v Franklin Natl. Bank (37 NY2d 245, 249 [1975]). As landlord, Mycroft argued in the courts below that :he lease provision should be construed strictly against the drafter of the lease—here, :he tenant.

Supreme Court awarded Mycroft partial summary judgment on the issue of liability, leaving open only the question of damages. The Appellate Division reversed (*citation*), concluding that there were questions of fact as to certain alleged subsequent modifications of the lease. Mycroft has appealed to this Court.

2005

BRIEF WRITING AND ORAL ARGUMENT IN APPELLATE PRACTICE

By ALBERT M. ROSENBLATT
Judge, New York Court of Appeals

It is well known that time and advice are a lawyer's stock in trade. To this I would add, certainly in an appellate context, the lawyer's use of words.

Oral argument and brief writing are forms of communication. If the communication is clear and orderly, the reader will grasp the advocate's position. A good product is lucid, lean, and crisp. We get many briefs and arguments of that kind. Unfortunately, other presentations, bent perhaps only on content, are ponderous and disorganized, burdening the reader with the job of ferreting out what is important.

These concerns go beyond grammar and style. Poor style or improper punctuation are a hindrance to the reader, but may be overcome. On the other hand, a brief that is written with good grammar and style will be an insurmountable frustration if it fails to orient the reader as to what the appeal is about.

The suggestions concerning orientation relate not only to the brief's introduction, but to its content. Throughout this article I have tried to identify other considerations that go into brief writing, notably, what to include, and how to include it, in a way that best informs the reader.

I. ORIENTATION

A clear orientation marks the difference between a brief that is either joyful and informative, or dark and incomprehensible. From this, all else follows. Principles of law

nd detailed factual accounts are of little value to a judge who is not told at the outset hat the parties are seeking, and why.

A good appellate advocate will note a critical difference between oral argument nd brief writing. In contrast with some past practices, appellate judges in New York oday will have read the briefs before the oral argument. The brief, therefore, is the idges' introduction to the case, and a talented brief writer begins with that in mind. It akes planning and knowledge of one's audience. As New York's Chief Judge Judith S. aye suggests (Callaghan's Appellate Advocacy Manual, John W. Cooley, ed.), "An ffective brief is fully thought through before a word is set to paper."

A clear orientation is a preview, a concise road map for a "naive" reader who at hat moment is being treated for the first time to an account that the writer may have ived with for days or weeks.

An introduction or orientation of this type may, more often than not, be done in about a page. If the orientation is not supplied, or if it fails to inform the reader meaningfully, the reader is soon thrust into a sea of facts and dates without an anchor. The reader, the judge, is unable to differentiate between critical facts and subordinate facts. A concise, meaningful orientation helps the judge process the torrents of information that follow.

CIVIL CASE APPEALS

Here is a sample of a clouded, unhelpful, introduction in a civil case:

FACTUAL AND PROCEDURAL BACKGROUND

This action was brought by plaintiff-appellant Holmbjorn Sigerson against defendant-respondent, a facility duly incorporated under the laws of the State of Delaware and acting under the name and style of Hilton-Cubitt, as well as the defendant-respondent United States East Coast Athletic Association. Because of the fact that Hilton-Cubitt is owned by a New York State parent corporation (Garrideb, Inc.) and because Hilton-Cubitt does business in New York, venue was lodged and the aforesaid action commenced in Supreme Court, Westchester County, the residence, at all times relevant herein, of the plaintiff-appellant herein.

Prior to trial, both defendants-respondents had moved to dismiss the action by notice of motion dated October 8,2004. The motion was opposed by the plaintiff-appellant who submitted his affidavit dated December 28, 2004, a former employee of defendant-respondent Hilton-Cubitt. The court, in its order dated January 20, 2005, determined that the case should not be decided as a matter of law, owing to the existence of factual questions, but did authorize defendants-respondents to renew the motion at the conclusion of the proof, at trial. On March 9, 2005, the motion was renewed, at which point the court granted it, holding that, as a matter of law, no claim was established. The ruling was duly objected to, thus preserving the issue for appeal.

* * * * *

There then follows a statement of issues in the form of "Questions Presented."

1. Did the trial court fail to deny defendants-respondents' motion?

   Plaintiff-appellant contends that the answer to this question is in the affirmative.

2. Did the proof at trial reveal the existence of a question or question of fact? Plaintiff-appellant contends that the answer to this question is also in the affirmative.

Although the stilted, legalistic style of the introduction is far from a model of good writing, it does set forth facts. But as an orientation to an appellate judge, the account has no value. What is this case about? The questions presented are indistinct. Is it contract? Negligence? A minority stockholder's suit? A warranty? Anti-trust? It could be anything.

* * * * *

There then follows a factual narrative. We cannot assess it because we haven't context. We are unoriented if not disoriented.

THE FACTS

The first witness called was Francis Carfax who testified that on March 13, 2002, he was an employee of Hilton-Cubitt, which operated a ski area approximately five miles from the center of the Village of Paddington. He left work at approximately 6:45 p.m. after seeing to it that the lift apparatus was shut down (R 118) for the night. As part of her routine, she examined each chair on the lift, and the race gates, to be sure that the equipment was in tact. She then reported to her supervisor, Maud Bellamy, that the main power switch was functioning properly, and that the area was in shape for the skiing and racing activities scheduled for March14, 2002 (R 120).... (It continues).

At this point, we are beginning to get the idea that the case has something to do with skiing; maybe there was an accident. We are given dates. Are the dates

important? If the case involves the statute of limitations, the dates are critical, otherwise less so. We are told that Carfax left work at 6:45 p.m. Should we mark that fact? Does nightfall have anything to do with this? As we read, we still do not know what is going on. We are getting cluttered.

Eventually we will find out what is at stake, but we must do so *in spite of the brief* Consider the following orientation instead:

As Rewritten

INTRODUCTION

In this personal injury action, the plaintiff-appellant, Holmbjorn Sigerson,a professional ski racer, was injured when he crashed into a slalom pole during a ski race. In his first cause of action, he claimed that the Hilton-Cubitt's ski area personnel were negligent in the way they set up the slalom poles. He also asserted negligence against the United States East Coast Athletic Association, which authorized the race, and devised the rules and the racing course layout.

At the close of the case, the court dismissed these causes of action, holding that the plaintiff, as a professional racer, assumed the risk. At issue is the extent to which a pro racer's collision with a slalom pole is a risk that inheres in the sport, as against plaintiff's claim that the slalom poles used during this race were blatantly defective, and that the defendants knew of the condition of the poles but did not inform plaintiff of their hidden hazards.

The other causes of action relate to the defendants' failure to secure prompt ıedical help for the plaintiff, after the accident. We submit that the court erred when it ismissed the plaintiff's complaint. We seek a reversal of the judgment and a new trial.

* * * * *

In light of what we know, go back to the first *Factual and Procedural Background* aragraph, on p. 23 and see what it contains and what it lacks. Facts there are, but if ıe examine them one by one we see that these "facts" serve only to clog the reader's ıind with a plethora of dates and corporate entities upon which nothing turns.

The questions presented might also be sharpened, as follows:

1. Did the plaintiff, as a matter of law, assume the risk of being injured when colliding with a defective slalom pole during a ski race? We say no.
2. Did the defendants fail to secure reasonable, prompt, medical assistance for the plaintiff after the accident? We submit that this claim presented a question of fact for the jury, and that the court should not have dismissed the complaint.

CRIMINAL CASE APPEALS

The same considerations are true for criminal case appeals. Examine the following sample introductory paragraph, and ask yourself whether you can tell what the appellate *issues* are.

FACTUAL AND PROCEDURAL BACKGROUND

The defendant-appellant was tried jointly with co-defendant Reginald Musgrave, charged with two knife point robberies committed on January 2, 2003 and January 5, 2003, in violation of Penal Law Section 160.10(1) at the residences of Roger Prescott and Mary Morstan, respectively, both of whom reside in the Whitehall section of Queens County. Upon his arrest, on February 8, 2003, defendant was allegedly in possession of a knife and was charged with Criminal Possession of a Weapon in the Second Degree, in violation of Penal Law Section 265.01(2). Before trial, Supreme Court conducted a combined Huntley/Suppression/Dunaway hearing and by order dated June 12, 2003, found defendant's statement admissible at trial. The defendant is not challenging so much of the Court's decision as deals with the suppression of the knife. Following the verdict, the defendant was sentenced as a second felony offender, to 7 ½ to 15 years.

There then follows a statement of issues:

QUESTIONS PRESENTED:

1. Was defendant's guilt proved beyond a reasonable doubt? Defendant-appellant contends that this should be answered in the negative.
2. Did the hearing court improperly find that defendant's statement was admissible into evidence? Defendant-appellant contends that this should be answered in the affirmative.
3. Did the court improperly refuse to grant defendant's motion for a mistrial? Defendant-appellant contends that this should be answered in the affirmative.

The questions and the *"Factual and Procedural Background"* do almost nothing to aid the appellate judge. In the first sentence the writer refers to a co-defendant, but gives no disposition of the co-defendant's case. This is a grave and perilous omission. Next, dates are given, along with names and addresses. This is "factual," and may be exquisitely accurate, but still does not direct the court to the points on appeal. Then there is mention of a mistrial. We do not know why the defendant sought one. The writer then refers to a non-challenge, and, lastly, that sentence was imposed.

We are then presented with an overly detailed factual account that we are unable to analyze:

THE FACTS

At the Huntley/Suppression/Dunaway hearing Patrolman C.F. Ricoletti testified that on February 8, 2003 he was on radio patrol while on duty at the 13th Precinct in the County of Queens (H 19). At 10:50 a.m., in the forenoon of that day, he received a dispatch telling him that a red 1981 Mustang automobile, bearing license plate number 443-CR, was seen leaving Simpson's Restaurant at a high rate of speed (H 20). He approached the intersection of Crooksbury Hill and Deep Dene Streets when he spotted a 1981 Mustang (H 21). With him, in the said vehicle, was his partner, John Darme, who had joined him at 10:00 a.m., to continue *through* the shift until 6:00 p.m. Ricoletti described the Mustang as having a "brownish-rust colored tint " Ricoletti ascertained from headquarters that the car was reportedly stolen. He saw the driver (the defendant), who was dressed in a blue sweat shirt, bearing lettering of a college, which he could not make out. The driver had a beard (H 22), shaped like a "goatee,"

and long sideburns. In the passenger seat he saw another male, wearing sunglasses (H 23), etc., etc., etc.

* * * * *

What have we here? We are awash in facts up to our eyeballs, but we cannot see. Are the times relevant? (As it turns out, no.) Is the college sweat shirt important? (As it turns out, no.) Is the car model and license plate material? (No, as we shall see.) We are being swamped, and we are uneasy.

Consider, instead, the following:

INTRODUCTORY STATEMENT

The defendant was indicted, tried, and convicted of two knife point robberies jointly with co-defendant Reginald Musgrave, whose conviction was reversed by this court on July 25, 2000 *(citation*).

When defendant was arrested and questioned by the police, he had an open "adjournment in contemplation of dismissal" (ACD) in Criminal Court. Defendant claims that when he was brought to the station house he told the police of the ACD and asked about the availability of his lawyer. We contend that the police proceeded to interrogate the defendant in violation of his expressed right to counsel, and that his purported confession should have been suppressed.

The defendant also contends that the prosecutor, while cross-examining the defendant, violated the court's *Sandoval* (34 NY2d 371 [1974]) ruling, so as to warrant a mistrial, by inquiring into defendant's 1990 youthful offender adjudication. Moreover, the defendant's guilt was not proved beyond a reasonable doubt. The only testimony

elating to the robbery charges came from the alleged complainants, notably, drug addicts who were intoxicated at the time of the alleged crime and while testifying.

II. CHRONOLOGY

At times, a labored recitation of dates is not only unnecessary, but distracting. An irrelevant date is nothing more than a burden on the court. There are times, though, when dates are critical. There are also cases with tangled procedural histories that may bear on the appeal. The following is adapted from a brief. It is long and belabored. The facts are there, but the jumble of dates frustrates the reader:

A judgment of foreclosure and sale was entered on March 20, 1999, upon the motion of plaintiff-respondent's attorney, Joyce Cummings.

Defendant Vincent Spaulding has appealed from the judgment. On May 9,1999, this court denied defendant Spaulding's motion for a stay in the sale of the premises.

On October 23, 1991, the defendant Spaulding, a real estate management corporation, purchased the premises known as 221-B Baker Street in Hewlett from Mawson Holding Corp. (hereinafter Mawson) which later assigned the mortgage to the plaintiff 840 Appledore Corporation (hereinafter 840) on July 31, 1996.

On January 13, 1997, 840 brought the within foreclosure action, which also sought appointment of a receiver, when Spaulding's failure to make payments triggered the mortgage's acceleration clause. On March 18, 1997, Justice DeNide appointed Sebastian Moran receiver. Spaulding then brought an application to vacate the receivership via an order to show cause which was denied by April 6, 1997 order of Justice DeNide.

On June 27, 1998, this court dismissed Spaulding's appeal from the order of Justice DeNide, entered August 4, 1997, which, upon Spaulding's default, granted 840's motion to appoint a referee to compute the amount due on the mortgage, and denied Spaulding's motion to deem its answer and counterclaim served nunc pro tunc.

In a companion appeal, the Appellate Division, on May 13, 1998, reversed an order of Justice DeNide dated May 13, 1997 which had imposed sanctions of $3,000 on Spaulding for frivolous motion practice, finding that the court lacked the inherent power to impose such sanctions (*citation*). The action, *supra,* brought by Spaulding against Mawson had sought damages alleging false and fraudulent representations made at the time of contract, and an injunction enjoining assignment of the mortgage.

On October 20, 1996, the court (Rowbottom, J.) had dismissed with prejudice the TRO which had been granted by Mycroft, J., enjoining the assignment of the mortgage and any action to foreclose the mortgage.

On January 14, 2000, this court denied Spaulding's motion to reargue the dismissal of the appeal.

On April 24, 1999, this court had found that the appointment of a receiver for the property in question was proper.

While the above appeal was pending in this court, Spaulding brought a suit in Federal Court challenging the constitutionality of the provision of Real Property Law Section 254(10) which allows ex-parte appointment of a receiver. The Eastern District Court dismissed the action, and the Court of Appeals for the Second Circuit affirmed on May 15, 1988.

Consider employing a chronology, as an appendix. Be sure to tell the reader, arly on, that there is a chronology, and where it is located.

CHRONOLOGY

10/23/91	Defendant Spaulding purchases property from Mawson.
7/31/96	Mawson assigns mortgage to plaintiff 840.
10/20/96	Rowbottom, J., dismisses TRO of Mycroft, J., by which Mycroft, J. had enjoined foreclosure.
1/13/97	Plaintiff 840 brings foreclosure action.
3/18/97	DeNide, J. appoints Dodd as receiver.
4/6/97	DeNide, J. denies defendant's motion to vacate receivership.
5/5/97	Defendant's answer.
5/13/97	DeNide, J. imposes sanctions on defendant.
8/4/97	DeNide, J. order appointing referee to compute.
5/13/98	Appellate Division reverses DeNide's order of 5/13/85 (_AD2d_).
6/27/98	Appellate Division dismisses defendant's appeal from 8/4/85order in that it's an appeal from a default judgment (AD2d_).
[1]10/25/98	Order of Denide, J. denying defendant's motion to vacate DeNide's 8/4/85 order.
10/28/98	October 25, 1998 order entered.
2/14/99	Defendant's instant appeal perfected.
[2]3/20/99	Judgment of foreclosure entered.

[1]Order *appealed from.*

[2]Judgment, which includes the order (10/25/98) *appealed from.*

4/24/99 Appellate Division finds appointment of receiver proper (AD2d_)

5/9/99 Appellate Division denies defendant's motion for stay of foreclosure sale.

1/14/00 Appellate Division denies defendant's motion to dismiss the appeal (_AD2d_).

5/15/00 Second Circuit affirms dismissal of defendant Spaulding's federal action (_F2d_).

* * * * *

We are able to see that the order appealed from is subsumed in the judgment, so that the appeal is from the judgment. There is no appeal from the order. This emerges from a morass of dates and proceedings. The chronology helps identify relevant dates.

III. INCLUSION OF MATERIALS

If there is a relevant statute or regulation, reproduce it in the brief. This calls for judgment. Obviously, the brief would be swollen if every remotely relevant statute were reproduced. Bear in mind, though, that judges sometimes read briefs at locations other than offices or libraries and do not have ready access to law books or to the record.

If there is any criticism as to overly lengthy briefs it is, generally, not because statutes are included.

IV. THE DESIGNATION OF PEOPLE AND PARTIES

The following sample is an overblown legalistic description of people and parties:

While in front of her home at Grosvenor Square in the Town of Brewster, on March 15, 2002, the seven-year-old infant plaintiff herein, Isadora Klein, was struck by a vehicle having been driven by defendant third-party plaintiff, Grice Patterson (R 113). The use and operation of the vehicle was admitted. Negligence, however, was denied by the defendant third-party plaintiff, on the ground that the said vehicle was defective (R 115). It was asserted that his automobile, a 2001 Renault was equipped with brakes that were improperly manufactured and/or installed by Renault International, Inc. , and Renault, and not he, was liable therefor, as third-party defendant. By service of summons and complaint dated May 12, 2003, a fourth-party action was commenced, wherein Cardboard Box Co., Inc., the actual brake supplier, was named by the third-party defendant, as being at fault (R116).

The defendant, the third-party defendant, and the fourth-party defendant each cross-claimed against the other, leaving questions of fact for the jury as to whether and to what extent liability should be imposed on any or all of them.

* * * * *

Try this:

On March 15, 2002, defendant Grice Patterson, while operating his 1998 Renault, struck the seven-year-old plaintiff, Isadora Klein (R 113). Patterson, in a third-party action, impleaded the auto manufacturer, Renault, blaming it for defective brakes. Renault, in turn, in a fourth party action, blamed its supplier, the Cardboard Box Co., Inc. (R 115). The driver, the manufacturer, and the brake supplier cross-claimed against one another, creating questions of fact as to who was at fault and to what extent.

It is best to designate the parties by first identifying the legal status (e.g., plaintiff-appellant Cox & Co., [buyer]). It then follows that "Cox, the buyer, sought specific performance." It is also usually preferable to refer to the Town, the Board, the Village, the City, the Department of Health, etc., rather than respondent-intervenor-appellant, etc. (e.g., "The trial court directed a verdict against the Village.").

Similarly, refer to "the bank," "the wife," "the husband," "the doctor," "the hospital." Although there is nothing legally or stylistically wrong with the words "insurer" or "insured," they create problems because that are too easily (and too often) switched, owing to typographical errors or oversights. An "insurer" is more clearly referred to as "the carrier" or "the insurance carrier." An "insured" may be a "policy holder."

At times, proper names will help clarify. There are obvious exceptions: Often it is clearest to simply say "the plaintiff." In a single-defendant criminal case, it is obviously better to say "the defendant," than "Jones" or "Roylott." Use whatever is clearest. Almost always, terms like "respondent-appellant" are least clear.

There are other expressions or usages that should generally be avoided, such as words like "counsel" and "witness." "The witness said..." sometimes presents a case of identity. So, too, with counsel, as in "counsel argued...and opposing counsel retorted... " [which counsel?] Better to say "the hospital argued," the "City asserted," and so forth.

THE USE OF DESCRIPTIVE RECOGNIZABLE TERMINOLOGY

'LLUSTRATIONS FROM BRIEFS THAT ARE OVERWRITTEN	*IN MOST (BUT NOT ALL) INSTANCES, THIS IS ALL WE NEED:*
)n April 26, 2001, the lease was sent to he office of plaintiff-respondent's ittorney (T 18), after having been ;igned on that day by lefendant-appellant (T 24). Thereafter,)n April 30, 2001, the lease was signed)y plaintiff-respondent, by a duly authorized officer of plaintiff-respondent, lamely, Vice President Archie Stamford T 30).	The landlord signed the lease on April 26, 2001 (T-24). The tenant signed it on April 30, 2001 (T 30).
Following the entry of an order of support, plaintiff-appellant brought on a motion to correct an Income Execution pursuant to CPLR 5241 (R18), asserting in her affidavit that the court, in setting the amount of support, had made a "mistake of fact" in calculating arrears. The defendant-respondent's attorney made across-motion to correct, and submitted an affidavit in support thereof, averring that the calculations were inaccurate only to the extent that they were tabulated in a way that unduly favored plaintiff-appellant (R 51).	The wife moved (R18) to correct the Income Execution (CPLR 5241) , claiming that the court made a "mistake of fact" in calculating arrears due her. The husband cross-moved claiming that he overpaid (R51).

Appellate courts usually have page limitations in briefs. The reformulation results not only in greater clarity but a sizable gain in economy.

V. THE PASSIVE VOICE

The improper use of the passive voice is a serious drawback. It is not only stylistically poor, but often leaves the reader groping. Tom Goldstein and Jethro K. Lieberman in *The Lawyer's Guide to Writing Well* (McGraw Hill, 1989) emphasize this point. The passive voice is a construction that permits the writer (to the discomfort of the reader) to avoid referring to the person or thing that takes the action. "The lease was broken." But we are not told who broke it. The passive voice expressions on the left, adapted from briefs, convey uncertainty and incompleteness. Compare them with the active voice.

PASSIVE VOICE	*ACTIVE VOICE*
The contract was signed on March 12, 2005. [Who signed it?]	The buyer signed the contract on March 12, 2005.
It was argued that the adjournment had been sought twice. [Argued *by* whom?]	The plaintiff's attorney argued that she had sought the adjournment twice.
A motion for joinder was opposed. [By whom?]	The defendant Moriarty opposed the prosecutor's motion for joinder.
At 10 p.m. the car was returned to the defendant's girlfriend, after reading the agony column. [Who returned the car?]	After reading the agony column, Donald Melas returned the car to defendant's girlfriend at 10:00 p.m.

VI. PRONOUNS THAT CONFUSE

ILLUSTRATIONS OF UNCLEAR EXPRESSIONS	*PREFERRED*
The defendant then spoke with Hattie Doran whom Moulton identified as his girlfriend (R 77). [Who's girlfriend is he?]	The defendant then spoke with Hattie Doran, Moulton's girlfriend (R 77). OR The defendant spoke with Hattie Doran, who, according to Moulton, was *defendant's* girlfriend (R 77).
The plaintiff stated that he returned to Jefferson Hope's (R 301), had a "few drinks" with his friend, Wiggins, and drove off in his car (R 302). [Whose car?]	Plaintiff stated that he returned to Jefferson Hope's (R 301), had a "few drinks" with his friend, Wiggins, and drove off in Louis's car (R 302). OR ...in his own car.

When editing the brief check it for confusing pronouns. "She sent her another letter on April 7, 2005" can be confusing. "X sent Y another letter on April 7, 2005" leaves no doubts.

Occasionally, a lack of clarity as to the order of words, or as to who is doing what, may result in some entertaining offerings:

Presbury could not identify the person who hit him at trial.

Mortimer Tregennis testified that the injury occurred when a pole banged against the plaintiff's head, as he was placing it on the ground.

The car was driven by the defendant without steering capacity.

This case involves the liability of a landlord arising out of a defective boiler.

Jack Woodley was struck by the defendant who was riding on a horse with defective bifocals.

VII. JARGON and "BAD WORDS "

Most judges are not impressed with legal jargon. In an article entitled *Working With Words* (New York State Bar Journal, vol. 54, no. 3, p. 24'7), Herald Price Fahringer urged attorneys to cleanse their writings of those "awful idioms" that amount to no more than a gaudy show of erudition. Only the impressionable novice is impressed. At best, these idioms are stilted and archaic; at worst, they are redundant.

Susan McCloskey, a writing consultant who often works with attorneys, has compiled a list of what she calls "bad words" and "inflated phrases," along with the cure. The list epitomizes the field:

INFLATED PHRASES (and the words they are inflating)	
at this point in time	now
by means of	by
by reason of	because of
by virtue of	by, under
despite the fact that	although
due to the fact that	because
during the time that	during, while
for the period of	for
for the purpose of	to
for the reason that	because
from the point of view of	to
have the capability to	can
in accordance with	by, under
inasmuch as	since, considering

in connection with	with, about, concerning
in favor of	for
in many cases	often
in relation to	about, concerning
in some instances	sometimes
in terms of	about
in the event that	if
in the nature of	like
on or before	by
on the basis of	because
on the grounds that	because
prior to	before
pursuant to	under
question as to whether	whether, the question whether
subsequent to	after
until such a time as	until
with a view to	to
with reference to	about, concerning
with regard to	about
with respect to	about

McCloskey also offers a number of instant editing devices that convert jargon into good writing:

Prune (or uproot) legalese.

Instead of: Pursuant to the Order of the Court, said defendant commenced his time in prison due to the fact that he had been held in contempt.

Try: Under the court's order, this defendant began serving time for contempt.

Don't bury the real verb in a noun phrase.

Instead of: give an extension to

Try: extend

If you're unnecessarily repeating words, phrases, or ideas, revise to eliminate the repetition.

Instead of: Decedent was only child and a widower, and had no offspring during his lifetime. Decedent died without siblings, spouse, or children, and therefore the decedent died without relatives to survive him.

Try: The decedent left no relatives.

VIII. DATES and CITATIONS

Perhaps it seems too obvious to urge that citations and dates be checked and double checked before signing off on the brief. If a citation is wrong we can, with some effort, usually locate the case. If a date is wrong it can throw the reader off course. It happens often enough as to merit our emphasizing it.