TRUST ME

The Little Things That Kill Credibility in Court Papers

by Jason W. Grams

The purpose of any court paper, from a simple motion to extend a deadline in county court to an appellate brief in the Supreme Court, is to request action from the court and to persuade the court to take that action. Knowing what to ask for is usually easy—grant or deny a motion, affirm or reverse or modify a judgment. The persuasion is the hard part. As lawyers, our task is to convince someone whose job it is to be skeptical to side with us and act in our client's favor. Some of us specialize in doing the work of persuasion live and in-person. But many important issues are decided solely on or heavily influenced by the papers. Mercifully, although the application may be different, the principles of persuasion are the same whether you are giving a closing argument or writing an appellate brief.

Jason W. Grams

Jason Grams is a partner of Lamson, Dugan & Murray, LLP. Jason's practice is focused on appeals and business litigation. He holds a B.A. in political science from UNL and a J.D. with high distinction from the University of Nebraska College of Law (order of the coif, order of the barristers), where he was an executive editor of the law review and member of the national moot court team. After law school, Jason served as a law clerk to Senior Judge Lyle E. Strom of the US District Court for the District of Nebraska and Chief Judge William Jay Riley of the US Court of Appeals for the Eighth Circuit.

For Some Reason, Everything Always Starts with Ancient Greece

Aristotle teaches us the three modes of persuasion are logos, pathos, and ethos. Logos is your argument, your appeal to logic. Pathos is your story, your appeal to emotion or justice, usually told in the facts section of your brief. Ethos is your ethical appeal, directed to the audience. Ethos is the Greek word for character and focuses on the speaker's need to establish credibility with the audience. It is easy to see how credibility is important in in-person settings. A calm and well-spoken lawyer with a polished, professional appearance is more likely to be thought of as careful, analytical, and prepared. Rightly or wrongly, a judge may think such a person less likely to make factual or legal errors than someone in sandals and a t-shirt pounding on a lectern, regardless of the merits. But where does ethos fit in to writing? Unlike logos or pathos, which are largely accounted for in formal sections of a brief, the writer's ethos permeates the whole document.

Credibility can be affected by big things and little things. The big things are often written about: high level structure and organization, argument choice, presentation order, depth of treatment of topics, omitting weak arguments, and so on. The big things are big, they are often strategic, and they are important to establishing credibility, but they are not the focus of this piece. This article is about the little things: following the rules and conventions of the court and the community in which you are practicing. The little things may often be neglected, but they should not be. A writer seeking to earn and maintain credibility ignores the little things at his peril.

Credibility is trust: trust that you will tell the truth; trust that you know what you are talking about; trust that you can help. You need credibility to avoid the thought, however fleet-

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ing, that "if I cannot trust you to get the 'easy' details right, how can I trust you to get the 'hard' legal analysis right?" What are the "easy" details? Following the court's rules is one, which starts with reading them. If the court rules require you to include certain things in your brief, include them. If the rules require you to individually number each statement you claim is an undisputed material fact and provide a record citation for it, do that. If the rules require you to provide a statement of the issues and a list of "most apposite cases," provide them. Some courts want particular font sizes, page lengths, section headings, or certificates. Give them what they want.

Otherwise you risk being seen as careless, and your judge will think she cannot trust you. Worse, you risk being seen as disrespectful, choosing not to comply with the court's rules. You did not double space a block quotation or number your statements of undisputed facts. Therefore you either did not care enough to read the court's rules or you felt your personal preference was more important than the court's. Either way, your credibility suffers. Worse, you will likely never know whether or how much this cost you, and there is no appeal from a loss of credibility.

But, you say, the judge should look past all of this and just make the right decision based on the facts and the law! It should not matter what I look like in court or whether I proofread my briefs! Maybe. But this position overlooks how elusive the right decision can be and how much courts need to trust advocates—to rely on your credibility—to help them understand both the facts and the law. If your judge cannot trust you to get the little things right, how can she trust you not to stretch the facts or cite a case for a proposition it does not support? Lawyers often underestimate the extent to which courts need to trust them in order to do their work. Except for those reading this article, judges are not superhuman. They need to trust that you will clearly and accurately report the relevant law and facts to them for decision. They need to rely on your credibility.

The Grand Dame of Minneapolis and the Horse

A great way to tax your credibility with most judges is to assign the work of reasoning out your argument to the court. This can take many forms, from attempting to force the court to mine your brief or evidence by failing to provide citations to hopeful suggestions that your point is "clear" or "obvious." This comes up more often than you might think, and the courts are well aware of this frequent, and lazy, dodge. For example, in an annual training session for new appellate law clerks, the late Circuit Judge Diana E. Murphy instructed the clerks that "any time a lawyer uses the words 'clearly' or 'obviously' in a brief, scrutinize it carefully. That means it is not clear at all." In a similar vein, Harvard Law Professor Henry Steiner is quoted as saying, "Whenever someone says 'clearly,' that's where the horse is buried." It is unclear whether the horse's burial is a reference to the progress of an old west investigation or merely the suggestion that using "clearly" or "obviously" in legal writing stinks.

Regardless, showing your audience why your point is correct is always more persuasive than asking your reader to rely on your credibility—to trust you. Don't do it! Save your credibility for the court's evaluation of your argument. Rather than saying, "clearly the sky was blue," try something along the lines of, "It being 2:00 p.m. on a 68 degree day in May, with the National Weather Service reporting no clouds or precipitation, it is safe to say the sky was blue on the date of the incident." If the fact matters enough to include in your brief at all, it matters enough to show instead of tell.

Death by Bluebook

Not understanding the Bluebook can hurt your credibility. Don't believe me? Consider Bluebook Rule 1.2. Under Rule 1.2 if you cite a case and put no signal in front of the citation, you are telling the court that your "[c]ited authority (i) directly states the proposition, (ii) identifies the source of a quotation, or (iii) identifies an authority referred to in the text." If, instead, your "proposition is not directly stated by the cited authority but obviously follows from it [or] there is an inferential step between the authority cited and the proposition it supports," your citation must lead with the "See" signal. And if your citation merely "supports a proposition different from the main proposition but sufficiently analogous to lend support," you should use the "*Cf.*" signal. Thus, if you make a statement about a case that does not appear in the case itself, at a minimum you should be introducing your citation with a "*See*" signal. If you just list a citation with no signal, you are representing to the court that your proposition is to be found directly in the cited case. If it is not there, your representation is false.

Is the misrepresentation unethical? It is if you knew what you were doing! And if you did not know what you were doing, your competence is questionable. Either way, the court cannot trust that your citations are accurate and must delve into each case you cite to check them. A corollary is that if you cannot manage to put an ordinary cite to a case or statute in proper form it leads one to wonder if you know the rules well enough to understand things like Rule 1.2. Not every judge will lose trust in you for minor transgressions in this area, but some will. And their law clerks certainly will.

Speaking of law clerks, because their work involves a great deal of careful review of the parties' briefs, they quickly become experts at noticing misrepresentations and neglect. One clerk friend of mind was working on an attorney-filed brief when she noticed the lawyer had used an ellipsis to denote the removal of the word "not" from a quotation of a legal proposition. Another was assigned to try to make sense out of a "brief" filed by a party which was nothing more than a caption and signature block with three long cases pasted in as the body, complete with graphics

and formatting from Westlaw. I personally cannot even count the number of times I looked up a quote or a proposition a lawyer had cited in his paper and it did not appear in the case. And then there was the federal appellate brief bound with silver duct tape, and two months later the reply brief bound the same way. Don't do these things. Whether intentional or not, these kinds of issues can damage an attorney's credibility well beyond the particular case the issue occurred in.

Garner and Butterick

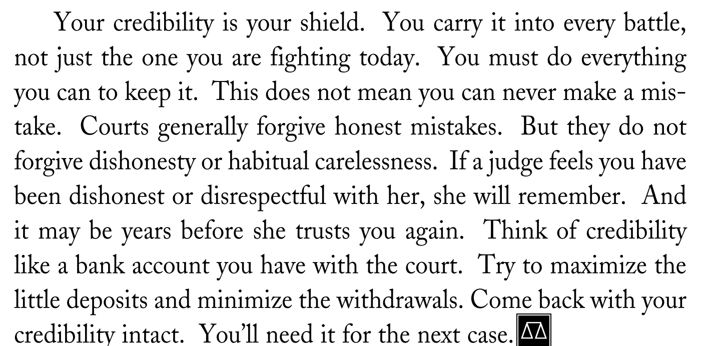
There is a movement of sorts afoot to overthrow the tyranny of spacing twice after ending a sentence. The leaders of this insurrection appear to be legal style luminary Brian Garner and typography guru Matthew Butterick. Garner suggests in his legal style manual, the Redbook, that although "[t]he custom during the reign of the typewriter was to insert two spaces between sentences," we should now place one space after all punctuation marks, including periods, because of computers. Butterick goes further and suggests we should switch to one space because "one space is the well-settled custom of professional typographers. You don't need to like it. You only need to accept it. . . . No one has yet shown me contrary authority."

The authority Butterick seeks wears a black robe. What is one thing that judges have in common? They are, let's say, seasoned. Seasoned is defined as "accustomed to particular conditions; experienced." For present purposes, that means your judge—the person you are attempting to persuade with your brief—is more likely to have learned to type on an IBM Selectric than on whatever fancy word processing software that you (and Garner and Butterick) are hammering away on these days. Most had it drilled into them that you press the space bar twice at the end of a sentence. Two spaces is the right way. Anything else is a typographical error, a sign of carelessness.

Dismissing another of Brian Garner's innovations, Justice Scalia aptly summarized the case against the single space. "Of course, whatever the merits of this debate, the conclusive reason not to accept Garner's novel suggestion is that it is novel. Judges are uncomfortable with change, and it is a sure thing that some crabby judges will dislike this one. You should no more try to convert the court [to single spacing after sentences] at your client's expense than you should try to convert it to colorful ties or casual-Friday attire at oral argument." This is no mere academic point. I once saw a California federal circuit judge's copy of a brief filed by a party just before the appeal was argued. This appellate judge had circled the end of every sentence, where the author had touched the space bar only once before starting a new sentence. Where legal briefs are concerned, it does not matter if you are right. The only opinion that counts is your audience's. And even if your audience thinks your method is innovative, it may cause her to pause and think about it. But you want her to do her thinking about your substantive arguments, not your position on how many spaces should be put at the end of a sentence. What's more, you will probably not ever know if your judge found your innovation refreshing or just a sign that you do not know the right way to do it. If you've been following along, the point should be obvious. Take no risks with style, lest you take attention away from making your point.

With This Shield or On It

When a young Spartan first went out to battle, his mother would give him a shield, and tell him to return only with his shield or on it. The phalanx required large, heavy shields and a hoplite could not escape the field of battle unless he tossed it away. "Losing one's shield," meant desertion. Dead fighters were carried back home on their shields. The mother's exhortation therefore amounted to "fight the battle honorably or be carried home dead on your shield."



Your credibility is your shield. You carry it into every battle, not just the one you are fighting today. You must do everything you can to keep it. This does not mean you can never make a mistake. Courts generally forgive honest mistakes. But they do not forgive dishonesty or habitual carelessness. If a judge feels you have been dishonest or disrespectful with her, she will remember. And it may be years before she trusts you again. Think of credibility like a bank account you have with the court. Try to maximize the little deposits and minimize the withdrawals. Come back with your credibility intact. You'll need it for the next case.