Perusing paragraphs with Professor Brad Clary

By Karin Ciano

Want to know why paragraphs work? I caught up with the University of Minnesota Law School’s esteemed Professor Brad Clary. Here’s our email interview, edited for clarity and possibly humor.

LWN: Hello Professor Clary and thanks for joining us. First things first: What is a paragraph?

BC: Put simply, a paragraph is a chunk of material relating to a single topic.

LWN: What do paragraphs do in legal writing? Do they have specific purposes?

BC: Paragraphs in legal writing are the building block of coherent writing. Each paragraph should focus on a single idea, which allows the reader to follow the logical progression of your argument. Paragraphs can also serve as a way to organize complex information, making it easier for the reader to follow the discussion.

LWN: What makes a good opening paragraph?

BC: A good opening paragraph tells the reader what lies ahead and gets the reader’s attention.

LWN: Can you give us an example?

BC: Yes. Chief Justice Roberts’ opinion in United States v. Apel, 134 S. Ct. 1144, 1147 (2014), led off like this: “Federal law makes it a crime to reenter ‘a military installation’ after having been ordered not to do so ‘by any officer or person in command.’” The question presented is whether a portion of an Air Force base that contains a designated protest area and an easement runs in a logical manner, so that the analysis flows. Some paragraphs set out the issue. Some describe the facts that give rise to the issue. Some identify the legal rule that will govern resolution of the issue. Some explain what the legal rule actually means. Some apply the rule to the facts of the case. Some explain the conclusion.

LWN: What impressed you there?  

BC: I like that the paragraph sets out the relevant rule of law in only the first sentence, in an objective way upon which the balance of the Court could agree. It also identifies the issue in one sentence. The only thing I might consider adding is a third sentence: “The answer is yes.”

LWN: Spoiler!  

BC: True. But it orients the reader.  

LWN: You’re also a fan of catchy beginnings. Why do they work?

BC: The first paragraph or two should spark a reader’s interest in examining the rest of the opinion. A catchy beginning (within reason) helps do that.

LWN: Like what?

BC: “This appeal concerns the straight-horned markhor, an impressive subspecies of wild goat that inhabits an arid, mountainous region of Pakistan. . . . As tempting as it may be to consider an arbitrary and capricious claim in a case involving a goat, an array of justiciability problems—mostness, ripeness, and standing—require us to decline the opportunity.” That is a catchy opening.

LWN: Nice. Now closing paragraphs are often the opposite of catchy. Often by the time I finish something I’m tempted to phone it in: “For the foregoing reasons, the court should grant the motion.” Maybe judges feel the same way because I’ve seen similar closings in judicial opinions. Remind us why we all should resist that temptation?

BC: Readers of judicial opinions typically want to know what the bottom-line takeaway is. That includes the fundamental reasoning behind the result and the fundamental reasoning behind the result. Some readers will immediately look to the end of the opinion for that information. If all the opinion says in closing is, “For the foregoing reasons, the court should grant the motion,” the reader doesn’t immediately see the logic of the analysis. For that reader, the closing is essentially uninformativ.

There is also a benefit to the writer in a closing that encapsulates an end result and the fundamental reasoning behind the result: Having to write such a closing forces you to consider and decide what the bottom-line takeaway is. That includes the fundamental reasoning behind the result. Some readers will immediately look to the end of the opinion for that information. If all the opinion says in closing is, “For the foregoing reasons, the court should grant the motion,” the reader doesn’t immediately see the logic of the analysis. For that reader, the closing is essentially uninformativ.

Defective Hernia Mesh

Physiomesh & C-QUR Mesh

GoldenbergLaw is currently taking cases of clients who required revision surgery because of complications caused by defective hernia mesh devices such as Ethicon’s Physiomesh Flexible Composite Mesh and Atrium’s C-QUR surgical hernia meshes, among others. Many hernia mesh devices have been linked to complications requiring revision surgery.

Injuries Requiring Revision Surgery

• Severe or chronic pain
• Bowel obstructions
• Adhesion of mesh to bowels
• Infection
• Organ perforation

Defective Design

Both products are made using a sticky, un-absorbable mesh with a non-stick, absorbable film coating. This design has proved problematic for both companies:

• In 2012 the FDA sent a warning letter to Atrium noting that the company was failing to address multiple complaints related to infections associated with C-QUR mesh.
• Ethicon voluntarily withdrew Physiomesh Flexible Composite Mesh from the market in May 2016 following reports of higher than average recurrence and revision surgery rates in patients implanted with the device.

Contact GoldenbergLaw

Partner, Laura Pittner will be leading our firm’s efforts in helping those injured by defective hernia mesh devices. Please contact her with your referrals at: 612-436-5027 or lpittner@goldenberglaw.com

LEGAL WRITING NOTEBOOK

Karin Ciano is owner of Karin Ciano Law PLLC and director of Twin Cities Custom Counsel PLLC. Contact her at karincianolaw.com.

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How an attack on affirmative action could work

By Noah Feldman
Bloomberg View

A year ago, affirmative action in higher education seemed safe for a generation, after Justice Anthony Kennedy blessed it in a landmark Supreme Court opinion.

Now President Donald Trump's Department of Justice is signaling that it plans to challenge the constitutionality of the practice in a way the federal government has never done before.

And with Justice Neil Gorsuch in place and the possibility that Kennedy might retire in the next few years, the challenge could succeed. The legal reality is that higher ed affirmative action is now vulnerable.

The sense of security that followed Kennedy's June 2016 opinion in Fisher v. Texas was a false one. Along with Kennedy's liberal vote the same term in an important abortion case, Whole Women's Health v. Hellerstedt, the affirmative-action decision seemed like Kennedy's attempt to cement his liberal legacy. Given that most observers expected Democrat Hillary Clinton to be elected president before Kennedy's legacy was expected to remain intact when she nominated successor justices to Antonin Scalia and eventually to Kennedy himself.

In particular, Kennedy's affirmative-action-opinion embraced the theory that admissions officers at public universities may use diversity as their rationale to give several advantages to applicants of color. The idea goes all the way back to a solo concurring opinion by Justice Lewis Powell in a 1978 case called Regents of the University of California v. Bakke, which embraced Harvard University's description of its admission practices at the time.

As interpreted by Justice Sandra Day O'Connor in a pair of 2003 cases involving the University of Michigan and by Kennedy last year, the diversity approach prohibits racial quotas. And it doesn't allow universities to expressly give more points in an admissions system merely on the basis of race.

But diversity does permit admissions officers to make holistic judgments about applicants and curate a class that includes people from many different backgrounds. In practice, at the institutions that use the technique — which is almost all major universities, whether state or private — the racial balance is closer to what academic researchers have found to be remarkably similar from year to year.

It was highly significant that Kennedy embraced the diversity rationale in 2016, because he had been a skeptic of affirmative action in the past, and had repeatedly voted to send the Texas case back to the lower courts, apparently trying to avoid issuing a definitive judgment. His opinion therefore seemed to settle the law, at least until the Supreme Court took on a different configuration.

Enter Trump and his attorney general, Jeff Sessions. According to an internal Justice Department document leaked to Charlie Savage of the New York Times, the department is looking for internal volunteers to work on an investigation and litigation of "intentional and systemic discrimination in college and university admissions."

The investigation would be run out of the political part of the civil rights division, where Sessions' policy team can keep an eye on it.

The memo shows that the Trump White House is coming after the diversity approach. There are at least two ways the administration can do it, not mutually exclusive.

The less radical line of attack would be to try to prove that, despite saying that they rely on the diversity approach, some universities are actually using unlawful quotas. The first piece of evidence would undoubtedly be the similarity of the statistical numbers of racial minorities each year at many such institutions.

Another piece of statistical evidence would be systemic under-admission of some groups of students, such as Asian-Americans. A lawsuit against Harvard University (my home institution) alleges that Asian-American applicants are rejected disproportionally when measured by their grades and test scores — and that Harvard's "holistic," diversity-based approach is a smokescreen for discrimination.

I'm not literarily hard to prove intentional discrimination by statistical evidence. The magic bullet would be internal documents showing that somewhere, some university is cheating by expressly giving points for race and setting quotas. It's unlikely, but not impossible, that such evidence exists at some institution that has been sloppy in following the law.

The other route for the Department of Justice would be to start investigating giving points for race and setting quotas. It's unlikely, but not impossible, that such evidence exists at some institution that has been sloppy in following the law.

Either way, the Justice approach is a significant departure from past practice — because for the most part, anti-affirmative-action litigation has always been a private affair. Those named plaintiffs in such cases are typically candidates who say they were denied admission on the basis of race.

The federal government always has the opportunity to weigh in on such cases as a friend of the court. The George W. Bush administration, for example, asked the Supreme Court to treat the University of Michigan's admissions practices as unconstitutional in the course of the litigation that ended in 2003.

But that's a far cry from the federal government leading the charge against affirmative action in higher ed. Here Trump and Sessions will be breaking new ground. It's another reminder that, whatever limits Trump faces in building coalitions to pass legislation, there is plenty he can do solely in the executive sphere to affect the country's future.

Noah Feldman is a Bloomberg View columnist. He is a professor of constitutional and international law at Harvard Law School and was a clerk to U.S. Supreme Court Justice David Souter. This column does not necessarily reflect the opinion of Bloomberg LP and its owners.