LEGAL WRITING NOTEBOOK

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Perusing paragraphs with Professor Brad Clary

By Karin Ciano
Special to Minnesota Lawyer

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?


Brad Clary

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 take a reader through an analysis of an issue 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 makes a good opening paragraph?

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

LWN: Can you give us an example?

BC: Yes. Chief Justice Roberts' opinion for the unanimous Court 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 for a public road qualifies as part of a 'military installation.'"

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–mootness, ripeness, and standing—require us to decline the opportunity."[1] 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. And 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 uninformative.

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 operates as a cross-check against the body of the opinion. If the encapsulated closing does not actually match up with the rest of the opinion, then there is something to change.

LWN: Good point. And in the middle, what problems do you see with interme-

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GUEST COMMENTARY

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, 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.

AP FILE PHOTO

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

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 ends up looking 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 race-based 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 really 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 systematic 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.

It's notoriously 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 for litigation now, and wait for Kennedy or Justices Ruth Bader Ginsburg or Stephen Breyer to retire before a case wends its way through the lower courts and ultimately to the Supreme Court. The goal would not be to ask Kennedy to reconsider his position, but to wait until there are five votes to overrule the Fisher case, or at least narrow it.

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. The 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 quotas 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.

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diate paragraphs?

BC: They don't flow inexorably from one to another.

LWN: Isn't that why we have topic sentences?

BC: Yes. A good topic sentence tells the reader what the paragraph will be about. A good transition sentence leads into the next topic. The reader should see a link between the topics that makes sense from the standpoint of an analytical flow.

LWN: Can you give us an example?

BC: Here's a series of topic sentences from Justice Neil Gorsuch when he was on the Tenth Circuit:[2]

After he pleaded guilty to federal fraud charges in connection with a doubtful wind farm scheme, the district court sentenced Mr. Reed to prison.

First, Mr. Reed contests a district court ruling, issued after his appeal, that dismissed his motions to supplement the appellate record.

Second, Mr. Reed argues that the district court erred by denying a number of other motions he filed after losing his appeal.

The district court's orders are affirmed.

There is nothing especially flashy about these opening sentences. This is a classic "first, second" approach. But it is a simple road map for the reader to follow.

LWN: How do effective transition sentences create a flow?

BC: The first sentence in a paragraph repeats something from the immediately preceding paragraph in introducing the new material. The reader thus links the new information to something the reader already knows. That helps the reader assimilate the new material.

LWN: A question I often get is how long sentences should be, and my advice is often to mix up the length. Do you agree?

BC: Yes.

LWN: What does a long sentence do well? What does a short sentence do well?

BC: A long sentence provides detail to set up a point. The short sentence drives the point home.

LWN: Chief Justice Roberts seems to have a thing for punchy short sentences – can you give us an example?

BC: Yes. "Apel contends that the listed military places have historically been defined as land withdrawn from public use. Not so."[3]

LWN: No way!

BC: Way.

LWN: Really? Or is that one of those kids-don't-try-this-at-home techniques that's too informal for you and me?

BC: I like the technique. And I use it. I just try to be careful not to overuse it, or the punch is lost.

LWN: Thanks Professor Clary! Any parting thoughts for our readers?

BC: Writing good paragraphs takes effort. Subject to the time limitations imposed by deadlines, edit, edit, and then edit again.

LWN: I concur!

Footnotes

1. The first sentence of the first paragraph, and the entirety of the second paragraph, in Judge Merrick Garland's opinion for the Court in *Conservation Force, Inc. v. Jewell*, 733 F.3d 1200, 1202 (D.C. Cir. 2013).

2. These are the first sentences in the paragraphs of Judge Neil Gorsuch's opinion for the Tenth Circuit in *United States v. Reed*, 644 Fed. Appx. 847 (Mem) (10th Cir. 2016):

3. These are the first two sentences of the second paragraph in Section IIA of Chief Justice Roberts' opinion for the unanimous Court in *Apel*, 134 S. Ct. at 1150.