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SOME OBSERVATIONS ON COLORADO APPELLATE PRACTICE

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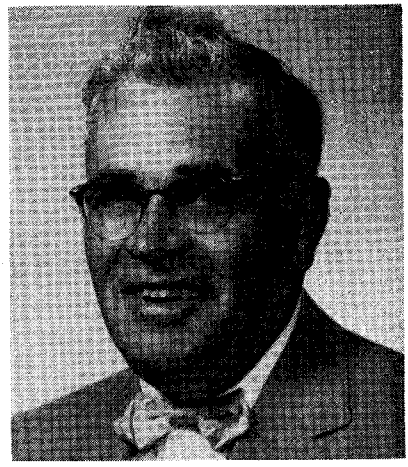


O. Otto Moore is Chief Justice of the Colorado Supreme Court. He received his legal training at the University of Denver College of Law where he was granted an LL.B. degree in 1922. That year he was admitted to practice law in Colorado, and he engaged in active practice until 1949 when he became an Associate Justice of the Colorado Supreme Court. He has served on the court continuously since 1949. Chief Justice Moore is a member of the Colorado, Denver and American Bar Associations. He is chairman of the Colorado Judicial Conference.

In this article I wish to make suggestions to those who are contemplating appearances in the Supreme Court. These suggestions, if followed, will go a long way toward cutting down the backlog of cases; enable the court to write better opinions; permit us to apply our time to a consideration of the merits of the controversies before us; and result in speedier determination of those cases and fewer dismissals on technical grounds.

I direct your attention to the provisions of Rule 112 (e).[1] This rule is all but forgotten by the members of the bar. In the approximately 2000 plus cases which have been disposed of by the Colorado Supreme Court in the past eight years I cannot recall more than four or five that have been submitted under its provisions. In pertinent part this rule provides:

> "When the questions presented by a writ of error can be determined without an examination of all the pleadings, evidence, and proceedings in the court below, the parties may prepare and sign a statement of the case showing how the questions arose and were decided in the trial court and setting forth only so many of the facts averred and proved or sought to be proved as are essential to a decision of the questions by the supreme court. The statement shall include a copy of the judgment sought to be reviewed and a concise statement of the grounds to be relied on by the plaintiff in error. If the statement conforms to the truth, it, together with such additions as the court may consider necessary fully to present the questions raised by the writ of error, shall be approved by the trial court and shall then be certified to the supreme court as the record on error."

[1] Colo. R. Civ. P. 112(e).

We will never know how many thousands of dollars have been expended by litigants to defray the cost of preparing thousands of pages of reporters' transcripts, many pages of which had no relevancy whatever to any point urged on writ of error. Many thousands of hours have been spent by members of the supreme court in reading the countless questions and answers contained in the transcripts of court reporters. Those hours could have been saved if counsel for the parties had conscientiously made use of the "agreed statements." It is my sincere belief that at least one-third of the cases which have been decided in recent years could well have been presented by counsel upon an agreed statement within the provisions of Rule 112, without jeopardizing in the least the rights of any of the litigants, or without reducing the chances of a successful result for either party. On the contrary, agreed statements of the issues, without exception, will make for clarity of the questions which you ask the court to decide. If the questions are clear there is a remote chance that the answer which the court gives may be equally clear. At least there would be less ground, after adverse decision, for the losing party to claim that the court had bypassed the most important point in his case.

The next time you have a matter to present in the supreme court consider seriously whether the "agreed statement" technique would adequately present the controlling issues to the court. It will save your clients a lot of money for expensive records. It will save the court a lot of valuable time which otherwise would be used in reading many pages of matter irrelevant to the issues on the appellate court level.

Let me now direct your attention to Rule 113. I quote therefrom:

> "Whenever plaintiff in error desires a stay of execution pending the determination of a writ of error, he may apply to the supreme court for a supersedeas at any time after the filing therein of the record prepared and certified in accordance with rule 112. A succinct brief shall be filed with such application for supersedeas and served upon the defendant in error. * * * At the time of filing his first brief either party may request a final determination of the controversy."[2]

When a matter is at issue on application for supersedeas the clerk of the court immediately brings the record and briefs to the Chief Justice who assigns it at once to a judge to look over and report whether supersedeas should be granted. He makes his recommendation, the court then acts. Many times we find that application for supersedeas is made in cases where nothing would be accomplished by granting it. In claims for money judgment, where the trial court or jury has found against the plaintiff and judgment has been entered for the defendant, don't bother about an application for supersedeas. Ordinarily the court will not grant supersedeas in such a case, and it would be manifestly unfair to decide the merits of the case on the briefs filed in support of the supersedeas application. If the court did this the effect would be to move the case from the bottom of the docket to the top, and other cases at issue on the merits would be delayed immeasurably by that device. Any case which the court elects to decide finally on the supersedeas briefs will be moved to the bottom of the docket and will be determined in the regular order. Unless there is some specific purpose to be served, do not conclude that in every case you must secure a super-

[2] Colo. R. Civ. P. 113.

sedeas if you are to properly represent the interests of your clients. Petitions for supersedeas and briefs in support consume a lot of the court's time. All too frequently the time is wasted for the reason that the litigant seeking the supersedeas has nothing whatever to gain in making the application.

I do not mean to say that you should hesitate to apply for supersedeas in those cases in which your client will suffer prejudice unless the judgment be stayed. A full reading of Rule 113 should be indulged by counsel just prior to making an application for supersedeas. The rule itself will suggest the type of case in which supersedeas will be frowned upon by the appellate court. Don't file the application just to harrass your opponent, because by so doing you harrass the court as well, and time is lost which could be applied elsewhere.

Hundreds of man hours are spent by judges of the court in considering petitions filed for the purpose of invoking the original jurisdiction of the court. The constitution provides that the supreme court "shall have power to issue writs of habeas corpus, mandamus, pro warranto, certiorari, injunction, and other original and remedial writs, with authority to hear and determine the same." All too frequently counsel have attempted to use the petition for rule to show cause as a substitute for a writ of error. Scarcely a week goes by but a judge of the court is required to give several hours study to a petition for a writ

of prohibition or other relief formerly known as the common law prerogative writs, when few, if any, of the requisites for such relief are present. In many instances where rule to show cause issues, the respondent makes a showing which completely destroys the position of the applicant and the rule is discharged after the court has wasted a lot of time. Very often nothing whatever is accomplished by this loss of time. The parties are left exactly where they were to begin with, and the work, or a substantial portion thereof, must be done over again, when the case arrives in regular course on writ of error.

Be sure of your ground in asking the court to assume original jurisdiction. Put all the pertinent facts in your petition—not just those which seem to favor your own contention. Put *all* the cards on the table. Don't stack the deck in your petition. Your time, and that of the court, is worth something. Don't waste it!

During the summer I attended a seminar for appellate court judges conducted by New York University. From 9:00 A.M. until 12:30 P.M. and from 2:00 until 4:00 P.M. for ten full days twenty-two judges of appellate courts in the nation were exposed to the intellects of experts in various fields of judicial activity. It was a very worthwhile experience. Several sessions of the seminar were devoted to the subject, "The Technique of Writing Opinions." I believe that the basic rules which should govern the author of an opinion are substantially the same as those which should control the form and substance of a brief. I learned in New York this summer just how bad some opinions which I have written really are when tested on the scales used by experts to evaluate the output of appellate courts.

Let me quote briefly from a lecture delivered by Circuit Judge Frederick G. Hamley, former chief justice of the Washington Supreme Court, and recognized authority on opinion writing:

> "But while we treasure variety, let us also recognize that there are certain minimum requirements which all opinions should meet, and certain characteristics of form or organization which are to be striven for, or avoided, as the case may be.
>
> "The ordinary appellate court opinion contains statements covering the following five points: (1) The nature of the action and how it got to the appellate court; (2) the questions to be decided; (3) the essential facts; (4) a determination of the questions; and (5) the disposition of the case."

If you will examine carefully the contents of Rule 115[3] you will discover that the requirements of the brief as there set forth are such as to point up the responsibility of the appellate court, and to reduce the labor of the court to a minimum in discharging the five-fold function of the judicial opinion. Let me again quote from Judge Hamley:

> "Extreme care must always be taken to assure a fair and impartial statement. This is particularly true with respect to the facts favorable to the side which is going to lose on the appeal. Chandler points out, in this connection, that judges need to be especially careful that they do not unconsciously color the statement of facts to support the conclusions which are to follow. That is a fault about which trial lawyers fre-

[3] Colo. R. Civ. P. 115.

quently complain in petitions for rehearing. A lawyer will forgive a judge for mistaking the law. But take his facts away from him and he is bitter!"

If this is true of the opinion—it is equally true of the brief.

It is possible to write a brief that is "easy to read." It is possible to write a brief which will carry the sustained interest of the reader without conscious struggling to "follow the ball." There are some simple rules which if applied will bring this result. Judge Hamley stated in his address to the seminar judges that "ease" of reading depends primarily upon the structure of the words, sentences and paragraphs which go to make up the opinion—or the brief. Long words, he said, are notoriously hard to read. "Fancy words are often merely evidence of pompous pride of knowledge." He directed attention to Winston Churchill's statement: "Short words are best and the old words when short are best of all." There are fourteen words in that sentence and no word is more than one syllable in length. We all agree with the statement, but we judges don't always bear it in mind when writing opinions, and I for one can testify that many lawyers pay no attention to it when writing their briefs.

Many times I have studied a brief with a dictionary at my elbow which I frequently consult to determine the meaning of words of many syllables, only to find that a very commonplace word of one or two syllables would have served the purpose better. I am then not too happy at being reminded of my limited knowledge in dealing with sesquipedalian words. (Sesquipedalian means one and a half feet long. I remember it because it was one of the words I found in a brief upon which I wasted time looking for the meaning of the word in the dictionary.)

Professor E. H. Warren of Harvard Law School gives seven tangible rules to improve juristic style. One of them is:

"See to it that not less than 66% of your words are words of one syllable, and that not less than 83% are words of one or two syllables."

When you read over the first draft of your brief, put a check mark over the long words. With a little effort you can find a substitute which is short and even more effective. So much then for words. What about sentences?

Dr. Rudolph Flesch in his recent book "The Art of Readable Writing," says that the average number of words in the standard English sentence is seventeen. Very difficult writing contains twenty-nine words or more per sentence. He asserts that the legal profession stands

"accused of being the one profession that thinks it can't live without long sentences." No one knows better than the judges of the supreme court that long drawn-out sentences become so complex that they are not readily understandable. Yet lawyers persist in loading their briefs with long sentences. It makes for heavy reading. It is done in an effort to be exact, and cover all angles connected with every statement.

The late Judge Cardoza said, "The sentence may be so overloaded with all its possible qualifications that it will tumble down of its own weight."

Another distinguished authority has said that the cure for "sentence inflation" is to stop being stuffy, legalistic, technical and overly precise.

Most long sentences consist of a series of phrases joined together with conjunctives or disjunctives. How easy it is, when the first draft has been completed, to strike out some of those "ands" and "ors," and cut the long sentences in two! To one who is not used to doing this, it will at first seem as if the smooth flow of the first draft has been destroyed. But a little practice will demonstrate that smoothness need not be sacrificed in cutting the length of sentences. On the other hand, ease of reading and force will be gained. So much then for the sentences you write in your briefs.

What about the paragraphs? All that has been said about the sentence applies with equal force to the paragraph. The "ease" of reading a brief can be greatly improved by the use of short paragraphs. Hamley told us in New York that, "Almost every paragraph which contains more than three or four sentences is too long."

All of us would rather read a printed page consisting of three or four paragraphs than one continuous paragraph from top to bottom. It is a hard job to wade through five or six pages of printed matter without a break for a paragraph. Yet how frequently we find it in briefs. It doesn't help the "ease" of reading the brief. Short words—short sentences—short paragraphs—make for "ease" of reading.

"Readability" means "ease" of reading *plus* interest. How can you make your briefs more interesting to read? First let me suggest that you may crash through the skull barrier of members of the court and guide them toward the conclusion for which you contend by putting concrete examples after your statements of abstract principles. Don't forget that the greatest of all teachers used parables. It helps to create interest. Word pictures, concreteness, clarity, can be gained by the frequent use of the names of the litigants, rather than a constant repetition of the cumbersome "plaintiff in error," "defendant in error," "third party defendant," or similar terms. Interest is stimulated when you say, "Joseph Henry brought an action against Clara Bell. He alleged that Clara contracted, and so forth." It is more interesting than to say, "plaintiff in error brought an action against defendant in error."

Interest can be stimulated by reference to real names and real locations rather than by the uninteresting "A. B. & C.," or the overworked "Blackacre" or "Whitacre." It is more interesting to read about what happened to the southwest forty acres of the farm which Clara Bell claimed she owned. In negligence cases, instead of saying, "conditions were suitable for driving on the night in question," why not say, "the pavement was dry, the night was clear, the moon was full"?

It is of prime importance to remember that judges know nothing about the case except that which is contained in the briefs. We consult

the briefs first, expecting thereby to get a clear picture of the controversy. Unlike the author of the briefs, we have not lived with the case for a year or two theretofore. What may seem perfectly clear to the author of the brief who has been close to the controversy throughout its development may not be equally clear to the judge who must get all his information from the brief. One of the things to be kept constantly in mind is the importance of clear expression. Will someone who picks up your brief and who knows nothing of the case, get a distinct and accurate picture of just what you are writing about? If not, there is a lack of clarity in your style. It might be well to ask a lawyer friend, who has never heard of your case, to read your brief and criticize it. If it is clear to him it is barely possible that even we will understand it.

Daniel Webster observed that, "The power of clear statement is the great power at the bar." Make your assertions clear; let no judge read your brief and have doubts about what you consider to be the controlling questions in the case at hand. Let no judge be in doubt as to what you think the answers to those questions should be.

"A clear style is one that is sincere, simple, coherent and direct. It results from exactness in the use of specific words—short words—short sentences—short paragraphs."

In your statement of the case the court wants the facts. Be honest and candid in stating them as they are. The court does not want arguments, nor explanations, nor interpretations. Do not avoid important facts in the record because they are against you. State them before your opponent does. This at least demonstrates fairness on your part, and the adverse matter will hurt you less if you face up to it voluntarily.

Develop a reputation in all courts for accuracy of statement and your future assertions will be respected. Segregate the undisputed facts from those which are disputed. This will help the court to grasp and understand the case. Avoid long quotations from the record. It interferes with easy readability. If you set your hand to it you can develop the art of clear summarization, and your folio references will guide us to the full text if issue is taken with your summary.

I must not omit mention of the area in which the lawyer can be of greatest assistance to the court. Before you start work on your brief, read and reread Rule 115.[4] Read all the sub-sections of that rule. Don't start your brief until you understand it. On numerous occasions our court has warned of the possible consequence of noncompliance therewith.

In *Mauldin v. Lowery*,[5] the opinion of Chief Justice Stone contained the following:

> "The brief of plaintiffs in error, upon which reversal of the judgment of the trial court is sought, contains no subject index and no summary of the argument, separately or otherwise, and no other provision for advising this Court of the grounds relied on for reversal. There is no separate statement of the case, as required by Rule 115 (a) and (c), and the part of the brief which might be considered as intended for such statement is intermingled with argument; the statement of facts is not supported by references to folio numbers of the

[4] Colo. R. Civ. P. 115.
[5] 127 Colo. 234, 255 P.2d 976 (1953).

record, and the verdict and judgment sought to be reviewed are not set forth.

"Our Court will not search through briefs to discover what errors are relied on, and then search through the record for supporting evidence. It is the task of counsel to inform us, as required by our rules, both as to the specific errors relied on and the grounds and supporting facts and authorities therefor.

"The judgment is affirmed."[6]

In *Fraka v. Malernee,*[7] the court said:

"Because the writ of error in the instant cause must be dismissed, and for the reason that there seems to be a growing tendency among members of the bar to believe that briefs can be filed whenever it is convenient, and that the Rules of Civil Procedure relating to proceedings before this Court can be ignored or violated without serious consequences, we feel compelled to say that failure to follow the established rules of appellate practice may be fatal to a cause. Our Court intends to enforce the Rules of Civil Procedure, and we solicit the cooperation of members of the bar, with the firm belief that they will approve an orderly procedure in appellate practice which can only be brought about by the observance of the rules which must govern that practice. We return to a consideration of the case at hand."[8]

In *Waters v. Culver,*[9] we said:

"Failure of plaintiff in error to comply with Rule 115 of our Rules of Civil Procedure ordinarily would be fatal to our consideration of this cause. The brief of plaintiff in error does not contain a concise statement of the facts 'based on the evidence material to the case' with appropriate folio references."[10]

In *Gardner v. City of Englewood,*[11] the opinion written by the late Justice Clark pointed out in detail the essentials of a brief. Several other cases could be mentioned in which the court has directed attention to the necessity for compliance with Rule 115.

It might interest you to know that thus far in the year 1957 there have been about 115 motions filed by lawyers attacking the work of other lawyers as being short of compliance with Rule 115. These motions are to strike briefs which have been filed, and for dismissal of writs of error. Each of these motions is supported by a brief and the lawyer whose work is thus attacked filed a brief attempting to excuse the failure to abide by Rule 115, and, having read it apparently for the first time, frantically seeks to avoid the impending disaster. I think I'm safe in saying there isn't a judge on the court who has not been compelled within the past ten days to give at least two or three hours of his time to a study of a motion to dismiss a writ of error grounded on the assertion that Rule 115 has been ignored by his opponent.

[6] Id. at 236, 255 P.2d at 977.
[7] 129 Colo. 87, 267 P.2d 651 (1954).
[8] Id. at 90, 267 P.2d at 653.
[9] 130 Colo. 360, 275 P.2d 936 (1954).
[10] Id. at 361, 275 P.2d at 937.
[11] 131 Colo. 210, 282 P.2d 1084 (1955).

Not all of such motions are well founded to be sure, but whether well founded or not, a vast amount of time is given over to a study of the question of compliance with this rule. If the brief is prepared in conformity with the rule all of this wasted time could be saved, and we would not be one full year behind submission date in handing down an opinion.

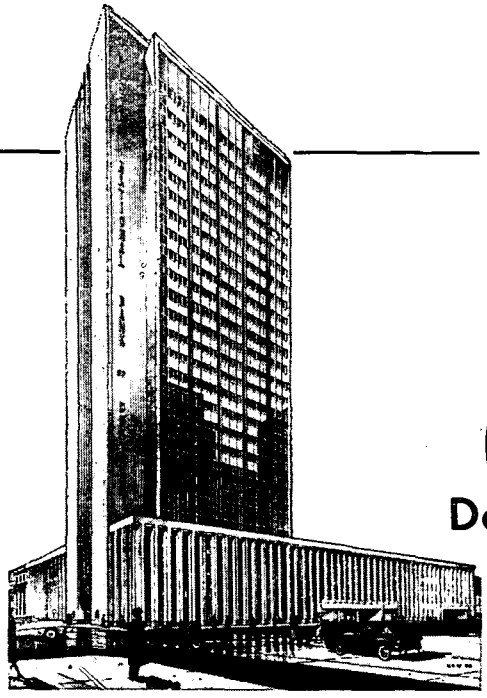
If you can't understand Rule 115, and don't know how to go about setting up your brief, let me suggest that you ask the capable Clerk, Mr. George Trout, to give you the number of a case in which a good brief was written. Look up that brief and use it for a guide.[12] Better still, invest a five dollar bill in one of the several very fine books which are available on the subject.[13]

The quality of the opinions which judges write is very largely a reflection of the ability of the lawyers. If I am ever accused of having written a particularly good opinion I am ready to admit in advance that the credit should go to the very fine briefs which have been filed by counsel on both sides of the case. A good brief on one side and a poor brief on the other will not necessarily lead to a good opinion. I assure you that it is a great pleasure to study the briefs of able lawyers whose work meets the standards set by the rules.

It is a great burden to have a case assigned for an opinion in which the briefs reflect the fact that counsel have failed to conform to the orderly procedures outlined in the rules, and the opinion which is rendered in such a case may be good or bad. If I wrote it, and if it is bad, I shall insist that the lawyers who wrote the briefs which did half a job should share at least half the responsibility for the poor opinion.

It is the fervent wish of the court that bench and bar may cooperate in a joint effort to save the time of the busy lawyer and the time of a hard-pressed court; that the busy court shall understand the problem of the busy lawyer and not be unduly critical of his minor shortcomings; that the busy lawyer will be mindful of the heavy demands upon the time and energies of the busy courts; that together we may cause it to be said that in this jurisdiction justice is being served as effectively and efficiently as is possible through human means.

[12] E.g., see the excellent briefs in Colo. Sup. Ct. Case #18171.
[13] E.g., Pittoni, Suggestions on Brief Writing and Argumentation (Foundation Press 195—).



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