THE SCRIVENER

Dear Scrivener

By Scott Moïse

Three years have passed since the last "Dear Scrivener," my personal legal writing and grammar advice column, and the Scrivener mail bag and inbox are over capacity. Actually, these days most questions come in by telephone or somebody showing up at my office door—and none of them calling me "dear"—but a question is a question, and I will give you some of my recent favorites.

Dear Scrivener: I'm a Bluebook nerd, and I saw that Justice Clarence Thomas made up a new citation rule that is not in the Bluebook! He just made it up! *See Brownback v. King*, 141 S. Ct. 740, 748 (2021) (making up a new explanatory phrase).

What do you think?

--*Chelsea E.*

ANSWER:

For some background for readers who have not heard, Justice Thomas likely was tired of going through the grammatical contortions the Bluebook requires when making changes to statements we are quoting: rules requiring brackets, ellipses, quotation marks, and altered capital letters. I understand the frustration. It takes time, and if a lot of changes are made, the sentence is barely readable. So, Justice Thomas did something about it in *Brownback*. He quoted another case on the issue of res judicata and **did not show where he made the alterations**! Instead, he simply added a parenthetical at the end of the case citation that said, and I quote, "cleaned up." Excuse me while I retire to the fainting couch! Just kidding. We already knew that the Supreme Court has its own citation rules, which frequently conflict with the Bluebook. However, I wonder if this new citation form may have gone too far.

To understand what happened, we need to look at the original quotes that Justice Thomas included in his opinion from *Semtek International Inc. v. Lockheed Martin Corp.*, 531 U.S. 497, 501–02 (2001):

> The original connotation of an "on the merits" adjudication is one that actually "pass[es] directly on the substance of [a particular] claim" before the court. Restatement § 19, Comment *a,* **at 161.**

In *Brownback* this is how Justice Thomas handled the quotations:

> Under that doctrine as it existed in 1946, a judgment is "on the merits" if the underlying decision "actually passes directly on the substance of a particular claim before the court." *Id.*, at 501–502, 121 S. Ct. 1021 (cleaned up).

Brownback, 141 S. Ct. at 748.

If Justice Thomas had followed the Bluebook and *Gregg's Reference Manual*, the citation would have been as follows:

> Under that doctrine as it existed in 1946, a judgment is " 'on the merits' " if the underlying decision "actually 'pass[es] directly on the substance of [a particular claim]' before the court." *Id.* at 501–02 (alterations in original) (citing Restatement § 19, Comment *a,* **at 16**1).

For me, making those changes is just fun and makes the passage more accurate in that the actual alterations are shown. Also, knowing that the Restatement was the source for the original quotation may help the reader. Otherwise, Justice Thomas's method was fine and gets rid of the brackets. Moreover, Justice Thomas had legal precedent because "cleaned up" has been used by some courts since at least 2017. *See, e.g.*, *United States v. Reyes*, 866 F.3d 316, 321 (5th Cir. 2017). What I take issue with, though, are the words "cleaned up" because the original quotation was not dirty or incorrect, as that label implies. Instead, I would use another term, such as "quotations altered from original" or something that the smart students on the Bluebook editorial board can debate and decide. But I personally will not use "cleaned up" unless ordered by a court of law to do so.

Dear Scrivener: Should one space or two spaces be placed at the end of sentences?

--*Eric S.*

ANSWER:

Although I answered a similar question several years ago here, this is the most frequently asked question I get when speaking to groups about legal writing and grammar, so I want to answer it again. People in my seminars have

gotten into yelling matches over this issue. I am not kidding.

Here is my answer: the majority of grammar style books agree that one space at the end of sentences is correct. This includes the *Associated Press Stylebook* (which is not surprising because the AP is always looking for ways to reduce space); *The Gregg Reference Manual* (my go-to grammar book); and *The Chicago Manual of Style* among others.

Additionally, legal writing experts like Bryan Garner overwhelmingly call for one space. *See The Redbook: A Manual on Legal Style*. Also, author Matthew Butterick does not quibble: "Some topics in this book will offer you two choices. Not this one. **Always put exactly one space between sentences.**" *Typography for Lawyers* (2d ed.) (emphasis in original) (found at https://typographyforlawyers.com/one-space-between-sentences.html). Even some courts, such as the Seventh Circuit Court of Appeals, require using just one space.

Beyond the rules, using two spaces is just not cool anymore. As one blog writer, put it, "Nothing says over 40 like two spaces after a period!" Jennifer Gonzalez, www.cultofpedagogy.com/two-spaces-after-period/ (Aug. 12, 2014).

For many of us who decided to make the change, adding two spaces at the end of a sentence had become second nature. Although I am making progress on this front, that extra space creeps in without my realizing that I have added it. But you can check your document for the errant second space by using the "search and replace" option in Word. In the "Find what" tab, type a period, followed by two spaces (made with your space bar). In the "Replace with" tab, type a period, followed by one space with the space bar. If your document has other punctuation marks at the end of sentences, like question marks, repeat the process with those marks. It works.

Despite the modern trend and the rule books, some people do not care and will flatly tell you that they are not going to change. As my partner Robert Brunson once said, "You'll have to pry that second space out of my cold, dead hands." (But never say never. Robert came back to me on this about a year later and sheepishly admitted that he is now in the one-space camp, having been shamed out of it by his associates and young partners.)

Dear Scrivener: My friend and I have a bet on this. Do you have to put a space between a single quotation mark and double quotation mark that are next to each other? Here's an example:

> **The district court ruled for Ainsley's client, stating that "under *Willcox v. Stroup*, the Court is bound by the truism that 'possession is nine-tenths of the law.'"**

Dinner at Hall's is riding on this bet.
--*Donna L-J*

ANSWER:

Spaces have become a hot topic all of a sudden. *The Gregg Reference Manual* requires spaces between

the two quotation marks, so the end of your sentence would be this: 'possession is nine-tenths of the law.' " The reason for this rule is that the space keeps the quotation marks distinct when writing a quotation within a quotation. My legal writing heroine Grammar Girl agrees with this rule, but she advocates usage of a "thin space" between the two quotation marks. *See* Mignon Fogarty, *Single Quotation Marks Versus Double Quotation Marks*, Quick and Dirty Tips (Nov. 15, 2019), www.quickanddirtytips.com/education/grammar/single-quotation-marks-versus-double-quotation-marks. She defines a "thin space" as being "just what it sounds like: a space that's thinner than a regular space."

"Thin spaces" would be wonderful, but getting a thin space is not easy. Here is how: Highlight the two quotation marks and press "Ctrl + D." That brings up the "font dialogue" box. Click on the down-arrow of the "spacing" box and click on "expanded." Then click on "OK." There you have your thin space. Victory! But then the next sentence you type is now still in "expanded" mode, so go back through that process with the new sentence and change spacing back to "normal." Hopefully, you will not need many thin spaces in your document, or you can just use normal spacing between the two quotation marks.

Also, remember to use "smart" (a.k.a. "curly") quotation marks and not straight quotation marks. As with using two spaces at the end of a sentence, straight marks are unnecessary unless you are using a typewriter, and they are just as uncool.

Dear Scrivener: We have a new president of our local Bar association. We address a man as "Mr. President" if he is president of an organization. What is the correct term for addressing a woman who has that role? Ms. President? Madame President?
--Andrew C.

ANSWER:

A woman should be addressed as Madam President (no "e" unless you are speaking French).

Dear Scrivener: I know this is an odd question, but what is a "pollyanna"? During research, I came across this in a 1980 New York case: "[I]t would have been pure pollyanna to presume that the necessary safety information would filter down to those who had to work on the machine." Is this a New York thing like "yous guys"?
--Michael S.

ANSWER:

This not just a New York expression. The judge was referring to a fictional character, Pollyanna Whittier, in a book series written by Eleanor H. Porter that was first published in 1913. The book *Pollyanna* was later adapted into seven movies, a play, and a TV show. Hayley Mills even won an Oscar for her Pollyanna movie.

But that does not answer your question. Pollyanna was a twelve-year-old orphan, who was always, and I mean always, cheerful and upbeat despite having had a hard life. She had a "glad game" in which she looked to find good in every bad situation. For example, one Christmas, Pollyanna was hoping for a doll from the missionaries, but all she got was a pair of crutches, and she was not lame. Did that send Pollyanna running in a vale of tears to her cold attic room? No! She was just glad that she was strong and did not need the crutches.

"Pollyanna" then became a noun (better than an Oscar), meaning "a person who believes that good things are more likely to happen than bad things, even when this is very unlikely" (*Cambridge*) or "an excessively or persistently optimistic person" (*Collins*). The New York judge seems to have invented the term "pure pollyanna" to mean "a state of unfounded optimism."

Through an unscientific poll of lawyers of a range of ages, the only ones I could find who knew the term "Pollyanna" were members of the baby boomer generation. The younger ones had no idea, which raises a legal writing lesson for judges. Because court opinions are the law that we must follow, and because these cases will be read for years to come, including popular culture in the opinions can cause consternation after the referenced culture is no longer popular.

Dear Scrivener:

In a brief, should I preempt arguments that I expect the opposing party to raise by first raising the issue myself and explaining why that argument is inapplicable or incorrect? Or should I wait for the other side to raise the argument first, hoping that they might overlook it?
--Michael S.

ANSWER:

The answer to this depends on several factors.

First, if there is a case in the controlling jurisdiction that is directly adverse to your client's position, Rule 3.3 of South Carolina Rules of Professional Conduct requires you to disclose that case to the court if the opposing lawyer has not done so. That is non-negotiable. In that case, disclose the case up front—do not wait for the other side to raise it—and explain why the case is distinguishable or wrongly decided.

Unless there are adverse cases that are directly on point in your jurisdiction, the comments to Rule 3.3 clarify that lawyers are not expected to make an "impartial exposition of the law" or a take neutral and disinterested position. Therefore, determine if you will have the chance to make a reply to the adverse party's opposition and then decide whether you want to raise the opposing party's argument first.

In South Carolina state circuit court, lawyers are not required to submit supporting or opposing briefs. They can submit the brief as late as at the hearing—or never file one. Although this practice sets up motion by ambush and deprives judges of valuable research and insight from each party, lawyers must assume that they will not have a chance to reply in a filed document, so raising and disposing of

adverse arguments in the opening brief will protect the record. If you are blind-sided by an unexpected argument at oral arguments, ask the court for permission to submit a supplemental brief, which is usually allowed but is not guaranteed.

In federal court, South Carolina district court Local Rules 7.04 through 7.06 require supporting and opposing briefs for all motions other than for motions to compel and those made in a hearing or trial. Relative to your question, Local Rule 7.07 discourages, but allows, reply briefs, which are limited to replying to matters initially raised in the opposing party's response. Therefore, if you are the moving party, waiting for the other side to first raise opposing arguments is less risky than in state court. For the opposing party, the rules do not explicitly allow sur-replies, so you will have to make a motion for leave to do so, a decision that is discretionary with the court. Note, too, that despite Local Rule 7.07, some judges have not waited for replies before ruling. Also, oral arguments are not as prevalent in federal court, so you may not have the opportunity to clean up the record outside of your filed briefs.

Additionally, whether in state or federal court, the judges themselves may raise issues that are unhelpful to your case, and you will want to ensure that your position is in the record.

The bottom line is that no one answer works for all cases. Base your decision on the facts, law, and lawyers in your cases and make an educated decision on when and if to address opposing arguments, always keeping in mind your duty of candor to the court and opposing counsel.

As always, I love getting questions. Keep those cards and letters coming!