

Typographic Legibility: Delivering Your Message Effectively

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Lawyers deliver most of their messages through words in print (on paper or screen), but usually they pay little attention to the typographic forms that convey their messages. Legal typography probably gets less thought from lawyers than the selection of physical delivery services.

In the days of the typewriter (manual, electric, or memory), we churned out our briefs and letters in the standard font, commonly known as “Courier” for the name that IBM gave its standard typewriter font, a font in which (because of the mechanical needs of typewriter keys) each letter took up exactly the same width. Once computer word processing became available to lawyers, we looked for a standard and seemed to find it in “Times Roman,” the word-processing standard font derived from Stanley Morison’s famous 1929 design for the *Times* of London. When we needed to emphasize something, WE JUST SHOUTED IN THE WAY THAT SEEMED NATURAL IN TYPING, WITH ALL-CAPITAL LETTERS, BY LOCKING DOWN THE SHIFT KEY ON OUR KEYBOARDS. We gave up old ways slowly and grudgingly. On a typewriter, underlining was a substitute for the italics that the mechanical device didn’t offer — but plenty of lawyers stuck to underscor-

ing case names and words of emphasis, even after italics became available.¹

Lawyers are so conservative that they are unlikely to change their typographic ways just because their ways are old-fashioned, outdated, or even somewhat ineffective in meeting their persuasive and expository goals. But lawyers do care about compliance with the law, especially clear statutory directives. And current legal typographic practices arguably violate statutory directives requiring clear presentations, particularly of important contractual provisions like liability disclaimers.

While this issue has existed for years, recent attention to typographic legibility is bringing it to the fore and is likely to affect how courts interpret statutory legibility requirements. Not unlike the movement for plain-English consumer contracts that began in the late 1970s, the new scholarship may open up a good-typography movement. In short, courts may eventually declare bad typography ineffective for conveying its message, potentially voiding or imperiling important provisions of many contracts that have been drafted using suboptimal typography.

Importance of Typographic Legibility

Before we address legal requirements, let's consider whether lawyers should care about typographic and visual legibility even without legal compulsion. Typography deals with the presentation and legibility of words on a page. We as lawyers use words on pages, every day, for two purposes: persuasion and explanation. As litigators, we seek to persuade judges, adversaries, and third parties of our clients' positions. As transactional lawyers,

¹ See Antonin Scalia & Bryan A. Garner, *Making Your Case: The Art of Persuading Judges* 122 (2008) (“As for underlining, it is a crude throwback: that’s what writers used in typewriting — when italics weren’t possible. Nobody using a computer in the 21st century should be underlining text.”); Robert W. Harris, *The Elements of Visual Style* 118 (2007) (“[U]nderlining cuts through the descenders of lowercase letters, thereby making the letters harder to identify.”).

we seek to clearly document business agreements and transactions. Clarity and understanding are always essential.

“Our written language is communicated through type. Typography conveys or obscures and gives voice to our message in one fashion or another.”² *If I were to write my briefs using a typographic style that did not facilitate comprehension by my intended reader, I would be doing my client a disservice — even if, for example, I used a classic typeface that traced back to Gutenberg and the Bible.* Readability depends in part on familiarity, and some types communicate better than others.³

For example, typewriter typefaces were always less than ideal. The typewriter’s mechanics (exactly the same striking surface for each letter) required that each letter be designed to be the same width -- the letter *i* stretched out so that it would fit in the same space as the letter *m*. That made words longer than necessary, and because our reading occurs through repeated “fixations” of our eyes on groups of words, it slowed down reading and comprehension, since it took more fixations to read the same content than with proportionately spaced letters.

At times, lawyers using Courier compounded the legibility problem by using full justification — that is, aligning the type not only on the left margin but also on the right. This practice, derived from professional printing but often ill suited to typed documents, injected extra spacing between the already-extended Courier-set words, thus putting even less content in each eye fixation. And the extra word spacing made it more difficult for the eyes to grasp related words in meaningful groupings.

² Paul Kahn & Krzysztof Lenk, *Principles of Typography for User Interface Design*, 5 Interactions 15, 16 (Nov.–Dec. 1998).

³ Phil Baines & Andrew Haslam, *Types & Typography* 125 (2d ed. 2005) (“Our collective perception of what is legible is not a constant value: with every new reading the unfamiliar becomes the familiar.”).

Modern proportionately spaced typefaces generally solve the spacing problem. In most of the typefaces we use today, the letter *i* is far thinner than the letter *m*, and every letter is proportioned so that it best fits with other letters, making words compact and easy to grasp, as our eyes take in text in multiple-word fixations. But proportionality is only one issue in typographic legibility.

Consider the difference between lowercase and uppercase letters. Our eyes are accustomed to reading lowercase letters, with a modicum of capitals mixed in. And lowercase letters are used for a reason — their distinctive shapes are instantly recognizable, given varieties of width and design, including prominent design elements such as the ascenders on the letters *b*, *d*, *f*, *h*, *k*, and *l*, and the descenders on the letters *g*, *j*, *p*, *q*, and *y*. Particularly because of the ascenders and descenders, we can usually comprehend a line of lowercase type even if we cover up the top or bottom half of the line.

Uppercase letters lack the distinctive outlines of lowercase letters and for that reason, as well as their infrequency, are much harder to read. Giving us no clues like the rugged top and bottom edges of lowercase type, they impede comprehension.⁴ All-caps text is also difficult to read because readers are most experienced with reading upper- and lowercase letters combined, and because it is more difficult to pick out names in all-caps text.⁵ OUR EYES MUST SLOW DOWN TO FIX ON AND PROCESS LETTERS OR SINGLE WORDS, NOT WORDS OR GROUPS OF WORDS. WHENEVER, IN THE COURSE OF READING TEXT, YOU ENCOUNTER ALL-CAPITAL LETTERS, YOUR READING WILL

⁴ Betty Binns, *Better Type* 17 (1989) (“Psychologists and reading experts have also discovered that once we have mastered reading, we largely recognize words by their outlines, rather than by their individual letters. This tells us that long passages of capital letters are difficult to read, since words composed of all capitals have basically rectangular outlines and lack ascenders and descenders.”).

⁵ Harris, *The Elements of Visual Style* at 21–22.

AUTOMATICALLY SLOW DOWN AND YOUR COMPREHENSION WILL BECOME MORE BELABORED. IF YOU ARE LIKE MOST OF US, YOU WILL LOOK FOR WAYS TO AVOID SUCH BELABORED READING, AND MAY WELL SKIP ON TO THE NEXT SECTION, IN LOWERCASE TEXT.

Variations among different typefaces can also affect comprehension. This is most clear with the distinctions between roman and sans-serif type, and between typefaces with different x-heights.

“Roman type” refers to type with serifs, those little extenders at the end of each typographic stroke; “sans-serif” type (sometimes referred to as “Gothic”) means type without those flourishes. Some typographic experts believe that serifs assist readability, perhaps because we have grown up with mostly roman types and perhaps because the serifs help our eye to recognize letterforms.⁶

Similarly, x-height is a significant feature in legibility, particularly as it affects type size. A brief explanation is necessary about type sizing. In the era of metal typesetting and letterpress printing (roughly from Gutenberg until the 1960s), type was measured by the height of the metal piece on which each let-

⁶ *Id.* at 12–13 (describing characteristics of serif type that makes it more readable, including familiarity, distinctiveness of letterforms, and beneficial aspects of the serifs in tying words together and creating a horizontal base to each text line); Walter Tracy, *Letters of Credit: A View of Type Design* 31 (1986) (“[T]he characters in a particular sans-serif face may be perfectly legible in themselves, but no one would think of setting a popular novel in it because its readability is low. (Those typographers who specify a sans-serif for the text columns in a magazine may be running the risk of creating discomfort in the reader — to the ultimate benefit of a rival journal.)”). *But see* Manuel Perea, *Why Does the APA Recommend the Use of Serif Fonts?*, 25 *Psicothema* 13, 16 (2013) (reporting results of readability test: “In a normal reading setting . . . the presence of serifs does not impact on reading fluency. The present data are entirely consistent with the claim that ‘reading appears to proceed at about the same rate if the type font, size, and length of line employed are all reasonable.’”).

ter was cast. That size (which in America since 1886 has been measured in “points,” there being 72 points in an inch) includes some blank space above the highest ascender. We still use the same measurements, meaning that our point sizes do not actually refer to the height of any letterform. Moreover, the height of a lowercase letter’s core (the portion comparable to *x* or any other lowercase letter without an ascender or descender) and its proportion to ascenders and descenders is not standard; it varies by typefaces. If I use a 12-point typeface with a small *x*-height, like Garamond, it will appear smaller than a 12-point typeface with a much larger *x*-height, like Century.⁷ In terms that a litigator can understand, typographic selection could have given you more words under the old appellate rules that specified only a type size for your briefs. More importantly, types with large *x*-heights have diminished readability⁸ — a fact that needs to be considered in “fine print” conditions presented to consumers.

The extent of a typeface’s condensation (how much its letters are designed to be squished together, accentuating the vertical) or the extent to which the typeface is extended (designed with the letters pulled apart, accentuating the horizontal) can also affect legibility. For text in tables, for example, it generally makes sense to use either a condensed type, which will fit more readily and appear natural in narrow table columns, or a special “lining” font in which each numeral has the same width, so that numbers line up with one another.

Finally, the medium in which text is presented affects readability, comprehension, and the choice of typographic elements. Significant amounts of text are read today in electronic formats

⁷ Harris, *The Elements of Visual Style* at 18 (noting that because *x*-height affects the apparent size of type, it should always be considered when choosing type size).

⁸ Binns, *Better Type* at 17 (“As *x*-height increases, ascender and descender height necessarily decreases; this can lead to poor differentiation of certain letter pairs, such as lowercase *n* and lowercase *b*. The larger *x*-height also reduces the channel of white space between the lines.”).

— on computer, on tablet, or on smartphone screens. Often, because of screen-resolution limits, scalability issues, or the need for content to adapt to different platforms, sans-serif type is preferred for those applications. Sans-serif letterforms require fewer pixels and thus present better when screen resolution is limited. That gave them an advantage for screen presentation, particularly before higher-resolution displays became more widely available. By contrast, the print medium well suits roman typefaces with their greater detail, dignity, and familiarity. A common rule of thumb is “serif for print, sans-serif for screen.”⁹

Research on Typographic Legibility

Lawyers care about the rules and standards for good writing. They learn *The Bluebook* rules for citations. They study usage manuals like Strunk and White’s *The Elements of Style* and *Garner’s Modern English Usage*. At trial, they carefully consider visual and multimedia means of presenting their cases to make them understandable to jurors. But lawyers rarely examine the research and guidance on typographic presentation that can improve the persuasiveness and effectiveness of their ordinary legal documents.

The ways in which typographic material can be more or less readable, understandable, and persuasive are not just matters of speculation. Many of them are matters of established science.

⁹ See, e.g., Stacey Kole, “Serif v. Sans: The Final Battle,” <https://www.webdesignerdepot.com/2013/03/serif-vs-sans-the-final-battle/>; Joel Falconer, “What’s the Most Readable Font for the Screen?,” *Design & Dev.*, Mar. 1, 2011, https://thenextweb.com/dd/2011/03/02/whats-the-most-readable-font-for-the-screen/undefined/dd/2011/03/02/whats-the-most-readable-font-for-the-screen/#.tnw_DZj3ux1m. But see Design Shack, “Web Design Debate: Do I Really Need to Use Sans Serif Fonts?,” <https://designshack.net/articles/typography/web-design-debate-do-i-really-need-to-use-sans-serif-fonts/> (because of increasing screen resolution, “great web typography does not have to be sans serif”).

And the research isn't buried in obscure social-science journals. Matthew Butterick's 2010 book, *Typography for Lawyers: Essential Tools for Polished & Persuasive Documents*, now in its second edition, provided lawyers with a well-organized, readable manual, tying the lessons of legibility research directly into the kinds of documents that lawyers create. And law professor Ruth Anne Robbins discussed key elements of the research, and brought together its key findings for lawyers, in her 2004 article *Painting with Print: Incorporating Concepts of Typographic and Layout Design into the Text of Legal Writing Documents*.¹⁰

Professor Robbins relied on multiple studies of readability, reading psychology, and effective typographic and graphic presentations, including landmark studies by Miles A. Tinker and Donald G. Paterson on the effect of typography on reading speed and comprehension. Some of these studies showed dramatic differences in comprehension for different typographic styles, such as the fact that using all caps lengthens reading time by 9.5% to 19%.

The scientific studies are particularly useful because they revealed some of the physical and neurological realities that affect readability and comprehension. It's useful for any writer to know that readers' eyes make a certain number of "fixations" per line in the course of reading.¹¹ From this basic fact, we then understand why extra-long lines that cause longer fixation pauses will slow reading, whereas lines with fewer fixation pauses are likely to lead to greater retention and comprehension.¹² It also explains why using block quotations may disrupt a reader's pleasant reading rhythm and thus inhibit comprehension.¹³ Finally, because we see groups of words on each fixation, it becomes clear why the greater spacing between words in some

¹⁰ 2 J. ALWD 108 (2004).

¹¹ See *id.* at 122, 128.

¹² *Id.*

¹³ *Id.* at 123.

fully justified lines will slow comprehension compared to use of a ragged right margin (which maintains uniform word spacing).¹⁴

The scientific research on reading leads to many sound principles — use of clear typefaces (especially well-designed classic serif typefaces), appropriate use of spacing and white space, use of headings, avoidance of all-caps text or too much italic, and so forth. Robbins devotes much of her article to specific graphics guidelines consistent with the scientific research, noting that “most of the accepted principles of document design are grounded in scientific study.”¹⁵

Using good visual-literacy techniques brings aesthetic as well as readability benefits. As one researcher has noted, “The balanced arrangement of visual elements on a page, the contrast among these elements, the efficient use of space — together these create a unified visual display that predisposes the reader to respond favorably (or unfavorably) to the information in the document.”¹⁶ Indeed, Daniel Kahneman, a Nobel Prize-winning psychologist, has noted that type clarity influences the message’s believability.¹⁷

All in all, following science- and aesthetic-based readability guidelines benefits lawyers and their clients in many ways. Visual legibility can bring the emotional appeal of pleasing aesthetics, it can affect the substantive effectiveness of the material through better comprehension, and it can influence the reader’s perception of the writer’s credibility. “Visual effects thus are as critical an element of persuasion as proper grammar and adherence to the rules of court and citation form.”¹⁸

¹⁴ *Id.* at 130–31.

¹⁵ *Id.* at 111.

¹⁶ Charles Kostelnick, *The Rhetoric of Text Design in Professional Communication*, 17 *Technical Writing Teacher* 189, 200 (1990).

¹⁷ Daniel Kahneman, *Thinking, Fast and Slow* 62–63 (2011).

¹⁸ Robbins, 2 *J. ALWD* at 111.

Embedded Graphics as an Aid to Clarity

When given a choice, most people prefer to learn through multimedia and visual presentations rather than mere words. Graphics — at least appropriate ones — almost always aid written expression, and modern tools make it relatively easy for lawyers to bring images into their writings. Images have long been used in legal documents, especially in legal fields like intellectual property and advertising. Now document creators can place the images together with the text — side-by-side comparisons of trademarks or copyrighted art, or of patent drawings and product images, for example, or explanations of a patented device right next to the relevant drawings.

Robert W. Harris concludes his visual-style manual with a before-and-after notice from a library.¹⁹ The original notice, set in forbidding centered all caps, obliquely told patrons where a book-shelving sequence continued. Graphically, the notice was a turnoff; we can assume that most patrons either gave up or guessed their way to the proper shelf. A revised notice, however, presented the same words in upper- and lowercase text, with key words emphasized, above a simple map with a here-to-there arrow. That notice would be read, understood, and acted on.

In a legal example, a lawyer's graphic, comparing her client's situation to those in cited precedents, clearly brought home the big difference between her client's situation and the precedent.²⁰ Johansen and Robbins provide examples of the many kinds of graphics — analytical visuals, transformative visuals, heat maps, interpretive charts — that provide cognitive boosts to the reader's understanding.²¹

¹⁹ Harris, *The Elements of Visual Style* at 159–60.

²⁰ Steve Johansen & Ruth Anne Robbins, *Art-iculating the Analysis: Systemizing the Decision to Use Visuals as Legal Reasoning*, 20 *Legal Writing* 57, 57–59 (2015).

²¹ *Id.*, *passim*; see also Michael D. Murray, *The Ethics of Visual Legal Rhetoric*, 13 *Legal Comm. & Rhetoric* 107 (2015).

Understanding Our Tools and Our Knowledge

A novice might incorrectly assume that today's personal computers offer all the instruments and variations of fine typography. In fact, many of the fonts installed on personal computers are inappropriate for legal documents.²²

Some fonts may be available on computers because they are good for display on a screen, but those fonts are usually unsuitable for print. Some special “lining” fonts may be designed for use in aligning numbers or text in tables or charts, but those fonts will impede readability in text. Many PC fonts are display types, meant for headlines and advertising.²³ Finally, it should go without saying that several fonts (think Comic Sans or ransom-note typography) should never be used. Bryan Garner suggests no more than two fonts in any one document.²⁴

Another word of caution: the fonts on personal computers are often far more limited than professional fonts of the same name. Well-designed typefaces are not proportionally scalable — that is, the letterforms contain minute design variations from size to size, all keyed to the subtleties of shape that will best connect with the reader's eye. In custom typefaces, an 8-point letterform will contain differences in strokes and curves, often including greater thicknesses than a 12-point letterform of the same typeface. These differences always existed in metal type, where each size was specifically designed and cut. But because of the ease of proportionally scaling digital fonts, many computer

²² Harris, *The Elements of Visual Style* at 1–2 (“The drawback of digitized type is that it can be used by people who know nothing about type. . . . [W]ithout an understanding of type, you might be creating visual chaos.”).

²³ Tracy, *Letters of Credit* at 27 (“The absence of practical experience of type gives rise to a tendency to all types as equal and similar in nature, purpose and function. . . . In particular, there is sometimes a lack of understanding of the fundamental difference between types designed for display and types meant for text.”).

²⁴ Bryan A. Garner, *The Redbook: A Manual on Legal Style* § 4.4, at 88–89 (3d ed. 2013).

fonts lack such subtle variations, so scaling them to different sizes will lead to suboptimal letterforms.²⁵

For little cost, lawyers can upgrade to a professional font. These fonts are available online, and Butterick includes suggestions and samples in his *Typography for Lawyers* book.

Judicial Recognition of Typographic Facts

Typographic realities, which derive from history, graphic design, and the brain's perception and processing of symbols, are a little foreign to lawyers and judges. But those realities do come into play in legal work, as two cases illustrate.

A telling example of the difficulty of reading contract language in all-capital letters is found in *Randall v. Lady of America Franchise Corp.*²⁶ The court had to carefully review a 231-word disclaimer provision that was critical to the case. So the court quoted the provision in its opinion — but with a twist. The court transformed it to ordinary text, mostly lowercase, for its review. Why? For ease of reading:

For the sake of legibility, the Court reproduces the relevant language here in upper and lower case.²⁷

In short, to really read, comprehend, and analyze text, we need it in legible type, not all-capital letters. (This, of course, is the opposite of what is often done in legal forms in the name of emphasizing particular textual provisions.)

²⁵ Derek H. Kiernan-Johnson, *Telling Through Type: Typography and Narrative in Legal Briefs*, 7 J. ALWD 87, 97–98 (2010) (“[A]lthough top-end professional layout software gives designers and printers access to the best in digital typography, common word processing programs do not, and in fact they may pervert good typography without the user’s knowledge. Chief among these perversions is the Frankensteinian manipulation of the letter forms to create such things as fake, or scaled[,] smallcaps and italics.”).

²⁶ 532 F. Supp. 2d 1071 (D. Minn. 2007).

²⁷ *Id.* at 1075 n.4.

In another case, the historical nature of type-sizing measurements and conventions led to a 62-page decision from the Michigan Supreme Court, including a vigorous dissent from a justice who refused to apply historical standards.²⁸ The case arose because the legislature, seeking to protect citizens, had decreed that referendum petitions must use headings in 14-point boldface capital letters.²⁹ On this “big constitutional issue,” the court focused on “something as small as 14/72 of an inch” (the approximate size of 14-point type or, more precisely, the metal base for the raised type used in the bygone days of letterpress printing).³⁰ Its decision explored the distinction between “letters” and “type,” whether metal and digital type should be treated similarly, and fundamentals of typography.³¹ The chief justice even included in his concurring opinion a classic illustration of a piece of metal type, showing all its characteristic elements, including “face,” “counter,” and “shoulder.”³² One dissenting justice, in his 17-page opinion, insisted that statutory compliance hinged on a measurement of printed letter height, not on the printing industry’s standard type measurement.³³

Left totally unsaid in the many pages of the court’s opinions was that the difference between 14 points under standard measurement and under the dissent’s measurement was infinitesimal and highly unlikely to affect a citizen’s understanding of the petition. Nor was it mentioned that the legislature’s primary choice of typographic emphasis — all-capital letters — was based on faulty assumptions about readability. And no one mentioned that readability is influenced much more by the particular typeface used (especially one with a large or small x-height) than by the 14-point size.

²⁸ *Stand Up For Democracy v. Secretary of State*, 822 N.W.2d 159 (Mich. 2012).

²⁹ Mich. Comp. Laws § 168.482(2).

³⁰ *Stand Up For Democracy*, 822 N.W.2d at 163.

³¹ *Id.* at 168–73.

³² *Id.* at 177 (Young, C.J., concurring in part and dissenting in part).

³³ *Id.* at 187 (Markman, J., concurring in part and dissenting in part).

These two cases illustrate misunderstandings of typography in legal practice. In one case, a judge had to circumvent the hard-to-read typography in a contract — intended for emphasis, but countereffective in practice — to understand it. In another case, judges interpreting a statute that was intended to make text easily readable struggled to apply measurements that are largely irrelevant to readability. At least some attempts at promoting typographic legibility for the sake of consumers and citizens are simplistic, ineffective, and even self-defeating. Unfortunately, this seems to be the rule when laws address typography.

Laws Implicating Typography

A number of laws set out typographic requirements in an attempt to ensure that consumers are made fully aware of contract terms to which they may be bound. These laws typically direct that an entire contract be presented clearly (essentially, no illegible fine print), or that important provisions be given some kind of emphasis. In both instances, current standard practices inadequately meet those goals.

Some consumer-protection laws require type of a certain size. The Federal Trade Commission imposes type-size requirements for consumer-credit disclosures.³⁴ The Missouri Merchandising Practices Act requires cancellation clauses in consumer contracts to be printed in type of at least 10 points.³⁵ Some courts have refused to enforce liability-limitation provisions printed in “Lilliputian typography” or otherwise capable of being read only with a magnifying glass.³⁶

³⁴ 16 C.F.R. § 642.3; see *Murray v. New Cingular Wireless Serv., Inc.*, 523 F.3d 719, 724–25 (7th Cir. 2008) (noting that the FTC’s regulation “defin[es] ‘conspicuous’ to mean at least 8-point type for the full notice, plus a short notice in 12-point type on the brochure’s first page”).

³⁵ Mo. Rev. Stat. Ann. § 409.938.3.

³⁶ See, e.g., *Lisi v. Alitalia-Linee Aeree Italiane*, 253 F. Supp. 237, 243 (S.D.N.Y. 1966).

Some plain-English laws — including the federal Plain Writing Act of 2010,³⁷ which requires federal agencies to provide clear information to consumers — do not specifically address type legibility. But others do. For instance, Connecticut’s plain-English law requires that covered consumer contracts use “type of readable size” and that subheadings be set off with boldface type or, alternatively, that the type size be at least 8 point and the headings be in at least 10-point boldface.³⁸ New Jersey’s law provides a number of language-based readability issues for courts to consider and requires that contractual conditions and exceptions be printed in at least 10-point type.³⁹ Pennsylvania’s requires that the contract “have type size, line length, column width, margins and spacing between lines and paragraphs that make the contract easy to read.”⁴⁰

Many laws, by contrast, direct that certain parts of consumer contracts be given special emphasis. For example, under section 2-316(2) of the Uniform Commercial Code, an implied warranty of merchantability may be excluded by a conspicuous writing that mentions the term “merchantability,” and an implied warranty of fitness may be excluded by a conspicuous writing. Language is “conspicuous” if it is “in larger or other contrasting type or color.”⁴¹ Deciding whether language is “conspicuous” is

³⁷ Pub. L. No. 111-274, 124 Stat. 2861 (requiring “writing that is clear, concise, [and] well-organized, and follows other best practices appropriate to the subject or field and intended audience”).

³⁸ Conn. Gen. Stat. § 42-152(b)(5), (8), (c)(7), (10).

³⁹ N.J. Stat. Ann. § 56:12-2.

⁴⁰ Pa. Stat. Ann. tit. 73, § 2205(c)(1).

⁴¹ U.C.C. § 1-201(10).

left to the courts.⁴² Other laws offer guidance for what constitutes a “conspicuous” disclosure.⁴³

In interpreting these emphasis-required laws, courts have generally approved all-uppercase treatments as meeting the statutory standard. This passage from the Missouri Court of Appeals is typical:

Here, the containers of varnish delivered to plaintiff from Gemini were affixed with labels containing disclaimer language. The introductory phrase of the disclaimer, “LIMITATION OF LIABILITY,” was printed not only in capitals but also in bold print. The language excluding the warranties was written in capitalized letters and was more prominent than the other type on the label. The language was sufficiently set off from the surrounding material so as to draw attention to it. The language thus conformed with the definition of “conspicuous” as set out in § 400.1-201(10).⁴⁴

Such rulings seem to defy the principle that all-uppercase text is harder, not easier, to read than lowercase text.⁴⁵ And they ignore as well the UCC’s definition of conspicuousness, which refers to being “in larger or other contrasting type or color,” not all caps. The explanation may be that most of these rulings

⁴² *Id.*

⁴³ *See, e.g.*, 16 C.F.R. § 1500.131(c)(6)(ii) (regulation under Federal Hazardous Substances Act providing that “[t]he type size of the cautionary labeling shall be reasonably related to the type size of any other printed material in the accompanying literature and must be in conspicuous and legible type by typography, layout, or color with other printed matter on the label”).

⁴⁴ *Karr-Bick Kitchens & Bath, Inc. v. Gemini Coatings, Inc.*, 932 S.W.2d 877, 879 (Mo. Ct. App. 1996). *See also Cate v. Dover Corp.*, 790 S.W.2d 559, 560 (Tex. 1990) (“A printed heading in capitals . . . is conspicuous.”); *Atlas Mut. Ins. Co. v. Moore Dry Kiln Co.*, 589 P.2d 1134, 1135–36 (Or. Ct. App. 1979) (capitalized warranty disclaimer held sufficiently conspicuous).

⁴⁵ *See* Roger W. Shuy, *Fighting Over Words: Language and Civil Law Cases* 117 (2008) (“Finally, the warning section contains twelve consecutive lines of all capitalized letters, producing a readability problem of its own, since readers are not accustomed to seeing texts in all capital letters and find such text difficult to process.”).

were handed down before modern personal computers introduced great flexibility into the typography for legal documents. Or the courts were not aware, or had not been made aware by litigants, of the legibility research on uppercase text. In either event, times have changed. Drafters of contracts currently have far more (and better) tools available for emphasizing text.

Plenty of authorities, moreover, support alternatives to all-capital letters.⁴⁶ Judge Alex Kozinski of the Ninth Circuit has noted that “there is nothing magical about capitals” and has labeled the use of all caps for “conspicuous” text as a “canard” and a “fallacy,” which has inexplicably survived “decades of improved literacy and technology.”⁴⁷ As he further explained:

Lawyers who think their caps lock keys are instant “make conspicuous” buttons are deluded. In determining whether a term is conspicuous, we look at more than formatting. A term that appears in capitals can still be inconspicuous if it is hidden on the back of a contract in small type. Terms that are in capitals but also appear in hard-to-read type may flunk the conspicuousness test. A sentence in capitals, buried deep within a long paragraph in capitals[,] will probably not be deemed conspicuous. Formatting does matter, but conspicuousness ultimately turns on the likelihood that a reasonable person would actually see a term in an agreement. Thus, it is entirely possible for text to be conspicuous without being in capitals.⁴⁸

Ultimately, these better understandings of legibility are likely to remove the past judicial imprimatur from the simple rule of “use all caps” or “use boldface capital letters.”

⁴⁶ See, e.g., *Stevenson v. TRW Inc.*, 987 F.2d 288, 295–96 (5th Cir. 1993) (“Language in the body of a form is ‘conspicuous’ if it is in larger or other contrasting type or color.”); *Cygielman v. Cunard Line Ltd.*, 890 F. Supp. 305, 307 (S.D.N.Y. 1995) (finding a boldface legend on ticket booklet’s cover sufficiently conspicuous to warn consumer of limiting terms).

⁴⁷ *In re Bassett*, 285 F.3d 882, 886 (9th Cir. 2002) (citations omitted).

⁴⁸ *Id.* (citations omitted).

New Typographic Understandings and Literature

Some say that the modern era of typographic understanding can be traced to a calligraphy class that Steve Jobs, the founder and legendary leader of Apple Computer, took at Reed College. The class opened his eyes to beautiful and effective typography, which the Macintosh computer later facilitated.⁴⁹ Those who remember the odd collection of typefaces on the original Macintosh may dispute that story. But there has undoubtedly been a recent flourishing of popular interest in typography — even in the legal profession.

Simon Garfield's book *Just My Type*, about typography, made it into the popular press in 2011, a year that also saw the publication of Butterick's *Typography for Lawyers*.⁵⁰ Books designed for professional type users in the advertising world, like *The Elements of Typographic Style* and *The Elements of Visual Style*, are finding readers in other professions.⁵¹ And in the legal world, the good-lawyering tips of Justice Antonin Scalia and

⁴⁹ Steve Jobs, Commencement Address, Stanford University (June 12, 2005), <http://news.stanford.edu/news/2005/june15/jobs-061505.html> (“I learned about serif and sans serif typefaces, about varying the amount of space between different letter combinations, about what makes great typography great. It was beautiful, historical, artistically subtle in a way that science can't capture, and I found it fascinating. . . . [The Mac] was the first computer with beautiful typography. If I had never dropped in on that single course in college, the Mac would have never had multiple typefaces or proportionally spaced fonts.”); see also Margalit Fox, *Rev. Robert Palladino, Scribe Who Shaped Apple's Fonts, Dies at 83*, N.Y. Times, Mar. 4, 2016, at A25 (describing Jobs's calligraphy teacher: “In Father Palladino's hands, however, calligraphy was about far more than mere beautiful letters: It was about the ways those letters can be coaxed to nestle companionably together to make words, and how those words in turn can be assembled to form a meaningful text.”).

⁵⁰ Simon Garfield, *Just My Type: A Book About Fonts* (2011); see also Craig Wilson, *Fonts Rule in Simon Garfield's Just My Type*, USA Today, Aug. 29, 2011.

⁵¹ Robert Bringhurst, *The Elements of Typographic Style* (1992); Harris, *The Elements of Visual Style*.

writing expert Bryan Garner included this rule #54 of effective persuasion: “Don’t spoil your product with poor typography.”⁵²

Administrative-agency rules are increasingly recognizing typographic realities. In its report urging better disclosures in connection with mobile apps, the Federal Trade Commission recommended that app developers use, among other things, “good design techniques such as tables, headings, white spaces, bold text, bulleted lists, and a larger font size.”⁵³

Some courts are encouraging attention to typographic legibility. The Seventh Circuit’s practitioner’s manual, for example, contains an eight-page section, titled “Requirements and Suggestions for Typography in Briefs and Other Papers,” with detailed typographic explanations and tips. The handbook notes that typographic selection will affect the brief’s effectiveness:

Any business consultant seeking to persuade a client prepares a detailed, full-color presentation using the best available tools. Any architect presenting a design idea to a client comes with physical models, presentations in software, and other tools of persuasion. Law is no different. Choosing the best type won’t guarantee success, but it is worthwhile to invest some time in improving the quality of the briefs [sic] appearance and legibility.⁵⁴

The handbook also advises lawyers to “read some good books and try to make your briefs more like them.”⁵⁵

Perhaps most importantly, the developing literature of typographic literacy makes it difficult for lawyers to bury their heads in the sand on this topic — and any lawyer who does risks censure by typographically literate judges.

⁵² Scalia & Garner, *Making Your Case* at 136.

⁵³ Federal Trade Commission, *Mobile Privacy Disclosures: Building Trust Through Transparency* 8 (Feb. 2013).

⁵⁴ Handbook for Appeals to the United States Court of Appeals for the Seventh Circuit 142 (2017), <http://www.ca7.uscourts.gov/rules-procedures/rules7.htm>.

⁵⁵ *Id.*

Applying New Typographic Understandings to Old Laws

The objection to change is obvious. The tradition-bound lawyer will protest, “Our current ways work; they are recognized and legally approved.” For now, that’s true, at least on one level. The old ways work in that they are judicially approved. They don’t work, however, for their purpose of promoting clarity and understanding.

One of these days, consumer advocates are going to challenge the way consumer contracts have been written, with critical sections displayed in my-eyes-glaze-over all-capital letters in lengthy paragraphs of dizzying and unreadable grayness. The contract you wrote, which your client used, could become the basis for their test case. We can hope that courts will give warnings before they abandon old standards for what constitutes “conspicuous” text — but isn’t it wisest to improve our communications before that day?

We have alternatives. Courts may have approved all-caps text as “conspicuous” when it really wasn’t, but that doesn’t mean that you can’t highlight critical text in your contracts in a way that really *does* make it conspicuous. Boldface type generally provides good emphasis. Type size and selection can also make a big difference in readability, especially if the type is selected by a knowledgeable design professional. (That’s a nice way of saying “not selected by a lawyer.”)

There are other useful graphic techniques. For example, in a recent unreported consumer-contract case, a key automatic-renewal provision was moved to the first page, given a boldface heading, and wrapped in an attention-getting black border. The provision was unquestionably “conspicuous,” and the company’s defense to consumer-deception claims was bolstered, not hindered, by its use of readable typography and good design.

Just as professional writers helped agencies to draft plain-English regulations, and companies to draft plain-English

contracts, design professionals can help create typographically readable text. National merchants that use standard consumer contracts are the likely first candidates for creating and using such improved forms.

The benefit of more readable forms doesn't just flow to the consumer or other contracting party. More readable forms mean that they are more readable for everyone. Your own clients will benefit when you make their forms more readable. After all, they probably never read through those ponderous and unreadable indemnity clauses, either — meaning that they never fully understood them, never properly edited them, and only reluctantly tackled bringing them up to date with new business realities. Clarity in typography, like clarity in drafting, will promote your own understanding and use of contracts and other forms.

Let's Try Legible Typography and Design!

Getting back to first principles, our job as lawyers is to help our clients to transact business and resolve disputes. Transactions are promoted by clarity in written expression, and dispute resolution requires effective persuasion. In print — the product of so much effort by lawyers — typographic legibility promotes both clarity and persuasion. Here are a few suggested steps.

1. *Specifically consider typography and page design for all written documents.* Just as we consider and decide where to sue, the choice of law that will apply to our contracts, and the arguments that we will assert on our clients' behalf, we should consider these elements of effective communication.

2. *Use traditional, legible typefaces.* Choice of typefaces should be made based on legibility, not habit or computer default settings. Don't pick a sans-serif typeface just because it looks modern; if it's not suitable for text, it won't promote your purposes.

Convention-following lawyers may want to stick with the tried-and-true Times Roman, figuring that if Stanley Morison's

design was good enough for the *Times* of London a century ago, it is good enough for them. But Judge Frank Easterbrook has raised the legitimate question of why a typeface designed for narrow news columns should be used by default on much differently proportioned legal documents.⁵⁶ And even the designer of Times Roman admitted that it was designed “by the vice of Mammon” as a narrow, utilitarian face, to help the newspaper minimize its newsprint use.⁵⁷

More adventurous advocates might consider other classic fonts with great dignity and readability, like Garamond, Caslon, Bembo, Trump Mediaeval, Century, and Herman Zapf’s modern classic, Palatino. As noted, Butterick’s *Typography for Lawyers* provides recommendations, commentary, and examples for many well-designed fonts suitable for legal text, including some sans-serif fonts. The Seventh Circuit practitioner’s handbook also suggests typefaces that work well in briefs. A classic, dignified, and readable typeface may bring not only legibility but also respectability to your briefs.⁵⁸ Some law firms may select house fonts, using typography to “say something about the law firm, about its personality, its character,” while an amicus may wish

⁵⁶ Kiernan-Johnson, 7 J. ALWD at 88 (quoting Judge Easterbrook: “Desktop publishing does not imply a license to use ugly or inappropriate type and formatting — and I assure you that Times New Roman is utterly inappropriate for long documents It is designed for narrow columns in newspapers, not for briefs.”).

⁵⁷ Stanley Morison, *A Tally of Types* 107 (1973) (“[T]he face under consideration, designed as it had been for a newspaper, was found peculiarly appropriate for the extensive post-war manuscript, whose pages and price needed to be kept down. . . . [William] Morris would have denounced the heresy of the original cutting immediately. As a new face it should, by the grace of God and the art of man, have been broad and open, generous and ample; instead, by the vice of Mammon and the misery of the machine, it is bigoted and narrow, mean and puritan.”).

⁵⁸ Carl Dair, *Design with Type* 123 (1967) (“[T]ypes do have essential qualities, romantic, documentary, poetic, realistic, efficient, and so on, which are capable of reflecting an author’s intentions.”).

to use a distinctive typeface to highlight its separate perspective or tradition.⁵⁹

Ultimately, typeface selection should be governed by the principles of Beatrice Warde’s classic “Crystal Goblet” essay, which emphasized that just as wine is best experienced in a clear crystal goblet that focuses all the attention on its properties, a typeface should be selected so that all attention is focused on the message it conveys.⁶⁰

3. Use boldface, italics, tables, bulleted lists, white space, and other design elements for emphasis. Make a study of printed reports, print advertisements, and other effective documents to see how to catch and keep the reader’s eye. White space in particular deserves more attention in legal writing. Frequent subheadings in briefs, for example, help persuasion by clarifying and emphasizing key points, and by breaking up text. And many textual passages can be made more readily understandable through use of tables and bulleted lists. (More on that in step 5.)

4. Avoid traditional techniques from old media that clutter or impede readability. Consider, for example, those traditional multiline subheadings in briefs, often formatted in all caps or with every word beginning with a capital letter. Both the length and the typographic awkwardness repel readers. It’s a lost opportunity; studies show that readers give significant attention to headlines, if they are readable. Your subhead should be boiled down to the main point, and put into plain English and easily readable typography.

5. Integrate graphics. We live in a multimedia world. People learn best with visuals. In my copyright and trademark practice, we often integrate the art and designs at issue in the case

⁵⁹ Kiernan-Johnson, 7 J. ALWD at 116.

⁶⁰ Beatrice Warde, “The Crystal Goblet,” *reprinted in* Allan Haley, *Typographic Milestones* 125 (1992) (“There are a thousand mannerisms in typography that are as impudent and arbitrary as putting port in tumblers of red or green glass! . . . Printing demands a humility of mind. . . . There is nothing simple or dull in achieving the transparent page.”).

into motions, briefs, letters, and agreements. That makes it easier for the reader than flipping to attached exhibits, and it often promotes the persuasive point at issue — for example, by demonstrating the similarity or difference between two trademarks. And apart from visual art, consider graphic displays of text in tables, charts, columnar comparisons, and even analytical graphics or infographics.

6. *Design with a view to your reader's medium.* Briefs are increasingly read on tablets rather than paper, and these electronic media present new legibility issues, which both lawyers and court rules should consider and address. I dislike some of the appellate-court rules that require what seems to be an unusually large text type size, but if appellate judges are reading their briefs on iPad screens, then 13-point type (or even larger type with larger x-heights) may promote readability.

7. *Don't be the last to abandon widely used but ineffective techniques.* One of these days, those techniques will be ruled inadequate.