

Chapter 8 Humor

By J. SCOTT BOVITZ

Dusting Off the Western Union “92 Code” to Shorten Briefs

I have been talking with the bankruptcy judges at ABI conferences. This type of personal communication is a hallmark of ABI events.¹ I have concluded that WE CAN ALL RADICALLY SHORTEN OUR BRIEFS!² But first, a little perspective.

Before 1362, a good English lawyer was required to be literate and conversant in English (Anglo-Norman), Old French, Latin, Old Occitan and other languages.³ However, England enacted the Statute of Pleading in 1362. Initially, life became a little easier for the lawyers and their clients.⁴

In order to avoid “great mischiefs” caused by pleading in the “French Tongue, which is much unknown in the ... Realm ... all Pleas which shall be pleaded in [the King’s] Courts whatsoever ... shall be pleaded, shewed, defended, answered, debated, and judged in the English Tongue.”⁵ With the many synonyms available in the English Tongue, attorneys in England and the colonies soon discovered that they could make the very same point, over and over.

Now, 656 years later, we have an intractable crisis of verbosity. When asked to consider an “Application to File an Oversized Replacement Answering Brief,” former judge Alex Kozinski wrote a stinging dissent about “chubby briefs”:

I do not consent to the filing of a fat brief.... This has become a common and rather lamentable practice ... lawyers wait for the last minute to file chubby briefs and dare us to bounce them.... Sly lawyers take advantage of this institutional inertia to flout our page limits with impunity. This encourages disdain for our rules and penalizes lawyers, like petitioner’s counsel, who make the effort to

comply. For my part, I don’t feel bound to read beyond the 14,000 words allowed by our rules, so I won’t read past page 66 of the state’s brief.⁶

Bankruptcy judges are known to share Judge Kozinski’s concerns, but what to do? One solution might be to radically shorten page and word limitations. **Michael T. O’Halloran** (Law Office of Michael T. O’Halloran; San Diego), husband of Hon. **Margaret M. Mann** (U.S. Bankruptcy Court (S.D. Cal.); San Diego), and Bovitz & Spitzer are the sponsors of a lighthearted contest at each annual California Bankruptcy Forum (CBF) conference.⁷ At the 2018 insolvency conference, we challenged CBF attendees to write an entire bankruptcy brief or story, in exactly nine words, that was based on an Ernest Hemingway bar bet.⁸

Whitman L. Holt (Klee, Tuchin, Bogdanoff & Stern LLP; Los Angeles), a 2017 ABI “40 Under 40” honoree,⁹ quickly replied when I told Mr. Holt about the nine-word CBF contest and the \$500 prize: “This plan sucks. Chapter 7 is better. Deny confirmation.” When I protested about the word count, Mr. Holt pointed out that Microsoft Word counts “7” as a word.¹⁰

No bankruptcy judge was publicly willing to limit attorney briefs to nine words, but most complained about unimaginative briefs that repeated the key points *ad nauseum*. Which brings us to the instructive lessons of the 1859 Western Union “92 Code.”¹¹

In the 1800s, the telegraph was the disruptive, highly successful communications technology



**Coordinating Editor
J. Scott Bovitz**
Bovitz & Spitzer
Los Angeles

Scott Bovitz of Bovitz & Spitzer in Los Angeles is board certified in business bankruptcy law and president of the American Board of Certification. He is also a certified specialist in bankruptcy law by the State Bar of California Board of Legal Specialization. He also struggles with an intractable crisis of verbosity.

1 I’m not exactly sure that I explained to these judges that they were being interviewed (“60 Minutes”-style) about improving legal briefs. Regardless, Chapter 8 Humor appreciates the contributions from Hon. **Bruce A. Markell** (ret.); Central District of California Bankruptcy Judges **Deborah J. Saltzman**, **Sheri Bluebond**, **Scott C. Clarkson** and **Martin R. Barash**; and Southern District of Alabama Bankruptcy Judge **Jerry C. Oldshue, Jr.**

2 I apologize for shouting.

3 I’m impressed. I was born and live in the multilingual town of Los Angeles, yet I still have a hard time ordering off a menu in Spanish. (I once proudly ordered a delicious dinner of “leg of soap” for my friends and family in Barcelona.) See also Gillian Polack, Ph.D., “Languages in Medieval England,” Trivium Publishing, available at triviumpublishing.com/articles/languages.html (“What languages did people speak in England in the Middle Ages?... [I]t changed considerably over time, for one thing.... What language do you insult someone in, and why? Modern English has retained several words that come from Old French insults, suggesting that maybe English was not always the language of choice for medieval impoliteness.”) (unless otherwise specified, all links in this article were last visited on May 22, 2018).

4 36 Edw. III c. 15 (Statute of Pleading, also known as the Pleading in English Act of 1362).

5 See languageandlaw.org/TEXTS/STATS/PLEADING.HTM (original spelling).

6 *Cuevas v. Hartley*, 835 F.3d 892 (9th Cir. 2016), dissent by Judge Kozinski.

7 See calbf.org (description of popular annual conference).

8 See “For Sale: Baby Shoes, Never Worn,” Wikipedia, available at en.wikipedia.org/wiki/For_sale:_baby_shoes,_never_worn (“While lunching with friends at a restaurant ... Hemingway bets the table ten dollars each that he can craft an entire story in six words. After the pot is assembled, Hemingway writes ‘For sale: baby shoes, never worn’ on a napkin, passes this around the table, and collects his winnings.”). Judge Saltzman is familiar with the Hemingway story, which led to a hotly contested writing competition in a class at Amherst College. She agreed that bankruptcy professionals would need at least three more words than Hemingway.

9 Visit abi40under40.org for details about the wonderful ABI program to recognize younger “insolvency professionals who are committed to the highest standards of achievement at work and in their communities.” Nominations closed on June 30, and the 2018 class will be announced soon.

10 Mr. Holt is super-smart. He is co-author (with attorney and Prof. Kenneth N. Klee) of *Bankruptcy and the Supreme Court: 1801-2014* (BarristerBooks 2015), available at barristerbooks.com/bankruptcy-and-the-supreme-court-1801-2014-american-casebook-series.9781628101744.htm#WvqIUxYtk (“[A] deep analysis ... [of] 700 bankruptcy-related Supreme Court cases ... principles, maxims, and lessons.”).

11 See “The Western Union 92 Code,” Listener’s Guide, available at www.listenerguide.org.uk/swl/western-union-92-code (“This first appeared in *The Telegraph Instructor* by G.M. Dodge back in 1859.”).

of the day. The telegraph permitted President Abraham Lincoln to communicate directly with his generals in the Civil War battlefield (much to the annoyance of the leaders of the Army of the Potomac).¹²

The telegraph permitted newspaper reporters to deliver timely stories. The telegraph also facilitated long-distance romances.¹³

Messages on the telegraph were relayed, from station to station, using Morse Code. Fast operators could send messages at a blazing speed of 40 words per minute or more. However, each message was required to be sent in sequence down the wire before the next message in the que could be sent.¹⁴

As you can imagine, health and welfare telegraph messages are repetitious. So, to shorten the time for transmission of routine messages, Western Union came up with a numerical shorthand for common phrases: the 1859 Western Union “92 Code.”¹⁵ A few shortcuts from the original “92 Code” included the following:

- 18 // What’s the trouble? //
- 26 // Priority, very important. //
- 30 // No more, the end. //
- 55 // Important. //
- 73 // Best regards. //
- 77 // I have a message for you. //
- 88 // Love and kisses. //

You can probably see where I am going with this. Chapter 8 Humor has created its own number code (the “8 Code,” obviously) for common messages and phrases in bankruptcy briefs. I am submitting the 8 Code to the ABI Commission on Consumer Bankruptcy as an example of “best practices.”¹⁶ Here are a few of the entries from the 8 Code (in “call and response” musical format, when appropriate):¹⁷

- 11 // The debtor is acting in bad faith. //¹⁸
- 12 // “A debtor in financial distress does not act in bad

12 Robert McNamara, “Abraham Lincoln and the Telegraph, Interest in Technology Helped Lincoln Command the Military During the Civil War,” Thought Co. (April 4, 2017), *available at* thoughtco.com/abraham-lincoln-and-the-telegraph-1773568 (“President Abraham Lincoln used the telegraph extensively during the Civil War.... Lincoln’s telegrams to generals in the field were a turning point in military history, as they marked the first time a commander-in-chief could communicate, practically in real time, with his commanders.”).

13 Michael Stroh, “The Victorian Net: The Electric Telegraph Was the 1890s Version of the Internet,” *Baltimore Sun* (Dec. 28, 1998), *available at* articles.baltimoresun.com/1998-12-28/entertainment/1998362053_1_victorian-internet-telegraph-standage (“More than a century before couples began courting over computer networks, Victorian Americans like these were finding love and marriage in eerily similar places — thanks to the electric telegraph.... Hyped at the time as the ‘highway of thought,’ the telegraph was invented in 1837 by Samuel F.B. Morse. In May 1844, the inventor strung a 40-mile electric wire between Washington and Baltimore, creating the first telegraph network.... Morse used the code of dots and dashes he had invented to inaugurate the line.”).

14 As a ham radio operator (call sign N6MI), I can still send Morse Code at 40 words per minute. In the 1800s, I would have made a good living as a telegraph operator in a distant railroad outpost until I was eventually stabbed and robbed by bandits.

15 See “1859 Western Union ‘92 Code’ and Wood’s 1864 ‘Telegraphic Numerals’ and Comparison of Alphabetic Telegraph Codes,” Signal Corps Association, *available at* civilwarsignals.org/pages/telewurules1866/92code.html (“The ‘92 Code’ was first adopted by Western Union in 1859 ... to reduce bandwidth over the telegraph lines and speed transmissions by utilizing a numerical code system for various frequently used phrases.”).

16 See ConsumerCommission.abi.org (“The ABI Commission on Consumer Bankruptcy is charged with researching and recommending improvements to the consumer bankruptcy system that can be implemented within its existing structure. These changes might include ... best practices that judges, trustees and lawyers can implement.”).

17 See “Call and Response (Music),” Wikipedia, *available at* en.wikipedia.org/wiki/Call_and_response_(music) (“In music, a call and response is a succession of two distinct phrases usually written in different parts of the music, where the second phrase is heard as a direct commentary on or in response to the first. It corresponds to the call-and-response pattern in human communication.”).

18 See, e.g., *In re De Rua*, 2009 Bankr. LEXIS 4497 (Bankr. E.D. Cal. Oct. 14, 2009) (“The court can determine that a debtor is not acting in ‘good faith’ without having to find that the debtor is acting in ‘bad faith’ (dishonesty of belief or purpose).”).

faith in simply taking advantage of a benefit Congress has chosen to provide.” //¹⁹

13 // Relief from the automatic stay is appropriate because there is no equity in the real property and no reorganization in prospect. //²⁰

14 // The secured creditor is trying to steal the equity in the debtor’s house and push the widow and her crying babies on the street. //²¹

15 // The requested attorneys’ fees are “unconscionable if not outrageous.” //²²

16 // “Baby needs a pair of new shoes.” //²³

24 // The debtor in possession has met the burden of proof on the issue of adequate protection for the use of secured creditor’s cash collateral. //²⁴

25 // Cash collateral?! No way. No how. Don’t even think about it. Seriously. Hey! What are you looking at?! //²⁵

26 // “The Debtor’s plan is not feasible.” //²⁶

27 // “Don’t stop believin’.” //²⁷

28 // “Priority, very important.” //²⁸

29 // The creditor has not met its burden of proof to show that his claim is entitled to a priority. //²⁹

The 8 Code also includes sophistry and insults, such as the following:

49 // “With all due respect.” //³⁰

50 // “Go ahead. Make my day.” //³¹

51 // “Your Honor, you’re a few French fries short of a Happy Meal.” //³²

77 // I have a message for you. //³³

88 // Love and kisses. //³⁴

89 // “I’ll be back.” //³⁵

19 See *In re Green*, 2010 Bankr. LEXIS 319, 2010 WL 396253, at *2-3 (Bankr. E.D. Va. 2010).

20 *Roswell Holdings LLC v. Houser* (*In re Houser*), 463 B.R. 580, 583 (Bankr. N.D. Ga. 2011).

21 Attributed to a famous oral argument by **Steven R. Fox**, a solo attorney in the Central District of California. Apocryphal?

22 Suggested by *In re Vill. Sundries & Tobacco Inc.*, 2017 N.J. Super. Unpub. LEXIS 987, *3 (Super. Ct. App. Div. April 21, 2017).

23 See *The San Francisco Call* (March 27, 1900), p. 4, *quoted at* esmpc.blogspot.com/2014/10/baby-shoes-calico-dresses-african-golf.html (“Stark Bell, Patrick Gallagher, John Thompson, Vincent Garcia and John Fernando, arrested Saturday for playing craps on a train from the Tanforan racetrack, appeared before Judge Conlan yesterday. The charges against Gallagher and Fernando were dismissed and the others were continued till today. Special Officers Kindelon and Madden, who made the arrests, testified that they saw the game being played, but instead of saying ‘Come seven; come eleven,’ they said, ‘Baby needs a pair of new shoes,’ ‘If I win I’ll eat chicken tonight’ and ‘The attorney’s fees must be paid.’ About sixteen of the players jumped off the train to escape arrest, although it was running at the rate of sixteen miles an hour.”).

24 Suggested by *In re Las Vegas Monorail Co.*, 429 B.R. 317, 328 (Bankr. D. Nev. 2010) (“Section 363(p) states: ‘In any hearing under this section — (1) the trustee has the burden of proof on the issue of adequate protection; and (2) the entity asserting an interest in property has the burden of proof on the issue of the validity, priority, or extent of such interest.’”).

25 For use by all secured creditors.

26 See, e.g., *In re Made in Detroit Inc.*, 299 B.R. 170, 180 (Bankr. E.D. Mich. 2003) (“The proposed financing had so many contingencies that [the] Debtor’s Plan was conditional at best. Thus, the Debtor’s Plan is not feasible under [§] 1129(a)(11).”).

27 Journey’s anthem, which was originally released as the second single from their seventh album, “Escape” (1981). See “Don’t Stop Believin’,” Wikipedia, *available at* en.wikipedia.org/wiki/Don%27T_Stop_Believin%27.

28 Same as the 92 Code.

29 See, e.g., *In re Alewelt*, 520 B.R. 704, 710 (Bankr. C.D. Ill. 2014) (“[T]he remaining issue is whether Mr. Hardin has met his burden of proving that the Debtor’s obligation to reimburse him for maintenance overpayments is entitled to priority treatment.”).

30 *Michoud v. Girod*, 45 U.S. (4 How.) 503, 557 (1846) (“But with all due respect for the learned judges who have so decided, we say that ... we have been unable to find any one well considered decision.”).

31 See “Go Ahead, Make my Day,” Wikipedia, *available at* en.wikipedia.org/wiki/Go_ah%20make_my_day (“[S]poken by the character Harry Callahan from the 1983 film *Sudden Impact*.”).

32 See *Goldberg v. Mount Sinai Med. Ctr. of Greater Miami Inc.* (*In re S. Beach Cmty. Hosp. LLC*), 20 Fla. L. Weekly Fed. B 483 (U.S. Bankr. S.D. Fla. 2007) (“I suggest with respect, Your Honor, that you’re a few French fries short of a Happy Meal in terms of what’s likely to take place.”).

33 Same as 92 Code. Sometimes used with an exclamation point, as in “Oh, you have a message for me? Well, then, 77!”

34 Same as 92 Code.

35 From the *Terminator* movie franchise. See *Terminator Wiki*, *available at* terminator.wikia.com/wiki/!%27I%20be%20back).

continued on page 69

Chapter 8 Humor: Dusting Off the Western Union “92 Code” to Shorten Briefs

from page 41

The 8 Code includes common phrases for the judiciary to use in findings and orders, such as the following:

30 // No more, the end. //³⁶

83 // “Hit the road, Jack, and don’t you come back no more, no more, no more, no more.” //³⁷

84 // “I know it when I see it.” //³⁸

³⁶ Same as 92 Code.

³⁷ “Hit the Road Jack,” Ray Charles, available at metrolyrics.com/hit-the-road-jack-lyrics-ray-charles.html.

85 // Section 105 is the last refuge of scoundrels. //³⁹

35// “Pigs get fat, but hogs get slaughtered.” //⁴⁰

Please send me your own additions for the 8 Code. **abi**

³⁸ *In re Roy*, 2013 Bankr. LEXIS 5710, *21, n.38 (Bankr. D. Kan. Sept. 24, 2013) (“With apologies to Justice Stewart, who coined this phrase....”).

³⁹ Suggested by *Hamilton v. Lumsden (In re Geothermal Res. Int’l)*, 93 F.3d 648 (9th Cir. 1996) (“[T]he court cannot, in the name of its equitable powers, ignore specific statutory mandates.”).

⁴⁰ *Finance Inv. Co. (Bermuda) Ltd. v. Geberit AG*, 165 F.3d 526, 534 (7th Cir. 1998). I don’t know what this means, but the phrase always sounds impressive.

Copyright 2018
American Bankruptcy Institute.
Please contact ABI at (703) 739-0800 for reprint permission.