

CLEARLY, USING INTENSIFIERS IS VERY BAD—OR IS IT?

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Although scholars have generally found that overusing intensifiers (words such as “clearly,” “obviously,” and “very”) negatively affects the persuasiveness or credibility of a legal argument, no one has studied actual appellate briefs to determine whether there is a relationship between intensifier use and the outcome of an appeal. This article describes two empirical studies of appellate briefs, which show that the frequent use of intensifiers in appellate briefs (particularly by an appellant) is usually associated with a statistically significant increase in adverse outcomes for an “offending” party. But--and this was an unexpected result--if an appellate opinion uses a high rate of intensifiers, an appellant’s brief written for that appeal that also uses a high rate of intensifiers is associated with a statistically significant increase in favorable outcomes. Additionally, when a dissenting opinion is written, judges use significantly more intensifiers in both the majority and dissenting opinions. In other words, as things become less clear, judges tend to use “clearly,” and “obviously” more often.

These results could be interpreted several ways. It could be that overusing intensifiers actually renders a brief suspect and subject to increased skepticism by appellate court judges. Alternatively, it could be that the overuse of intensifiers is accompanied by violations of other writing conventions that further affect the credibility of the brief. Or, it could simply be that appellants or appellees with difficult arguments (arguments that they believe they are likely to lose) tend to lapse into an intensifier-rich mode of writing in an attempt to bolster the perceived weaknesses of an argument. All of these factors may combine to produce the result. Of course, since no causal relationship is shown, it could be a yet unidentified factor. At the very least, the studies suggest the need for further research and a fruitful source of data for performing such research.

TABLE OF CONTENTS

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INTRODUCTION	2
I. THE ESTABLISHED TRADITION AND PERCEIVED PROBLEMS	4
WITH INTENSIFIER USE IN LEGAL WRITING	
II. JUDICIAL PERCEPTIONS OF INTENSIFIER USE	5
III. SCHOLARLY EXAMINATION OF INTENSIFIER USE	7
IV. INTENSIFIERS IN APPELLATE BRIEFS	10
A. The Pilot Study	11
B. The Full Study	12
C. Discussion	15
CONCLUSION	17
FIGURES AND TABLES	18

INTRODUCTION

Addressing students and faculty at Northwestern University School of Law, Chief Justice John Roberts commented on the use of intensifiers¹ in legal briefs:

We get hundreds and hundreds of briefs, and they're all the same
 . . . Somebody says, 'My client *clearly* deserves to win, the cases *clearly* do this, the language *clearly* reads this,' blah, blah blah. And you pick up the other side and, lo and behold, they think they *clearly* deserve to win. How about a little recognition that it's a tough job? . . . I mean, if it was an easy case, we wouldn't have it. (Emphasis added.)²

Perhaps unknowingly, the Chief Justice ratified the nearly universal advice of legal writing scholars and experts, who unequivocally recommend avoiding intensifiers such as “obviously” and “clearly.”³ Richard Neumann

¹ In grammar, an intensifier is an adverb or adjective that “adds emphasis or intensifies the word or phrase which follows it, e.g. very.” Allwords.com—Definition of Intensifier, <http://www.allwords.com/word-intensifier.html>. Also called an *intensive*, the Oxford American Dictionary of Current English similarly describes its grammatical meaning: “expressing intensity, giving force, as *really* in *my feet are really cold*.” The Oxford American Dictionary of Current English 411 (New Am. ed. 1999).

² Robert Barnes, *Chief Justice Counsels Humility; Roberts Says Lawyers Must Put Themselves in Judges’ Shoes*, WASH. POST, Feb. 6, 2007, at A15.

³ See, e.g., MARY BETH BEAZLEY, *A PRACTICAL GUIDE TO APPELLATE ADVOCACY* 194 (2d ed. 2006) (“*Clearly, obviously, of course, and it is evident that* have been so overused that they go beyond having no meaning to having a negative meaning.”) (emphasis in original); BRADLEY G. CLARY & PAMELA LYSAGHT, *SUCCESSFUL LEGAL ANALYSIS AND WRITING: THE FUNDAMENTALS* 102 (2d ed. 2006) (“Let nouns and verbs do most of your talking, not adjectives and adverbs. Particularly avoid exaggeration through conclusory modifiers such as ‘clearly,’ ‘plainly,’ ‘very,’ ‘obviously,’ ‘outrageous,’ ‘unconscionable,’

explained the reasoning for this admonition: “Judges assume that expressions like these are used to cover up a lack of logical proof.”⁴

Although Chief Justice Roberts is not fond of using the word “clearly,” and although legal writing texts consider intensifier use in legal briefs inappropriate and maybe even harmful, is there any empirical evidence that using intensifiers could actually negatively affect the outcome of an appeal? Scholarly studies of intensifier use in other legal and non-legal settings suggest, subject to some exceptions, that intensifier use may negatively affect the perception of the subject matter containing intensifiers or the person using intensifiers.⁵

This article describes an empirical study of eight hundred federal and state appellate briefs randomly selected for the purpose of determining whether any relationship exists between intensifier use in the parties’ briefs and the outcomes in those cases. The study examined intensifiers that often appear in legal writing, including words such as “clearly,” “obviously,” “very,” and “wholly.” The study showed that, in certain situations, excessive intensifier use in appellate briefs is associated with a statistically significant increase in adverse outcomes for the “offending” party, but in other situations--and this was an unexpected result--excessive intensifier use was associated with a significant increase in favorable appellate outcomes.

and the like.”); LINDA H. EDWARDS, *LEGAL WRITING AND ANALYSIS* 277 (2003) (“Because generations of writers have overused words like ‘clearly’ or ‘very,’ these and other common intensifiers have become virtually meaningless. As a matter of fact, they have begun to develop a connotation exactly opposite their original meaning.”); RICHARD K. NEUMANN, JR., *LEGAL REASONING AND LEGAL WRITING: STRUCTURE, STRATEGY, AND STYLE* 330 (5th ed. 2005) (“‘It is obvious’ and ‘clearly’ supply no extra meaning. Instead, they divert the reader’s attention from the message of the sentence. Judges assume that expressions like these are used to cover up a lack of logical proof.”); MARY BARNARD RAY & JILL J. RAMSFIELD, *LEGAL WRITING: GETTING IT RIGHT AND GETTING IT WRITTEN* 205 (3d ed. 2000) (“Also avoid modifiers that have little substantive meaning, such as *in this manner*, *very*, or *obviously*.”) (emphasis in original); BRYAN A. GARNER, *THE REDBOOK: A MANUAL ON LEGAL STYLE* 224 (2d ed. 2006) (“clearly; obviously. As sentence adverbs <Clearly, this is true>, these weasel words are often exaggerators. They may reassure the writer but not the reader. If something is clearly or obviously true, prove it to the reader without resorting to the conclusory use of these words.”); Neil Daniel, *Writing Tips*, 1 *PERSP.: TEACHING LEGAL RESEARCH & WRITING* 87 (1993) (“The rule for *very*, a conspicuously empty modifier, applies for other intensifiers as well. In general, writing without such words is stronger than writing with them. . . . Avoid *clearly*. The word is almost always the writer’s last resort when an argument is murky.”) (emphasis added); James W. McElhaney, *A Style Sheet for Litigation*, 1 *SCRIBES J. LEGAL WRITING* 63, 71 (1990) (“A recent study of courtroom language showed what good writers already know—intensifiers often have the opposite of their intended effect . . .”).

⁴ NEUMANN, *supra* note 3.

⁵ See *infra* Part III and accompanying notes.

Part I of this article discusses the established tradition of intensifier use in appellate briefs and the perceived problem with using intensifiers from the viewpoint of legal writing experts. Part II discusses judicial perceptions of intensifier use. Part III discusses scholarly studies that have addressed the effect of intensifier use in legal and non-legal contexts, and Part IV discusses the results of our pilot study and our full study of intensifier use in appellate briefs and the implications of those studies.

I. THE ESTABLISHED TRADITION AND PERCEIVED PROBLEMS WITH INTENSIFIER USE IN LEGAL WRITING

One need only randomly select two or three appellate briefs from an on-line database to understand the prolific use of intensifiers in such briefs. While writing this article, we did exactly that and in the first brief randomly selected, the intensifiers “very” and “certainly” were used six times in a twelve-page brief.⁶ In the second brief, the intensifiers “very,” “clearly,” “patently,” “absolutely,” “undoubtedly,” “certainly,” and “simply” were used forty-seven times in a fifty-nine-page brief.⁷

Noting the pervasive use of intensifiers, authors of legal writing texts, style manuals, and practitioner guides have universally attacked their use,⁸ claiming that intensifiers are “virtually meaningless,”⁹ or even harmful

⁶ See Appellant’s Opening Brief, *Ready Mixed Concrete Co. v. Farmers Reservoir & Irrigation Co.*, 115 P.3d 638 (Colo. 2005) (using the phrases “very unique,” “very clear,” “very careful,” and “certainly consistent” once each and the phrase “very similar” twice.).

⁷ See Appellee Schoenduve Corp.’s Opening Brief, *Schoenduve Corp. v. Lucent Techs., Inc.*, 442 F.3d 727 (9th Cir. 2006) (using the intensifiers “simply” twenty-one times, “very” twelve times, “certainly” six times, “patently” four times, “clearly” two times, “absolutely” once, and “undoubtedly” once.).

⁸ See *supra* text accompanying note 3. See also ROBERTO ARON, JULIUS FAST & RICHARD B. KLEIN, *TRIAL COMMUNICATION SKILLS* § 15:6 (2d ed. 2007) (“The *powerless* style is characterized by the frequent use of such linguistic features as intensifiers”) (emphasis in original); DAVID M. BRODSKY, *BUSINESS AND COMMERCIAL LITIGATION IN FEDERAL COURTS* § 34:15 (Robert L. Haig ed., 2006) (“Counsel should eliminate all forms of powerless speech in opening statements . . . [including] intensifiers, such as ‘very’ or ‘definitely’”); TED A. DONNER & RICHARD K. GABRIEL, *JURY SELECTION STRATEGY AND SCIENCE* § 21:4 (3d ed. 2006) (“Powerless speech is characterized by more frequent use of intensifiers . . . e.g. ‘so,’ ‘very,’ or ‘too,’ as in ‘I like him SO much’”); KEVIN J. DUNNE, *DUNNE ON DEPOSITIONS IN CALIFORNIA (THE EXPERT SERIES)* § 5:35 (2007) (“Powerful witnesses tend to speak quicker, . . . [and] use less intensifiers such as ‘very’”); NATIONAL JURY PROJECT, INC., *JURYWORK SYSTEMATIC TECHNIQUES* § 15:17 (2006) (“Powerless speech has the following qualities: . . . [f]requent use of *adverbial intensifiers*, e.g., ‘surely,’ ‘definitely,’ ‘very.’”); Gertrude Block, *Language Tips*, 68 N.Y. ST. B.J. 58, 59 (1996) (“The word very was once an adjective, but has weakened so much that it carries virtually no meaning and is now used as an intensifier, to prop up the meaning of the adjective it accompanies. . . . But because very was overused as the first of a string of

because they have been historically overused; “they go beyond having no meaning to having a negative meaning.”¹⁰ Legal writing expert Bryan Garner notes that the terms “clearly” and “obviously” “may reassure the writer but not the reader. If something is clearly or obviously true, prove it to the reader without resorting to the conclusory use of these words.”¹¹ Richard Wydick eloquently summarizes the same idea: “If what is said is clear, then clearly is not needed, and if it is not clear, then clearly will not make it so.”¹² The universal theme is that intensifiers, at best, create unnecessary clutter, or, at worst, through chronic overuse, may negate their intended purpose, causing a reader to question, rather than be reassured by, the proposition being intensified.

II. JUDICIAL PERCEPTIONS OF INTENSIFIER USE

Legal writing authorities and practitioners are not the only groups that have suggested that the excessive use of intensifiers may negatively affect participants in legal proceedings. Judges also seem to be annoyed and concerned by intensifier use. In addition to Chief Justice Roberts’s excoriation of inappropriately using the word “clearly,” surveys of justices and judges have indicated a similar disapproval of intensifier use.

In a 2001 survey of San Diego, California-based appellate court judges and staff attorneys conducted by Charles A. Bird and Webster Burke Kinnaird, the respondents generally reported that they were bothered by the “use of adverbs such as ‘clearly’ and ‘obviously’ in place of logic or authority.”¹³ In a series of later surveys conducted by David Lewis, all

adjectives, it lost its intrinsic meaning.”); Roxanne Barton Conlin, *Opening Statement: First Impressions Count Most*, 2 ATLA ANN. CONVENTION REFERENCE MATERIALS 2841 (2005) (“Eliminate all forms of speech such as: . . . [i]ntensifiers such as ‘very’ or ‘definitely’”); K.K. DuVivier, *The Lady Doth Protest Too Much, Methinks!* (*William Shakespeare, Hamlet, Act III, Scene II*), 23 COLO. LAW. 1511, 1511 (1994) (“First, adding an intensifier may be superfluous. . . . Next, while the intent may be to make a point stronger, adding an intensifier may have the opposite effect.”); Joshua Stein, *Writing Clearly and Effectively: How to Keep the Reader’s Attention*, 71 N.Y. ST. B.J. 44, 46 (1999) (“Intensifiers. Avoid intensifiers such as ‘very,’ ‘really,’ ‘much’ or the use of italics or boldface type to emphasize your point. They make you sound uncertain.”).

⁹ EDWARDS, *supra* note 3, at 227. See also RAY & RAMSFIELD, *supra* note 3 (“Also avoid modifiers that have little substantive meaning, such as . . . *very or obviously*.”); DuVivier, *supra* note 8 (“[A]dding an intensifier may be superfluous.”).

¹⁰ BEAZLEY, *supra* note 3, at 194. See also NEUMANN, *supra* note 3, at 330 (“You can do harm with words that claim too much.”); Stein, *supra* note 8, at 46 (“[Intensifiers] make you sound uncertain.”).

¹¹ GARNER, *supra* note 3, at 224.

¹² DuVivier, *supra* note 8, at 1511 (quoting RICHARD C. WYDICK, *PLAIN ENGLISH FOR LAWYERS* 67 (2d ed. 1985)).

¹³ Charles A. Bird, *Objective Analysis of Advocacy Preferences and Prevalent*

based on the California survey, both federal and state appellate judges were asked if “[i]t bothers [them] when a brief uses adverbs like ‘clearly’ and ‘obviously’ to support arguments.”¹⁴ All the studies reported similar results; judges mildly to somewhat strongly agreed that such a use of adverbs bothered them.¹⁵

While writing this article, we performed an informal survey of federal judges and clerks in the District of Utah that showed similar results. We asked the judges and clerks which of the following two sentences they thought was more persuasive: “It is obvious, therefore, that the defendant clearly understood the consequences of his acts,” and “Therefore, the defendant understood the consequences of his acts.”¹⁶ Fifteen out of the nineteen respondents answered that the second sentence was “more persuasive,” than the first. One answered that the second was “slightly more persuasive” than the first, two answered that both sentences were “equally persuasive” and one answered that the first sentence was slightly more persuasive. Twelve of the respondents also answered that they would tend to view as “less credible” a brief that used the first sentence. Seven respondents answered that neither sentence would affect their assessment of the brief’s credibility.

Judicial scorn for using intensifiers is also reflected in the restyling of the Federal Rules of Civil Procedure, which minimize the use of redundant “intensifiers.”¹⁷ On the other hand, as discussed *infra*,¹⁸ despite the apparent disdain for intensifiers, judges seem to use intensifiers in judicial opinions almost as much, and in some cases much more, than practitioners.¹⁹

Mythologies in One California Court, 4 J. APP. PRAC. & PROCESS 141, 152 (2002).

¹⁴ David Lewis, *If You Have Seen One Circuit, Have You Seen Them All? A Comparison of the Advocacy Preferences of Three Federal Circuit Courts of Appeal*, 8 DENV. U.L. REV. 893 (2006); David Lewis, *What’s the Difference? Comparing Advocacy Preferences of State and Federal Appellate Judges*, 7 J. APP. PRAC. & PROCESS 335 (2005); David Lewis, *New England Appellate Judicial Survey*, 29 VT. B.J. 41 (2003); Joseph C. Merling, *Advocacy at Its Best: The Views of Appellate Staff Attorneys*, 8 J. APP. PRAC. & PROCESS 301 (2006).

¹⁵ *Id.* The question used to elicit the response in these surveys may be somewhat leading. We tried to formulate a question that would avoid “leading” the respondents.

¹⁶ NEUMANN, *supra* note 3, at 330. Thanks to Richard Neumann, Kif Augustine Adams, and Fred Geddicks for helping us formulate this survey, and a special thanks to the court administrator, D. Mark Jones for facilitating the survey.

¹⁷ Am. Law. Inst, *The Restyled Federal Rules of Civil Procedure*, SM090 A.L.I.-A.B.A. 1, 3 (2007). See also Joseph Kimble, *Guiding Principles for Restyling the Federal Rules of Civil Procedure (Part 2)*, 84 MICH. B.J. 52 (2005); Charles Delafuente, *Refining Legal Language*, 4 A.B.A. J. E-REP. 3 (2005).

¹⁸ See *infra* Part IV.1-3.

¹⁹ See *infra* Part IV.1-3.

III. SCHOLARLY EXAMINATION OF INTENSIFIER USE

The effect of using intensifiers in both legal and non-legal communication has also been the subject of scholarly examination and numerous empirical studies in various disciplines over the last fifty years.²⁰ Not all of these studies support the conclusions and opinions of legal writing authorities, practitioners, and judges. As early as 1959, a study showed that intensifiers do, in fact, intensify,²¹ at least if one considers the reaction of a listener or reader to the same sentence first without and then, immediately thereafter, with the intensifier. In that study, “the intensifier ‘very’ was shown to have a scalar value of approximately 1.25.”²² In other words, if the word “good” has a “favorability value” of 1.16, then “‘very good’ carries a favorability factor of approximately 1.45 (1.16 x 1.25).”²³ Other studies have corroborated this finding.²⁴

However, a study of social survey questions found that, if not paired with a question omitting the intensifier, the effect of adding an intensifier to a survey question was insignificant.²⁵ For example, there was little difference in responses by subjects who were asked if they were “really annoyed” by a television commercial and those who were asked if they were “annoyed” by a television commercial.²⁶ This result supports the claim of legal writing professionals and practitioners that intensifiers are “meaningless” or “superfluous.”²⁷

But could intensifiers actually be harmful as suggested by Neumann and Beazley?²⁸ In 1975, Robin Lakoff raised that question in her

²⁰ Norman Cliff, *Adverbs as Multipliers*, 66 PSYCHOL. R. 27 (1959); John M. Conley, William M. O’Barr & E. Allan Lind, *The Power of Language: Presentational Style in the Courtroom*, 1978 Duke L.J. 1375 (1978); Bonnie Erickson, E. Allan Lind, Bruce C. Johnson & William M. O’Barr, *Speech Style and Impression Formation in a Court Setting: The Effects of “Powerful” and “Powerless” Speech*, 14 J. EXPERIMENTAL & SOC. PSYCHOL. 266 (1978); Colm A. O’Muircheartaigh, George D. Gaskell & Daniel B. Wright, *Intensifiers in Behavioral Frequency Questions*, 57 Pub. Opinion Q. 552 (1993).

²¹ Cliff, *supra* note 20.

²² O’Muircheartaigh, Gaskell & Wright, *supra* note 20, at 553.

²³ *Id.* See also Edward E. Smith, Daniel N. Osherson, Lance J. Rips & Margaret Keane, *Combining Prototypes: A Selective Modification Model*, 12 COGNITIVE SCI. 485 (1988) (finding similar results to the Cliff study using the words “very” and “slightly”).

²⁴ See O’Muircheartaigh, Gaskell & Wright, *supra* note 20 (finding that a survey question asked first without and then with an intensifier produced a response shift); Smith, Osherson, Rips & Keane, *supra* note 23 (finding similar results using the words “very” and “slightly” paired to the color of fruits.).

²⁵ O’Muircheartaigh, Gaskell & Wright, *supra* note 20, at 552.

²⁶ *Id.* One interesting exception was that the phrase “extreme physical pain” produced a pronounced response shift in comparison to the phrase “physical pain.”

²⁷ See EDWARDS, *supra* note 3; DuVivier, *supra* note 8.

²⁸ See BEAZLEY, *supra* note 3; NEUMANN, *supra* note 3.

groundbreaking book, *Language and Woman's Place*.²⁹ Lakoff suggested that using “intensives” (particularly the word “so”) was one aspect of women’s speech that reflected a woman’s lesser “real-world power compared with a man.”³⁰ Therefore, according to Lakoff, the use of intensifiers can be a negative indicator and perpetuator of lesser power in the real world.³¹

Taking their cue in part from Lakoff, William O’Barr and others proposed that using intensifiers was one of several forms of “powerless language” and, when used by witnesses in a courtroom, “strongly affects how favorably a witness is perceived, and by implication suggests that these sorts of differences may play a consequential role in the legal process itself.”³² Powerless language, in addition to including the use of intensifiers, includes using hedges, (such as “sort of,” “kind of,” “a little”), hesitations (such as “ah,” “um,” “let’s see”), answering a question with rising intonation (“thirty-five”?), polite forms, (“please,” “thank you”) and other language forms originally associated by Lakoff with female speech.³³

In two landmark studies performed by O’Barr and others,³⁴ the frequent use of intensifiers, as part of powerless language, was shown to have a significant correlation with lower ratings of witness veracity, competence, and intelligence.³⁵ These studies are especially significant for legal writing professionals and practitioners because they specifically apply the concept of powerless language to a legal context and show that the use of powerless language is not necessarily a gender-based phenomenon, but instead extends to any witness that speaks “a language of deference, subordination, and nonassertiveness,”³⁶ Furthermore, the effect was found in both oral and written language.³⁷

²⁹ ROBIN TOLMACH LAKOFF, *LANGUAGE AND WOMAN’S PLACE* 3 (Mary Bucholtz ed., 2004).

³⁰ *Id.* at 79-82.

³¹ JOHN M. CONLEY & WILLIAM M. O’BARR, *JUST WORDS* 64 (2d ed. 2005).

³² WILLIAM M. O’BARR, *LINGUISTIC EVIDENCE: LANGUAGE, POWER, AND STRATEGY IN THE COURTROOM* 75 (Donald Black ed., 1982).

³³ *Id.* at 63-75. Interestingly, later studies have found that many forms of powerless speech are not necessarily related to female speech. See CONLEY & O’BARR, *supra* note 31, at 64-66; James J. Bradac & Anthony Mulac, *Men’s and Women’s Use of Intensifiers and Hedges in Problem-Solving Interaction: Molar and Molecular Analyses*, 28 RES. ON LANGUAGE & SOC. INTERACTION 93, 109-11 (1995) [hereinafter Bradac I].

³⁴ O’BARR, *supra* note 32; Conley, O’Barr & Lind, *supra* note 20; Erickson, Lind, Johnson & O’Barr, *supra* note 20.

³⁵ O’BARR, *supra* note 32, at 74; Conley, O’Barr & Lind, *supra* note 20.

³⁶ CONLEY & O’BARR, *supra* note 31, at 64-65. *Just Words* is a must read for anyone wanting an overview of the past thirty years of law and language research and the current trends in that field.

³⁷ See Erickson, Lind, Johnson & O’Barr, *supra* note 20, at 269-78.

Later studies by Lawrence Hosman and others have further explored the findings of O’Barr and his colleagues and have focused on particular forms of powerful and powerless speech, including the use of intensifiers.³⁸ Although some of these studies seem to corroborate the conclusion that intensifiers, as a form of powerless speech, will likely generate less favorable perceptions of competence and credibility,³⁹ others have found that intensifiers, when isolated from other recognized forms of powerless speech, actually become powerful speech.⁴⁰ In a recent study simulating defendant testimony in a criminal trial, Hosman isolated the effect of intensifiers from the effects of other types of powerless speech, in particular, hedges and hesitations, and found that intensifiers were “evaluated positively” by the recipients.⁴¹ He concluded that “intensifiers should not be considered a powerless form of language,”⁴² and noted that this conclusion “confirms other studies . . . that have found that intensifiers are perceived as powerful forms”⁴³ Hosman does caution against reading too much into this conclusion, noting that several studies have failed to find that intensifiers had a significant independent impact in the presence of other language variables such as hedges and hesitations.⁴⁴

Despite extensive scholarly treatment, it remains unclear whether using intensifiers in legal writing is harmful. Currently, the best characterization of the literature seems to suggest that intensifiers, if isolated from other forms of powerless speech, or if used in simultaneous comparison with a phrase omitting the intensifier, actually do what intensifiers were originally

³⁸ See, e.g., Bradac I, *supra* note 33; James J. Bradac & Anthony Mulac, *A Molecular View of Powerful and Powerless Speech Styles: Attributional Consequences of Specific Language Features and Communicator Intentions*, 51 COMM. MONOGRAPHS 307, 315 (1984) [hereinafter Bradac II]; Peter W. Hahn & Susan D. Clayton, *The Effects of Attorney Presentation Style, Attorney Gender, and Juror Gender on Juror Decisions*, 20 LAW & HUM. BEHAV. 533, 550-51 (1996); Lawrence A. Hosman & Susan A. Siltanen, *Powerful and Powerless Language Forms: Their Consequences for Impression Formation, Attributions of Control of Self and Control of Others, Cognitive Responses, and Message Memory*, 25 J. LANGUAGE & SOC. PSYCHOL. 33, 43-44 (2006); Lawrence A. Hosman, *The Evaluative Consequences of Hedges, Hesitations, and Intensifiers*, 15 HUM. COMM. RES. 383, 384-85, 401 (1989); Calvin Morrill & Peter C. Facciola, *The Power of Language in Adjudication and Mediation: Institutional Contexts as Predictors of Social Evaluation*, 1992 LAW & SOC. INQUIRY 191, 208, 212.

³⁹ Hosman, *supra* note 38; Bradac II, *supra* note 38, at 339; Morrill & Facciola, *supra* note 38, at 208.

⁴⁰ Hosman & Siltanen, *supra* note 38; Hosman, *supra* note 38; Bradac I, *supra* note 38; Bradac II, *supra* note 38.

⁴¹ Hosman, *supra* note 38, at 43.

⁴² *Id.*

⁴³ *Id.* (citing Bradac II, *supra* note 38; Hosman, *supra* note 38; Hosman & Siltanen, *supra* note 38).

⁴⁴ *Id.* at 44.

meant to do—they intensify. On the other hand, when used in connection with other forms of powerless speech, and without reference to a phrase lacking the given intensifier, they may negatively affect the writer’s or speaker’s perceived credibility or competence—they “detensify.”

Interestingly, even though some later studies have found that intensifiers, when isolated from other forms of powerless speech, are positively evaluated, most practitioner materials have apparently not caught up with the more recent research and continue to suggest that using intensifiers is always improper, is always harmful, or is always associated with powerless speech.⁴⁵

IV. INTENSIFIERS IN APPELLATE BRIEFS

Despite the extensive treatment of intensifiers in scholarly literature, our research has uncovered no study specifically addressing the question of whether the use of intensifiers will be perceived negatively in appellate briefs. Legal writing experts and scholars have assumed that the same principles that govern the use of intensifiers in legal advocacy and writing generally will also apply to appellate briefs, and have implicitly, if not explicitly, assumed that appellate judges will react to intensifiers in the same way as other audiences.⁴⁶ The question is particularly interesting because although the traditional wisdom and opinions of legal writing authorities, practitioners, and judges claim that intensifier use will be negatively perceived in appellate briefs, the findings of Hosman and others suggest that it might not. Appellate briefs provide a unique vehicle for studying intensifier use because appellate briefs tend to use intensifiers but do not tend to use hedges, and, because they are written, they do not contain hesitations. Therefore, a study relating intensifier use in appellate briefs

⁴⁵ See, e.g., ARON, FAST & KLEIN, *supra* note 8; BRODSKY, *supra* note 8; DONNER & GABRIEL, *supra* note 8; DUNNE, *supra* note 8; NATIONAL JURY PROJECT, INC., *supra* note 8; Block, *supra* note 8; Conlin, *supra* note 8; Stein, *supra* note 8.

⁴⁶ See, e.g., Gerald Lebovits, *Legal-Writing Myths – Part 1*, 78 N.Y. ST. B.J. 64, 56-57 (2006) (“Techniques that fail with judges are . . . using intensifiers and qualifiers . . .”); Marilyn Bush LeLeiko, *Effective Legal Writing: A Hands-On Workshop Materials*, 43 PRACTISING L. INSTITUTE 247, 283 (1996) (“Eliminate meaningless modifiers and empty intensifiers [] such as very, quite, really, truly, actually, obviously . . .”); Barbara A. Lukeman, *The Ins and Outs of the Appellate Brief*, 36992 NAT’L BUS. INSTITUTE 51, 59 (2007) (“[A]void overly confident language such as ‘clearly.’ By inserting words such as ‘clearly’ or ‘obviously’ you tend to raise the bar for you and your client. A judge may agree with your position, but not your assertion that it is clear or obvious.”); Sarah E. Ricks & Jane L. Istvan, *Effective Brief Writing Despite High Volume Practice: Ten Misconceptions That Result in Bad Briefs*, 38 U. TOL. L. REV. 1113, 1118 n.17 (2007) (“By contrast, adverbial intensifiers such as ‘clearly’ or ‘obviously,’ do not strengthen legal writing and, in fact, often are considered red flags for logical leaps in the argument.”).

with the outcome of the appeal could arguably test Hosman's simulated results in a real-life legal setting. It is also interesting because both Hosman and Morrill have suggested that law and language research needs to be more directed towards "outcomes"⁴⁷ (although they probably did not have "appellate outcomes" in mind).

Of course, on a more practical level, one would hope that judges and clerks would discern between the appropriate use of intensifiers and the overuse of intensifiers in an attempt to bolster an argument. Our study does not answer the question of whether excessive intensifier use *causes* an increased likelihood of a negative result on appeal, but it does show that the rate of intensifier use is associated with a statistically significant change in the likelihood of success on appeal.

A. The Pilot Study

Initially, we performed a pilot study of seventy-six Utah Supreme Court cases decided in the years 2000 and 2001. We used every civil case decided in those years that had a clear decision (affirmed or reversed), had at least one published brief for each party, and had a written opinion. We then identified every time the following words were used as intensifiers in the parties' briefs: very, obviously, clearly, patently, absolutely, really, plainly, undoubtedly, certainly, totally, simply, and wholly.⁴⁸ Finally, we calculated the number of intensifiers used per page in each brief to obtain the "intensifier usage rate" or "IR."

The results of the pilot study piqued our interest because they indicated a correlation between success on appeal and the number of intensifiers used in a party's brief as shown in the plot in Figure 1. The plot shows that an excessive IR is associated with an almost certain negative outcome for the offending party. Of course, the pilot study was of limited scope, involving mostly Utah practitioners.⁴⁹

B. The Full Study

The full study, on the other hand, was based on 400 randomly selected state and federal court appellate cases. To obtain the sample of 200 federal

⁴⁷ Morrill & Facciola, *supra* note 38. Morrill points out "the need to move law and language research beyond the perceptual and attitudinal level to that of outcomes." *Id.* at 212. Hosman suggests that it may be profitable to focus on "outcomes such as experience formation and attitudinal changes." Hosman, *supra* note 38, at 44.

⁴⁸ In a few cases, if a principal brief was not available, we used a reply brief.

⁴⁹ Not that Utah practitioners would use more intensifiers than those from other states, but the selection was certainly not random or broad based.

cases, we randomly chose cases from 2001-2003 and randomly selected cases so that the appellate courts hearing the most cases (i.e., Ninth Circuit, Fifth Circuit, etc.) had a proportionally larger representation in the sample. The 200 state cases were randomly chosen in a similar manner, with larger states generally having more cases in the sample. As we did for the pilot study, we selected only civil cases that had a clearly discernable outcome, usually either “reversed” or “affirmed,” and the selected cases had at least one brief for each party, usually the principal and the response brief, but occasionally a reply brief was used if a principal brief was unavailable. We used the same intensifiers as in the pilot study⁵⁰ and made every effort to exclude the selected intensifiers when they were not used as intensifiers. For example, we did not include intensifiers used as legal terms of art, such as “*clearly* erroneous,” or intensifiers used in quoted materials.

Logistic regression⁵¹ was used to evaluate the impact of appellant and appellee intensifier rates on the odds of reversal. Additionally, we considered the following covariates’ impact on the probability of reversal: jurisdiction (federal or state), standard of review (de novo, abuse of discretion, clear error, or other), judicial dissent status (present or absent), and intensifier rate in the court’s written opinion. Interactions between these factors were also considered in the statistical model.

Backward elimination⁵² was used to eliminate non-significant factors and interactions from the logistic regression model. Table 1 lists the factors retained in the final model for the odds of reversal. The analysis indicates that state cases have 2.46 times higher odds of reversal than federal cases (p-value⁵³ < 0.0001). Cases with dissents have 1.81 times the odds of reversal as cases where there were no dissenting judges (p-value = 0.0308). The appellant IR has a complicated but significant effect on the odds of

⁵⁰ Even though the word “way” is currently a popular intensifier in the vocabulary of many law students (“the defendant is *way* guilty in this case”), we did not search for it and hope that such a search was unnecessary.

⁵¹ Like standard regression analysis, logistic regression is used to model the relationship between a response variable and one or more explanatory variables. As in standard regression, the explanatory variables can be a mix of quantitative or categorical variables. The unique facet of logistic regression is that the response variable is categorical (e.g., “yes/no,” “died/survived,” or “reversed/affirmed”) instead of quantitative (e.g., “exam score” or “annual salary”). In this analysis, the logistic regression models the odds of reversal based on the measured explanatory variables.

⁵² Backward elimination is a form of stepwise regression in which the variables to be included in the model are chosen via an automated process. In this algorithm, all of the explanatory variables and interactions are included in the preliminary model. If one or more variables are nonsignificant (p-value > 0.05), the least significant variable is dropped and the model is refitted. The process is repeated until all nonsignificant variables are eliminated from the model.

⁵³ P-values less than 0.05 are generally considered to be statistically significant.

reversal, but the appellee's IR was not statistically significant (with a p-value of 0.80 when added to the model). Note that despite the fact that the main effect for opinion IR was nonsignificant (p-value = 0.2336), we include it in the final model because the interaction of appellant IR with opinion IR was significant.

Because the interaction of appellant IR and opinion IR is significant (p-value = 0.0294), the interpretation of these effects must be interpreted jointly. Although an increased appellant IR is associated with a significant reduction in the probability of reversal, when the product of the appellant IR with the opinion IR increases by 1, the odds of reversal is significantly increased (6.96 times higher). Figure 2 illustrates the nature of this complex relationship between appellant IR, opinion IR, and odds of reversal. Note that the average appellant IR is 0.60 and the average opinion IR is 0.38, with a black square denoting a hypothetical case with these IR values. The shading and contours indicate how many times larger the odds of reversal would be with a change in appellant IR and opinion IR.

For example, if the IRs for a case were changed from the average level (located at the black square on the graph) to any other location on the odds ratio contour labeled "1" (without changing the jurisdiction level or the dissent status), the odds of reversal would remain unchanged. Changing to IRs located on the odds ratio contour labeled "2" doubles the odds of reversal, changing to IRs located on the contour labeled "0.5" halves the odds of reversal, and so forth.

Note that the effect of the appellant IR is different depending on the degree of intensifier usage in the judge's opinion. When the judge uses no intensifiers in the opinion, increasing the appellant IR by 1 intensifier per page simply yields an odds of reversal that is roughly 37% as large, as indicated by the odds ratio for appellant IR in Table 1. As the opinion IR increases, the detrimental effect of increasing the appellant IR is nullified (at opinion IR ≈ 0.50) and then reversed for even higher values of opinion IR. That is, when the opinion IR is roughly 0.50, increasing the appellant IR has virtually no impact on the odds of reversal. When the opinion IR is 1.0, increasing the appellant IR by 1 intensifier per page yields an odds of reversal that is 2.57 times higher.

An additional finding of interest from this study relates to the use of intensifiers in judicial opinions. In the quote from Chief Justice Roberts that opens this article, the point is made that if an appeal is granted hearing, then the case is anything but clear and the arguments should avoid the use of intensifiers such as *clearly*. However, when a case has a written dissent (i.e., the decision is not unanimous), both the judges' written majority opinions and the dissenting opinions use high rates of intensifiers.

Specifically, among the cases we studied, 20% had a written dissent

from the majority (8% among Federal cases and 33% among State cases). When a dissent is present, the mean opinion IR is 0.49 intensifiers per page—significantly higher than the mean rate of 0.35 when no dissent is present⁵⁴ (p-value = 0.0009). But, the judges writing dissents are by far the worst offenders, with the average dissent IR equal to 1.29 (the federal and state averages are equal to 1.56 and 1.23, respectively). Using these same cases where dissents are present, the average IRs for appellants, appellees, and opinions are 0.66, 0.75, and 0.49, respectively. A paired t-test comparing dissent IRs with majority opinion IRs for these cases indicated a highly significant difference (p-value $<10^{-9}$). So, within a case, dissents have significantly more intensifiers than majority opinions. Across cases, majority opinions submitted in the presence of a written dissent have significantly more intensifiers than in cases where there is no written dissent. In short, when things are *clearly* less clear in the judges' chambers, the judges too are more likely to use *clearly* and other intensifiers.⁵⁵

C. Discussion

Our study was a modest and simple first step toward determining whether intensifiers are harmful in appellate briefs. It did not consider contextual variables such as the gender of the writers or readers (although this would be a logical follow-up study). Nor does it formally consider the relational context of intensifiers with other forms of powerless speech (even though it does tend to isolate the effect of intensifiers). Nevertheless, we believe it provides a basis for further empirical research into the use of language in appellate briefs. With the ready availability of legal memoranda in on-line legal databases, data for such research is easily obtained.

Our results could be interpreted several ways. It could be that in connection with appellate briefs, the traditional overuse of intensifiers actually renders them suspect and subject to increased skepticism by appellate court judges. It could also be that intensifiers function as powerless language in appellate briefs, resulting in a greater likelihood of a

⁵⁴ This difference in opinion IRs for dissent vs no-dissent scenarios is *not* due simply to a higher overall IR among state cases (with most dissents in the study occurring at the state level). In fact, the average IR rate among opinions is the nearly the same for state and federal cases (p-value = 0.85).

⁵⁵ It could even be argued that the high rate of intensifiers in judicial opinions, especially where the answer is not clear, serves as a model for high intensifier use by practitioners in similar situations. Furthermore, by imbuing the intensifiers “wholly” and “obviously” with “cogent legal significance,” it could be argued that the Supreme Court may be encouraging intensifier use. See *Hagans v. Lavine*, 415 U.S. 528, 537 (1974) (stating that the words “wholly” and “obviously” when used in the phrases “wholly insubstantial” and “obviously without merit” have “cogent legal significance.”).

negative outcome. Alternatively, it could be that the overuse of intensifiers is accompanied by violations of other writing conventions that further affect the credibility of the brief.⁵⁶ Or, it could simply be that appellants or appellees with difficult arguments (arguments that they believe they are likely to lose) tend to lapse into an intensifier-rich mode of writing in an attempt to bolster the perceived weaknesses of an argument. This last interpretation is supported by the fact that dissenting opinion writers (who are arguing a losing cause) also tend to use more intensifiers. All of these factors may combine to produce the result. Of course, since no causal relationship is shown, it could be a yet unidentified factor. At the very least, the study suggests the need for further research and a fruitful source of data for performing such research.

In our study, we found that increased intensifier usage has a non-significant effect on appellees and a mixed effect on appellants. As the appellant's intensifier rate increases, the odds of reversal generally decreases. However, this negative impact of appellant intensifier usage is mitigated (or even reversed) as the intensifier rate in the judge's opinion increases. While none of these relationships between intensifier usage and judicial decisions are necessarily causal, there is some evidence that the effect of an appellant's intensifier usage will change with the rate of intensifiers used by the judge who writes the opinion. Although our study can make no claim about the causality of intensifier use as it relates to judges' decisions, there is some reason to believe that a judge's response to intensifiers in appellant and appellee briefs may depend on the judge's own use of intensifiers.

Despite judges and legal writing scholars generally denouncing the use of intensifiers, the odds of reversal can actually be higher for appellants who have high intensifier usage rates, but only when the judge writing the opinion is also a prodigious user of intensifiers. For the majority of cases, however, the conventional wisdom that intensifiers are associated with losing arguments is validated.

⁵⁶ In 1981, Maxine Hairston performed a landmark study of the responses of "nonacademic readers in the professions" to various grammatical errors read by the study's respondents. Maxine Hairston, *Not All Errors Are Created Equal: Nonacademic Readers in the Professions Respond to Lapses in Usage*, 43 C. ENG. 794, 795 (1981). Hairston ranked the perceived seriousness of various grammatical as "status markers," "very serious," "fairly serious," medium to low," and "bother[ed] only a very few people." *Id.* at 800-06. While the frequent use of intensifiers was not considered in her study, it is possible that writers who overuse intensifiers could also commit a higher rate of more serious grammatical errors; errors that synergistically could affect the reader's perception of the competence or credibility of a brief. It would be interesting to study whether this hypothesis is true. If so, then a high use of intensifiers would be an easily identified marker of more serious (but harder to identify) grammatical errors.

The use of intensifiers by judges who write opinions and dissents raises new and interesting questions. In this study, we made no effort to assess and adjust for the strength of the appellant's case when gathering our data. This would be a limitation if, in fact, the degree of intensifier use by the writer of a legal brief is a function of the writer's perception of the strength of his or her argument, relative to the opposing side's argument. While we cannot address this issue using the data gathered from the briefs, we *are* able to indirectly address this perception of argumentative threat via the judges' opinions. Because the intensifier usage is so high in both dissents and in opinions written in the presence of dissent, one might hypothesize that intensifier usage increases as a response to perceived threat. While the data certainly cannot warrant this "argumentative threat hypothesis" as definitive, it is a finding that may merit further research.

CONCLUSION

Although it is far from clear, our study suggests that intensifiers should be used with care in appellate briefs. A surprising finding relates to the possible propensity for the audience's (i.e., the judge's) personal intensifier usage to affect his or her reaction to intensifier usage by writers—specifically, writers of legal briefs. Of course, our findings only discuss an interesting association and cannot be used to proscribe behaviors with causal effect on outcomes. Hopefully, the more important significance of our study will be to spur further inquiry into the effect of other forms of language, style, and grammar in appellate brief writing. The ready availability of briefs from on-line databases presents fertile ground for further research.

* * *

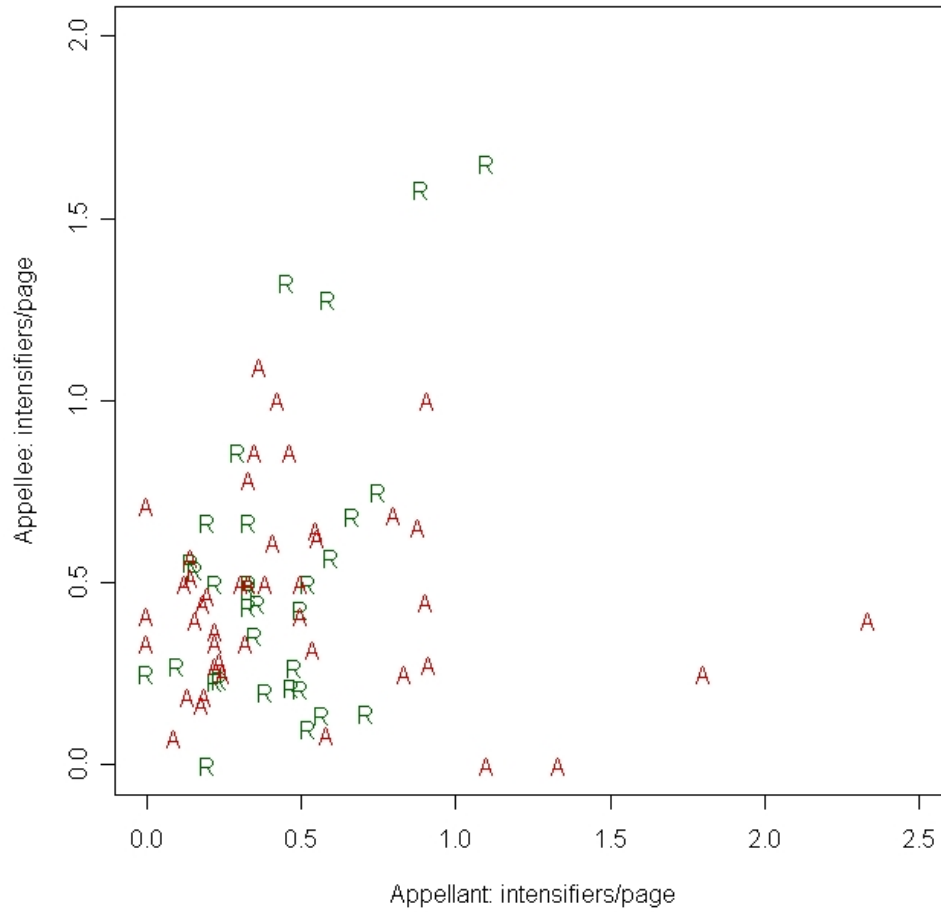


Figure 1. Plot of appellant intensifier rate (horizontal axis) versus appellee intensifier rate (vertical axis) for 76 Utah Supreme court cases. Cases denoted with an “A” were affirmed and cases denoted with an “R” were reversed.

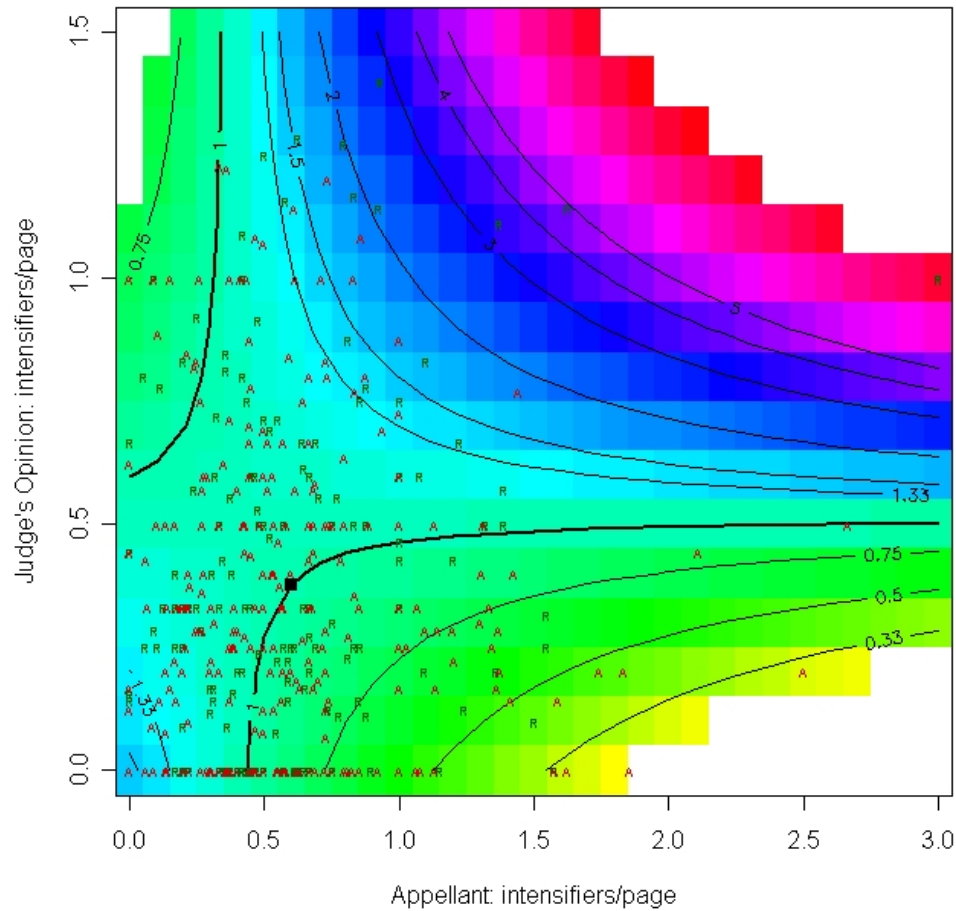


Figure 2. Plot of x =appellant intensifier rate (horizontal axis) versus y =judge's opinion intensifier rate (vertical axis) for 400 state and federal court appellate cases (200 of each). Cases denoted with an "A" were affirmed and cases denoted with an "R" were reversed. The black box at $(x,y)=(0.60,0.38)$ denotes the average appellant intensifier rate and the average judge's opinion intensifier rate. For each combination (x,y) , the colored shading and contours indicate the multiplier for the odds of reversal (relative to the odds associated with the average appellant IR and average opinion IR, holding other covariates constant).

Table 1. Output from backward selection logistic regression analysis when modeling the probability of reversal. Factors in the model are listed along with the associated odds ratio estimate. Also given is a 95% confidence interval for the odds ratio and a p-value indicating the statistical significance of the factor. For completeness in the presence of the significant interaction of Appellant IR with Opinion IR, the nonsignificant main effect for Opinion IR was also included in the model.

Factor	Odds Ratio	95% C.I. for Odds Ratio	p-value*
Appellant IR	0.37	(0.16, 0.87)	0.0233
Jurisdiction (state vs. federal)	2.46	(1.56, 3.88)	<0.0001
Dissent (present vs. absent)	1.81	(1.06, 3.11)	0.0308
Opinion IR	0.49	(0.15, 1.60)	0.2336
Appellant IR × Opinion IR interaction	6.96	(1.21, 39.92)	0.0294

* P-values less than 0.05 are significant.