Writing Briefs for Federal Litigation: The Province of the Elect

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Unending numbers of voluminous briefs, ill-considered and unpersuasive, clog the federal court system, delaying and diverting the resolution of conflicts, thereby undermining the credibility of the profession and public confidence in the system. While other critical factors have helped create the crisis, the hidden abuse of briefs remains chief among them.

When given the opportunity, judges and their clerks report that briefs presented in federal court proceedings are largely useless to the judge. These briefs tend to use too many words to say too little. The law is often oversimplified and undigested. Too often legal principles are misrepresented or misunderstood. Facts of the precedent cases and facts of the client's case are skeletal or unconnected to the law. In short, too often briefs fail to inform the decision-maker.

Unfortunately, writing briefs for federal litigation is often regarded as a task for new lawyers. Seasoned lawyers prefer more prestigious endeavors, such as appearing before judges to argue legal issues already briefed by absent subordinates. Thus do priorities become confused; law-

yers become separated from the law; and lawsuits are lost. Because brief writing requires the application of the highest cognitive skills, it should be the province of the elect.

Lawyers who would write better briefs must consider their audience, the principles of sound legal reasoning, and the historic characteristics of good writing.

II. CONSIDER THE AUDIENCE

The judge and the judge's clerk, your primary audience, have no time to read long briefs or to puzzle out the meaning of your discourse. Briefs longer than ten pages insure delay in the consideration of your position. Because judges and their staffs spend virtually all office time in hearings, trials, and conferences, briefs must be read in brief moments, often interrupted by phone calls or meetings. Because of the massive increase in workload, briefs may be read in evenings in front of the fireplace. Consider, then, that your primary audience, beset by fatigue, irritation, and distractions, has little patience for those who write as if they were paid by the word.

Because your audience is judicial, tone and content should be tailored to meet judicial needs. Too many lawyers view briefs as weapons to wound opponents. While bloodletting may be emotionally satisfying, it fails to impress the judiciary. Where briefs are needed, that is, where the law is developing or where the application of the law to your facts is controversial, briefs should inform, not divert. Because time for legal research is a declining resource in most judicial offices, lawyers who want to remain credible and effective must reveal adverse authorities and avoid incomplete quotes, quotes devoid of context, misrepresented holdings, and other marginally ethical approaches to legal argument.

Lawyers who write judge-oriented briefs tend to win more frequently than those who write lawyer-centered briefs. Research soon to be published by James F. Stratman of Carnegie-Mellon University and the University of Pittsburgh School of Law strongly suggests that lawyer-centered or adversarial briefs are less persuasive than judge-centered briefs. According to Stratman, research shows that tactics which lawyers imagine will sway the court rarely mislead judges. For example, the use of strongly emotive terms elicits judicial skepticism, while the use of bare citations leads a judge to doubt the candor of the brief writer.

A judge-oriented approach to brief writing does not require you to ignore your opponent's arguments, those past and those to come.
Rather, Stratman’s research suggests that adversarial tactics should be limited to fully developing the legal position of your client objectively and briefly.

III. USE THE PRINCIPLES OF SOUND LEGAL REASONING

The simple but fearful premise on which this advice is based is this: If you want the judge and the judge’s clerks to read your brief, write your brief so that it will inform the decision-making process. Your brief must shine with reasoning that is sound, clear, and objective. Judges do not choose the position of one advocate over another. They apply the law to the facts. Because that process is rarely an easy or obvious one, briefs written by officers of the court should explore and report, not distort or filter the truth.

Benefits of this approach do not accrue only to the court. Advocates who would win must base discovery and trial on the law. Judge-oriented briefs will inform the entire process by which an advocate prepares a case for litigation, thereby increasing significantly the chances for success. Such briefs will provide a rational basis for the decision to settle or to litigate. In short, because reason is chief among the weapons of advocacy, sharpen it and use it in the the arena of the brief.

While the following suggestions are not exhaustive, they are elemental.

A. Connect Your Argument to the Law Which Frames Your Brief

Most briefs submitted to federal judges result from motions based on the rules of federal procedure. The law interpreting these rules forms the boundaries of the field on which you are playing. While the field may seem narrow and cramped, the possibilities for argument recombine and multiply at an amazing rate. The fundamental challenge is to keep your argument connected to both procedural and substantive law. Successful briefs must not only identify the law relating to the motion but must keep the substantive argument fully connected to that law.

Failure to connect the law of the motion with the law of the cause of action may result from viewing the task sequentially rather than holistically. To avoid this fundamental failure, frame your argument with the law of the motion by exploring the intricacies of your circuit’s view of the procedural law. Then attach the web of your argument to that frame at every critical location. While most judges know the law relating to federal procedure better than most lawyers, most judges want lawyers to
weave the web of connections between the law and the dispute at hand. Too often brief writers leave this difficult work to the judge.

B. *Never Support Your Arguments Solely With Case Citations or Holdings*

For many good reasons, multiple citations always arouse a judge's suspicions. Judges daily participate in the arduous search for legally relevant cases. Five or ten cases directly on point are the exception, not the norm. In addition, a string of cases with no accompanying discussion states a clear message to the judge: Read these cases yourself and look for the connections to my argument because I lacked the time, energy, and interest.

Exclusive reliance on the holding of a court also causes a judge to stop reading a brief, again for good reason. The holding of a court is about as useful to a judge as the score of a baseball game to a coach. No doubt it matters. However, just as the score alone fails to facilitate a coaching decision, so does an unadorned holding fail to inform judicial decision-making.

C. *Find the Few Cases Which Support Your Argument and Discuss Them in Relevant Detail*

Judging the relevance of detail requires as much skill as finding relevant cases. Few rules exist to guide those who brave the swamps of case law in search of sunken treasure. The dangers are formidable. Circuit courts often lump all facts, relevant and irrelevant, into a separate section. In such cases, finding key facts may require guesswork. Nonetheless, avoid the temptation to leave this important work for the judge. Even though the writer of the opinion may have done so, in your analysis of the case don't mix background information with pivotal facts.

The key facts often signal the presence of the object of your search, the reasoning of the court. However, judges, seemingly in a mood of revenge upon bad brief writers, often hide their reasons amid rejected theories, legislative histories, and the judicial version of string citing. In such cases, you must elucidate what the court has omitted. You may have to argue that the court has implicitly adopted or rejected the reasoning patterns of the cited cases. You may have to supply omitted pieces of the argument. Too often you must make clear what is implied or unstated, that is, how the court has applied the law to the key facts of

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the case. As you do this, omit all irrelevances and focus only on the essentials.

D. *Never Use a Quote Unless Your Argument Will Die Without It*

For many good reasons, judges don’t like quotes. First and most significant of the reasons is this: Most people do not quote accurately. Every word and every punctuation mark must be correct if you want the judge to chew on this fodder. However, since judges can’t presume accuracy and lack the time for verification, you should save this valuable space for argument. Secondly, because brief writers use quotes to avoid thinking and writing, quotes normally lack a context. No judge can risk reliance on a quote without knowing the place of the material in the original. Such contextless quotes are useless to judges.

Judges don’t like to read quotes. Usually quotes interrupt the thread of the argument. Sometimes quotes introduce ideas that are irrelevant or which are never again discussed. Often the quoted material is densely written and stylistically incongruous with the style of your brief. Even worse, quotes interrupt the logic of your argument, inserting a mini-argument which may distract from your pattern of communication.

Admittedly, in rare instances quotes may be essential. However, consider carefully the real risks of quoting. If you must use a quote, prepare your reader well for its unpleasant arrival, and never continue until you have told your captive audience of its relevance to your argument.

E. *Exploit the Analogical Form of Reasoning*

Reasoning by analogy is a highly informal and fact-dependent mode of argument. Most lawyers are well-trained in the accepted methods of identifying a base point for analogizing. However, brief writers often omit a discussion of the base point and give short shrift to factual similarities and differences between precedent and the client case.

Developing an argument based on analogy requires a rigorous comparing and distinguishing of the facts. While few can resist the temptation to distort or exaggerate similarities between a precedent and a client case, judges are rarely deceived by this tactic. It is a quick way to destroy your credibility with the court. On the other hand, a well-organized and full analysis which considers the weaknesses of the analogy as carefully as the strengths is so rare that even if the judge does not agree with you, surely your stock with the court will rise in value.
Attacking your opponent’s use of analogy requires you to discover ways in which the analogy is false. Because analogies always contain differences, you must focus on the legal significance of the differences. While many brief writers feel constrained to follow the agenda set by their opponents, you should organize your argument to clarify the weaknesses in choice of base point, the overwhelming legal significance of a single difference despite many similarities, and to suggest the significance of counter-analogies.

F. Always Discuss Assumptions and Implications of Deductive Arguments

Deductively structured legal arguments begin with a rule, code, regulation, executive order, or statute. Many statutes, for example, attempt to identify a class of persons to be included in coverage, as well as the circumstances under which the rule applies to the class. Often however, either the class or the circumstances or both suffer from vagueness, indefiniteness, or ambiguity. When words become slippery, judges appreciate briefs which not only provide warnings but routes to safe ground.

In addition, most deductive arguments are based on largely hidden assumptions. Assumptions consist of all that you take for granted as you begin to argue. In legal argument, it can be fatal to assume that the judge agrees with your assumptions. If, after inquiry into the hidden assumptions of your position or those of your opponent, you decide that agreement is problematic, you should reckon with those assumptions. Do not presume that if you hide them, the judge or your opponent will remain in blissful ignorance.

Just as assumptions are frequently hidden, so implications of deductive arguments are rarely discussed in briefs. While you may choose to forget about the implications of your argument, the judge never does. Because implications are critical to judicial decision-making, failure to examine all important implications fully may doom your argument.

G. Remember that Conclusions Are Not Self-evident

The tactics of legal reasoning must include skillfully-drawn conclusions. Because a brief may deal with several issues, most briefs will have a number of penultimate conclusions which precede the final conclusion. All conclusions fail when they lack adequate support or are too broadly drawn. Every conclusion, large or small, must have support. Although you may wish to summon a variety of secondary proofs to your use, fed-
eral judges continue to be convinced by arguments based on the application of case law to facts.

Consider the following propositions:

— A conclusion should not cover more territory than the evidence permits.
— A conclusion should not be based solely on another conclusion or series of unsupported conclusions.
— A conclusion should not merely summarize or restate your argument, nor should it merely ask the court to act.
— A conclusion should point to the implications of alternative actions.
— A conclusion should assist the judge in the decision-making process.

The conclusion of your brief is your last chance to convince the judge that the law works in the way that you suggest. If the brief is disorganized, illogical, and legally vague, the judge may give you one last chance on the last page. If the conclusion sparkles with clarity and vision, the judge may return to the swamp and try once more to follow your trail. Careful conclusions are definitely worth the effort.

IV. RECALL THE PRINCIPLES OF GOOD WRITING.

Even if your reasoning is correct, the judge may never know it if you fail to follow a few basic rules that assure that the judge understands your argument. The rules of good writing form for many writers a mountain more unapproachable than Mount Everest. Admittedly, as many things can go wrong with a sentence as with an automobile whose warranty has just expired. However, if you follow a handful of suggestions, you will appear to the judge as the most literate of your colleagues. Good writing boils down to a few things you should do and a few things you shouldn’t do. The bottom line is this: get rid of your bad habits, and consider your readers.

A. As Painful as It Is, Organize First

Simply put, being organized requires that you know where you’re going, how you’re going to get there, and that you share the road map with those who travel with you.

If you truly know your destination, you should not keep it a mystery. Reveal it in your introduction, after you have let the judge know who is arguing about what. Elemental as this may seem, few brief writers discipline themselves to make the introduction introduce. Too many briefs begin with a great clearing of the throat, some mumblings, some irrelevant asides, and a vague promise to eventually discuss something of
interest. For most, introductions are boring, highly preliminary, and fundamentally irrelevant to the real beef of the main argument. While most brief writers never know it, such an attitude can be fatal. If the argument is to make it into orbit, the introduction must be prepared with the meticulous care of a rocket launch at Cape Canaveral.

The *sine qua non* of organizational techniques is the thesis statement. A carefully crafted thesis statement contains the internal guidance system for you as writer and for the judge as reader. This statement enfleshes the central idea, the rationale for the idea, and what you want the judge to do about it. The first sentence of every paragraph should be tied back into the thesis statement. In fact, the test of your organizational success is whether, when read together, the thesis statement and topic sentences form a completely independent, coherent mini-argument. Such internal structure speeds reading, assures communication, saves valuable court time, and raises your credibility with the judge.

While nearly all brief writers use headings, few use them to full advantage. Often headings are too wordy, too vague, or too diffuse to reveal an organizational plan. At worst, poor headings announce poor organization. At best, they keep reader and writer on the desired track. At a minimum, headings should be used to reveal your organizational plan, not to announce the law or the cases you plan to use.

B. *Write in Clearly Structured Paragraphs*

For the most part, paragraphs should contain a single idea, an idea which is examined, supported, illustrated, proved, or disproved as the paragraph unfolds. Once again, a simple reason explains the simplicity of approach. If your paragraph contains more than one idea, most likely none of the ideas will be sufficiently developed. The challenge is to form a paragraph around an idea that can be adequately managed in about 150 words. If your paragraphs consistently run significantly longer or shorter than this length, your idea is either too large or too small.

For the purpose of writing a brief, paragraphs fall into four patterns or shapes: T, I, L, or +. The T-pattern begins with the main idea and employs the remaining words to support or explain the idea. You should use this pattern most frequently. In the I-pattern, the main idea or topic sentence is repeated in fresh language in the final sentence of the paragraph. This form is most useful for complicated argument. The L-pattern should be called into service only when you know that the judge will be opposed to your idea. First give your proof; then at the end of the
paragraph, show the judge in a sentence what idea you have proved. The transitional paragraph (+) is useful to ferry the reader across a wide turn in your argument. Consisting of about three sentences, it points back to the preceding paragraph and ahead to the coming paragraph, showing the connection while making the leap.

Judges and their clerks appreciate paragraphs which begin with an accurate topic sentence. Good topic sentences explain completely and accurately the single idea of the paragraph. Working up to the main idea with a series of sentences usually is a waste of time for the judge and space for the brief writer. Unfortunately too many writers like to hint at the main idea, almost seeming to savor the bewilderment of the reader. The paragraph is not a mystery story. Even if it is, judges want to know that the butler did it in the first sentence. Neither should reading a paragraph be a do-it-yourself project. That is, the judge should not have to search out the hidden idea.

Forcing yourself to precisely state your idea has multiple benefits. It helps the judge to work through your argument quickly and with less chance of an error in communication. It helps the writer keep the focus, giving a standard by which to judge the relevancy of each sentence. Taking the time to narrow and focus the topic sentences of your paragraphs will pay rich dividends in clarity and improved communication.

Finally, most brief writers need to remember that paragraphs normally do not stand alone. Each paragraph must be carefully connected back to the thesis as well as to the paragraph that came before. This connection involves the use of transitional phrases or the repetition of key words. Most brief writers omit these connectors not because of malice or sloth but because of over-familiarity with the argument. As you begin to practice these suggestions, you should consider adding these signposts judiciously in the process of revising.

C. Use Emphasis and Variety in Sentences to Keep the Judge Reading

As you construct or revise your sentences, remember the simple principle that the power spot of the sentence lies at the end. That is, readers, including judges, notice and remember the material presented not, as you might think, at the beginning or middle of the sentence, but at the end. If a monetary value were to be attached to the three locations, the beginning would be worth about a quarter, the middle about a dime, and a dollar for the tail of the sentence. Thus, if you want the judge to notice your point, place it at or near the end of the sentence. To
assist in achieving this emphasis, place secondary material in dependant clauses or phrases at the beginning of the sentence. Then place your most powerful idea in the power spot, the end of the sentence.

Because repeating this pattern in every sentence of your brief would put the judge to sleep in front of the fireplace, you must also strive for variety. You can achieve pleasing variety by mixing the lengths of your sentences. To check your habits in this regard, examine a typical paragraph for average sentence length. You should aim for an average length of 20 to 23 words, with some longer and some much shorter.

To make certain that the judge finds the jewels among the pebbles in your sentences, toss out useless words. Clearly this is no easy task. Most brief writers become deeply attached to their words as soon as words move from mind to paper. As you discard your favorites, remember that even the most experienced writers must push the delete button frequently. It’s all for a good cause: communicating your position to the judge. Good sentences are lean sentences.

D. Choose Words; Don’t Let the Words Choose You

When all is said and done, words carry the meaning of your brief. If the words you choose are flabby, they tend to let you down on that final drive to the goal line. Most brief writers use the words that first come to mind, that is, words that have become habitual, words that judges write and lawyers read every day. When pen is put to paper or mouth to dictaphone, these words ooze out and take over. To avoid becoming victimized by the worn-out language of another time, become a connoisseur of words.

Most words carry electrical charges that can be harnessed to serve your cause. While two words may have a similar denotation, the connotations may be quite different. Note that the words “denotation” and “connotation” are highly abstract. Like many legal terms, they carry a precise meaning to people who teach logic and language. However, abstract terms like these raise a yawn in most people, even those who like these words. Because briefs are not contracts, you have the freedom and responsibility to choose words that keep your audience awake. Collect and use words with rippling muscles, words that are charged with the energy of the earth and the senses, words with some zip and zing. Remember that not one of the rules of federal procedure requires you to cling to bureaucratic antiques of dead civilizations.

Abstract words are dangerous for a more important reason. Be-
cause these words carry highly abstracted meanings, they lack the clarity needed in most situations. Brief writers prize these abstractions for their outer garments of authority. Jargon, terms of art, and Latinate cognates are trotted out in briefs like visiting dignitaries to create the appearance of weighty argument. Too often brief writers rely on the outer form of these words and omit the substance of argument, trusting that the mere appearance of legal-sounding words will carry the day.

While overly charged words can be used to manipulate and deceive, surely most brief writers recognize the golden middle ground.

V. BE SHREWD ENOUGH TO REVISE

Few writers get it right the first time. Because linguistic skills develop haphazardly in our society, few people have an organized and systematic approach to writing. In fact, few people enjoy writing. Whether a writer was first or last in the law school rankings, it is likely that several drafts will be required to produce a brief of quality. Because time and money are matters of life and death to lawyers, it may seem imprudent to squander the time of the best and brightest in the effort to raise the mediocre to the superior. What is the payoff?

Just as the destructive effects of bad briefs are rarely evident to the bar, the positive impact of a superior brief is widely underestimated. While you may be reluctant to charge your client for hours spent restructuring and polishing, the alternative may be equally unappealing: The judge will make a decision without help from you. If the issue is important enough to litigate, and if the matter is weighty enough to place before a federal judge in writing, it is important enough to be rewritten once or twice or maybe more.

Personal computers on the desk of every brief writer will make the process of revision less painful. Once you become comfortable with this medium, it will clear away many of the psychological barriers to writing and revision. Deleting material and replacing it with something better is quick and easy. Linguistic inhibitions tend to ease. The leap from thought to written word is less threatening. Best of all, the computer gives you a level of control over your prose that pen and paper deny.

VI. THE SOLUTION

Surely with the cooperation of the bench, the bar, and law professors, lawyers can be persuaded to write better briefs. Judges must encourage a higher level of performance by example, by finding ways to
make it clearer to the bar when bad briefs yield bad results, and by rewarding excellence with praise. If judges lead the way, law firms may be motivated to provide the time and training for necessary improvement. Law schools must change their ways too. The value of the written word and practice in its use must find a permanent and pervasive place in the curriculum.

This new era must begin with the recognition that the writing of briefs requires the exercise of the highest cognitive skills. This is not a task for the intellectually lazy, the faint-hearted, or the inexperienced. At its best and most effective, the process of constructing a brief connects lawyers to the highest values of a civilized society: fairness, honesty, and commitment to the truths that underpin our legal system and our common life.