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ARTICLES

Five Simple Writing Tips for Busy Trial Lawyers

Simple brief writing tips to make every brief better.

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I often proofread the written work of busy trial lawyers who, though talented writers, frequently do not have time to focus extensively on revising their briefs. The following practice points do not attempt to address either the most common or most grievous errors that I typically encounter. Instead, my goal is to furnish lawyers having limited time with a few writing tips that can deliver meaningful dividends right away, with minimal added effort.

Tip No. 1: Delete cut-and-paste introductions. Efficient lawyers often use templates of past work as a starting point for new motions and briefs. If you do so, make it your practice to delete the stock introduction that many lawyers (and their support staff) include almost as a habit:

> Comes now, Plaintiff John Doe (hereafter, "Plaintiff"), by and through undersigned counsel, and pursuant to Fed. R. Civ. P. 37, respectfully files this Motion to Compel Defendant ABC Insurance Company (hereafter, "ABC") to Produce Better Responses to Plaintiff's Second Set of Interrogatories ("Plaintiff's Motion"), and as support, states as follows. . . .

Skilled cross-examiners know that primacy and recency—the way you start your examination and how you end it—are the two parts of an examination that the jury is most likely to remember. The same principle applies to legal writing. Your caption already tells the reader whether your brief is a motion to compel, a response to summary judgment, etc., so there is no need to waste the first words of your brief repeating this information. Instead, approach your introduction as an elevator

pitch. Focus your reader on the precise issue addressed, and present your position in clear, succinct terms:

> Defendant ABC Insurance Company contends that its claims file is work product, a position that is contrary to controlling law holding that claims files are discoverable in bad faith cases. ABC's objection to John Doe's discovery request should accordingly be overruled.

Author Bryan Garner refers to this form of introduction as framing "the deep issue," with the goal being to capture the judge's focus from the very beginning of your brief. He suggests that such introductions be no longer than 75 words and fit directly below the caption on your brief's first page. *The Redbook: A Manual on Legal Style* (3d ed. 2013).

Tip No. 2: Focus on form for easy reading. If a brief is difficult on the eye, your judge will be tempted to skim it rather than read it. This means that the form of your written work can diminish or even drown your substantive arguments. Down-style capitalization, headings that express a point of your argument, and complete paragraphs (as opposed to numbered sentences) are all techniques that make your writing easier to read, helping you to avoid this pitfall.

Down-style capitalization simply means that you should capitalize as little as possible. All writers should follow the obvious conventions, such as capitalizing proper nouns and the first letter of a sentence. But for discretionary choices—say, whether to capitalize each word of a heading or subheading or whether to refer to a contract as "the Contract"—tilt toward using lowercase words. Capitalization slows down a reader's pace of reading, and it's unnecessary for emphasis if you are already using boldface or italics for elements such as headings. So, use capitalization sparingly—and avoid all-caps altogether.

Explanatory headings are headings that make a point that advances your argument. They serve both to create white space on a page (giving the reader a natural pause without interrupting her concentration) and to highlight what should be the most important takeaway of the section that follows. Headings, which should typically read as complete sentences, should appear both in your statement of facts to signal a transition from one important set of facts to another (e.g., transitioning from an accident to a person's injuries) and for every main argument in your brief. If an argument has two or more parts, use subheadings.

Ultimately, what you are striving for is a set of headings and subheadings that, when read in sequence, provide a snapshot of both the facts and the law supporting your argument. Were a

judge to read only your headings, she should understand the summary of your argument without reading anything more.

Last, though most judicial opinions published today do not use numbered paragraphs, the style persists in trial court briefs, particularly shorter ones. If you use this style of writing, do not fall into the trap of using a new number to mark each sentence, a persistent mistake in busy law practices. Paragraphs communicate important information for making your point. Readers give greater emphasis to the first sentence of a paragraph because it tells the reader why all the sentences that follow belong together. They also use paragraph breaks to visually cue an appropriate pause, and without paragraphs, there's a risk that the reader will interrupt her reading right before an important point of argument. Briefs that contain only numbered sentences do not communicate any of this information and are in general more difficult to read. Strive to weed these out from your practice.

Tip No. 3: Minimize acronyms and honorifics. Except for well-known acronyms in everyday usage, like *FBI* or *CIA*, acronyms rarely make legal writing clearer. They often achieve the opposite. The point of using an acronym is to give the reader (not the author) a term that is easier to digest than the formal term or name it replaces. Most acronyms don't achieve this because the acronym is unfamiliar, and so the reader must either pause to recall it or, worse, search backward in the brief to locate its definition. In lieu of an acronym, use a descriptive abbreviation, such as *the commission* for "the Florida Parole and Probation Commission" or *the university* for "the University of Nevada." As long as the meaning is obvious (e.g., the only commission that your brief mentions is the Florida Parole and Probation Commission), your reader will understand your abbreviation without any added effort.

Unlike acronyms, the drawback with honorifics (Mr., Mrs., Dr., etc.) is not that they obscure meaning so much as interrupt flow. The sentence "Dr. Smith told his patient, Mrs. Parry, to arrange a second examination with Dr. Roosevelt, the cardiologist" is perfectly acceptable. But a judge can read the same sentence without honorifics more quickly, without any loss of meaning: "Smith told his patient, Parry, to arrange a second examination with Roosevelt, the cardiologist." And notice how the sentence's rhythm improves when the honorifics disappear. The style is punchier.

Tip No. 4: Move or delete long footnotes. Style manuals consistently warn against the overuse of footnotes, and so this tip is a good rule of thumb for paring down footnotes (though it is not a hard-and-fast rule). A judge reading your brief is more likely to skip over footnotes and block quotes than any other part of your written work. Making important points in footnotes is therefore a risky

endeavor. If a footnote is important, you should strongly consider folding it into the main body of your text. And if a footnote is longer than a sentence or two, the point you are making is either (1) important or (2) a detour. Move important points to your text; get rid of the detours.

The cases cited by your opposition are almost always important matters. It is therefore rarely appropriate to discuss or distinguish them in footnotes. Instead, address them directly in the body of your brief.

Tip No. 5: Focus on your position before your opponent's position. For response and reply briefs, there is a lawyerly impulse to immediately tell the judge why your opponent's argument is wrong—particularly where your opponent's brief takes a position on a matter of importance that, from your point of view, misapplies the facts or the law. An example of such a response might look something like this:

> In favor of his motion to dismiss, Mr. Smith argues that Rule 9 requires specific allegations of fraud, citing *Ford v. Doe*. But *Ford* has nothing to do with this case. It involved a different cause of action, negligent misrepresentation, whereas our case proceeds on a theory of unjust enrichment. . . .

The drawback to the above is that by addressing the adversary's argument first, the author concedes her opponent's framing of the issue. The implicit question for the court is the opponent's chosen ground: "Does Rule 9 apply?" You need not make this concession.

Consider a rebuttal that begins by presenting first, in affirmative terms, the author's position that the complaint is well pleaded, and that refutes the opponent's argument only afterward:

> Dismissal is inappropriate because the complaint is well pleaded. For unjust enrichment claims, Rule 8 governs. Rule 8 requires only a short, plain statement of the grounds entitling a party to relief. The complaint in this case satisfies this requirement because [insert explanation].

> The Defendant argues that Rule 9 applies, a proposition that, for the reasons stated above, is mistaken. *Ford v. Doe* is not an unjust enrichment case and so is inapposite. . . .

In this version, the author reframed the question to one of her choosing: "Does Rule 8 apply?" In so doing, she is placing her thesis front and center and asking the court to affirm it, rather than simply

denying her opponent's position. And she's now arguing on her home turf. The more complicated the issue, the more important this technique becomes.

Conclusion

All lawyers aspire to write efficiently and persuasively, and the above practice points represent just a few suggestions on how busy lawyers can achieve these goals. For further reading in this area, consider the following sources, from which many of the ideas in this article were drawn:

- *Thinking Like a Writer: A Lawyer's Guide to Effective Writing and Editing* by Stephen V. Armstrong and Timothy Terrell
- *Point Made: How to Write Like the Nation's Top Advocates* by Ross Guberman
- *Woe Is I: The Grammarphobe's Guide to Better English in Plain English* by Patricia T. O'Conner
- *The Redbook: A Manual on Legal Style* (3d ed.) by Bryan Garner
- *Making Your Case: The Art of Persuading Judges* by Antonin Scalia and Bryan Garner

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