“Develop the fundamentals and improve your writing systematically, to the benefit of the client.”

Writing To Win

Improving Your Law Practice Through Attention to Detail

by Benjamin R. Norris

Lawyers—particularly those of us who are litigators—are professional writers. Most cases are decided either by motion or by settlement, events when the parties' relative leverage in negotiations frequently depends on the outcome of previously filed and decided motions. On appeal, most cases are won or lost on the briefs, and only rarely does oral argument change the outcome.

WRITING WELL IS difficult and time-consuming. Legal writing in the litigation context is particularly demanding, because it has to be precise and persuasive, both of which are difficult to achieve. The challenge is especially great for newly minted litigators, because drafting pleadings and briefs is very different from the academic style of writing that all of us are taught from first grade right through our undergraduate years. Even in law school, legal writing is treated almost as an afterthought and not as a core skill. This is unfortunate, because even for seasoned litigators, writing well remains important.

This article summarizes key concepts of clear and persuasive legal writing and provides specific guidelines for writing effective briefs. The primary focus is on writing briefs, but writing pleadings also is addressed.

GENERAL RULES OF LEGAL WRITING

1. Most Important, Remember That Writing Is Thinking and Thinking Is Writing

Writing and thinking are not separate mental processes. Although all of us have our own writing styles, very few of us operate by first imagining an entire pleading or brief in our heads and then simply setting it down on paper. Make your drafting process a part of your

reasoning process by testing, examining and focusing your arguments as you write. Incorporate the results of your analysis in each succeeding draft and critique your writing as you proceed from one draft to the next. Is your reasoning internally consistent? Is there a material fact or significant legal authority you are glossing over rather than addressing directly? If your arguments are not persuasive to you after you have written them down, they are even less likely to persuade the judge. Keep in mind that editing to refine your arguments substantively will work only if your sentences and paragraphs are already drafted in careful and precise language; if your writing is careless and fudges the difficult points and does not deal directly with them, editing will not force you to refine your thinking. Therefore, right from your first draft, write to make your points and arguments as specific and precise as possible so that your writing process becomes a part of your thinking process.

2. Avoid Careless Writing

Write with precision. It is all too easy to create unnecessary ambiguity by writing as if the reader knows the facts as well as you do; for example, do not use pronouns so that readers cannot discern to which preceding nouns they refer. Also, be sure to make your arguments explicitly. It may seem an obvious point, but if a cause of action has five separate elements, address each of the five elements separately, explaining why each element is (or is not) present. Do not expect your reader to infer your arguments from your writing—make your arguments clear and distinct.

Regrettably, the growing use of e-mail and voice mail has contributed to a general decline in writing skills. For whatever reasons, the ethos of e-mail and voice mail is conversational—people write e-mail and leave voice mail as if they were having a face-to-face conversation. Many people send e-mail full of misspellings, with improper punctuation and capitalization, without editing or reviewing what they have written. Similarly, many people leave long, rambling, and sometimes emotional voice mail messages. Because so many of us have learned to communicate this way, this careless-

ness now is spilling over into more formal writing, such as pleadings and briefs. Aside from sending e-mail and voice mail with the precision and care that you would devote to any other permanently recorded form of communication, remember that the drafting of pleadings and briefs is a very formal form of communication. Because every word in a pleading or brief counts, write carefully.

3. Remember Your Audience

Many of us enter the legal profession having had our only experience with writing in an academic setting, writing for teachers and professors who are already familiar with the material that they are passing on to their students. As a result, we tend to have been trained to write to prove that we were paying attention in class or that we have read the course materials, not to communicate new facts or to persuade.

This will not work with a judge; judges are very familiar with general principles of law, but they do not start the case already knowing the material facts or your arguments on the law. Set out your legal arguments in such a way that the judge can see how established principles of law support your client's position, or why a change in the established law is required to do justice in the case. That judges are besieged with paper only makes precise and persuasive exposition of your legal arguments all the more important. Even more essential, no judge knows or can know the facts of your case—unless you set them out in your writing. In cases in which technical expertise is required for an adequate understanding of the facts, explain the underlying terms and principles clearly but without condescension.

4. Use a Consistent and Readable Format

Focus on creating a visual presentation that aids the judge in understanding the information you are presenting. To make it easier for the judge's eyes to go from line to line, use a justified left-hand margin and a ragged right-hand margin. Be consistent. For example, do not randomly double-indent in some places and single-indent in others. Do not attempt to squeeze in more text by using a smaller font or narrower margins than are allowed by the applicable rule or by excessive use of single-spaced footnotes; this will not fool the court and will

detract from the persuasiveness of your arguments, not enhance them.

5. Avoid Hyperbole

Nothing reads less persuasively than naked appeals to your reader's emotions, such as dramatic-but-unsupported allegations of wrongdoing by the other party or its counsel. Your writing should make it clear that you and your client care about the outcome of the case, but save your emotions for your next jury trial.

6. Avoid Overuse of Emphasized Text

Do not overuse emphasized text—your emphasis should be self-evident from your structure, your arguments, and the words you use to make your arguments. On those rare occasions when emphasized text is appropriate, use only one kind of emphasis (for example, bold type) and reserve that form of emphasis for adding your emphasis in the document. Avoid the ALL CAPITALS format, because this is particularly difficult to read; capitalize only when called for by the rules of the English language.

7. Present the Facts So As To Tell Your Client's Story

Use your presentation of the material facts to *tell your client's story*. Present the facts in a readable narrative sequence that relates the material events in a light that favors your client. Provide a citation to the record for each fact upon which you rely.

8. Use Simple Words, Phrases and Sentences Whenever Possible

There is a temptation to believe that "writing like a lawyer" means writing long-winded sentences with complicated, Latin-derived words and pointless adjectives like *said* (as in "the said contract"). Do not fall into this trap. Use the most simple, most clear language possible. Use short, common words rather than longer, less-common words, and choose descriptive nouns and verbs rather than excessive use of adjectives and adverbs. If you can make your point with fewer words and less space, do it. Use the parties' names, not *plaintiff* and *defendant,* and use defined terms (e.g., the "First Contract," the "Second Contract") when necessary to avoid confusion and improve clarity. There will be times when there is no alternative to using complex language to express a complex line of reasoning, so save the use of qualifying phrases and complicated sentence structures for those occasions when they are truly needed.

9. Be as Direct and Specific as Possible; Avoid Being Coy

Being cute or clever is no substitute for clear and direct writing. For example, instead of making generalized-but-vague allegations such as "Smith tap-dances around the fraud issue," state, "Smith's brief fails to even address three of the nine elements required for a showing of fraud under Arizona law. More specifically …." Instead of stating, "All of the requisites for a fraud action are present," be more specific: "The undisputed facts establish all nine elements required under Arizona law to establish fraud. First, …." Avoid putting words or phrases in quotation marks to suggest without explanation that the word or phrase is somehow inappropriate, such as, "Smith states in his declaration that he 'liked' the idea." Instead, explain directly why the word or phrase is inappropriate or inaccurate.

10. Use Quotations as Tools, Not Crutches

Use quotations to support your arguments, not as substitutes for making your arguments in your own words; the judge wants to know why you think you should win this case, not why some other judge thought some other party should win some other case. Avoid quoting overlong passages from cases, statutes or exhibits, because this will only bury the key passage that you really wanted to bring to the judge's attention. When possible, keep quotations in the body of your text, rather than use a quotation so lengthy that it has to be indented and single-spaced. If you do use a lengthy quotation, supply an informative lead-in; assert your point in the lead-in, and then use the quotation to support the point. This technique allows you to make your point twice, but without being obviously repetitive. Omit irrelevant portions of quoted text by using an ellipsis, but never use this technique to change the apparent meaning of the quoted text, or the judge will lose faith in your writing—and in you. If you can improve the language of a statute, contract or case to make it easier to understand, then paraphrase instead of using a quotation, or use your paraphrase as the lead-in to explain the quotation that follows.

11. Do Not Overuse Footnotes

Footnotes are distractions. Use footnotes to quote the text of lengthy passages from cases, statutes or exhibits, or to explain peripheral points that otherwise would interrupt the flow of your principal arguments, such as explaining why a particular argument or fact is not relevant to resolving the issue at hand. Although string cites should not be used to support noncontroversial points, if the law in Arizona is not clear, or if you are seeking a change in Arizona law, use footnotes to string-cite cases in support of the minority and/or majority rules you are attacking or defending. Only the string cites themselves should be in the footnotes; your argument should be in the text. If winning or losing depends on a particular argument or fact, discussion of that argument or fact belongs in the text, not in a footnote.

12. Use Clear References and Parallel Structure

If you discuss "the Jones contract" in one sentence, do not refer to it as "the first agreement" in the next sentence. If you are going through the nine elements of fraud under Arizona law, make sure it is clear on the face of your writing where your discussion of one element stops and your discussion of the next element begins.

13. Make It a Practice To Perform "Ruthless Edits"

When you think you are finished with a piece of writing, edit it again—ruthlessly questioning the need for every word, paragraph and section. The general rule is that if you can shorten your writing and still keep the sense of your argument, do it. Less is almost always more. When all else fails, read the piece backward, sentence by sentence, to give yourself a fresh perspective, and/or make an after-the-fact outline of what you have written. These techniques will force you to examine whether each sentence makes sense, whether each sentence logically follows its predecessor, whether each paragraph is in the right place, and whether your arguments are presented in a logical sequence. These techniques are especially useful when you have spent so much time on a piece that your editing process has disintegrated into aimless revision, and there is no time to put the piece down for a day or two or to have someone else read it over for you.

1. GIVE YOUR BRIEF A CLEAR, LOGICAL STRUCTURE

The format for appellate briefs is defined by the Appellate Rules, but the same basic structure should be used for all briefs, unless the brief is very short (fewer than three or four pages). Begin with a short two- or three-sentence paragraph explaining the relief you are seeking and why your client is entitled to it; write this introductory paragraph as if you were writing a 20-second speech to the court explaining what the case is about and why your client should win. Then, frame the issues using short, clear sentences; try to keep one issue per sentence and one sentence per issue; explain each issue so that a stranger to the case, even a nonlawyer, can understand the issue and see why your client's position makes sense. Follow by stating the material facts you will be relying on in making your arguments. State each factual assertion only once, using the facts to tell your client's story. In motion practice, if the rules allow, use a statement of facts to set out the complete material facts one by one, with your citations to the record of the case. Furthermore, use the brief itself to present the facts in a more integrated, persuasive manner, citing to the specific paragraphs of your statement of facts. Next, make your arguments one by one, starting with the strongest argument first and followed by the other arguments in descending order of strength. Use your conclusion to state one last time—very briefly—the specific relief that you are seeking from the court. Resist the temptation to use the conclusion to repeat your arguments all over again; at most, if your arguments have been particularly complex, include a brief summary that reads like a 20-second speech that puts the big picture back into focus.

2. STATE EACH ARGUMENT CLEARLY, BUT ONLY ONCE

Do not make the same argument more than once. Repeating yourself will bore, not convince, the judge. State each argument, support the argument, and move on. If the brief makes more than one separate argument in support of your client's position, give each argument a separate section in the brief. Make sure your arguments are internally consistent with each other; if you are presenting your arguments in the alternative, say so, and explain why you are doing so (for example, begin your second argument, "Even if Smith's claim that a contract was formed is accepted, Smith cannot show that Wilson's actions would have breached such a contract …"). Each section should have a clear, logical reason for its separate existence and should present your client's complete argument on the issue in question. Avoid melding together two arguments in a single section, and also avoid oversubdividing your brief into segments that present less-than-complete arguments. Use your section headings to give the judge a road map through your brief. Each heading should summarize the text in the section that follows and should be short, argumentative, and, whenever possible, in the form of a single sentence.

3. GIVE EACH PARAGRAPH A STRUCTURE THAT MAKES SENSE

Just as each section of the brief should be dedicated to a specific argument, each paragraph within each section should address a single, specific proposition that supports the argument made in that section. Begin each paragraph with a topic sentence that defines the purpose of that paragraph. The judge should be able to skip from one topic sentence to the next, going straight through the brief, and come away with a clear understanding of your position. Many judges actually read briefs this way the first time through, and if your arguments are not obvious in this first quick read-through, the judge is likely to pick up your opponent's brief for a clearer explanation of the case. Subsequent sentences in the same paragraph each should make a single, clear point in support of the proposition set forth in the topic sentence. Do not try to stuff your entire argument into overlong sentences full of qualifying clauses and phrases. Also, avoid writing "mushy" sentences that ramble on generally about the subject matter instead of making a clear, declaratory point in support of that paragraph's proposition. Paragraphs seldom require concluding sentences. Only paragraphs that close a particularly extensive discussion of a case or other topic need a final sentence to sum up what has gone before.

4. SUPPORT EACH PROPOSITION OF LAW WITH A SPECIFIC CITATION TO AUTHORITY

For each legal proposition that you make, cite to a specific case, statute or other

authority. Use "pinpoint" citations, always citing to the specific page or pages of the case or sections of the statute on which you rely. Many cases and statutes are long and complex, so do not force the judge to go hunting for the particular text. Because both state and federal judges in Arizona are assigned hundreds of cases at any one time and therefore have little time to devote to your case, a precise reference to a citation the judge will need to rule in your favor dramatically improves your odds of prevailing. If a case or statute is particularly important to your arguments, consider attaching a copy to the brief—like everyone else, judges frequently work away from the office.

5. Explain, Don't Conclude

In making your arguments, avoid conclusive statements that do not explain the specifics of why the conclusion necessarily results. For example, "Smith's complaint must be dismissed because he fails to prove damages" is preferable to the more vague and less specific "Smith's complaint must be dismissed because it lacks merit." If you do make a conclusive statement, follow it with explanatory text.

6. Cite Cases for Their Holdings, Not Their Language

Cite cases for their holdings. Do not rely on cases that have "good language" but hold against the party in your client's position. Doing so only gives your opponent the opportunity to undercut your argument by pointing out that, notwithstanding the "good language" that you quoted, the holding of the case actually undermines your argument. Use a parenthetical after your first citation to each case you cite (unless the case is discussed at length in the brief) to explain the holding and to demonstrate how it supports your argument. Making this a practice will force you to read each case for its holding and will help prevent you from inadvertently citing a case that hurts your position.

7. Draw the Sting

If your brief is the opening brief, anticipate and address your opponent's likely arguments. Do not let your opponent have a free shot at writing "what the other side did not tell you, judge, is that …." Anticipating the arguments against your client's position allows you to frame the issues in your terms. Being honest about tough facts and issues also gives you and your arguments credibility with the judge.

WRITING PLEADINGS

1. In Pleadings That Make Affirmative Claims, Use Short, Specific Allegations of Fact

Draft pleadings setting forth affirmative claims, such as complaints and counterclaims, as a series of short, single-subject paragraphs numbered with Arabic numerals in a manner that tells your client's story. Long paragraphs and paragraphs dealing with more than one specific subject matter should be avoided. Go beyond the requirements of Ariz.R.Civ.P. 10(b) and, if a paragraph can be subdivided, do it. Not following this approach will give the responding party the opportunity to make ambiguous denials. Although not always possible, a well-crafted affirmative pleading can serve as a request to admit, forcing the responding party to concede key facts at the very beginning of the case.

2. Make Pleadings Setting Forth Affirmative Claims Tell a Story—Your Client's Story

The importance of making your client's case at every opportunity cannot be overemphasized. Because your client's affirmative pleading is the first chance to tell his or her story, take the opportunity and use it to set forth and frame the material facts in the most favorable light possible. Modern notice pleading does not require the party making a claim to state much to survive a motion to dismiss, but go beyond the minimum and take the opportunity to be persuasive.

3. Make Your Responsive Pleadings Self-Contained

Draft responsive pleadings (answers, replies to counterclaims, etc.) so that they can be read on their own, without reference to the pleading to which they respond. Too many responsive pleadings simply admit or deny large blocks of allegations, making the pleading unintelligible on its own. Responsive pleadings should restate each paragraph of the pleading being responded to, followed by a paragraph that begins "Response:", followed by your client's response to the paragraph in question. This format encourages the judge to pick up your responsive pleading for an explanation of the initial positions of the parties, giving your client one more opportunity to present the facts from its point of view.

4. Make Your Responsive Pleadings Persuasive

When appropriate, go beyond simply denying the allegation of fact in question and explain briefly why your client denies the allegation in question. To make your client's position clear, respond separately to individual factual allegations, even if they are contained in the same paragraph or sentence of the pleading to which they respond. Again, your responsive pleading is your first opportunity to tell your client's story, so take that opportunity and use it.

CONCLUSION

Writing for the court is one of the most difficult challenges facing any litigator. Because few of us are natural writers and because writing for the court makes demands that few other forms of writing make, drafting briefs and pleadings is a skill that takes considerable effort to master. However, by focusing on developing the fundamentals—a crisp, succinct and logical structure and writing style—a litigator can improve his or her writing systematically, to the benefit of the client.

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