

Expert Analysis

Simple Secrets For Writing A Killer Brief

By **Daniel Karon** March 1, 2019, 1:38 PM EST

"I have yet to put down a brief and say, 'I wish that had been longer.'"

—U.S. Supreme Court Chief Justice John G. Roberts Jr.

God gave us two ways to communicate: speaking and writing. And because our profession, these days, offers meager opportunity for oral argument, we need to always be the better, brighter, tighter writer. Thing is, most lawyers are dreadful at it.

That's about to change.

What's in Your Writer's Toolbox? (Do You Even Have a Writer's Toolbox?)

My son plays baseball. His coach tells him to always bring with him his bat and his glove. These are his tools. As professional writers (and if you don't think you're a professional writer, you're wrong), what are our tools? You can find them in your writing library.

You don't have a writing library? Then it's time to start one. After all, words are our stock in trade.

Creating a modest but functioning writing library is simple and requires only a few staples: the current "Chicago Manual of Style" (not the "AP Stylebook" — that's for journalists); the current "Bluebook"; Strunk & White's "The Elements of Style" (of course); "The Winning Brief," by my writing mentor, Bryan Garner; Garner's "Redbook — A Manual on Legal Style"; Garner's "The Chicago Guide to Grammar, Usage, and Punctuation"; Garner's



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“Dictionary of Modern American Usage”; and Matthew Butterick’s “Typography for Lawyers.” And if you want to get wonky and dig into writing theory, you can add William Zinsser’s “On Writing Well” and Stephen King’s “On Writing.”

It’s also essential that you read good writing, such as the *New York Times*, the *Washington Post* and *The Atlantic*. Reading the classics — for delicious turns of phrase and inspiring syntactical gems that will make your heart stop because you’ll never come close to replicating them — is essential, too.

But the best way to elevate your prose is to study writing and to practice it every day. Useful writing lessons are more accessible than you may think. Several free subscription services promote daily content, including essential grammar and punctuation exercises. (For instance, today’s exercises involved the subjunctive mood and gerunds.) If you want to get started, the best email subscriptions are dailywritingtips.com, lawprose.org, quickanddirtytips.com and grammarbook.com.

A Good Brief Persuades by Controlling — and Assisting — Its Reader

Good brief writing begins by understanding what a good brief isn’t. It’s not written to show off or to take shots at the other side. It’s also not for your client. Briefs are for only one person — your judge. Like a fiction novel, your brief must grab and keep your judge’s attention. But unlike a fiction novel, it must also persuade.

The best way to persuade your judge is to begin with a deep and provocative issue. And by begin, I literally mean to begin your brief with it. No vapid and wasteful “Now comes Defendant and hereby moves this Court to dismiss...” preamble. Your judge already knows whom you represent and the name of your brief by, well, the name of your brief.

U.S. Supreme Court Justice Felix Frankfurter observed decades ago, in *Rogers’ Estate v. Helvering*,^[1] that “[i]n law[,] the right answer usually depends on putting the right question.”^[2] A deep issue asks the right question and in a way that avoids your judge having to dig for the goods. Because delivering the goods — quickly explaining why you’re taking your judge’s time — is the surest way to achieve buy-in. Conversely, a sprawling and directionless brief with the issue buried somewhere around page three, if anywhere, is the surest way to piss your judge off.

Fashioning a deep issue means expressing it syllogistically in three sentences. The first sentence (the major premise or predicate of the conclusion) is the law. The second sentence (the minor premise or the subject of the conclusion) describes the facts. And the last sentence (the conclusion) expresses the necessary and desired outcome that naturally follows from feeding the facts through the law. Also, you should invite your judge to answer your deep issue — ending it with a question mark — in a way that wins your case. The rest of your brief merely supports the answer that your judge just gave.

How does issue-framing look in real life? Let’s start with a worthless summary-judgment issue that lacks zip and impact: “Whether Defendant breached his contract with Plaintiff.” The judge’s answer to this question (or statement, really) is, “How am I supposed to know?”

Now, here's a deep, powerful and persuasive rewrite that leverages the available facts and law: "Defendant's contract with Plaintiff required Defendant to give Plaintiff ten apples for ten dollars. Plaintiff gave Defendant ten dollars, but Defendant gave Plaintiff only eight apples. Did Defendant breach its contract with Plaintiff?" See the difference? Assuming the correctness of the law and the facts, the judge can reach but one conclusion. Plaintiff's.

But your need to maintain control doesn't end with your issue. This goal extends throughout your brief. You achieve this control by using persuasive section headings derived directly from your outline. And an outline must always be your first step.

The difference between a weak and strong section heading is the difference between "Rule 12(b)(6) Standard" and "Rule 12(b)(6) promotes a forgiving standard that support this Court's order sustaining Plaintiff's complaint." The second version leaves your judge no doubt about what follows and why.

Even where writers succeed in keeping the court's attention, invariably things crumble in their worthless conclusion. I'll bet this conclusion looks familiar: "Based on the foregoing, Plaintiff's motion should be denied." In addition to being passively expressed (easily lawyers' most common gaffe), this conclusion adds nothing to the prose.

The writer may as well have skipped this conclusion and saved on word count or page length. A useful and effective conclusion should highlight a brief's main points in only a few words, then wrap up with a stirring and committed pitch for truth and justice directed by the author's position. I see purposeful conclusions in almost none of the briefs I read — except for mine, of course.

Persuasiveness Means Nothing if Not Related Powerfully

These persuasive methods don't work unless you fuel them with a good story that has a powerful theme. We are a species of storytellers, whether lying in bed as kids or standing before a jury. Everyone wants a good story to sweep them away. And it's not difficult to do.

To demonstrate the power and provocativeness of story, consider the following sentence: "The cat sat on the mat." This sentence has a subject, a verb and a direct object. It's the type of line that you'd routinely see in a brief. But does it stir anything in you? No way.

Now, consider this version: "The cat sat on the other cat's mat." Hmmm. That raises questions — and lots of them. Why did the cat do this? What's so special about the other cat's mat? Do the cats know each other? Do the cats like each other? If so, why? If not, why not?

I've given you the beginning of a story. This is precisely the attitude that your brief's storytelling — its facts section, which should follow your issue — must embrace. Granted, legal writing should avoid raising too many questions and must emphasize answers, but the principle here is that your story must move the reader forward. Your client does not want to pay you for a brief that resembles the other drivel infesting your judge's slush pile.

So be memorable, be different and take chances. But most of all, be readable and don't write like a lawyer. (I'm not, am I?) Make your judge's experience the same as if she or he were reading the latest Grisham novel, refusing to put it down at 11 p.m. despite tomorrow morning's early motion call. We're storytellers — period. There's no reason why your writing shouldn't evoke a good storyteller's response.

Of course, you need to figure out how to tell your own story. I can't offer you my story any more than I can provide you my voice. But I can help you find effective ways to tell your story. According to Strunk & White, the most valuable method is to "omit needless words." Or better yet, "omit words." I just edited a brief where I omitted 30 percent of the words and enhanced the brief's readability immeasurably. Chief Justice Roberts would have been pleased.

Tell me the following real sentence doesn't make you nauseous: "The undersigned hereby returns to the party of the first part the attached and enclosed stipulation to dismiss in the above-entitled matter; the same being duly and timely executed by myself." That's 31 words. The writer could have simply said, "Here's the signed stipulation." Four words. My edit results in a 90 percent word savings. (Although, uncannily, the writer did manage to hyphenate the compound adjective.)

Thoughtlessness like this adds to word count, infuriates your reader and detracts from your story. Often, I read co-counsel's briefs written this way and find myself rooting for my opponent. Supreme Court Justice Ruth Bader Ginsburg agrees. "[E]ye-fatigue," she says, "and even annoyance will be the response [lawyers] get for writing an overlong brief." So tighten and lighten your story.

Michelangelo, it's said, would gaze at a lumpy, clumpy block of marble and imagine the form that he wanted to free from within it. Editing involves this same process. So "[s]it down and write," the late Supreme Court Justice Antonin Scalia and Bryan Garner instruct. "Then revise [and] revise again. Finally," they say, "revise."

But most crippling to lawyers' ability to relate their stories (if, indeed, they have articulable stories to begin with) is their penchant for telling and not showing. Telling "that" instead of showing "how" is ineffective and worthless. After all, tell them and they won't believe you but show them and they will have no choice but to agree.

An easy way to show, not tell, is to avoid arguing by adjective and adverb. Consider these real-life sentences: "Defendant's blatant disregard for the law and this Court is too much to ignore. Defendant's continued attempts to improperly manage and operate its property violate a plethora of state laws." What good does shouting at the reader more loudly by adjective ("blatant" and "continued") and adverb ("improperly") do? If you strip the sentences of these pace-suckers, they lose no meaning and become more compelling.

But a more sophisticated method exists for showing, not telling. This method is complicated and requires ceaseless observation and practice. It often eludes me, but when I recognize it, I pounce. This technique taps the reader's senses. It conveys a word picture and evokes the writer's desired response by only delicately mentioning the subject and the action.

For example, let's say we're responding to a motion to dismiss our complaint in a gruesome case involving a high school principal who abused his students. When it comes time to introduce our antagonist, Principal Jones, we could always just say "Principal Jones was a monster who routinely molested Plaintiff and other students."

But we want to show the court who this monster is, not merely tell the court what he did. So let's consider this version instead: "Principal Jelly Fingers. That's what they called him — at least those whom he molested. One time, when Plaintiff needed a permission slip signed, he had to ask himself whether his absence from class was important enough that it was worth getting fondled."

See what I did there? I created a word picture that invited the reader to see, feel, hear and even smell and taste what happened. It makes you shift in your seat a bit when reading it, doesn't it? This way is more effective than going with some thoughtless version of subject, verb and direct object. Now you see what I mean when I say that this technique isn't easy. It's creative and thematic, which are things that take time and thought.

And speaking of theme, you need a powerful one to drive your story and to carry your judge through the brief. Without a strong theme, you have a bad story. Themes are easy to develop because there aren't that many of them, even in fiction writing.

Think about the themes that have fueled the books and briefs you've read — for example, justice, responsibility, perseverance, truth, redemption. If you can steer a compelling story through a potent theme, then combine everything with rock-solid craft, you'll have yourself a killer brief.

Wait a minute — what's craft? Craft is the art of writing. It's grammar, syntax, usage, punctuation, organization, typography and an ear for what makes writing sing. I can't even begin to address these technical issues here; they're what I suggested you study every day and pick up from other good writers. But if you can master the craft of writing and couple it with persuasive storytelling and theme (along with solid legal research and well-expressed arguments, since we're talking about legal writing), your briefs will be unbeatable.

Conclusion

Although we're not writing fiction, my brief writing has been subject to that criticism (or compliment). But we are telling stories. Sure, we lace our stories with law, policy and doctrine, but we're telling stories just the same.

And because we're storytellers, it's important to appreciate that every story — whether about justice, responsibility, perseverance, truth or redemption — has already been told. The nice thing is that these stories just haven't been told by you. They haven't had the privilege of being channeled through your creativity, ingenuity and passion. So tell your next thematic story in a persuasive and technically sound way and go write that killer brief.

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[1] *Rogers' Estate v. Helvering*, 320 U.S. 410 (1943).

[2] *Id.* at 413.

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