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CHIP RICE

On LITIGATION SKILLS

Writing a good legal brief is more a matter of craft than art. Most judges aren't persuaded by eloquent phrasing, vivid metaphors or clever reasoning that calls attention to itself, and I suspect that such attempts at artistry only put judges on their guard.

The best briefs are clear, credible and easy to follow. They don't aspire to be thrilling symphonies or colorful canvasses that sweep the reader away. They are watches that just keep ticking or trains that take the reader to the desired destination without any squeaking or jostling.

No matter how just your cause or how brilliant your arguments, you will fail if you lose your reader somewhere along the way. Even after you have come up with sound, well-supported arguments, you need to continue to think relentlessly about how to make your brief easier to read. You should assume your readers will be too busy and impatient to give your work the attention that you think it deserves. You need to give them all the help that you can.

There are a lot of good ways to try to keep your reader on track. Make sure that your headings use your key terms and can stand by themselves so that a reader will understand the thrust of your argument by simply reviewing the brief's table of contents. (But don't count on anyone reading your headings, because many readers don't, so the first sentence of a section should repeat your heading in different words.)

Keep your paragraphs short with concise topic sentences. Many readers have a practice of reading only the first sentence of a paragraph and then skimming the rest of the paragraph. A new paragraph is a new chance to engage the reader's attention.

Don't risk making your reader's eyes glaze over by being boring and redundant. Get to the point as efficiently as possible by cutting extraneous words and phrases and by organizing your arguments to avoid repetition. Avoid sarcastic or snarky comments about your adversary — no matter how clever you think you are — because it will just annoy most judges.

The most important thing is to keep working the problem at every level by re-writing sentences or paragraphs that don't quite work or re-ordering small or big pieces of your brief to make it flow better. We'd all like a brief to spring full grown from our brilliant minds, like Athena from Zeus's brow. It would be nice if we could wait for an epiphany and then sit down and dash off a winning brief in one fell swoop. But that is a sure recipe for

writer's block. It is better to start putting things down on paper and then push them around until you find the most logical and persuasive order. In the end, perspiration will matter more than inspiration.

Each section of your brief must fill its purpose as part of the whole. The introduction must explain what you want and why in a lucid and concise way. It should be the last section that you write or, at least, the last section that you finish.

The statement of facts must tell a compelling story with conflict, suspense and heroes that inspire sympathy. And it can't just be a "story." It must be backed by specific cites to the evidence, preferably with pithy quotes as well, in order to assure your reader of your credibility.

Finally, the legal argument must explain the law and apply it to the facts in a way that inspires the reader's confidence in your fairness and accuracy. A long string cite without any quotations or parenthetical explanations of the holdings won't inspire such a confidence. As a general rule, you shouldn't cite a case unless you can quote some helpful language from the opinion or explain something about the underlying facts or holding that will bolster your argument. And pay attention to getting the pin-cite right in order to make it easier for the reader who wants to check the case.

No matter how hard you try, you won't know if your brief is working without getting other people to read it and give you comments and suggested edits. Editing can be a painful process when people don't get your arguments or don't like your favorite lines, but it is better to hear it from your colleagues than from your judge or arbitrator.

It's easier to submit to such editing if you think of yourself as a humble craftsman rather than a romantic artist. It's also easier if you tell yourself that your reader is always right about the problem, but not necessarily the solution. You don't need to take anyone's edits verbatim, but you do need to solve the problem that made your editor want to change your words.

Writing a good brief takes a lot of work and time, and you usually will get sick of the process before it is done. If possible, try to find time to put your work aside for awhile so that you can come back to it with a fresh perspective. You will find new ways to clarify, shorten or expand particular arguments. Keep working at your craft and good things will happen.



Chip Rice

