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A Few Brief Words

Keep busy readers in mind when crafting your written arguments

BY CHIP RICE

Giving advice to lawyers about their legal briefs may seem even more presumptuous than some of my past articles because most lawyers think of themselves as excellent writers. I've heard that 75 percent of drivers think they are better than average behind the wheel, and the number would probably be even higher if you polled lawyers about their writing. But most judges, arbitrators and mediators will tell you that they see a lot of bad writing that ranges from vaporous to impenetrable and a lot of mediocre writing that simply wastes their time.

A big part of the problem is that lawyers like to imagine that someone will give their briefs the sort of extended and undivided attention that they certainly deserve. After all, we put a lot of work into these things and it is only human to expect a judge or neutral to do the same. But that's not realistic, especially if you are filing your brief in a busy law and motion department in state court.

Your readers — assuming that you are lucky enough to get both the law clerk and the judge to read your brief — will probably be very busy and distracted.

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As a result, you have to make it as easy as possible for them to get your points if you want to be effective. Being brief — pun inevitable — is only part of the job. The number of words is less important than whether your writing can be read and understood quickly — even by someone who does not put much time or energy into the effort. That means you need good organization, section headings, topic sentences and citation form in addition to clear and convincing content. And it all has to look good.

Put simply, you have to make the whole package user-friendly at every level. A good brief moves like a freight train: Its velocity and precision reinforce its persuasive power. But building a freight train takes time and attention to detail.

BASIC PRINCIPLES

At the risk of sounding like a grade school teacher, you have to begin with an outline. Many lawyers feel that they have to start writing as the spirit moves them but I don't buy it. Flashes of inspiration have their place but they are no substitute for the hard work of making sure that the judge follows and understands your argument.

At the most fundamental level, to borrow from Aristotle, your brief has to have a beginning, middle and end. But you can't write a really tight beginning (or end) until you have a solid middle, which comprises the core of your argu-

ment with all the facts and law in place.

For me, an outline is a computerized bunch of boxes in which I put facts, legal principles and reasoning (including the occasional flash of inspiration) as I am reviewing the relevant documents and cases and thinking through the possible arguments. I switch back and forth between organizing the boxes and developing the arguments within each box until I am happy with the overall structure and flow. Then I convert the outline into a text format and begin editing, word by word and sentence by sentence, to make everything as easy as possible for the reader. That means eliminating unnecessary words, ironing out language that is hard to follow and making sure that each sentence leads to the next without distractions, digressions or gaps in logic. I keep editing, draft after draft, until I can read the entire brief quickly without noticing any ways of improving it.

Over the course of this long and laborious process, I often find that the sentences and sections that give me the most trouble are the ones where my thinking is unclear or inconsistent. The editing process inevitably isolates — and forces me to work on — the weaknesses in my arguments, so I think the trouble is worthwhile. (I'm not sure, however, whether colleagues who graciously allow me to edit their briefs would agree.)

INTRODUCTION

Resist the urge to start with some

rhetorical flourish. The first sentence of your brief should say who you are and what you want. The next sentence should say why. The following two or three paragraphs should describe the key facts and summarize your argument. Hit all of your important points but make it quick because your readers are already impatient. This is your first chance to grab them so you should not even try to draft the introduction until your statement of facts and legal argument is so clear on the page and in your own mind that you can nail this opportunity.

STATEMENT OF FACTS

For my money, this is the most important section in most briefs. If you are a plaintiff and can tell a compelling story that requires that something be done — or if you are a defendant and can tell a story of someone unjustly accused — then you are more than half way home. I have had clients bridle at my use of the term “story” in this way but I don’t mean to suggest anything dishonest. In fact, your story will only be effective if it is supported by the evidence. We all seem to be hardwired to respond to stories — chronological narratives with protagonists, antagonists and moral lessons. They engage our attention and our emotions and are incredibly powerful tools of persuasion.

Take the time to tell your client’s story well. Make the players and the sequence of events as clear as possible and avoid argumentative characterizations. Let the facts speak for themselves but bear in mind that they do so only if you put them in a compelling order. Keep asking yourself what does someone who starts by knowing nothing need to know

next in order to keep the story straight.

Every statement of fact should be supported by a persuasive and precise citation to the evidence. It always bothers me when lawyers use a long but vague citation form such as “see Declaration of Jonathan Doe, Exhibit A.” I prefer something like “See Doe Dec., Ex. A: 1/2/2007 Doe letter to Schmoe at p...” It is more work but it conveys more information and shows more effort without taking much more space. And don’t be lazy about adding and double-checking the pin cite. If you convey that you don’t care enough to look it up, why should the judge?

Don’t cite any evidence without adding a parenthetical description — or better yet a quote — that tells the reader what to expect to find if she looks at the cited evidence. I also like long, block quotes because most judges want to know the exact words of the witnesses and documents rather than the lawyer’s characterizations. But long quotes can also be boring and distracting — and some readers skip them — so take the time to highlight the most important language in bold.

LEGAL ARGUMENT

As I’m editing, I keep asking the same basic questions about the legal argument section that I do when editing any other part of the brief: How can I make this more persuasive to — and easier for — the judge?

Here’s where an outline is crucial for organizing your arguments in concise and clearly titled sections and subsections. A judge should be able to follow your argument by simply reading the table of contents.

Using an outline also should force you

to write good topic sentences, a neglected art that has been serving readers for centuries. I have a theory that most people give greater attention to the first sentence of a paragraph and declining importance to every succeeding sentence in that paragraph. I also suspect that many readers, like me, skip paragraphs if not grabbed by the first sentence. I try to craft my topic sentences carefully and keep my paragraphs short so I have more chances to engage the reader.

Like evidence citations, legal citations should be as user friendly as possible, including pin cites and parenthetical quotes or descriptions. When explaining important cases, use as much of the actual language of the opinion as possible. And try not to make arguments that only a lawyer could love. Don’t jeopardize your credibility by distorting the evidence or law or taking clever but unfair positions.

CONCLUSION

I’m surprised by how many briefs end with a conclusion that states: “For the reasons stated above, we respectfully request the Court to grant (or deny) the motion.” What a waste of words — especially when this is your last opportunity to persuade the judge!

I usually wait until the rest of the brief is almost done before taking the first crack at drafting a conclusion. Then, to get momentum, I re-read the whole thing from the beginning and try to crystallize the main points of the brief in two paragraphs or less. If nothing else, this exercise — like all of the steps described above — sharpens my thinking for oral argument and whatever other opportunities I may have to persuade judge and opposing clients and counsel. ❖