WRITING THE WINNING BRIEF (WITH SOME REFLECTIONS ON ORAL ARGUMENT)

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Shakespeare in the *Merchant of Venice* had a few words of warning for would-be appellate attorneys:

Gratiano speaks an infinite deal of nothing, more than any man in all Venice. His reasons are as two grains of wheat hid in two bushels of chaff: you shall seek all day ere you find them, and when you have them, they are not worth the search.

Before I went to law school, I took a course in editing at N.Y.U. On the first day I asked the professor the following question: “I’m presently reading a novel that is an acknowledged masterpiece of literature, but I can only get through about 15 pages a day. Yet over the weekend I picked up a short novel by Stephen King and I finished it in a few hours and loved it. What’s the matter with me?”

The teacher asked me what the classic novel was and I replied *Tess of the D’Urbervilles*. She then explained that Stephen King was a good writer but it wasn’t deemed politically correct to say so. Further, *Tess* was no longer filled with shocking ideas and its grammar was outmoded. A modern reader would have trouble getting through more than 15 pages a day. Yet, while I have quoted *Tess* on occasion, I have never repeated Stephen King’s words to serious company.

This points out the paradox of legal writing. We want our prose to be as easy to read as Stephen King’s but be as memorable as a literary classic. It can be done.

Legal writing can be good, even poetic, prose. Consider Justice Brandeis’ language in *Whitney v. California*, 274 U.S. 357,376 (1927)

Fear of serious injury cannot alone justify suppression of free speech and assembly. Men feared
witches and burned women. It is the function of speech
to free men from the bondage of irrational fears.

This is the stuff of poetry. Appellate writing can reach these heights: here is a
paragraph from the appellant's brief in Gideon v. Wainwright, 372 U.S. 335 (1962,
securing an accused person the right to counsel)

An accused person cannot effectively defend himself. The
assistance of counsel is necessary to “due process” and to a
fair trial. Without counsel, the accused cannot possibly
evaluate the lawfulness of his arrest, the validity of the
indictment or information, whether preliminary motions
should be filed, whether a search or seizure has been
lawful, whether a “confession” is admissible, etc. He
cannot determine whether he is responsible for the crime as
charged or a lesser offense, he cannot discuss the
possibilities of pleading to a lesser offense. He cannot
evaluate the grand or petit jury. At the trial he cannot
interpose objections to evidence or cross-examine
witnesses, etc. He is at a loss in the sentencing procedure.
An indigent is almost always in jail, unable to make bail.
He cannot prepare his defense.

Consider just the use of the word ‘cannot’ in this passage: appearing in the
first and last sentence, it binds the flow of words together with a kind of incremental
repetition. Yet, it is always followed by a different verb each time to add variety.
Then, just before the end of the paragraph, ‘cannot’ vanishes only to return in the
last line. It is almost as effective as a sonnet.1

1 Here is a passage from the respondent's brief:

Even if we assume, arguendo, that failure of a court to
appoint counsel in a non-capital case under present
procedural rules, is, per se, a denial of fundamental
justice, it must be conceded that there is always the
possibility that model rules of criminal procedure can
be devised which would afford fair trial even to those
Notice also that there are no legal citations in this fairly lengthy passage: it relies entirely on human experience and simple, direct rhetoric.

The remainder of this essay is in two parts: a short introduction to good legal writing and a guide to writing a persuasive appellate brief. It is not meant to be the last word, but rather only a step on the journey to effective appellate legal writing.

I

TOWARD BETTER LEGAL WRITING

Reader, only you can teach yourself how to write well. This discussion will offer some thoughts for self-education.

Don’t ‘Write Like A Lawyer’: Early on in my law school days I came upon this sentence in an opinion by Cardozo: “Danger invites rescue.” Wagner v. Int’l Ry. Co., 232 N.Y. 176 (1921). This three word sentence was so powerful and descriptive that I never forgot it. Indeed, I have tried to emulate its sheer energy in my writing many times. Yet how would many lawyers attempt to convey the same thought? Probably something like this:

It is respectfully submitted to the Court that a reasonable person, upon seeing the dangerous

who are unable to procure the assistance of counsel.
For instance, a state may simplify its court procedure to such extent as to equalize any differences in the respective abilities of the prosecutor and the average defendant, or it may even find a way to dispense with the need for prosecuting attorneys in some cases.
circumstances, would decide the appropriate action
would be to come to the aid of the individual in peril.

Given a choice between a sentence of three words and one of thirty-three,
which one do you think that would make a better impression on a judge?

Some of the following suggestions may help you write better legal prose.
(They are “suggestions” and not “rules” because there are always exceptions.
Experience will teach you what they are.)

1.) Avoid excess verbiage and cut needless words. Shorten
as well as simplify. After first identifying the parties in a
brief, provide a shortened version of their names:
International Business Machines Inc., hereafter “IBM”.
When drafting a brief on the Kramden’s divorce, write
“Ralph” and “Alice,” not petitioner and respondent.

Judges are human and have a great deal to read. On the
other hand, while brevity is a good thing, do not let it
compromise what you need to say.

2.) Don’t repeat yourself unnecessarily. But do make
subtle incremental changes when necessary to convey
an idea by repetition. Consider the passage from
‘Gideon.’

3.) Use the active, not the passive, voice.

4.) Avoid adverbs. Beginning every sentence with words
like “Incredibly,” “Remarkably,” and “Significantly”
creates a mental fogbank, dulling your prose when you
need to be sharp.

5.) Do not make personal attacks, whether on the other
attorneys or the trial court judge.

6.) Write in the positive, not the negative. Do not use
multiple negatives to highlight an idea.

Find A Literary ‘Mentor’: Every writer needs a model for his or her work.
Even Shakespeare borrowed from others. One way to master the art of legal writing
is to study how the greats did it.

Lincoln, one of the most eloquent Americans, only had about a year of formal
schooling. The rest was self-education. Yet he became one of America’s great prose
stylists, and as an attorney he argued before the Supreme Court of the United States.
Benjamin Cardozo was also a brilliant writer. If you study both men’s works
carefully they will come to your aid when you are at a loss how to express yourself
well.

This writer would now like to champion a personal favorite. Although he
was not a lawyer, few can match George Orwell’s gift\(^2\) for clear expression and plain,
simple prose. Study these writers-Cardozo, Lincoln, and Orwell- and others like
them. Any law librarian can guide you to these riches.

\(^2\) See “Politics and the English Language” in the Bibliography.
II

WRITING THE WINNING BRIEF

Know The Court’s Requirements: The finest advocate in the world will go down to defeat if he or she does not know the Court’s rules, procedures and deadlines.

Know Your Audience: You are writing for a select audience of sophisticated legal minds who appreciate hard work, good writing and detailed analysis. Write accordingly.

Keep Briefs Short: The length of a brief does not impress an appellate judge; content does. As Judge Plager of the federal bench has written:

On average, a judge will have 25 (plus-or-minus) new cases assigned each month. Each case is typically 125 printed pages or typewritten double-spaced pages, whichever it is; 50 for the appellant, 50 for the respondent, 25 for the reply brief. Without even reading a single outside case or even looking at the record, you’re talking about something in the neighborhood of 3,000 to 3,500 typewritten or printed pages per month of material to read.3

Consider this: when the Gettysburg Civil War Cemetery was dedicated in 1863 a famous orator, Edward Everette, spoke for two hours. Today, only very specialized historians recall his name. But everyone remembers another speaker who took up only two minutes that day – Abraham Lincoln.

Adequate Resources: Before you undertake any project, you must make certain you have adequate resources of time and materials to do the job well. A

good example of an unequal battle can be seen in the classic *Gideon’s Trumpet*, the story of the *Gideon v. Wainwright* decision.

Gideon was represented by what is now Arnold & Porter. Abe Fortis, who later served on the Supreme Court himself, supervised the writing of the brief and even spent a weekend in a hotel just to polish a draft. Fortis also took the unusual step of spending a week in the library researching.

In contrast, a single lawyer handled the State of Florida’s case. He wrote his brief on weekends and at night. This hapless counselor also had to drive more than a hundred miles each weekend to a decent law library (electronic research lay in the future). This writer would like to think that Gideon was correct on the merits, but resource allocation may have been a decisive factor.

Know the relevant portions of your record on appeal thoroughly before you begin writing your brief: If you don’t, you’ll waste a lot of time.

Summarize your arguments at the beginning of your brief: Many an over-worked appellate court attorney will be in your debt.

Be a good storyteller: A Former Chief Clerk of the Second Department, James Pelzer, said in an interview that to be a good appellate attorney one has to be a good story teller. However, the art can be learned.

The only way to become a good storyteller is to read extensively, both briefs and works by established masters of fiction and then practice and practice.

A Statement of Facts is not required to set forth all the facts, just the relevant ones. One thus has the opportunity to present the facts, without skirting the negative aspects, in the light most favorable to one’s client.

1. Seize the story (present your client in a positive light)
2. Summarize the Story First
3. Embrace the Ugly
4. Be honest

**Keep Arguments Short and Simple Where Possible:** Many briefs spend pages expounding on well-established points of law that can be stated in a paragraph or two. Nothing in the law is so obvious that it can be passed over in silence, but it is self-defeating to make the simple complex and lengthy.

For example, there can be no summary judgment granted in a New York court if a question of material fact exists. This is hornbook law and the point can be made in a few sentences. Yet I have seen briefs go on for pages reiterating this point.

**Use Only Your Best Arguments:** *Persuading Quickly* explains that the more arguments you make the more suspicious judges will be that your case is not strong.

**Use Legal Citations Judiciously:** One thing we are all taught in law school is how to research the law. The blue and tan books teach us how to cite it. Yet a lawyer can cite too much authority; a smaller number of cases that are right on point will be more effective than page after page of string cites.

Let us consider how Lincoln used legal authority in his briefs: according to *Lawyer Lincoln*, he normally eschewed legal precedent for a solid command of the facts, a strong moral sense of what the law should be and excellent powers of

⁴ The authors are a judge on the Third Circuit Court of Appeals and her one-time clerk.
persuasion and reasoning. However, if the need arose, he was perfectly at home in a law library. When a complex appellate case required he combine both aspects of his abilities, he was truly a force to be reckoned with in an appellate court.

**Answer What Is Asserted Against You:** If you are the appellant, reply to every negative point raised against you by the court below. If you are the respondent, defend yourself against every point raised in your adversary’s brief. However, do not carry this to the extreme of only being on the defensive and forgetting to research and put forth your own ideas.

**Consider the Sensibilities of the Reader:** I have seen briefs with paragraphs that run on for more than a page, and block quotes from cases that go on for nearly as long. These can have a mind-numbing effect. Try to avoid them.

**Check Every Quote And Citation:** This applies to your brief and to your adversary’s. Be especially wary of ellipses in texts and paraphrases of cases.

**Try not to cut and paste:** It can head to disaster. The only time you are justified in using this dangerous practice is if you commit yourself to edit and cite check the material as if you had not written it before.

**Let your ‘Conclusion’ section spell out the relief you seek:** Do not make the court guess what it is.

**The Reply Brief:**

The reply brief should not merely repeat the opening brief; nor should it be used to make new arguments. Instead, a reply brief should respond to the arguments made in the appellee’s brief. . . . The appellant should not leave an argument made by the appellee unanswered in its reply brief.
(Hughey, supra, at 414)

Special hint: Most judges read the reply brief first, so make sure it is self-contained.

Have Your Work Reviewed Independently: It is always good practice to have a second pair of eyes review what you’ve written, especially if it is bound for an appellate court. In particular, if you are writing about a difficult concept of law, why not give your brief to a non-lawyer to read? If he or she can understand it, then the court probably will.

In closing, recall Truman Capote’s words: “Good writing is rewriting.”

III

REFLECTIONS ON ORAL ARGUMENT

Contrary to popular belief, judges do not engage in oral argument because they have an abundance of free time on their hands and they like to ask tough questions of lawyers. Indeed, oral argument is in danger, judges are so over-worked that it is becoming an increasing rarity. This is something that should be fought against wherever possible because I am convinced that oral argument is an important part of convincing judges of the correctness of your position. I don’t think it changes many minds, but I believe that many judges come to the bench undecided about a case and oral argument can tip the scales. It can also be an occasion for a judge to ask a question designed to enlighten a doubting colleague on the bench.

Before the argument: My preparation for oral argument begins when I start writing my brief. I can almost sense what points a judge is going to pick up on. I
deal with this by taking special care to write those sections well and by asking myself how I will cope with them in oral argument.

Before your first argument:  
a) Everybody has a first time arguing. Before that great day, go to the courthouse and watch a few arguments. It will help put you at least and you will get to know procedure. (If you are scheduled to argue at the Court of Appeals and you cannot journey to Albany to sit in, you have the option of watching arguments on their web-site.)

b) Leave yourself plenty of time to get to the courthouse on time before the argument. Allow for traffic, train delays and security checks. In fact, why not take a hotel room nearby the night before?

c) The last thing you should do before your argument is cite check all your key references and make sure they’re still current. If they’re not, be prepared to distinguish them.

d) Reduce your key argument points to one sheet of paper if possible. Have a separate sheet of paper listing all the cases you and your adversary cite, together with a short blurb on each so you can discuss and, if need be, distinguish each one of them.

The argument: Begin your argument with a salutation to the court, introduce yourself, then give the “grabber” to get their attention. Strike a human theme. (Here’s an actual example from a denaturalization proceeding: “The question before the Court is whether a good Nazi can be a good American.”)
Do not go into an oral argument with a script: The first question from a judge will knock you off balance and you’ll never recover. Look upon oral argument as a conversation with judges and your script as a collection of talking points.

How to begin your oral argument: A good generic beginning would be a salutation to the Court, then identify yourself and the party you represent and then in one sentence tell the court: “The order/judgment of the court below should be affirmed/reversed/modified because . . . .”

As has been said, use ‘grabber’ language: Imagine saying this to a court: “We seek reversal of an order of the Family Court that took a six year old away from the only home she has ever known.” Use powerful imagery wherever possible, both in your written and oral presentation.

Never evade a question if you don’t know the answer: We will all get “blindsided” at least once in our careers as oral advocates. Accept it. If you are asked a question and you don’t know the answer ask the judge for a page reference. If that doesn’t help, admit that you don’t know the answer as you stand there but ask the court for permission to submit a written response after the oral argument.

How to conclude an argument: If you finish before the time limit, ask the court if there are any questions. If there are none, say “thank you” and sit down.
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