

Effective Legal Writing: Perspectives from Practitioners and the Courts

Lou Jones Breakfast Club

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PART 1: General Principles from the Practitioner's Perspective

- I. Why should we care about writing well?
 - A. We need to write well to:
 - Effectively represent our clients and
 - Get justice done.
 - B. Our writing skills are our stock in trade.
 - C. Our writing reflects who we are and how we think.
 - D. In our written work, we should strive to be right, fair, clear, brief, and timely.
- II. How to write efficiently: a four-step writing process
 - A. Madman: “creative spirit who generates ideas”
 - During this step, you jot down your ideas in no particular order.
 - Key is simply to brainstorm. Avoid organizing and editing.
 - Keep the judge out to avoid writer's block.
 - This step provides a stress-free way to generate ideas and content.
 - B. Architect: “the planner who ensures that the structure is sound and appealing”
 - During this step, you arrange your ideas.
 - Key is to make sure big, paragraph-level ideas are organized logically and persuasively.

- C. Carpenter: “the builder who makes the corners square and the counters level”
 - During this step, you rough out the draft.
 - Key is to write quickly, filling in the gaps.
 - To do this step effectively, you cannot skip the madman and architect steps.
 - Continue to keep the judge out of the way – do not edit.
 - D. Judge: “who checks to see whether anything has gone wrong.”
 - During this step, you edit to smooth out the product.
 - Check headers, transitions, grammar, punctuation, spelling.
- III. Issue-framing: convey your key issue up front, simply, and clearly
- A. Your biggest challenge: figuring out the main points you need to make
 - B. Present your key issue up front.
 - “In law the right answer usually depends on putting the right question.” *Estate of Rogers v. Comm’r*, 320 U.S. 410, 413 (Frankfurter, J.)
 - “Unfortunately, the judge does not possess the luxury of time for leisurely, detached meditation. You’d better sell the sizzle as soon as possible; the steak can wait.” Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* 142 (1992).
 - C. Your key or “deep” issue is the ultimate question that the court must answer to decide the case your way.
 - D. Make your main point within the first 100 words of your brief.
 - Garner suggests that “every brief should make its primary point within 90 seconds.” Bryan A. Garner, *The Winning Brief* 48 (1999).
 - E. To frame your key issue persuasively:
 - Put it up front;
 - Break it into separate sentences, following a premise, premise, question form;
 - Weave in enough facts to give the issue context; and
 - Write the issue in a way that leads to one inevitable answer – the one you want. *Id.*
 - F. Example:
 - The Constitution of the Republic of Palau entrusts the Senate with the power to make law. The Constitution entrusts the President and the executive branch with the power to

execute law. Should this Court hold that the Senate has standing to sue the President for allegedly overspending the 1998 national budget and thereby give the Senate the executive power – nowhere established in the Palau Constitution – to enforce an already enacted law?

- G. Choose only a few issues, carefully
 - In the trial court, and especially in the court of appeals, limit your issues to those dispositive or key procedural issues that are likeliest to “attract the interest and generate serious consideration” of the judges before whom you appear. Aldisert, *Winning on Appeal* 115.
- H. On appeal, incorporate the standard of review into your statement of the issue.
 - Example: Did the district court clearly err in finding, when imposing a two-level sentencing enhancement for role in the offense under U.S.S.G. § 3B1.1, that Watts had recruited his wife to participate in the money laundering conspiracy?

IV. Document design

- A. Follow court rules in formatting brief.
- B. Choose a readable font.
- C. Avoid all caps and unnecessary underlining, bolding, and italicizing.
- D. Use ample margins.
- E. Avoid full justification. Instead, set text to left flush to:
 - Avoid “rivers” of white space, and
 - Break up the text and help the reader find his place in text.
- F. Use headers to set off introduction, background, facts, argument, and conclusion.
 - Avoid proliferation of roman numerals, letters, and numbers.
 - Instead, consider centering these major section headings and setting all other headings flush left, single space.
- G. State points in argument section as a sentence, as simply as possible.
 - On appeal, incorporate the standard of review into your argument points.

- Example:

ARGUMENT

I. The district court properly exercised its discretion by admitting evidence of mailboxes that Watts had rented as a part of the conspiracy to conceal his identity, his whereabouts, and his criminal proceeds.

H. Write the facts section like a story.

- Include only the relevant facts; eliminate surplusage.
- A chronological discussion of facts is often best. But consider using topic sentences to group events by topic, as follows:

Jones bought the seized van with proceeds of his drug sales. On . . .

Moreover, Jones used that van to transport marijuana at least three times in the past month. Specifically, on June 1, 2008, Jones

- Be accurate. Do not be loose with the facts or in drawing factual inferences.
- Include both the good and the bad relevant facts. Be candid. Your – and your client’s – credibility are at stake at all times and in everything you do.
- Lay out facts objectively – in a neutral, even-handed tone.
- Every important fact should have a citation to the record.
- Consider using subheaders in facts section as well to:
 - Help organize your thoughts;
 - Give readers, especially judges, signposts; and
 - Break up text.
- Consider using schematics, charts, and tables.

V. How to write strong paragraphs

A. Begin with a topic sentence.

- The topic sentence centers the paragraph. All other sentences should serve to support the point of the topic sentence.
- In the argument section, one tried-and-true formula for paragraph structure is the N-E-P-C approach: name it, explain it, prove it, and conclude it. Aldisert, *Winning on Appeal* 29.

- B. Use transition words, as appropriate, between paragraphs and sentences.
 - Transition words move reader from one paragraph to the next.
- C. Use connecting words to clarify and tighten up your text.
 - Types of connecting words:
 - Pointing words – this, that, these, and those
 - Echo links – words or phrases echoing or referencing a previous idea – that drug conspiracy with Smith and Jones
 - Explicit connectors – transition words – too, also, moreover, therefore, hence.
 - Examples of explicit connectors:

Purpose	Words
Adding a point	additionally, in addition, further, moreover, likewise, also, too
Giving an example	for example, for instance, specifically
Introducing a cause	because, since, when
Introducing a result	as a result, thus, therefore, accordingly, hence, then
Contrasting	but, instead, yet, however, still, nevertheless, nonetheless,
Pressing a point	in fact, indeed, of course, without exception
Conceding a point	granted, of course, to be sure, admittedly, though, even though, even if
Summarizing a point	In short, in sum, in brief, to summarize, to conclude, consequently, therefore, hence
Sequencing ideas	First, second, etc.

VI. How to write strong sentences

- A. Brevity is beauty.
 - Short, clear sentences:
 - Lay your thoughts bare;
 - Force you to clarify your thoughts; and
 - Show respect for the reader and the value of her time.

- Empathy for your reader is a cornerstone of good writing.
 - B. Generally, try to convey one major thought per sentence.
 - Subject-predicate construction is good. Too many clauses can make a sentence hard to understand.
 - Omit unnecessary words.
 - Try to have sentences average 20 words.
 - C. Favor active voice over passive.
 - Passive voice = be-verb + past participle (verb ending in -ed)
 - Passive: “The property was purchased with drug proceeds by Jones.”
 - Acting: “Jones brought that property with drug proceeds.”
 - Active voice:
 - requires fewer words,
 - is easier to read and understand – the construction is chronological, and
 - is punchier.
 - D. Use parallel phrases for parallel ideas.
 - State related ideas using related phrasing:
 - Bad example: The defendant used the proceeds of her fraud scheme to buy a house and she also used those proceeds to invest in a time share and to make clothing purchases.
 - Example: The defendant used the proceeds of her fraud scheme to buy a house, a time share, and clothing.
 - E. Use bullet points where appropriate.
- VII. Choosing effective words
- A. Use simple, descriptive words. Accurate nouns and clear verbs eliminate need for superfluous adjectives and adverbs.
 - B. Favor short over long words.
 - C. Avoid wordy phrases.
 - Beware especially phrases containing the word “of.” They can often be shortened.

– Examples:

Wordy phrase	Plain English
a number of	many, several
at the time when	when
hot water heater	water heater
in the event that	if
notwithstanding the fact that	although

D. Turn “-ion” nouns into verbs

Wordy noun form	Verb form
made a motion for	moved

E. Avoid legalisms, acronyms, and jargon

Legalism	Plain English
prior to	before
said	the, this, that
subsequent to	after
thereafter	later

F. Refer to people and entities by name.

- Avoid legal titles like “the Defendant.” Use names instead.
- Except for confidential informants and victims.

G. Avoid unnecessary parenthetical shorthand names.

H. Be clear when using pronouns such as “he” and “she.” If you cannot easily tell which person the pronoun is referencing, use a noun instead.

I. Use “that” and “which” correctly:

- Use “that” restrictively and “which” nonrestrictively.
 - Example 1: The police stopped all the cars that were red. Here, “that” has a restrictive meaning – namely, that the police stopped not all the cars but only the red cars.

- Example 2: The police stopped all the cars, which were red. Here, “which” has a nonrestrictive meaning – namely, that the police stopped all the cars and all happened to be red.
- Choosing the right word matters because the meaning of the sentence might depend on it. Consider, for example: “All the cases which were decided after the 2000 amendments support this position.” What does this mean?
- If you see a “which” without a comma before it, 90% of the time it should be a “that.” Garner, *The Winning Brief* 210.
 - Place these pronouns next to the noun that they modify.

VIII. Review and proofread.

- A. Use a phased review process. First, read for understanding.
- B. Second, make large structural, header, and paragraph-level edits.
- C. Third, make sentence-level edits.
 - Revise, edit, or delete passive-voice constructions, wordy phrases, poor grammar, spelling errors, and typos.
 - Tighten up text.
- D. Proof the brief one last time.
 - Have your co-counsel or a trusted colleague review the last draft of the brief before you file it.

IX. How to improve your writing

- Read good books.
- Read good books about writing and, specifically, legal writing.¹
- Read examples of good briefs.
- Own a dictionary, thesaurus, and writing style manual. Use them.
- Practice, practice, practice – thoughtfully.

¹ See, e.g., Bryan A. Garner, *The Redbook: A Manual on Legal Style* (2006); Stephen Armstrong & Timothy Terrell, *Thinking Like a Writer: A Lawyer’s Guide to Effective Writing and Editing* (2003); Bryan A. Garner, *The Elements of Legal Style* (2002); Bryan A. Garner, *Legal Writing in Plain English* (2001); Ruggero J. Aldisert, *Winning on Appeal: Better Briefs and Oral Argument* (1992).

X. Conclusion

- Drafting timely and effective persuasive documents is one of our main jobs as litigators.
- Learn the applicable facts and law and make the complex simple and clear so that your judge or reader can readily understand why your position is right and righteous.

PART 2: General Principles from the Court's Perspective

I. Briefs.

A. Why should lawyers care about writing well?

- Lawyers need to write well to:
 - Effectively present the facts to the Court.
 - Establish credibility.

B. Starting off on the right foot.

- The court will never be as intimately familiar with the case as the lawyers are—the best briefs try to get the court up to speed in as efficient a manner as possible.
- Efficiency should not come at the expense of clarity.
- Before getting into the argument section of the brief, the brief needs to have.
 - Procedural posture—who are the parties and what has gone on so far that are they before this court.
 - Facts—what are the basic facts the court needs to know to resolve the legal dispute.
 - Issues—what legal issues does the court have to resolve.

C. Know your audience.

- Know who you are writing for; boil down esoteric terms and jargon.
 - *See* Judge Posner - *Ind. Lumbermens Mut. Ins. Co. v. Reinsurance Results, Inc.*, 513 F.3d 652, 658 (7th Cir. 2008),

But their briefs, although well written and professionally competent, were difficult for us judges to understand because of the density of the reinsurance jargon in them. There is nothing wrong with a specialized vocabulary--for use by specialists. Federal district and circuit judges, ... are generalists. ... Lawyers should understand the judges' limited knowledge of specialized fields and choose their vocabulary accordingly. Every esoteric term used by the reinsurance industry has a counterpart in ordinary English, as we hope this opinion has

demonstrated. *The able lawyers who briefed and argued this case could have saved us some work and presented their positions more effectively had they done the translations from reinsurance into everyday English themselves.*

(emphasis supplied)

- D. Making your case: finding organization and focus.
 - Too often lawyers use the “garbage dump” approach to litigation and love to provide a slew of arguments to judges, leaving the court to sort it out. Do this at your peril.
 - Pick your best arguments, jettison the rest. Note Justice O’Connor’s advice: “The process of ‘winnowing out weaker arguments . . . and focusing on those more likely to prevail . . . is the hallmark of effective . . . advocacy.’ ” *Smith v. Murray*, 477 U.S. 527, 536 (1986).
 - Make sure each section of the brief flows into the next section. Use transition words and sentences that direct the reader to where the writer wants to go.
 - E. Get the little stuff right.
 - Citations need to be uniform.
 - Know or check the local rules.
 - Be sure that whatever is cited to is easily accessible to the court – label exhibits on CM/ECF, provide entire transcripts and depositions.
 - Proof, proof, proof. A grammar mistake or a typo kills your credibility with the court.
 - F. But, don’t forget the big picture.
 - The best briefs discuss *why* ruling for your party aligns with the rationale behind the given law.
- II. Motions & Objections.
- A. The principles of good legal writing apply to Motions & Objections.
 - B. Explain why you should get what you are asking for.
 - If you're moving to reopen a case for a debtor who blew the first installment fee payment, use one sentence to explain why the debtor blew it.

- If you are objecting to a motion to modify a plan, explain the problem.
- Include statutory citations. What statute or section of the Bankruptcy Code entitles you to the relief sought?
- Do away with meaningless anachronisms:
 - Don't say: "Now comes above described debtor, Jim Smith, having been advised in the premises and herein otherwise . . ."
 - Just say, "Debtor Jim Smith moves the Court for an order continuing the automatic stay beyond 30 days from the petition date. In support of this motion, the debtor states that . . ."
- Explain what you would like the court to do. Do you want the court to grant relief from the stay? Do you want the court to leave the stay in place but modify it? Do you want the court to disallow the claim in its entirety, or allow it as unsecured, or allow it but at a different interest rate? Imagine the court ruling in your favor at the hearing—put in the last paragraph the words you would like to hear come out of the judge's mouth.
- Be wary of forms. If a form has been used, are the names of the parties correct? Is the case number correct? Are there superfluous sentences that do not apply to this motion?

III. Proposed Orders.

- A. Foremost, remember you are asking the judge to place his or her name on the Order. Typos and inaccuracies waste the court's time and your time.
- Check the little things:
 - Does the caption include the correct case number, chapter, and names of the parties? Are the hashmarks (####) included at the end of the Order? Does the formatting comply with local rules?
- B. Orders for default judgment should state that a hearing was held and evidence was given. Simply stating the court grants the motion for default judgment is not sufficient.
- C. If required, has the other party been given an opportunity to review the proposed order?
- D. Does the order make sense and reflect what happened? For example, if the order states "after notice and hearing . . .," was there actually a hearing?
- E. Do not create blank spaces in the order for dates or signatures to be filled in. Do not include signature lines, or state "dated."

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