

40 More Writing Hacks for Appellate Attorneys

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I served as a career law clerk for a legendary federal appellate judge. A few years ago in Chicago, I spoke with Wyatt Mick toward the end of his long and accomplished career. He clerked for a federal appellate judge in the 1950s.

Wyatt described the horrors of the days before page limits for appellate briefs. One case's briefs — never mind the appendixes — might fill a box! So Wyatt and his judge waded through reams of verbiage, page after unhelpful page. It was a disaster. Wyatt extolled brevity's virtues.

All judges agree with Wyatt. Chief Justice John G. Roberts encourages brevity:

I have yet to put down a brief and say, "I wish that had been longer." So while I enjoy it, there isn't a judge alive who won't say the same thing. Almost every brief I've read could be shorter.¹

Did you hear that? Even when the Chief enjoys your brief, he doesn't want more of it. A judge probably named court filings "briefs" to give attorneys a hint.

We have come a long way since Wyatt's clerking days. Page limits and the plain-language revolution have increased access to justice. But every new brief is a chance for more progress. Legal

¹ Bryan A. Garner's interview of Chief Justice Roberts, *Interviews with United States Supreme Court Justices: Chief Justice John G. Roberts Jr.*, 13 *Scribes J. Legal Writing* 5, 35 (2010).

writing should be “terse, elegant, forcible and convincing.”² Given the warm reception for *40 Writing Hacks for Appellate Attorneys*, 19 *Scribes J. Legal Writing* 49 (2020),³ I humbly offer 40 more. As in the original 40, I slightly altered the briefs to protect the guilty — although the briefs are all in the public record.

41. Check your caption. Don’t assume that the district court or opposing counsel got every detail of the caption right.
42. Think hard about your jurisdictional statement. We will make you redo it if it’s wrong. Watch for common mistakes, like failing to identify the citizenship of every member of a limited-liability company or a partnership.
43. In your statement-of-issues section, you don’t have to limit each issue to one sentence. Sometimes a one-sentence issue statement is a convoluted anacoluthon with double negatives and twisted grammar. Avoid that by using multiple short sentences.

Compare:

Did the district court err where it violated the Mandatory Victim Restitution Act, which limits restitution to the actual losses caused by the specific conduct underlying the offense of conviction, by ordering restitution for losses caused by uncharged conduct, but not adequately explaining its

² “He tried to set an example in opinion writing. Drafts of opinions . . . show what a painstaking draftsman he was. . . . Opinions resulted which were terse, yet clear and forceful. Chase-hater that he became, Rutherford B. Hayes characterized Chase’s writing as ‘terse, elegant, forcible and convincing.’” David F. Hughes, *Salmon P. Chase: Chief Justice*, 18 *Vand. L. Rev.* 569, 604 (1965) (citations omitted).

³ See Ellie Margolis, *Visual Legal Writing: A Bibliography*, 18 *Legal Comm’n & Rhetoric: JALWD* 195, 203 (2021) (citing the article as part of a group that is “particularly useful”).

reasoning or referencing evidentiary support, such that this Court should remand this case for resentencing?

To:

The Mandatory Victim Restitution Act limits restitution to actual losses caused by the specific conduct underlying the convicted offense. Yet the district court ordered restitution for losses caused by uncharged conduct. And the district court did not explain its reasoning or reference evidentiary support. Do these errors require remand for resentencing?

44. Spare us long wind-ups. Get to the point. If you're on appeal, the case is big. Your opponent's winning run is on base. So you must deliver straight to the plate from the stretch.
45. For brevity's sake, be brief.

I saw this terrible attempt at brevity:

For Brevity's sake, Plaintiffs, Thompson and Jonas, will generally be collectively referred to only as "Plaintiffs" and, where necessary, will be individually referred to by their last names only.

Spare us that warning. We don't need it. And why in the world would you capitalize *Brevity* here?

46. Don't say that the order you're appealing is "regrettable." Just say why it is erroneous. We know you regret it.
47. I said this last time. Explain the broad significance of your case. I recently read a brief about a police encounter that some might consider trivial. But the brief had a good, simple sentence explaining why the case is important, like this:

These facts raise important issues about the limits of the community-caretaker exception to the Fourth Amendment's warrant and probable cause requirements when police interfere with citizens who are freely going about their lives and engaging in no criminal or unlawful conduct.

And the brief had another good paragraph like this:

Even after seeing there was no emergency, observing that the Smiths were fine, and hearing them decline assistance, the police continued to detain them. This raises a fundamental question. In a free society, who gets to decide what the Smiths' welfare requires?

48. If you are appealing and your opponent has a strong point, you must mention it and try to refute it in your opening brief. This takes some sting out of your opponent's point and frames the issue favorably for you. We start thinking about how you might overcome the point that you prepared us to encounter. But if you don't mention it, we will question your credibility when we read about it for the first time in the response.
49. Look for ways to turn the weak point of your argument into a strength.
50. In certain cases, why not give the court three courtesy binders of the most important statutes and cases, printed clearly on both sides of the pages, tabbed and highlighted? One binder for each judge on a panel of three. No rule requires this. But no rule forbids it, either. Ask first. And give an identical binder to opposing counsel with the same tabs and highlighting, to avoid *ex parte* communication.
51. You've heard the advice that appellate lawyers should think of their audience as smart generalists. That's fine. But don't be afraid to think of your audience as first-year law students when the issues are nuanced or complicated. Make it simple.
52. Watch out for tricks that words play. I recently saw text like this:

Nobody testified to hearing a gunshot. Smith and Jones affirmatively testified they did not.

Affirmatively is a stumbling block here, suggesting a positive confirmation. A better word might be *expressly* or *explicitly*. And consider whether the sentence would punch harder without an adverb. Adverbs are boxing gloves. Verbs are bare knuckles.

53. Avoid needlessly weird versions of normal words.

Don't write: "That is not a fair presentment of the applicable law." Write *presentation* instead.

Or maybe write: "That does not fairly present the law."

Better: "That is not the law."

Don't write: "The Wall Street Journal's reportage was not protected by *New York Times v. Sullivan*." When was the last time you read any reportage? Just say *reporting*. Or maybe *article*.

Don't write: "The district court's assignation of two points for his prior conviction increased the sentence." Write *assignment of two points*.

An occasional weird word can be wonderful, like *anacoluthon*. But *anacoluthon* is an actual weird word, not just a weird version of a normal, better word.

54. Eliminate gibberish and roundabout phrasing. Do you think you're showing off? You're not. I recently suffered through text like this:

That Press Release publication occurred on January 7, 2021, a copy of which was thereafter archived and maintained indefinitely on the corporation's official website as a component of the corporation's data, publicly available upon an internet inquiry search.

Instead, try:

The corporation issued a press release on January 7, 2021, and put the statement on its website for anyone to see.

And I recently read text like this:

Email correspondence occurred concerning whether or not the quotes which were attributed to him were, indeed, an accurate account of the statements made by him.

Instead, try:

The parties emailed each other about whether the quotes were accurate.

55. “Begg the question” does not mean what many attorneys think it means. “Rhetoric” does not mean what many attorneys think it means.
56. Be wary of too many numbers in the same sentence. I recently saw text like this — no exaggeration:

The “Basin Main Loader Attachment” pricing page, effective July 1, 2020 [Doc. 84 at 97, Dr. Alcarez dep. exh. 7, Appendix A-19] lists Piece Item Number 3184994-2a2, a 64" Main Load Basin, with a two-side heaped maximum load capacity of 10.1 cu.ft, weighing 318 lbs., costing \$527.00.

This sentence has many other problems. But fixing the number-jumble would go a long way to solving them, too. One beauty of good style is that fixing one problem often solves others.

57. Don’t spell out a number and then parenthesize its Arabic numeral. We don’t need both versions. You’re not writing a check. (Not yet, anyway.⁴) I saw text like this recently:

⁴ See *McCurry v. Kenco Logistics Servs.*, 942 F.3d 783, 786 (7th Cir. 2019) (This “monstrosity of an appellate brief is incoherent, so we order her lawyer . . . to

Midland Furniture operates fifty-seven (57) furniture stores in Illinois.

58. Don't write *utilize* when *use* works just as well.
59. Hunt the word *of* like a hawk and cut it. It often signifies wordiness. Often 's is better.
60. Don't write *with the goal of* when *to* will do.
61. Don't say: "Alpha filed a motion for summary judgment." Say: "Alpha moved for summary judgment."
62. Don't write *said* unless someone said something.
63. Don't be afraid to use Latin. But use it well. *Res ipsa loquitur* and *caveat emptor* and *mens rea* have purchase and power. These phrases can be better than their English versions. But don't say *nemo bis punitur pro eodem delicto* when *double jeopardy* will do.
64. The problem with *inter alia* is not that it's Latin, but that it's misused at worst and wordy at best. *Inter alia* means "among other things." But lawyers often use it instead of *therein*, replacing one worn word with an inapt ancient phrase.
65. Here's an example of good writing I saw about a surprise and a failure to disclose:

show cause why he should not be sanctioned or otherwise disciplined . . ."); see also Heidi K. Brown, *Breaking Bad Briefs*, 41 J. Legal Pro. 259, 287 (2017) ("Though some courts are reluctant to penalize clients for the poor briefing of their counsel, some judges indeed have imposed monetary sanctions directly against the attorneys (and sometimes jointly and severally against the client) for submitting bad briefs.").

And this new theory was presented to the defense at the same time it was presented to the jury — on the fourth day of trial.

66. Here's an example of good writing I saw about bad writing:

The applications and orders were a mishmash of inapplicable federal statutes and concepts. They were gobbledygook. They were unintelligible by excessive use of abstruse and inapplicable technical terms. What is clear is that they were not *search warrants* based on particularized and individualized probable cause, as was required.

67. Here's a good, punchy sentence I recently read:

InterGenetix is so concerned with arguing why this Court should ignore the plain language of the contract that it ignores what the contract actually says.

68. Hold the line on the Oxford comma.

69. Keep most of your sentences short and crisp. But vary their lengths.

70. When writing in general terms, opt for the singular where possible.

Compare these:

Defendants charged with crimes have rights to jury trials.

A defendant charged with a crime has a right to a jury trial.

71. We recently asked parties in a case to address a bankruptcy's effect on the appeal. One party concluded its response with text like this:

Subsequent to the Bankruptcy Court's disposition of the Agreed Motion, the parties will file its order with this Court.

As Mozart muses in the film *Amadeus*, while reworking a march by Salieri *in the king's presence*: “That doesn’t really work, does it? Did you try . . . ? Shouldn’t it be a bit more . . . ? Or this? This. Yes. Better? What do you think?”

Did you try:

After the Bankruptcy Court rules, the parties will file the order with the Second Circuit.

72. The other party in that case concluded its response with text like this:

ABC will provide this Court with notice of a ruling on the agreed motion promptly upon its entry by the Bankruptcy Court.

Shouldn’t it be a bit more:

ABC will notify this Court once the Bankruptcy Court rules.

73. Mind your lines.

Hyphen: -

A hyphen links words in a phrasal adjective:

Conflict-of-laws analysis, statute-of-limitations defense.

Exception: Don’t hyphenate otherwise-unhyphenated proper nouns in a phrasal adjective.

The law is from the Civil War era.

Exception: Don’t use a hyphen if the phrasal adjective begins with *very* or an adverb ending in *-ly*:

Police found illegally purchased guns in the car.

Exception to exception: Use hyphens in a phrasal adjective longer than two words even if it begins with an adverb ending in *-ly*.

Hyphens can also link compound numbers like *ninety-nine* and compound nouns like *attorneys-at-law*. (But why would you spell all that out? Just write *99 attorneys*.)

Hyphens can also link statutory titles to chapters to sections to subsections:

Ind. Code § 35-42-5-1 and 720 ILCS 5/18-2.

En-Dash: —

An en-dash gives a range, such as a page range:

United States v. Garcia, 948 F.3d 789, 804–05 (7th Cir. 2020).

An en-dash also links equals:

The McCain–Feingold Act.

Em-Dash: —

An em-dash emphasizes a phrase within a sentence:

The notion that every violation of law should be prosecuted, including — indeed, *especially* — every violation by those in high places, is an attractive one, and it would be risky to argue in an election campaign that that is not an absolutely overriding value.

Morrison v. Olson, 487 U.S. 654, 732–33 (1988) (Scalia, J., dissenting).

Note in this next example how the parentheses bury their contents while the em-dashes highlight theirs:

After some speculative discussion (probably irrelevant here) over whether the Jets are depraved because they are deprived, Tony and the other gang members break off further

conversation with the statement — not entirely coherent, but evidently intended to be rude — “Gee, Officer Krupke, krup you.”

City of Chicago v. Morales, 527 U.S. 41, 82 (1999) (Scalia, J., dissenting).

AWOL Elements

Here’s a sentence missing a hyphen and an en-dash:

The legal compliance officer reported on the 2021-2022 fiscal year.

We’re left wondering what crimes some illegal compliance officer might have committed on this strange new planet orbiting two suns and measuring time by years and subyears.

Memory Hacks

An en-dash is roughly as wide as the letter N. Use an en-dash for a Number raNge.

An em-dash is roughly as wide as the letter M. Use an em-dash for eMphasis.

N

–

M

—

74. Be careful. Don’t overdo it. But sometimes poetic phrasing, or a literary allusion, or a captivating metaphor, or a note of irony can compel. After all, law lives in language and proceeds by analogies. Where would we be without the cat’s paw theory of liability, castle doctrine, ostrich instruction, squatter’s rights, eggshell plaintiff, fruit of the poisonous tree, mailbox rule, unclean hands, one-bite rule, meeting of the minds, mirror-image rule, Platonic golf, pure applesauce,

jiggery-pokery, delta smelt, or World-Wide Volkswagen and International Shoe arguing that they lack sufficient minimum contacts with a forum?

Where would we be, literally, without the equal-footing doctrine telling us who owns the lake and the beach?

Consider these examples:

If there is any fixed star in our constitutional constellation, it is that no official, high or petty, can prescribe what shall be orthodox in politics, nationalism, religion, or other matters of opinion or force citizens to confess by word or act their faith therein.

W. Va. State Bd. of Educ. v. Barnette, 319 U.S. 624, 642 (1943).

If it were impossible for individual human beings (or groups of human beings) to act autonomously in effective pursuit of a common goal, the game of soccer would not exist.

United States v. Virginia, 518 U.S. 515, 584 (1996) (Scalia, J., dissenting).

I find it a sufficient embarrassment that our Establishment Clause jurisprudence regarding holiday displays has come to require scrutiny more commonly associated with interior decorators than with the judiciary.

Lee v. Weisman, 505 U.S. 577, 636 (1992) (Scalia, J., dissenting).

Throwing out preclearance when it has worked and is continuing to work to stop discriminatory changes is like throwing away your umbrella in a rainstorm because you are not getting wet.

Shelby Cnty. v. Holder, 570 U.S. 529, 590 (2013) (Ginsburg, J., dissenting).

75. Don't be easily satisfied with your writing. Be vigilant. Look for ways to improve each sentence.⁵
76. Don't throw away your shot at a reply.⁶ Use your reply to address the response directly. Don't regurgitate your opening brief. Make your reply sharp. In the exceedingly rare case in which your opening brief is amazing, and your opponent's response lands no punches, consider opting not to file a reply.
77. I know you're busy. But take breaks and read appellate briefs by other successful attorneys to glean inspiration and tricks.
78. When you think you've finished writing a brief, try to cut something from each paragraph so that the entire brief is two pages shorter. This will spare us two superfluous pages. But more importantly, it will improve all your writing.
79. When you think you've finished writing a brief, read it again and again. Read it again for structure. Read it again for style. Read it again for errors. Edit, edit, edit. If possible, sit on it for a couple of days and then read and edit it again. Then ask someone you trust to read and critique it before you file it. I know that time is money. But you should budget for editing. You've already spent much time, money, and effort writing your brief. Why not take the extra step of editing it

⁵ "A good legal brief, penned methodically and mindfully, in quietude, word-by-word by a thoughtful legal writer can change minds." Brown, 41 J. Legal Pro. at 260.

⁶ See Professor Mark Cooney, Speaker, "Effective Reply Briefs in Appellate Practice: Strategic Uses, Best Practices for Drafting," Strafford National Webinar, Dec. 17, 2019, <https://www.straffordpub.com/products/effective-reply-briefs-in-appellate-practice-strategic-uses-best-practices-for-drafting-2019-12-17> (containing an outline of the author's talk).

thoroughly? It's worth it. There is no good writing. Only good rewriting.⁷

80. Bill for the time you spend writing, rewriting, and editing. If your client balks, cite this article. Tell your client that you heard from someone on the inside that great legal writing matters. It is worth the time and effort. It pays for itself. Great writing increases the odds of winning. Terrible writing decreases them.⁸ And if your client doesn't believe me, maybe it will believe the Chief:

The quality of briefs varies greatly. We get some excellent briefs; we get a lot of very, very good briefs. And there are some where the first thing you can tell in many of them is that the lawyer really hasn't spent a lot of time on it You can tell that if they'd gone through a couple more drafts, it would be more effective We depend heavily on the lawyers. Our chances of getting a case right improve to the extent the lawyers do a better job. . . . You don't have a lot of confidence in the substance if the writing is bad.⁹

⁷ "Good writing is rewriting." Truman Capote, remark to Judy Green, in Julie Baumgold, *Unanswered Prayers, Part II: The Magical Drape*, New York, Nov. 26, 1984, at 60, *quoted in Quotationary* at 955 (Leonard Roy Frank ed., 2001). See also Melissa N. Henke, *Polishing Makes Perfect . . . Or Maybe Not*, Bench & Bar, Nov.–Dec. 2016, at 32 ("While proofreading is time-consuming, a polished document is important for your credibility as a writer and lawyer.").

⁸ "Judges are not like pigs, hunting for truffles buried in briefs." *United States v. Dunkel*, 927 F.2d 955, 956 (7th Cir. 1991). "Since appellate judges are not haruspices, they are unable to decide cases by reading goats' entrails. They instead must rely on lawyers and litigants to submit briefs that present suitably developed argumentation with appropriate citations to applicable precedents and to the record below." *Reyes-Garcia v. Rodriguez & Del Valle, Inc.*, 82 F.3d 11, 12 (1st Cir. 1996).

⁹ Garner's interview of Chief Justice Roberts, 13 *Scribes J. Legal Writing* at 6.