

Four Tips for Effective Brief Writing

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Litigators live and die by their legal writing, but even seasoned litigators sometimes write weak or lackluster briefs. Here are four tips to improve your brief quality.

Tip #1: Don't Use Excess Words

First, don't use too many words, which increase mental load on the reader. Even brilliant legal writers can fall into the trap of larding their sentences. Consider this famous passage from Supreme Court Justice Antonin Scalia's dissent in *Morrison v. Olson*:

Frequently an issue of this sort will come before the Court clad, so to speak, in sheep's clothing: the potential of the asserted principle to effect important change in the equilibrium of power is not immediately evident, and must be discerned by a careful and perceptive analysis. But this wolf comes as a wolf.¹

The final sentence of this passage is a paragon of vivid judicial prose. But the preceding sentence is clunky at best, mostly because it's far longer than it needs to be. Why add the "so to speak" qualifier before the sheep's-clothing metaphor? Everyone already knows that he's using a metaphor. And why cram 29 words between the sheep's-clothing metaphor and the "wolf" denouement? Those contrasting metaphors play off each other. They would be more powerful if placed closer together, so that the passage read something like this: "Frequently an issue of

¹ 487 U.S. 654, 699 (1988) (Scalia, J., dissenting).

this sort will come before the Court clad in sheep's clothing: its potential to change the balance of power is not immediately evident. But this wolf comes as a wolf."

To avoid using excess words, be wary of metaphors and similes. If you deploy these literary devices, make sure they're powerful and worth the extra words. Many legal writers fail to follow this tip, instead using metaphors or similes as rhetorical flourishes. Even worse, some writers use metaphors or similes that distract, confuse, or weaken the prose. For example, in the first case I ever worked on as a judicial clerk, the appellant began his reply brief by saying, "Like star-thistles on a hillside, [appellee's] brief is littered with irrelevant and misleading points." Huh? What in the world is a star-thistle? Turns out that it's a rather pretty European plant that's an invasive species in the United States. But I really didn't need the botany teaser or the internet rabbit hole. If you're going to spend words on a metaphor or simile, make sure it's one that your readers will instantly understand.

Tip #2: Watch Out for Double Negatives

Double or triple negatives also bog down writing and increase the reader's mental load. Years ago, in a contract case, I came across this stinker of a sentence from opposing counsel: "Plaintiff fails to show that no reasonable jury could find that the contract claim was inherently unknowable." Far better if the writer had teased out some of the negatives, so that the passage read: "A reasonable jury could find that the contract claim was inherently unknowable. Plaintiff does not rebut this conclusion."

Judges can fall into the same double-negative trap. I can't count the number of times I've seen a judicial opinion say, "We

are not unmindful of [X].” Far simpler if each of these passages had instead read, “We recognize [X].”

Thoughtfulness is the watchword here. Occasionally a double negative really will be the classiest or clearest way to make your point. You don’t need to religiously avoid all double negatives. But you should at least *recognize* when you’re using a double negative and avoid it unless you’ve made a reasoned decision that it’s the best way to express yourself.

Tip #3: Write for the Judge, Not for Opposing Counsel

Because lawyers litigate against opposing counsel, it’s tempting to view opposing counsel as the target audience of your briefs. But this is a mistake. Your target audience is the judge.

Remembering this point is perhaps the best way to modulate the tone of your briefs. Litigation can be heated, and it’s easy to let your briefs get too personal or combative if you view them as missives to opposing counsel. It’s easy to accuse opposing counsel of “willfully misrepresenting the record,” being “disingenuous,” and so on. But the judge will rarely appreciate this sort of rhetoric, so steering away from it will benefit you. Focus instead on what will persuade the judge. Even if opposing counsel takes potshots at you, try not to respond in kind. A good rule of thumb: if your first thought upon writing a sentence is “wish I could see opposing counsel’s face when they read *that* one!,” you’re probably writing for the wrong audience.

Recently, as a DOJ lawyer, I was faced with opposing counsel who sometimes seemed more interested in attacking us than making his actual legal points. We were trying to repatriate \$40 million to the Philippines under U.S. treaty obligations, and opposing counsel represented a private claimant to the funds. He peppered his briefs with accusations against us as

borderline traitors who were carrying water for the Philippine government. It was clear that he was venting his dislike for us more than trying to persuade the court through these remarks, because the commentary he put in his briefs was identical to his invective in emails and telephone calls to us. By putting the focus on us instead of the actual legal issues in the case, he did his client a disservice and significantly weakened his briefs.

Tip #4: Write Your Appellee's Brief First

My last tip is an oddball, but I swear by it: whenever you're the appellee, draft your appellee's brief before you see the appellant's opening brief. The appellant's brief frames the facts and arguments to favor their side. If you read their brief before drafting your own, it's easy to subconsciously adopt their structure and find yourself playing defense against their points. By contrast, drafting your appellee's brief first lets you present the case in your favor, undistracted by the appellant's framing.

Besides, by the time an appeal begins, the facts and legal arguments have usually been litigated at the trial-court level. There is usually no big surprise about what facts the appellant will raise or what legal arguments they will make. So you have considerable ability to "respond" to their brief before you even see it by making strong educated guesses about what they'll say. And after you see what the appellant actually filed, you'll probably have to change your draft very little. Give it a try; you'll be pleasantly surprised by how well it works.

Note on Contributor

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