

ENHANCING APPELLATE BRIEFS THROUGH PURPOSEFUL SENTENCES

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First, thank you for reading this manuscript. Writing is central to what we do, and I enjoy thinking about what makes writing effective. You're indulging my interests just by reading this manuscript; I'm personally grateful.

This manuscript has a three-part structure. The first part introduces the concept of purposeful sentences—including what I mean by this term and why I think it aids reader comprehension. The second part offers five strategies for crafting purposeful sentences. The third part speculates about the reasons that might impede the use of purposeful sentences.

One more preliminary but important note: I'm eager for your feedback. I don't think that the points in this manuscript constitute the best or only approach to effective writing. I would very much like to hear about alternative approaches. My e-mail address is stephen.feldman@elliswinters.com. Please consider this an open invitation to begin a dialogue about the features of effective writing.

Part 1: What are purposeful sentences, and why do they matter?

Here is my thesis: The reader of an appellate brief (or any document) will more likely understand what the writer is trying to convey if the writer assigns a purpose to each sentence in the brief.

This thesis, I know, sounds obvious. Think, though, about most of the briefs that you read. How often do you understand the purpose of each sentence? In my experience, a lot of well-intentioned sentences leave the reader confused.

Here are two examples to show the point. These examples are modified from actual appellate briefs.

Example No. 1

This is the first sentence in an appellate brief’s fact section:

There are thirty-one (31) townhouses located at Wedgeworth Cliffs in Sangamon County, with each building comprised of three (3) townhouse units per building, for a total of ninety-three (93) townhouse units building during the period in and about 2004 through and including 2007 (“Wedgeworth Cliffs Townhouses”).

This sentence has at least five concepts: (1) Wedgeworth Cliffs is a townhouse development; (2) Wedgeworth Cliffs is located in Sangamon County; (3) Wedgeworth Cliffs has thirty-one townhouses; (4) Wedgeworth Cliffs has ninety-three townhouse units; and (5) these facts apply to the period 2004 through 2007. Which concept should the reader understand to be the most important? One? More than one? All of them?

The position of this sentence—again, it’s the first sentence in the fact section—is significant. The reader wants to know, right off the bat, what the case is about. This case is about townhouses, probably, but that’s as much as the reader can discern. A reader who can’t tell what the case might be about after the first sentence probably won’t be enthused to read the rest of the brief.

Example No. 2

This is the first sentence in an appellate brief’s argument section:

Faced with overwhelming evidence of its statutory violations, appellant Red Coach Inn mischaracterizes the facts in order to attack Judge Langfelder’s multiple legal rulings.

Let’s do the same exercise that we did with the first example. First, how many concepts did the writer put in this sentence? I count five: (1) Red Coach Inn’s statutory violations;

(2) the particular evidence of those violations; (3) the quantum of evidence of those violations; (4) the mischaracterizations of the facts; or (5) Judge Langfelder’s legal rulings.

This sentence, as the first sentence in the argument section, also has special importance. The reader expects this sentence to convey, or start to convey, the brief’s central contentions. This is true even if the reader has already studied the questions presented and the facts. The writer, moreover, should not assume that the reader has carefully studied those sections. The reader might jump into the brief at the argument section.

My goal here is not to poo-poo these sentences as being “bad,” but to suggest that, in each case, the writer could have done more to tell the reader what the reader was supposed to get out of each sentence. If the reader doesn’t understand what’s important in a brief, after all, the brief has not served its purpose.

Part 2: Five strategies for purposeful sentences

If you’re still reading this manuscript, you might have bought into the idea that a reader wants to know the important point in each sentence. The next question: What can the writer do to help the reader understand the important point?

There might be a lot of good answers. I offer five ideas here.

A. Utilize stress positions.

The best advice that I’ve read about how to aid reader comprehension comes from Duke University professor George Gopen. Professor Gopen preaches about the “reader expectation” model of writing.

According to Professor Gopen, empirical evidence shows that the reader understands the most important part of a sentence to be the concept that is conveyed immediately before a hard

stop in the sentence. He calls each hard stop a “stress position.” The most common stress position is the period. The semicolon, colon, and em-dash are also stress positions.

To see how stress positions work in the reader-expectation model, let’s return to the examples on page 2. The first example was this:

There are thirty-one (31) townhouses located at Wedgeworth Cliffs in Sangamon County, with each building comprised of three (3) townhouse units per building, for a total of ninety-three (93) townhouse units building during the period in and about 2004 through and including 2007 (“Wedgeworth Cliffs Townhouses”).

Professor Gopen’s theory says that most readers of this sentence will think that the time period of 2004 through 2007 is the most important part of this sentence. It’s hard to imagine, though, that this three-year time period is central to the appellate argument—unless maybe there’s an issue about the statute of limitations or statute of repose.

Let’s say that the case is about a governance dispute in the Wedgeworth Cliffs homeowners association, and that the number of townhouse units matters to how the association is governed. Applying the reader-expectation model, the sentence could be broken into multiple sentences:

In 2014, the Wedgeworth Cliffs homeowners association amended its by-laws; the amendment passed by a single vote, 47-46. This appeal concerns the procedure that the association used to enact the amendment.

The stress positions in these sentences tell the reader that two things are important:

(a) the one-vote margin by which the bylaw passed, and (b) the bylaw amendment process itself.

Now let’s say that the case is about a construction defect. The first sentence could be redrafted as follows:

This appeal concerns a construction defect—a defect that has damaged nearly one-hundred townhouse units.

Here again, the stress positions tell the reader what's important: (a) the defect, and (b) the magnitude of the defect.

Lastly, let's return to the second example on page 2, which reads like this:

Faced with overwhelming evidence of its statutory violations, appellant Red Coach Inn mischaracterizes the facts in order to attack Judge Langfelder's multiple legal rulings.

Here's a revised draft with emphasis on stress positions:

This appeal by Red Coach seeks new rulings on issues of fact. The trial court's findings of fact, however, are all supported by competent evidence—the governing standard of review. Those facts, moreover, reflect straightforward violations of North Carolina's trade-secret and unfair-trade practices statute.

These stress positions tell the reader exactly what's important, including (a) the standard of review, and (b) the relevant statutes.

As these examples show, employing the reader-expectation theory through the careful use of stress positions can have a serious effect on what the reader understands to be important.

B. Decide who the case (and sentence) is about.

The reader wants to know which concept in a sentence is the most important concept.

The reader, however, also wants to know who the sentence is about. In most cases, the reader expects that the sentence is about the subject of the sentence. For example:

Behind the stellar pitching of Rick Sutcliffe and the timely hitting of Ryne Sandberg and Jody Davis, the Chicago Cubs edged the New York Mets and St. Louis Cardinals to win the 1984 National League East title.

This sentence is about the Cubs. It could have been about Rick Sutcliffe, Ryne Sandberg, Jody Davis, the Cardinals, the Mets, the year 1984, or the National League East title. The stress position tells us that the most important concept is that the Cubs won the title.

What, though, if the writer really wanted to tell the reader about the heroic contributions of Sutcliffe, Sandberg, and Davis? Change the sentence:

In 1984, three key players—pitcher Rick Sutcliffe, second baseman Ryne Sandberg, and catcher Jody Davis—led the Chicago Cubs to the National League East title.

This sentence is more about the players than it is about the team.

Note that, in both sentences, the most importance concept is the same: the Cubs won the National League East title.

This concept can be powerful. Consider the following sentences in an appellate brief about whether or not one party reasonably relied on another party's misrepresentation:

Isaiah Thomas, the chief salesman for PistonGuard, gave the presentation at Bullco's main office in Riverton. Thomas told the attendees, including Bullco's John Paxson, Bill Cartwright, and Stacey King, that Thomas's company could complete the required testing for Bullco's product in sixteen months.

These sentences are all about Thomas. He gave the presentation in Riverton. He talked to Paxson, Cartwright, and King. He gave the sixteen-month forecast.

The appeal, however, isn't as much about Thomas as it is about who at Bullco reasonably relied on the sixteen-month forecast. A change in sentence structure can clarify this point:

Bill Cartwright—one of Bullco's senior executives, and a fifteen-year industry veteran—sat in on the PistonGuard presentation. Cartwright listened carefully to the presenter, Isaiah Thomas. Cartwright specifically noted Thomas's statement that PistonGuard could complete testing on Bullco's product in only sixteen months.

That's a major change: These sentences are about Cartwright. Even more specifically, they're about Cartwright's experience and his careful attention to what Thomas told Cartwright. These sentences set up what's almost surely coming next in the brief: Cartwright's reasonable reliance on the sixteen-month representation.

In litigation especially, a reader expects a protagonist and an antagonist. You, as the writer, get to control the reader's expectations about exactly who the case is about.

C. Create a roadmap

A writer can help a reader understand what's important by giving the reader a clear guide, at the start of the brief, and/or at the start of each section of the brief, about what's to come.

This sounds obvious enough, but my observation is that introductions to briefs don't always help the reader understand the brief's key points. What attributes, then, makes for a successful roadmap?

- A good roadmap gets to the essence. Think about how you would explain why you should win to someone who isn't a lawyer. Hone this reasoning into a few sentences; make these sentences your opening paragraph.
- A good roadmap is objective in tone. When focused on writing objectively, the writer is more likely to emphasize the points that a neutral reader would find persuasive.
- A good roadmap considers the reader's expectations on length. The primary consumers of an appellate brief are appellate judges and their law clerks. Those consumers are asked to read many briefs on a daily basis; they are therefore likely to be grateful for an introduction that summarizes the key arguments in a succinct fashion.

- A good roadmap gives the reader the conclusion. When the reader is finished with your brief’s introduction, the reader should know how you want the court to rule and why.

D. Avoid obvious distractions.

Please read Judge Dietz’s manuscript. His points have a common theme: a distracted reader is a frustrated reader. A frustrated reader, in turn, is less likely to appreciate the points that the writer is trying to convey.

I want to add three more distractions to Judge Dietz’s excellent list. I add these distractions because I see them so often repeated.

First, avoid—or at least be thoughtful about—acronyms and defined terms. They usually make a sentence harder to read. For example:

In 1992, Steve Fuller and Matt Suhey entered into a joint venture. They called the venture Bear Logistics and Consulting, Inc. (“BLCI”). In early 1993, BLC signed a two-year lease for a storefront in White Oaks Mall (“the WOM Lease”). In June 1993, however, BLCI breached the WOM Lease.

Now try it this way:

In 1992, Steve Fuller and Matt Suhey entered into a joint venture; they called it Bear Logistics and Consulting. The company signed a two-year lease in early 1993 for a storefront in a Springfield mall. Just two months into the lease, however, Bear Logistics stopped paying its rent. The mall sued and obtained a judgment; this appeal concerns that judgment.

One thing to note in this example: The writer does not need to tell the reader that the brief will refer to the company as “Bear Logistics.” The reader knows that every reference to Bear Logistics means “Bear Logistics and Consulting, Inc.”

Second, think very carefully before employing footnotes. A footnote, by its nature, requires the reader to leave the current paragraph, engage at the bottom of the page, and then re-engage in the paragraph.¹ That’s a lot of work for the reader; more importantly, the reader might lose sight of the points being made in the textual paragraph.

Footnotes need not be eschewed entirely. A footnote might be a good place, for example, to tell the reader about a procedural point. The take-home message: A writer should be intentional about where a footnote is placed and whether the information in the footnote would be more appropriately placed in the text.

Third, use digestible titles for headings and subheadings. In an appellate brief, headings and subheadings create a table of contents—a critical document that serves as an outline for the reader. If the titles for the headings and subheadings are tough to follow, then the writer has converted the table of contents from an outline to a distracting mess.

Consider the following argument headings:

- THE TRIAL COURT ERRED BY ISSUING AN ORDER THAT DISMISSED THE COMPLAINT FOR FAILURE TO STATE A CLAIM WHEN THE FRAUD CLAIM IN THE COMPLAINT WAS PLEADED WITH PARTICULARITY AS REQUIRED BY RULE 9(b) OF THE NORTH CAROLINA RULES OF CIVIL PROCEDURE.
- THE COMPLAINT’S ALLEGATIONS ABOUT PISTONGUARD’S FALSE STATEMENTS SATISFY RULE 9(b).

Both argument headings get to the same place, but consider how much easier the second heading is to read. The reader of the second heading is likely to have a favorable impression of the writer; the writer got to the point and, in doing so, showed appreciation for the reader.

¹ See what I mean? It’s distracting.

E. Be purposeful with parentheticals.

Parentheticals can be a helpful way to tell the reader about a case. Be cognizant, though, that a reader will treat material in a parenthetical as being less important than material in a textual sentence. See, e.g., Roenick v. Pittsburgh Penguins Hockey Club, L.P., 783 A.2d 991, 994 (Pa. 1991) (explaining that no reader would expect a writer to put critical points in a parenthetical).²

Parentheticals, after all, cause the same problem as footnotes: they disturb the flow of the paragraph. In a paragraph, each sentence should link to the prior and subsequent sentence. A parenthetical is not really a sentence and, probably for that reason, is hard to link to other sentences. Placing a parenthetical in the middle of a sentence can cause maximal distraction.

Parentheticals are also distracting when they don't aid reader comprehension. For example:

A claim for breach of contract requires the existence of an enforceable contract. Taylorville Metal Supply, Inc. v. West Lafayette Toolworks, 879 F.2d 501, 505 (7th Cir. 2001) (dismissing claim for breach of contract where complaint did not plead existence of enforceable contract).

This parenthetical tells the reader nothing. The sentence before the citation tells the reader the point that the writer was trying to communicate. The citation to the Taylorville Metal Supply³ case tells the reader that Taylorville Metal Supply stands for the proposition in the preceding sentence. The parenthetical then repeats that very principle—for no reason!

² The Roenick case is not a real case. I made it up. This footnote is distracting, too.

³ This is also not a real case. But this footnote is a real distraction.

What if Taylorville Metal Supply was an especially compelling case? Does that situation merit a parenthetical? No; it merits a textual discussion. The writer should tell the reader—in textual sentences—what the case is about, why it’s important, and how it applies here.

Again, as with footnotes, this is not an admonition to avoid parentheticals. They can be useful at times. My point here is that, as with footnotes, the writer should be very purposeful about where and why a parenthetical would aid reader comprehension.

Part 3: What gets in the way of purposeful sentences?

Finally, I want to address four reasons why so many sentences in appellate briefs (and other advocacy pieces) seem to lack purpose. A disclaimer: These reasons are my hunches; I have no empirical evidence to back them up.

Theory No. 1: The writer feels compelled to share what he knows.

Some briefs seem designed to show the reader just how much the writer knows about the facts and the law. These briefs often feature lengthy fact and/or law sections, together with detailed fact discussions and lots of case citations.

To be fair, a writer might think that this strategy gains the reader’s trust—a laudable goal. Battering the reader with non-essential facts, however, won’t gain that trust. Instead, the reader will be confused about why he is being asked to digest so many facts. That confusion could lead to other, less helpful feelings about the writer.

I acknowledge the temptation to include a lot of facts and law in a brief. You worked really hard to learn those facts and find that law. You want to show the Court just how hard you worked. You might also want to show your client. It takes willpower to overcome these

temptations. Finding and exercising that willpower, however, will bring big benefits to your reader—and, therefore, your client.

Theory No. 2: The writer wants to establish a narrative about the equities.

Some briefs work hard to show the reader that one party is good and the other party is bad. This approach is reasonable: in any story, everyone wants the good guys to win.

The problem, though, is that few cases involve only good guys and bad guys. Each side usually has some good and some bad. Judges and lawyers all know that. For these reasons, even if the writer uses a lot of space to cast a tale of good versus evil, those efforts will not gain much traction with the court.

Some briefs, unfortunately, take the good-versus-evil narrative further and attack the other side's litigation tactics. This strategy has even greater risk. The reader, after all, will probably ask, "How do the litigation maneuvers described in this brief affect the law that I'm supposed to apply here?"

In sum, sentences that seem focused on good-versus-evil narratives don't do the thing that judges likely value most: explain what the law is and how it applies.

Theory No. 3: The writer wants to show that his arguments are really right.

Many briefs seem designed to show the reader just how correct the writer is. This strategy leads to sentences replete with adjective and adverbs, plus a lot of italics, underlining, or both. Though the reader might perceive these sentences to be exceptionally persuasive, they tend to have the opposite effect: The reader wonders why, if the facts and law are so clearly in the writer's favor, the writer strains so much to show why his client should win.

The use of adjective, adverbs, and emphasized terms also creates more confusion about which concepts in a sentence are most important.

Theory No. 4: The writer does not allocate sufficient time.

Writing a brief with purposeful sentences takes time. Framing each sentence around stress positions alone is a significant endeavor. It's easy to say that, in view of the many pressures and priorities that lawyers face, there simply isn't enough time to write with the sentence-level attention that I've described here. It's likewise easy to say that clients won't pay for that amount of time.

That's all bad advice—though we all have voices in our head giving us that bad advice. Every brief has great meaning both to your client and to you personally. As a matter of self-respect, carve out the time and find the resources that you need to make the brief one that the reader can really understand. And don't hide any of this from your client. Indeed, a big brief is a great opportunity to get on the same page with your client about expectations for the time it takes to write a reader-friendly brief. Those shared expectations will align you and your client and, most likely, deepen your relationship through the type of conversation that most lawyers and clients don't have.

Conclusion—and thank you

Thank you again for reading this manuscript. I hope that these points were thought-provoking. I invite you not only to give these concepts a try, but also to start a discussion with your colleagues about what makes for effective writing. In both appeals and other areas of litigation, written advocacy drives decisions. We should talk often, and with purpose, about how to improve our collective efforts in this area.
