

LEGAL WRITING IN THE DIGITAL AGE:
TEN PRINCIPLES TO CONSIDER WHEN DRAFTING A BRIEF

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Has technology changed the way that we read—and how to write effective briefs?

To state the obvious: smartphones, email, and the Internet more generally increase the likelihood for distracted reading. It happens every day. You start reading something and, after a little while, you're tempted to check your email. Or the news. Or text messages. It's human nature.

Technology has had another effect on the way we read: we read a lot on screens.

My current view, however, is that the principles of persuasive briefwriting mostly remain the same regardless of how a reader studies a brief. This manuscript describes ten of these principles. In several descriptions, I note why certain principles might be especially important for screen reading.

Before you read further, I want to thank you for reading this manuscript in the first place. Writing is central to our success as lawyers—especially when it comes to appellate advocacy. I'm honored to present these ideas for your constructive criticism, and I invite your feedback.

1. Get the reader on your side in the argument summary.

In an appellate brief—or any brief—the summary of the argument offers the writer a real opportunity: the chance to state the writer's key arguments in a condensed, punchy format. In a handful of paragraphs, the writer can get the reader on the writer's side. The writer can refer to the key evidence, the key cases, and any meaningful policy considerations.

An argument summary is also reader-friendly. Even if the reader has fatigue, or isn't enthralled by the subject-matter of the case, the reader will invest in the paragraphs that make up the summary of the argument. Indeed, if the reader is going to invest any time in a brief, the argument summary will receive that investment.

Because it's short, an argument summary invites an opening sentence or paragraph that draws in the reader. Consider, for example, a brief about whether two business competitors reached a price-fixing agreement. A traditional argument summary might start like this:

The Sherman Act forbids conspiracies that restrain trade. This appeal involves such a conspiracy—an agreement to charge the same price—between Schwarber Meats and Rizzo Dogs.

This isn't terrible. It tells the reader that the case concerns a price-fixing conspiracy between Schwarber and Rizzo, and that the case is governed by federal law.

Compare, though, this alternative:

In the past two years, Schwarber Meats and Rizzo Dogs have won major gains in the Springfield market for organic sausage products. Their parallel successes, however, are more than coincidental: emails reveal an intentional decision to fix the prices of their products.

This version is more interesting, for several reasons. The first sentence is specific to the case, not a generic statement of law. It gives the names of the parties and the relevant market. It also creates a narrative that the defendant companies are profit-hungry bad guys. Finally, the second sentence contains a juicy detail: there are emails that show a price-fixing conspiracy.

These details make a reader want to read more. That's the goal of any argument summary.

2. Educate the reader from the start with “deep issues.”

Bryan Garner has an intriguing column in the March 1, 2017 issue of the ABA Journal. In that column, Garner discusses different ways that briefs present issues in the “Questions Presented” section.

Garner opines that most briefs don't express issues well. Sometimes the issues are conclusory declarations, and sometimes they're stuffed with facts. Sometimes they're phrased as questions, and sometimes they're just sentences, often starting with “whether.” No method is particularly effective at presenting issues clearly enough to be understood in a single reading.

To address this problem, Garner offers a solution to which he refers as the “deep issue.” He describes a “deep issue” as a multisentence issue statement with three parts:

1. a legal premise,
2. a factual premise or miniature story demonstrating the applicability or inapplicability of that legal premise, and
3. a short question devoid of new information.

Want to see it in action? Here are two examples:

Example 1

The Ex parte Young exception to Eleventh Amendment immunity allows lawsuits that seek to enjoin ongoing violations of federal law. Plaintiffs here seek an injunction that addresses a state agency's decision in 1997. Does the Ex parte Young exception apply?

Example 2

A claim for violation of section 1 of the Sherman Act must plausibly allege anticompetitive effects and a relevant market. In his section 1 claim, Mr. Smith describes injuries to himself, but has pleaded no facts concerning any effects on market competition. His complaint also offers contradictory allegations about the definition of the market itself. Has Mr. Smith stated a cognizable section 1 claim?

Deep issues might seem unconventional, but they educate the reader about the key legal and factual issues right off the bat. It's hard to argue against that outcome.

3. The table of contents can be another argument summary.

The table of contents in a brief can seem like an afterthought—something to be done mechanically at the end by a legal assistant or paralegal. A writer might take this view even if he or she gives meaningful attention to section headings during the briefwriting process.

The table of contents, however, can have serious value independent of the text of the brief.

Like the summary of the argument, the table of contents tells the reader each of the writer's main arguments—and does so in one place, in no more than two pages. If the table of contents has enough detail, the reader can scan it and get the thrust of the brief.

That's a serious benefit to the reader. For one, it saves the reader time. It also gives the reader a high-level map to keep in mind as the reader studies your entire brief. In addition, if the reader wants to scan your brief—especially if the reader is studying your brief on the screen—the table of contents operates as a menu. The reader can find the key section(s) of the brief to read and jump right to it.

To achieve these goals, a table of contents needs some detail. Headings with just a few words—such as “The Parties Conspired,” or “The Agreement,” or “Summary Judgment Is Appropriate”—provide only surface-level education to a reader. Consider these two examples:

Example 1: Table of Contents with Minimal Headings

- I. The Economic-Loss Rule Justified Dismissal
 - A. The Economic-Loss Rule
 - B. The Warranty
 - C. Mr. Lester’s Non-Contract Claims

Example 2: Table of Contents with More Detailed Headings

- I. The Economic-Loss Rule Bars Mr. Lester’s Non-Contract Claims about His Refrigerator
 - A. The Economic-Loss Rule Honors Contract Terms
 - B. Mr. Lester Signed a Contract with Arrieta Appliances when He Bought His Refrigerator
 - C. Under the Economic-Loss Rule, Mr. Lester’s Remedies Are Limited to the Terms of His Contract with Arrieta

As you can see, the second example gives the reader much more information than the first. The reader can jump to the section that the reader wants to study. A reader familiar with the economic-loss rule, moreover, might not have to read much more to form an opinion on the merits.

These examples show the benefit of studying the table of contents before the day that your brief is due. By studying them separately and independently from the brief itself, you can ensure that the table of contents itself educates the reader—in some detail—on why you should win.

4. Consider explicit roadmap paragraphs.

We have now discussed three framing tools—the argument summary, deep issues, and the table of contents. If you’re writing a lengthy or complex brief, you might try one more framing technique: an explicit roadmap paragraph.

By “explicit roadmap paragraph,” I mean a paragraph that describes what you’re going to argue, in the order that you’re going to argue it, potentially with references to specific subheadings. For example:

Section I.A below reviews the definition and purpose of the economic-loss rule. Next, Section I.B reviews three key cases—including Schiraldi v. Wilson—on the economic-loss rule that bear on this case. Finally, Section I.C applies the teachings of these cases to the facts of this case. These teachings show that the economic-loss rule bars Mr. Buckner’s claims about an allegedly faulty design of his baseball glove.

This type of roadmap may seem too rigid and/or unnecessary, so using your judgment is essential. This paragraph, though, leaves no doubt in the reader’s mind what’s going to be argued, in what order, and under what subheading. It’s an approach worth considering if the flow of the argument might not be apparent.

5. Take great care in crafting topic sentences and transitions.

Topic sentences can play a big role in whether a reader gets the argument that you’re making. When I refer to topic sentences, I mean the first sentence of a paragraph.

The topic sentence in each paragraph has several important functions. First, it likely contains a principle important to your argument. The topic sentence also tells the reader the purpose of the paragraph; it sets the reader’s expectations for the paragraph. In addition, the topic sentence is critical to the flow of your argument: it must link back to the final sentence of the preceding paragraph.

These points might seem obvious, but, based on my observation, topic sentences often do not achieve these goals. Paragraph breaks can seem almost random, as if being done to vary the length of paragraphs, or as if paragraph structure simply reflects the writer’s stream of consciousness.

Attention to topic sentences might be even more significant if you’re writing for a screen reader. If a screen reader is scrolling through your brief, the sentences that the reader will probably study most are topic sentences. They’ll look at the first sentence of the paragraph and assess whether to invest time in that paragraph based on that sentence. If they don’t understand the sentence, or understand how the sentence fits in the argument, they’re likely to skip the whole paragraph—and its substantive value.

They’ll also miss your transition between the end of that paragraph and the topic sentence in the next paragraph. A reader that can’t see the link between concepts in your argument is a reader who will have a hard time buying the argument that you’re trying to sell.

In my experience, these two tasks—writing convincing topic sentences and crafting clear transitions from one paragraph to the next—are the most time-consuming parts of briefwriting. Even with pre-drafting outlining efforts, figuring out the best flow of an argument takes time and

experimentation. Once you have the flow, you can turn your attention to the sentences themselves.

6. Eschew footnotes. Mostly.

In theory, footnotes can be really useful. If you have a minor or procedural point that you want the reader to know, but that might really disrupt the flow of a paragraph, then a footnote can be a good solution. The notion is that, by not putting the point in the text, the writer ensures that the reader reads the paragraph text without interruption.

Here's the problem: a footnote still causes an interruption. When you're reading, and you see a footnote, you go to the bottom of the page¹ and read the footnote. The footnote doesn't eliminate the distraction; if anything, the footnote can magnify the distraction.

This point applies for paper reading and screen reading. A screen, however, might make things worse. If a reader has zoomed in on the brief, then the reader will need to scroll down the page to find the footnote. After the reader finds and reads the footnote, the reader must scroll up the page back to where he or she left off. That's a lot of work to ask the reader to do—especially for some tangential point.

Do these points call for the end of footnotes? They at least call for a critical assessment of the purpose of each footnote—and for an examination about whether the footnote can be placed somewhere in the text.

One idea for your footnote calculus: if you conclude that the footnote is the best route, try out the footnote at the end of a sentence, and not midway through a sentence. When a footnote is at the end of the sentence, the reader can finish the prior sentence and digest the point of that sentence before moving onto the next sentence.

Even better, consider placing the footnote at the end of a subsection of the brief. That placement avoids disturbing the flow of the argument. In addition, the end of a subsection is the natural time when the reader takes a deep breath and transitions to a new concept at the beginning of the new subsection.

In sum, footnotes are not inherently bad, but they come at a price. Your reader will benefit if you can assess just how high that price is, and then try alternatives to lower it.²

¹ See what I mean?

² We're now at the end of this section of the manuscript, which is probably the best place for a footnote related to this section.

7. Make every sentence count.

I have written before about [how reader comprehension increases when the purpose of each sentence in your argument is clear to the reader](#). I will summarize my thinking here, without repeating it in full.

A Duke professor named George Gopen espouses a “reader expectation” theory. According to Dr. Gopen’s empirical research, a reader understands the most important concept in a sentence to be the concept that comes before the sentence comes to a full stop. This means that whatever concept comes before a period, colon, semicolon, or em-dash is the concept that the reader will understand to be most important concept in the sentence. Professor Gopen refers to each of these stopping points as a stress position.

In my experience, when attention is given to stress positions, the writer becomes more focused on the role of the sentence in the paragraph and the argument. When the reader gets the purpose of each sentence, the reader’s comprehension necessarily increases. The reader can see links between sentences. The flow of a paragraph—and from one paragraph to the next—becomes more apparent.

To give one example, consider the following sentence:

Thanks to home runs by Dexter Fowler, Javier Baez, and David Ross, the Chicago Cubs broke a century-long World Series drought with an 8-7 over Cleveland on Wednesday night.

This example has one stress position—a period at the end. The concept right before the stress position is that the game happened on Wednesday night. Did the writer really intend for the night that the game took place to be the most important concept in the sentence?

Consider this revised draft:

Behind three home runs, the Chicago Cubs beat the Cleveland Indians 8-7 on Wednesday night to become World Champions for the first time since 1908.

In this revised draft, the reader understands the most important concept in the sentence to be that the Cubs broke a century-long World Series drought. That’s more likely what the writer intended to convey.

The revised draft makes another notable change. It does not include the names of the three Cubs players who hit home runs. Those home runs were critical, for sure, but the identities of the hitters distract from the take-home point of the sentence—that the Cubs won the World Series for the first time since the Teddy Roosevelt administration. The writer can write about the individual home-run hitters in a later sentence or paragraph. That placement will give the hitters’ identities more attention and cause less confusion for the reader.

8. Embrace lists.

A bulleted or numbered list can be easy on the eyes—especially compared to a dense paragraph. This is especially true for screen reading. As some studies have shown, when we read on a screen, our eyes follow an “F” pattern on the screen. A list of items can look a lot like an “F” pattern.

What type of information, then, lends itself to lists? Here are three categories to consider, but there are surely many more:

1. The elements of a claim, especially when the claim has more than three elements, and/or spelling out each of the elements is significant.
2. Key facts that have a connection to one another, or that make sense to be grouped together. They could be placed in the fact section, or in the argument section of a brief as factual support for a proposition.
3. A chronology of key events—again, either in the fact or argument section.

I’m a big proponent of lists in briefs. With that said, lists have at least three dangers.

First, if you convey information in a list, the reader might not understand which items in the list are the most important items for your argument. There’s no easy solution for this issue—though if you put a semicolon after each item on the list—and therefore create a separate stress position for each item—the reader might understand each item on the list to be equally important.

Second, a list can disturb the flow of an argument or narrative. This can happen if (1) the list goes is long, and (2) certain items in the list are pretty bulky. In either situation, textual paragraphs are better tools for educating the reader about what points are most important, for maintaining a smooth flow of the brief, and for making the brief visually appealing.

Third, a brief with too many lists will weaken the power of any one or two lists. I usually include a lot of lists in early drafts of a brief, and then narrow down the lists to just a few in the final draft.

For all of these reasons, discerning the utility of lists in a brief requires flexibility and patience.

9. Your brief can use more than words.

Live presentations often feature visual aids to aid listener comprehension. Why don't more written briefs do the same thing?

Visuals can be powerful in a live presentation because they give the listener another way to learn. The listener hears the speaker's written word and sees whatever concept the visual is trying to communicate.

Briefs, in contrast, only involve written communication. Perhaps for this reason, the power of a visual in a brief might not seem as apparent.

A visual, however, can convey information differently when compared with a textual sentence. A table can make comparisons and contrasts for the reader in a more succinct manner than textual paragraphs. A photograph can make the subject-matter of a case feel more real or alive for the reader. A flow chart can show a reader how a process works, or the steps of an important procedure, or the key moment on a timeline.

In addition, a visual can be especially effective for screen reading. The reader can zoom into the visual so that it fills the screen. The reader's attention will be captured.

A few words of caution, however, if you're considering a visual:

First, a visual breaks up the flow of the text. This means that attention must be given to the words that lead up to the visual and that immediately follow the visual. Your brief needs to link those two sentences with the visual. (The same is true for a block quote.)

Second, refer to the rules of the Court in which you're submitting your brief to ensure that they don't prohibit visuals in briefs.

Third, if you're using a photograph or other copied material, be sure that the quality of the visual is stellar. A visual that's hard to see is worse than having no visual at all.

Fourth, be picky. As with lists, having too many visuals can dilute the power of the most important visual.

10. Be consistent in terminology.

One of my favorite functions in word-processing and PDF programs is Control+F. The ability to find words throughout a brief can save time. I suspect that many readers and writers use Control+F frequently.

Why does the Control+F feature matter for briefwriting? It means that your reader might be skipping around the brief to read parts of the brief about a key term or topic.

To give an example, imagine a brief about the enforceability of a contract term. The reader might want to find all references to that contract term in the brief, and then study the arguments about that term. If the brief is short, the reader might read the whole brief. With a longer brief, however, the reader might turn to Control+F and search for the contract term. Referring to the term in the same way throughout the brief will ensure that a search with Control+F leads the reader to each use of the term.

This point, however, can create bad briefwriting decisions. In particular, please do not read this advice as calling for more defined terms in briefs. Defined terms can aid the reader at times—for example, if the title of a document is especially long, or if multiple parties or concepts sound similar, and defined terms would distinguish among them. More frequently, however, defined terms (hereinafter “Defined Terms”) add Random Capitalization in sentences and lead to Clunky Sentences.

Consistency in terminology does not necessarily require defined terms.

Consider, for example, a brief about a property located on Bellerive Road. The brief could refer to this property as “the Bellerive property” without specifically defining that term. The reader would clearly know what “the Bellerive property” means. The same is true if the brief concerns the conduct of a person—say, Kris Bryant. The brief could refer to Bryant or Mr. Bryant without needing a defined term.

Even a contract need not require a defined term. Imagine a lender-borrower case about a promissory note entitled, “Second Amended Promissory Note Dated March 29, 2015 in Favor of Heyward Corporation Signed in New Berlin, Illinois.” A brief could refer to this document as the Heyward note; the meaning would be obvious. In deciding how to refer to the note, the writer would be wise to pick the language that highlights the key feature of the note. If the date is most important, then the brief could refer to the note as the March 29 note, or the 2015 note.

In sum, the goal is consistency, not awkward terms.

Thank you again for taking the time to read this manuscript. My views and experiences with briefwriting are always evolving, and I would be grateful to hear from you about what works for you.