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On Editing

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ON EDITING

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I. INTRODUCTION

Editing is an essential part of the writing process. For virtually all writing of merit, the finished product does not appear at its inception.[1] As a "work in progress," the writing goes through stages, and the editorial stage will help trim and sharpen the final piece. The process may be compared more to the creation of an oil painting, which may have several layers of pigment and translucent glazes to produce the final effect.[2] Revision begins during composition with, for example, an automatic spell checker or through self-correction by the writer as the piece takes shape. The process of editing, however, is different than the work of composing. Editing involves an outside perspective that brings focus and clarification to the work. It requires a different mindset, even when the editor is also the author of the piece.

When editing, it is important to keep in mind basic compositional principles,[3] as well as additional principles relating specifically to editing. The following description of these principles is, for the most part, not original. It is useful to review them together and to reflect on why they work. Editing strengthens the composition by requiring the author to account for certain essential principles that may have been overlooked during the creation process.

This Article is intended for use by authors and editors in all settings. Because an author of any piece is, by necessity, the first editor, many of these suggestions are best implemented before the piece receives an outside review. This Article focuses on specific issues for brief editors and law review editors. While some of the propositions that follow are also applicable to composition,

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1. One must acknowledge the possibility of what may be called the Mozart Exception. Although there is evidence that even Mozart went through drafts before completing a work, the movie *Amadeus* portrays beautifully the notion that Mozart "had simply written down music, already finished in his head. Page after page of it, as if he were just taking dictation. And music, finished as no music has ever finished." *See My Favorite Scene from Amadeus*, YOUTUBE, http://www.youtube.com/watch?v=vNaXQQbcgw0 (last visited Sept. 11, 2014). By contrast, this article, like all of my writing, did not originate in finished form.

2. One of Rembrandt's innovations was to use layers of paint and glazes to produce effects of light and texture that cannot be produced by a single brush stoke. The effect cannot be produced directly in one move. *See, e.g.*, *Technical Innovations of Rembrandt*, THE ATELIER OF VIRGIL ELLIOTT http://virgilelliott.com/node/19 (last visited Sept. 11, 2014).

3. *See, e.g.*, Jonathan K. Van Patten, *Twenty-Five Propositions on Writing and Persuasion*, 49 S.D. L. REV. 250 (2004) [hereinafter *Twenty-Five Propositions*].

they bear repetition here because of their importance to the practice of editing.[4] These principles will take on additional meaning because the editorial process has a different viewpoint and purpose.

II. EDITING PROPOSITIONS

1. The Paragraph is the Unit of Composition.

This is *the* essential proposition for legal writing. It comes from Strunk & White's *The Elements of Style*.[5] The paragraph as the basic unit of composition is an assertion about the proper size of the unit. The unit is not, as some might maintain, the word or the sentence. Those are important objects of study, but for composition, it is the paragraph that constitutes the basic unit. The paragraph is the right size for thinking about composition. It forces the writer to think about the problems of proposition, support, transition, and sequence in the most productive way.

If the paragraph is the basic unit, it must be about one thing. As an editor (and as a writer), you should be able to look at a paragraph and summarize it in a single sentence. If you cannot, it is likely that the paragraph is about nothing, or about more than one thing. The paragraph has "stuff" in it, but it does not have a clearly discernable single purpose. Making the paragraph about one thing will force more disciplined writing. Most often, what the paragraph is about may be found in the first sentence—the topic sentence.[6] It is not an absolute requirement for persuasive writing that the topic sentence be in the first position in the paragraph, but you should have a very good reason for departing from this norm. Legal writing is more purpose driven than most other writing. To persuade, you should not leave the purpose of the paragraph until the end or, worse, hide it in the middle. The shape of the basic paragraph is: (1) proposition; (2) supporting sentences that explain, elaborate, or develop; and (3) summary, restatement, closure, or a conclusion that leads to the next proposition.

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4. *Cf.* RICHARD MITCHELL, LESS THAN WORDS CAN SAY 43-44 (1981) [hereinafter LESS THAN WORDS CAN SAY]. On writing, Mitchell provides the following:

> Ordinary speech, like poetry, is a kind of art; discursive prose in particular, like writing in general, is a technology. Clear, concise writing is a result of good technique, like an engine that starts and runs.
>
> Good technique requires the knowledge and control of many conventional forms and devices. They must be conventional because writing is public and enduring, and the path of its thought must be visible to other minds in other times. Like the conventional "rules" of any technology, the rules of writing have come to be what they are because they work. You do well to keep the subject of your sentence clearly in view just as you do well to keep your powder dry and your eye on the ball. These things work.

Id.

5. WILLIAM STRUNK, JR. & E.B. WHITE, THE ELEMENTS OF STYLE (4th ed. 2000) [hereinafter STRUNK & WHITE]. *See also Twenty-Five Propositions*, *supra* note 3, at 250-52 (discussing the importance of this proposition).

6. *See Twenty-Five Propositions*, *supra* note 3, at 252.

Each paragraph has a proposition, a statement with an attitude. Legal writing, whether in the form of a brief, law review article, research memo, or opinion letter, should move forward through a series of propositions. The propositions form the structure of the argument. This used to be called an outline. It is still not a bad way to think about structure. A true outline is not just a collection of topics, talking points, or quotes, but, instead, a coherent sequence of propositions that takes the argument through each step. A proposition is not simply a statement. It is a statement that pushes the argument forward. It is more than description. Description is essential to argument, but it is not advocacy. A good proposition involves advocacy. You do not have to "pound the table" with each proposition, but propositions should not be neutral, even with the less-argumentative forms of writing, such as legal memoranda or law review articles. Thinking through your writing as a series of propositions will greatly aid the composition process.

Not only is "the paragraph is the unit of composition" fundamental for composition, it is by far the most useful diagnostic tool for editing. The paragraph method of analysis will expose most of the structural problems that undermine the draft. To do the paragraph/proposition method of analysis, you should number each paragraph and then, on a separate sheet, write out a sentence that summarizes each paragraph. You may have to create the sentence rather than copying the topic sentence given by the author. That, alone, will tell you something about what needs to be done. When you have finished the section, or the entire piece, look at the succession of sentences. This review helps you to see structural problems, such as gaps or sequence issues. It will also make the argument more transparent. Your insistence on viewing the piece at the paragraph level will force you (and the author) to think in terms of propositions and how to fill out each proposition. And you will now have something concrete to go to the author and make specific suggestions about structure. This approach is far better than opaque or non-specific comments like "unclear," "awkward," or "this doesn't flow."

Thinking in terms of a series of propositions also helps to regulate the tone for the piece. Beginning authors rarely get this right the first time. For briefs, the tone of the propositions tends to be too neutral or too adversarial. You will see this tendency, possibly even more clearly than the author, and you should dial the tone up or down accordingly. When I was a newly minted lawyer, one of the best pieces of feedback I received was that my briefs read more like law review articles, *i.e.*, it was hard to tell whose side I was on. For a brief, the reader should not have to guess. On the other side, however, if the brief is so relentlessly adversarial in its propositions, it may generate resistance on the part of the reader. Litigated matters are not that easy. As my mentor, the late Robert Willard, would say, "It's a full and complete statement of half of the problem." Overselling, by claiming too much and ignoring problems from the other side, generates sales resistance.

Following the paragraph method of editorial analysis is time-consuming. But that is a good thing. Deliberately slowing down the editorial process will allow the editor to see more things that need attention.[7] Substantively and procedurally, the paragraph is the right size unit for thinking about editing.

2. The Editor's Job Requires Vigilance to Strike Out Unnecessary Words.

The authoritative source for this, again, is Strunk & White: "Omit needless words."[8] Simple advice, this is probably the second most important proposition in editing. Trim, trim, and trim. Crossing out unnecessary words is the editor's primary tool. Stephen King reiterates this advice in his book *On Writing* and offers the following formula:

> In the spring of my senior year at Lisbon High . . . I got a scribbled comment that changed the way I rewrote my fiction once and forever. Jotted below the machine-generated signature of the editor was this *mot*: "Not bad, but PUFFY. You need to revise for length. Formula: 2nd Draft = 1st Draft – 10%. Good luck."
>
> I wish I could remember who wrote that note . . . Whoever it was did me a hell of a favor. I copied the formula out on a piece of shirt-cardboard and taped it to the wall beside my typewriter. Good things started to happen for me shortly after.[9]

The second draft is the first draft less ten percent. This is a great formula for all writers to live by. First drafts always have too many words.[10] Inexperienced writers use too many words. Lawyers generally use too many words. Inexperienced lawyers? Watch out. For legal writing, I would suggest amending King's nameless editor's advice to twenty or twenty-five percent.

Most writing can be made better simply by striking out unnecessary words. There are several reasons why drafts are usually "puffy." The basic reason is that nearly everyone overdoes it on the first few drafts. There is wisdom in the famous line, attributed to several authors: "I didn't have time to write a short letter, so I wrote a long one instead."[11] The natural tendency is to overwrite.

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7. *See infra* Part II.3.

8. STRUNK & WHITE, *supra* note 5, at 23-24.

9. STEPHEN KING, ON WRITING: A MEMOIR OF THE CRAFT 222 (2000) [hereinafter ON WRITING]. The author demonstrated this technique with a brief example of striking needless words from a draft. RICK FRIEDMAN & PATRICK MALONE, RULES OF THE ROAD: A PLAINTIFF LAWYER'S GUIDE TO PROVING LIABILITY 271-84 (2d ed., rev. & expanded 2010) [hereinafter RULES OF THE ROAD].

10. *Too Many Notes!*, YOUTUBE, http://www.youtube.com/watch?v=Q_UsmvtyxEI (last visited Sept. 11, 2014). Do not confuse this very sound proposition with the laughable assertion in the movie *Amadeus* that Mozart's music had "too many notes." *Id.*

11. *See, e.g.*, *Writing – Quotes*, ENGLISH TEACHERS NETWORK, http://www.etni.org/quotes/writing.htm (last visited Nov. 16, 2014) (attributing the quote to Mark Twain). *See also If I Had More Time, I Would Have Written a Shorter Letter*, QUOTE INVESTIGATOR, http://quoteinvestigator.com/2012/04/28/shorter-letter/ (last visited Nov. 16, 2014) (attributing the quote to Pascal).

The first task of the editor is to trim off the natural "fat" by simply crossing out. Bryan Garner describes the problem in this way:

> The English language has vast potential for verbosity. Almost any writer can turn a 15-word sentence into a 20-word sentence that says the same thing. Many writers could make it a 30-word sentence. And a truly skilled verbiage producer could make it 40 words without changing the meaning. In fact, almost all writers unconsciously lengthen their sentences in this way.
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> Reversing this process is a rare art, especially when you're working with your own prose. You see, you're likely to produce first drafts that are middllingly verbose – each sentence being probably a quarter or so longer than it might be. If you know this, and even expect it, you'll be much less wedded to your first draft. You'll have developed the critical sense needed to combat verbosity.[12]

Awareness of wordiness is an important insight for both writer and editor. It will make the writer more amenable to crossing out unnecessary words and make the editor more inclined to do so.

Legal writing itself has a long tradition of wordiness. Drafting for legal transactions, especially contracts, provides many examples.[13] Statutory and regulatory provisions are often needlessly complex.[14] While the explanation that

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12. BRYAN A. GARNER, LEGAL WRITING IN PLAIN ENGLISH: A TEXT WITH EXERCISES 17-18 (2001) [hereinafter PLAIN ENGLISH].

13. *Id.* at 91-93.

14. We might cut the drafters of statutes and regulations a little slack because their product may later come under the scrutiny of a court under circumstances not necessarily foreseen by the drafters. *See, e.g.*, LESS THAN WORDS CAN SAY, *supra* note 4, at 142-44. Illustrating this point, Mitchell provides the following example:

> Here is [] the sort of thing that infuriates the advocates of plain English. It's an extract from one of those handbooks put out by the Occupational Safety and Health Administration, an outfit notorious not only for its torture of English but for the fact that many of its thousands of rules and regulations render each other what they call in Washington "inoperative." It's hard to decide whether the people at OSHA are simply ineffectual bumblers or supremely talented satirists boring from within. Here, for instance, is how they define an exit: "That portion of a means of egress which is separated from all other spaces of the building or structure by construction or equipment as required in this subpart to provide a protected way of travel to the exit discharge." That's not all. Now they elaborate on "means of egress": "A continuous and unobstructed way of exit travel from any point in a building or structure to a public way [which] consists of three separate and distinct parts: the way of exit access, the exit, and the way of exit discharge."
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> That's certainly ugly, and it makes us wonder whether an exit has to be defined at all, and, if it does, why couldn't it just be called a way to get out. Then we wonder why a "means of egress" has to be defined at all, and, if it does, why couldn't it be called a way to get to the exit. If these reservations seem reasonable to you, it's because you're just not thinking. You are assuming that any ghastly mess of verbiage that comes from a bureaucracy needs to be simplified because it is needlessly complicated to begin with. Wrong. As it happens, that horrid prose serves its aims perfectly. Regulations of this nature have one clear purpose, and that is to answer, before the fact, any imaginable questions that might be asked in a court of law. For that purpose it's not enough to assume that everyone knows what an exit is. Is a door an exit? Maybe, but maybe not, if a drill press just happens to be standing in front of it. Is a hole in the wall acceptable as an exit? Do you really get out of the building (let's say it's ready to blow up) if you go through a door and find yourself in an enclosed courtyard instead of a "public way"? You don't have to be very

lawyers in the past were rewarded for wordiness because certain transactions were paid by the word, the contemporary emphasis on avoiding ambiguity by defining everything may lead to confusion and loss of clarity. Sometimes less is more. There is also a long tradition of rhetorical excess in legal style where synonyms are utilized without necessarily adding meaning: cease and desist; aid and abet; aid and comfort; custom and usage; fraud and deceit; free and clear; null and void; true and correct; last will and testament; give, devise, and bequeath; right, title, and interest; rest, residue, and remainder; ordered, adjudged, and decreed; and, my favorite, necessary and proper. There are a few times when the additional words add meaning, like heirs and assigns, but usually they do not.[15] Repetition for rhetorical purposes usually reflects tradition and nothing more. In agreements, the repetition may create unnecessary confusion because it runs into the canon of construction that every word should be given meaning.[16]

The problem is worse when the lawyer has been trained in other disciplines that regularly use words as embellishments. Prolonged exposure to empty words, such as goals and objectives, true excellence,[17] input,[18] or words that

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clever to think of lots of other such questions, and the writer of this regulation is thinking about your questions. He has done a good job, although he has written something very ugly. But it's *only* ugly; it's not wrong, it's not more complicated than it has to be.

Id.

15. BRYAN A. GARNER, A DICTIONARY OF MODERN LEGAL USAGE 292-95 (2d Ed. 1995) [hereinafter MODERN LEGAL USAGE].

16. *See, e.g.*, Maynard v. Heeren, 1997 SD 60, ¶ 14, 563 N.W.2d 830, 835 (1997) (quoting Cummings v. Mickelson, 495 N.W.2d 493, 500 (S.D. 1993)) ("No wordage should be found to be surplus. No provision can be left without meaning. If possible, effect should be given to every part and every word.").

17. *See* LESS THAN WORDS CAN SAY, *supra* note 4, at 76-77. Richard Mitchell on this point provides the following:

> Think . . . about the president of the University of Arizona . . . who writes as follows in the magazine sent out to alumni:
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> > As has been the case for the past several years, the most notable accomplishment of the University during 1976-77 was the strides took toward recruiting distinguished faculty members. Never before have so many outstanding scholars, teachers, and researchers joined our institution. These men and women are the very lifeblood of the University. They will hasten the time the university reaches its goal of true excellence.
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> If some of those outstanding scholars read the alumni magazine, they may want to hasten something else, but their chagrin will be small compared with that of those faculty members who've been around for more than a year. They've just been excluded from the lifeblood, the *very* lifeblood. Strangely enough, though, even the new faculty, the very lifeblooders, are given only second place because the "most notable accomplishment" is not, in fact, their additions to the rolls, but the "strides took toward recruiting" them.
>
> What a pity. That little paragraph is full, of padding and clichés, but that's what we expect from presidents of all kinds. Their appearances, after all, are mostly ceremonial, and they are expected to mouth empty and generally comforting formulae . . . . Who listens? We expect clichés. We expect compounded clichés in which *mere* lifeblood is barely thicker than the punch; it has to be *very* lifeblood. Excellence? Just excellence? Certainly not. Down there in Arizona it's *true* excellence or nothing. Faculty are always distinguished, scholars are always outstanding, accomplishments always notable, time always hastened, and strides always took.

Id.

have become empty through overuse, such as absolutely (and many variants – "1000%"[19], perfect,[20] awesome), unique, essential, impossible, critical, and empty phrases, like "I take full responsibility," "If you like your doctor, you can keep your doctor," "I have the scars to prove it," "I'm madder than Hell," and countless others, have a narcotic effect on the mind.[21]

A common marker for wordiness is the innocent looking "of." Bryan Garner says that "other than small doses . . . [the word *of* is] among the surest indications of flabby writing."[22] No one is immune from Garner's criticism:

> The second clause *of* the second section *of* the second article empowers the President *of* the United States . . . . The Federalist No. 67, at 409 (Alexander Hamilton) (Clinton Rossiter ed., 1961). [A possible revision: The second clause of Article II, § 1 empowers . . . (From three *ofs* to two.)][23]

Every "of" and what follows should be regarded with suspicion. Make them prove their usefulness.

To the extent that description is involved, there is a built-in tendency for wordiness. The purpose of much legal writing is to describe the legal landscape

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18. *Id.* at 104: In discussing jargon as "a handout of material designed to prevent the need for thought," Mitchell considers the "infamous 'input'" with the following:

> For certain technicians, [input] has a concrete meaning and points to something that can be pointed to with no other word. For sales managers, deans, politicians, and most of the rest of us, "input" provides an ornamental cover for a hole in the brain. When a vice president for administration asks for your input, what *exactly* does he want? Does he want your opinion? Your advice? Your hypothesis? Your knowledge? Your hunch? Your money? What? Does he know? If he wants to know how many long distance calls you've made this month, why does that get called "input," the same term he would use in asking for your height, weight, and blood type? Does "input" describe adequately *anything* you might send someone?
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> Again, a word that means almost anything means almost nothing.

Id.

19. Democrat candidate for President in 1972, George McGovern stated: "I am 1,000 percent for Tom Eagleton and I have no intention of dropping him from the ticket," shortly before dropping him from the ticket. *See* Ken Rundin, *The Eagleton Fiasco of 1972*, NPR.COM (Mar. 7, 2007, 12:41 PM), http://www.npr.org/templates/story/story.php?storyId=7755888.

20. As in: "Would you like cream with your coffee?" "Yes." "Perfect." The misuse of excellent words by degrading them through overuse is common in the culture. The misuse by lawyers comes with overloading useful words, by way of emphasis, to give a false sense of urgency. Think of absolutely, clearly, obviously, manifestly, and without a doubt. Bryan Garner recalls an excellent metaphor from Theodore Roosevelt, describing "weasel words." "When a weasel sucks eggs, it sucks the meat out of the egg and leaves it an empty shell. If you use a weasel word after another there is nothing left of the other." MODERN LEGAL USAGE, *supra* note 15, at 926.

21. If you need to take a break after reading that sentence, go ahead. In the foreword, Mitchell provides:

> Words never fail. We hear them, we read them; they enter into the mind and become part of us for as long as we shall live. Who speaks reason to his fellow men bestows it upon them. Who mouths inanity disorders thought for all who listen. There must be some minimum allowable dose of inanity beyond which the mind cannot remain reasonable. Irrationality, like buried chemical waste, sooner or later must seep into all the tissues of thought.

LESS THAN WORDS CAN SAY, *supra* note 4, at 5.

22. MODERN LEGAL USAGE, *supra* note 15, at 612.

23. *Id.*

that is relevant for understanding and resolving the problem. The initial steps are finding and gathering. The tendency thus is inclusion: "If I found it, you should know about it." This is natural. But the initial process of inclusion should then lead to the process of exclusion, or culling the information.[24] One of the basic editorial tasks is to delete whole sentences and paragraphs because the writer has not completed the task of exclusion or reduction that should have followed the finding and gathering.

Several of the propositions that follow are specific applications of this general proposition. They are specific types of writing faults that usually involve needless words. Use of passive voice, overuse of dependent clauses, editorializing, repetition, and taking needless side trips are all examples of unnecessary words. Wordiness reflects a pattern. Once you discover one of these problems, you can usually find more examples nearby, like fish who swim in schools.

Strunk & White's admonition to omit needless words will serve the editor well. There is more to editing, but with the paragraph method and striking out needless words, you will have a solid foundation for the art of editing. Without them, you are more likely to become part of the problem.

3. The Key to Editing is to Find the Right Pace for Reading Carefully.

I have found that the best editing comes when the editor is going slow enough to see what needs to be fixed. Poor editing is usually a problem of pace[25] and it is usually that the pace is too fast. Go slow. Taking seriously the procedure of summarizing each paragraph in a single sentence will help you slow down to the right pace. When you go slow, it will allow you to see more things that are not right. These include problems of focus (weak propositions), sequence, not allowing the prior foundation to carry through, repetitive structure of sentences, parallelisms, colloquialisms, word choices, grammar, and more.

Don't become impatient and try to speed up the process. Efficiency will come as your editorial "eyes" improve. The improvement really begins to show as your ability to spot tendencies develops and your understanding of the argument allows for anticipation of problems—both substantive and procedural. One check on your pace is to stop for a break when the number of problems begins to diminish. It may be you have temporarily lost the editor's edge.

A slow pace will not, in and of itself, assist you in finding problems. You must read with a sense of anticipation. Slow down when what you see or feel is different than your expectation. There usually is a reason. Think about it. A slow pace allows you to take in a number of concerns at a speed that allows you to process effectively. A slow pace for editing is ironically similar to speed-

24. *See infra* Part II.9.

25. The other recurring problem is editing without having a good grasp of the principles of editing.

reading. Both require anticipation.[26] Anticipation allows your understanding of patterns to kick in. Slow reading for editing purposes is not slow *per se*. It is the right speed to see most of the problems.[27]

4. Buy Bryan Garner's *The Redbook* and Use It.

The original heading for this section was: Use Good Resources When Editing. That is good advice, but not strong enough. Bryan Garner's *The Redbook: A Manual on Legal Style*[28] is indispensable. Buy it and use it. Even if you are educated and an experienced writer, you will likely not know even one-fifth of the stuff that is in this volume. Because of Bryan Garner, you do not have to. You need to know when there might be an issue on which to consult *The Redbook*. During the course of writing this article, I have used Garner's identification of an issue and explanation of the appropriate resolution more than thirty times.[29] This is a great resource for the editor. It provides answers, so long as you know enough to ask.

One of my writing weaknesses involves the proper choice of prepositions. To me, prepositions are loose. We use them all the time, as we must. But my first choice is not always the best choice. The Third Edition of *The Redbook* has 33 pages dealing with the correct prepositional pairings.[30] I would like to see this expanded. I don't have a good feel for these pairings and I could use even more instruction. Fortunately, Garner has given us a lot more direction than we all currently know and practice. A very good start.

Word choices are important. A good thesaurus is a required writing companion. Word choices shape the argument by reinforcing the theme, helping with "temperature control" by kicking up or toning down the intensity of the argument, and avoiding loss of respect by steering you away from wrong

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26. Speed-reading requires the reader to take in words in groups, much like reading music. A piano player cannot possibly read individual notes and keep up with the tempo. Experience in reading music expands the amount of information taken in and the processing of that information becomes more efficient as the patterns are anticipated. There is no time to analyze each individual part. If you have to think about it, you will probably be too late, just like with evidentiary objections.

27. I think this is similar to the experience of the college or NFL quarterback for whom the game begins to "slow down." At each level, there is an initial complexity that is overwhelming, until analysis, repetitions, and muscle memory allow for the processing of information and the appropriate reaction to follow. The same can be said for the trial lawyer whose cumulative experience teaches the lawyer to"slow the game down."

28. BRYAN A. GARNER, THE REDBOOK: A MANUAL ON LEGAL STYLE (3d ed. 2013) [hereinafter THE REDBOOK].

29. Any remaining errors here are my own. Until *The Redbook* is incorporated into a word processing program, you have to sense that there is an issue before Garner can help you. Garner is especially helpful in laying out the reason behind the rule. For example, the matter of numbers, whether to use numerals or to spell out numbers, receives an extended treatment in *The Redbook*. *Id.* at 109-119. Garner's advice gave me confidence to go against the basic rule—spell out numbers one through ten and use numerals for 11 and above. I spelled out "thirty" in the text above, but used "33" only a few lines later because I wanted less precision with "more than thirty times" but greater precision with "33 pages."

30. *Id.* at 318-50.

choices, also known as malapropisms. *The Redbook* has an extended section "to find the correct uses of problematic expressions – words and phrases that are sometimes misused in legal writing."[31] There is some overlap here with Garner's *A Dictionary of Modern Legal Usage*,[32] with the latter having the more extended treatment. Both are very good. If you know to consult them, they will save you embarrassment.

Punctuation is important. If you want to establish competence, first avoid embarrassment. Garner has the last word on many of those nitpicking details, such as the proper typeface, the use of apostrophes, where to put the period or comma when using quotes, as well as: quotation marks; parentheses and brackets; ellipsis dots; and the proper use of hyphens, em-dashes, and en-dashes. You didn't know about em-dashes and en-dashes? Go see *The Redbook*.[33] In addition, he has sections on capitalization (The Court and the court; Congress and congressional; Spring and spring), typeface (italics, boldface, and underlining), document design, and the treatment of numbers. The detail is mind-boggling, but authoritative. I think my original estimate of what you might know right now without *The Redbook* is sinking to less than ten percent.

How important is spelling in the age of automatic spell-checkers? You can never relax. First, we all are familiar with those typos that are correctly spelled, but not what we wanted to say. Homonyms are especially problematic. Garner takes this several steps further with a section on spelling that goes well into detail beyond our ken.[34] He takes us through the use of hyphens. He instructs us on the proper use of plurals, possessives, and compounds. And he deals with the differences between American and British spellings. You don't want to look either affected or uneducated.

Grammar is something that may be best learned from the outside. I learned English grammar by studying German.[35] That is, I operated initially from the inside by listening and repeating what I heard from others. German taught me the structure of grammar, from which I learned about English grammar in a conscious way. There is a whole lot more than diagramming sentences. If you now want to learn grammar as an adult, take the time and read Garner's extended section, about forty pages, on grammar. It is not easy going, but well worth the time and effort.[36]

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31. *Id.* at 246. *See generally id.* at 246-350 (providing full glossary).
32. *See* MODERN LEGAL USAGE, *supra* note 15.
33. THE REDBOOK, *supra* note 28, at 40-44.
34. *Id.* at 127-46.
35. My editor, Derek Nelsen, agrees: "Learning Spanish in college taught me English."
36. *See also* ON WRITING, *supra* note 9, at 147-48. Stephen King's take on reading in various odd places:

> Reading is the creative center of a writer's life. I take a book with me everywhere I go, and find there are all sorts of opportunities to dip in. The trick is to teach yourself to read in small sips as well as in long swallows. Waiting rooms were made for books—of course! But so are theater lobbies before the show, long and boring checkout lines, and everyone's favorite, the [toilet].

Id.

The new third edition of *The Redbook* has an expanded section on how to prepare specific kinds of legal documents—business correspondence, case briefs, research memos, opinion letters, demand letters, affidavits and declarations, pleadings, motions, appellate briefs, judicial opinions, and contracts. All good stuff.[37] I cannot emphasize enough how important it is that you buy *The Redbook*, and use it, both as a law student and a lawyer.

Garner's *A Dictionary of Modern Legal Usage*[38] is more than a dictionary, just as *The Redbook* is more than a stylebook. *Modern Legal Usage* is an extended treatment of legal terms and their correct usage and includes sections on the proper use of non-legal terms and usage, apostrophes, capitalization, adjectives, adverbs, possessives, sentence endings, sentence fragments, sentence length, and much more. Again, there is material common to both books. If the editor could have only one, I would recommend *The Redbook*. Both should be in the editor's own collection, however,[39] and in every law school and law office library, as well.

Bryan Garner's *The Winning Brief*[40] is a composition and editing manual for legal briefs. Directed primarily at the brief writer, there are many editing suggestions in this book. It is organized around propositions or tips—a format I like a lot. Although this book can be used as a reference, it is more appropriate as a teaching manual. *The Redbook* and *Modern Legal Usage* are better suited for resolving the problems that need fixing during the editorial process. Reflective study of the many tips in *The Winning Brief* should come earlier for the writer (and editor).[41] I fully endorse Garner's emphasis on advancing the argument through paragraphs with simple and direct topic sentences.[42] *The Winning Brief* has many excellent tips and reminders for the brief writer. I

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37. With respect to pleadings, I would offer some thoughts with a different emphasis than appears in *The Redbook*. With respect to drafting a complaint, the main audience is the judge. You need legal competency in order to not lose respect from the lawyers on the other side. But the judge is the one you care most about. Go beyond the notice pleading style, where the basic facts constitute the elements of the cause of action, and nothing more, is the goal. Think of the complaint as an opening statement. Tell the story. This will shape how the judge first views the case, especially when considering a challenge to your pleading in the form of a motion to dismiss or a motion for summary judgment. With respect to answering the complaint, my position is even more adamant. The typical answer is deny, deny, and deny. Make the plaintiff prove the case. I believe this is also a missed advocacy opportunity. I usually admit or deny, as the case may be, and then add whatever affirmative facts relate to rebut the allegation. In other words, I treat the answer much like the complaint in using a narrative style to tell a story for the benefit of the judge. Because the pleadings may be used for impeachment, I use caution in what I allege, particularly with respect to dollar amounts claimed as damages. I generally do not ask for specific amounts, other than jurisdictional requirements, and leave it open for a determination by the trier of fact, as the evidence at trial will show.

38. MODERN LEGAL USAGE, *supra* note 15.

39. *See id.* at 409 for the proper use of "however," as well as for the many issues of punctuation inside and outside of quotes.

40. BRYAN A. GARNER, THE WINNING BRIEF: 100 TIPS FOR PERSUASIVE BRIEFING IN TRIAL AND APPELLATE COURTS (2d ed. 2004) [hereinafter THE WINNING BRIEF].

41. Here is an excellent opportunity for some of those short reads mentioned by Stephen King. *See generally* ON WRITING, *supra* note 9.

42. THE WINNING BRIEF, *supra* note 40, at 116.

strongly recommend it for both brief writers and editors as an essential part of their long-term development.

Thomas Vesper's great collection of quotes is one more indispensible resource.[43] Organized by topic and author, you can browse endlessly. I think it is best used from the ground up, not from the top down. Find the quote to fit the argument, rather than making the argument fit the quote. This is not to say one cannot use the Vesper collection at the beginning of the process to look for arguments or themes. It is an excellent source for ideas and inspiration. It is a rare resource book one can simply open at random and read with pleasure. If you are not familiar with it, you should check it out.[44]

5. Scout Your Writer and Counsel Accordingly.

There is no "one size fits all" approach to editing. Writers come in all ranges of experience and ability. In order to be effective as an editor, you should tailor your advice to your writer. The writer usually has more knowledge of the particular subject matter. But the editor should have the advantage of a fresh pair of eyes (and mind), if not also greater experience and ability. Be completely honest in your own evaluation, but be kind in delivering the message to the writer. Work with your writer. Do not crush your writer. Give only as much work for the next draft as the writer can handle for the next level. Be as positive as you can be. Look for writing deficiencies that are systemic[45]—*e.g.*, weak propositions, wordiness, or too short with the argument (conclusory). Be prepared to explain the problem. Do not use vague criticisms, like "unclear," "awkward," or "flow." The outlining of the article structure discussed above will help immensely in this regard. If you can straighten out the negative tendencies by showing how and why they are bad, it will help you and the writer get along better.

Listening is very important. You need to listen to the writer. This first occurs in your reading of the piece. Do not be like the book reviewer who is unhappy because the writer has not written the book that the book reviewer would have written. Read with an open mind. You must understand before you can criticize. When you bring your edits back to the writer expect some resistance. Listen to the pushback. It may help you reshape your approach so that it lessens the resistance. This approach will help build trust. The writer needs to listen to you and will be more likely to listen if there is trust. You gain trust by delivering, not by demanding. Pulling rank usually doesn't work.

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43. THOMAS J. VESPER, UNCLE ANTHONY'S UNABRIDGED ANALOGIES, QUOTES, PROVERBS, BLESSINGS & TOASTS FOR LAWYERS, LECTURERS & LAYPEOPLE (2d ed. 2010) [hereinafter VESPER].

44. For more on the use of quotes, *see infra* Part II.16.

45. *Cf.* LESS THAN WORDS CAN SAY, *supra* note 4, at 130. "Bad writing is like any other form of crime; most of it is unimaginative and tiresomely predictable." *Id.*

Everyone needs an editor.[46] There should be at least one other trusted, wise voice, weighing in on important decisions. In other words, everyone should have a mentor. My mentors have been very good for me. I have internalized a portion of their wisdom and still hear their voices, even though several have passed on.[47] The goal of the editor is that the writer will, with proper guidance, grow out of certain flaws and be able to self-correct. Teaching the writer as you go through the piece will stick longer than bare correction. There are times, however, when the editor's (and mentor's) best advice is: "No, don't do that. It will not end well if you do." If the relationship is supported by trust, this will work.

The ultimate goal of writing should be a collaborative effort. It is not a unilateral statement, like a message in a bottle, which is sent out with the real prospect that no one will ever see it. It is a collaboration between the writer and the reader. Here is a good description of what is going on between author and reader:

> [A] novel is only a set of black marks on a page till someone reads them, or, as some would say, decodes them. A novel doesn't exist of itself, except as a physical object. Printed words are a set of instructions by the writer for the reader to construct the story, and what we mean by a novel is really a joint operation by writer and reader.
>
> If you take this (to me) self-evident fact about writing and reading, then metaphors become only one kind of instruction. *What's unique about them, though, is that they engage our most primitive understanding: instead of using the abstractness of 'red' or 'wet road' or 'fear', the writer engages the reader's own physical memory of blood or snake or heart-in-*

46. Even editors apparently need an editor. See, for example, a review of a recent, lengthy biography of the actress Barbara Stanwyck: "The fact that [the author] is one of New York's most powerful book editors likely had much to do with her being allowed to publish a thousand-page biography that shows no signs of having been edited by other hands." Terry Teachout, *Going On and On and On About Barbara Stanwyck*, COMMENTARY (Feb. 1, 2014, 12:00 AM), http://www.commentarymagazine.com/article/going-on-and-on-and-on-about-barbara-stanwyck/.

47. Robert Willard, a trial lawyer in California (and my co-author for *The Limits of Advocacy: A Proposal for the Tort of Malicious Defense in Civil Actions*, 35 HASTINGS L.J. 891 (1984)) taught me many important lessons about the law. I hear his voice still. My chief mentor at the University of South Dakota, Mike Driscoll, was indispensable in my development as a law teacher and as a lawyer. *See* Jonathan K. Van Patten, *Dedication* in 57 S.D. L. REV. at x–xii (2012) (volume 57 of the *Review* was dedicated to Robert E. "Mike" Driscoll). John Hagemann was my friend and lunch partner for many years. We had good conversation on almost every possible topic. To my Pantheon of Mentors, Reverend Carroll Hinderlie and Reverend Walter Bouman. *See* Lee Moriwaki, *Rev. Carroll Hinderlie, 78, Always A Leader Of Diversity And Debate*, THE SEATTLE TIMES, Mar. 28, 1992, http://community.seattletimes.nwsource.com/archive/?date=19920328&slug=1483416; *Walter Bouman sermon 5/18/05*, YOUTUBE, http://www.youtube.com/watch?v=GNxVfvloxl4 (last visited Oct. 14, 2014); Walter R. Bouman, *Counting the Last Days*, THE LUTHERAN, Nov. 2005, *available at* http://www.thelutheran.org/article/article.cfm?article_id=5534. I miss them all now more than I could have possibly known when they were my teachers. Youth is indeed wasted on the young. But I am very grateful for their guidance and wisdom.

the-mouth. The best writing, you could say, is the writing that takes place in the reader's head.[48]

The best writing is the writing that takes place in the reader's head. This insight highlights the writer's task—to make the argument without causing distraction, skepticism, or outright resistance in the reader's head. To the same effect is Stephen King's observation: "Description begins in the writer's imagination, but should finish in the reader's."[49] The editor serves as the reader where the argument is finished. Do not lose that perspective when editing.

6. You May Not be Able to Fix Everything in One Edit. Fix the Big Problems First.

Sometimes, you cannot get there (the finished piece) from here. Meaning, some pieces are not far enough along to "edit." There is generally a sequence to the fixing: concept, structure, propositions, support, word choice, grammar, and "polish." If you don't call attention to the big problems and fix those first, you may find yourself doing a lot of editing that winds up on the cutting room floor. Using a baseball metaphor, an editor has a "pitch count"[50] with any given piece. Eventually, you lose the "fresh eyes" that come with the outsider's perspective. You are, in effect, brought in as a co-author. As an editor, you do not need to write the piece, you need to edit. Save your "pitches" for the teaching and the editing. Identify the big problems and ask the writer to address those problems before coming back to you with another draft.

From the writer's perspective, there is only so much that the writer can absorb without losing hope. You, as the editor, must be ruthless in your analysis, but kind in delivering to the writer only so much as you think the writer can take. Do not crush the writer. Communicate cautious optimism. Set a series of tasks that are realistic for the improvement needed to reach the next stage. Some writers will need several drafts to move the piece into a position where it is ready for a final edit. Try to make the next level attainable for the writer. If you require too much, the writer may give up or try to work around you.

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48. Emma Darwin, *My true love hath my heart . . .*, This Itch of Writing (Nov. 9, 2007), http://emmadarwin.typepad.com/thisitchofwriting/2007/11/my-true-love-ha.html (emphasis added).

49. ON WRITING, *supra* note 9, at 174.

50. The notion is that you change, both physically and emotionally, over the course of the performance and are "used up" by the end. *See* Tim Kurkjian, *Baseball's magic number: 100: When pitch counts reach the century mark, the end is near . . . but why?*, ESPN MLB, July 28, 2009, http://sports.espn.go.com/mlb/columns/story?id=4359938.

7. Identify the Overall Structure of the Argument.

The editor must make an independent assessment of the structure of the writing. Structure is essential and is too important to be left solely to the writer. Beginning writers often lose the focus of the piece because so much of the initial effort goes into description that eventually becomes untethered from the structure. Understanding structure helps to keep the writing on track, by dictating the sequence of the argument. Knowing where you are—whether it is introduction, foundation, description, analysis, or conclusion—keeps you close to the task at hand.

The academic practice of writing an abstract is a useful tool in formulating the basic structure of the piece. The writer should be able to answer the questions of what is the primary proposition, why is it significant, and how does this add to or differ from what we already know? In other words, what is the basic argument in a nutshell? For a law review piece, it typically involves identification of the problem, what has been done to address it, why have the attempts to address it come up short, and what is the best solution to the problem. With respect to the law, is the current law adequate? If it is inadequate, why is it inadequate? If the law is fine, is there a problem with enforcement? Is there a problem due to unintended consequences? What more needs to be done to address the issue?

For a brief, the writer ought to be able to tell you, in under one minute, why the party should win. Longer than that is probably not focused enough. This is what the conclusion of the brief should look like, not the throw-away: "For the foregoing reasons, the Appellant respectfully requests . . . ." It should also be the last minute or so of the oral argument. This kind of summarization is a good exercise in and of itself because it requires choice, clarity, and concision. It also assists in the search for a theme, if that task has not already been accomplished.

Structure also requires the writer and editor to be aware of the affirmative or negative side of the argument. Sometimes you are on offense; sometimes you are on defense. One of the most important lessons I learned in law school was from a lecture on the bar exam by Professor Ken Graham (UCLA). Intended to be mostly humorous, he made the following observation: "There are two ways to win a race. One is to run faster than anyone else and the other is to make sure that no one else runs faster than you." This is an important insight on the strategy of argument. Sometimes an issue is mostly against you, and it is too difficult to win outright. That is okay because many arguments are like that. Focus then on not losing by attacking the argument on the other side. Applied to moot court, I would often advise: "Don't try to win what you cannot win, just don't lose it. Survive for later when your stronger argument will put you in a place where you can win."

8. Look for the Moral Center of the Argument.

A basic rule of advocacy is the one who makes the argument the simplest will usually win.[51] Simple *and* effective, however, requires finding and then effective use of a theme. A theme is an overarching statement that expresses the basic sense of the argument. It is often a moral argument–why something is right or wrong (principle). It also may be based on experience (circumstance, comparison, or testimonial).[52] It must be short and should resonate with the reader's own values, at least in part.

A theme will engage the reader or listener in ways that bare facts or law cannot. A theme condenses the argument into a user-friendly size and ties into core values. It acts like a magnet to gather evidence that lines up with the theme and as a filter to discard or minimize evidence that does not. It shapes the argument down to the details, especially word choices. Themes are not just organizers. They also give power to an argument by tying into core values and making the audience active participants in the process of persuasion.

The use of themes is essential because we do not deal with facts in isolation. As Eric Oliver says: "Facts can't speak for themselves."[53] Human beings are theme-seeking creatures. We inevitably organize information around themes, whether consciously or not. If you do not take control of this process, someone else will:

> The search for the right theme is one of the most critical tasks facing a trial lawyer in presenting a case to a jury. Human beings do not absorb facts in the abstract. The theme gives them the necessary perspective to understand the evidence. If the plaintiff['s] attorney does not provide jurors with the right theme, the defense will, or jurors will do it for themselves.
>
> The most powerful themes appeal to a broad spectrum of humanity and tie into people's basic needs. Themes are the core ingredient of great literature plays, and cinema–and of winning cases.[54]

It is not unusual for the editor to find the theme before the writer does. The writer has been researching and collecting and has come to you with a mass of thoughts that need pruning and shaping before going any further. If this is the situation, it is time for someone (and that would be you) to start asking the questions that will uncover the themes that are hidden in the unrefined mass of material.

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51. *See, e.g.*, *Twenty-Five Propositions*, *supra* note 3, at 274.

52. *See* Jonathan K. Van Patten, *Themes and Persuasion*, 56 S.D. L. REV. 256, 264-79 (2011).

53. ERIC OLIVER, FACTS CAN'T SPEAK FOR THEMSELVES, REVEAL THE STORIES THAT GIVE FACTS THEIR MEANING, xv (2005) (title of book and provided for in David Ball's Foreword).

54. William S. Bailey, *Tie Your Case Together With a Good Theme: Themes that Evoke Basic Human Needs Give Jurors the Perspective to Understand Evidence*, TRIAL, Feb. 2001, at 63.

I usually start with asking the writer to describe the basic structure of the piece. I follow-up with the simple "who, what, when, and where" questions in order to comprehend how the essential facts fit into the structure. I then go on to explore some of the "how and why" questions so that my understanding of connections begins to form. When I have enough to go on, I begin to try out some tentative themes, which are usually prefaced by "so are you saying that . . ." or possibly more directed like "why isn't this a case of . . . ?" The suggestions should lean, however, toward the open-ended to allow the writer to respond. Remember, the writer has a greater command of the details. It is the focus on detail that perhaps has caused the theme to be buried. Unearthing the theme is best left to the writer, who probably has a better grasp of the matter by virtue of having done the primary research. The editor is more like a chief archaeologist who suggests where to dig. But the editor remains active throughout this exploration as a sounding board when considering potential themes. The editor's greater experience with themes will assist in this trial and error process.

I sometimes suggest to the writer that a drive or long walk will help in the search for themes. What the writer may need most is to get away from the books, the pages of research notes, and the drafts, in order to think about the piece at a more fundamental level. Going through the argument without being tied to text may lead to different connections or a changed emphasis. Another useful departure from the text is to explain the argument to a third party–lawyer or non-lawyer. The process of giving a concise account to a neutral listener may unearth a theme that previously eluded articulation.

After a careful reading of the piece, you should be able to state the argument in a few sentences. It should not be a reduction that becomes a mere recitation of the section headings. Be relentless with the brief writer: "Why should you win?" Each answer should be no more than one sentence and, ideally, there should be no more than three answers. This will help in finding the core of the argument. For the law review editor, a similar imperative applies. What is this piece about? Why is it important? How should we think honestly about the issues it raises?

Trial lawyer Rick Friedman emphasizes what he calls "moral core advocacy."[55] He asks lawyers to confront what they are afraid of, indeed, what they may even be ashamed of, and challenges them to talk honestly about it with jurors.[56] It is a challenge to go deeper in thinking about the problem. It is also an attempt to bring lawyers, who are usually more cerebral than they need to be, back to the common sense of what they should be telling jurors. Moral core advocacy will seek out the moral center of the argument, even if it requires

55. DVD: Moral Core Advocacy: Finding the Heart of Your Case (Rick Friedman 2010) (on file with author).

56. *Id.* This is similar to Gerry Spence's advice to use *voir dire* to talk to the jury panel about what scares you, as the lawyer, about your case. GERRY SPENCE, WIN YOUR CASE – HOW TO PRESENT, PERSUADE, PREVAIL – EVERY PLACE, EVERY TIME 114-15 (2005).

painful reflection, and attempt to talk about it honestly as the key to understanding the case.

The editor should never stop looking for themes. Think about the big picture even as you are striking out unnecessary words. As your understanding of the case or the writing evolves, revise accordingly. Be open to re-evaluation as new information arises or old information reveals itself in a different light. Better late than never. Your writer will thank you.

9. It is Important to Think About What Goes in the Finished Piece and What Does Not.

One purpose of the initial draft is to research and collect the relevant materials into a single document. Another purpose is to begin the process of exclusion.[57] Don't make the reader read everything just because you had to. The processes of culling and synthesizing are just as important as the collection of materials. The corollary to Strunk & White's "omit needless words" is omit needless sentences and paragraphs.

Less can be more, especially if the alternative is to obscure the main point by over-including the supporting material. Think of it as a problem of pace. There are times to slow down with the foundation and analysis, and there are times to get to the conclusion. When is it enough? This is a good place for you as the *editor* to make that call. I think the editor might even ask for over-inclusion on an early draft because you cannot make the call to include or exclude if the decision has already been made. The editor's viewpoint is probably closer to the reader's when it comes to determining when is it enough.

For briefs, think about using footnotes as a middle ground between inclusion and exclusion of research. It shows the court that a potential issue has been accounted for, but in a way that does not distract from the main argument. For law review articles, the footnotes serve as a mini-library for the reader who needs the depth of research on that particular point.[58] Footnotes allow the writer to include a larger part of the research as a side trip to be consulted later, as the reader's needs dictate. Although footnotes serve as a compromise on the inclusion/exclusion problem, you should take care that the writer has not used this as an excuse to throw everything else in. Make the writer justify the extent of the footnote.

The natural tendency of the writer to over-include and the editor's inevitable judgment call on when enough is enough support a natural division of labor. The editor must be vigilant about clutter—within sentences and within the

57. *See* RICHARD MITCHELL, THE GIFT OF FIRE 82 (1987). "The word 'intelligence' comes from two Latin words, *inter* [between, among] and *legere* [to weigh], which, put together, suggest the act of one who looks around among different things and makes choices, gathering some and leaving others." *Id.*

58. *See infra* Part II.23.

argument. The anti-clutter mindset, however, should not counsel against calling for more explanation when it is needed. What is going on inside the writer's head is not always what is on the paper. The anti-clutter mindset should also not overwhelm the search for, and articulation of, the moral core of the argument. Include what needs to be included and omit what does not. Got it? Obviously question-begging, but it provides a good reminder and point-of-view for the editor.

10. Think About Where to Begin.

The familiar advice is to "start at the very beginning, a very good place to start."[59] This obviously begs the question, but it remains as an important reminder. Just like establishing a point of view in opening statement, where you start is a very important strategic decision. It will have an impact on where you wind up. Be open to the possibility that your writer has not made the best choice on where to begin. This is likely if the writer does not yet have a clear sense of the theme or themes for the piece. Always think through the question of whether the beginning that the writer has chosen is the best one.

Let us begin with identifying some of the problems with finding the right place to start. For a factual narrative, the natural choice–the earliest event–is not obvious. What is the earliest event? In a personal injury case, is it the injury or the events leading up to the injury? Current books on the plaintiff's side—*Rules of the Road*[60] and *Reptile*[61]—put the emphasis on the defendant and what the defendant has done before introducing the plaintiff. Even the natural "tell the story from the beginning" has many notable exceptions. We are well aware, especially with movies, of the technique where the story is not strictly chronological, but the narrative is shaped by flashbacks, which sharpen the understanding of the events as the chronology is resumed.[62]

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59. *Do-Re-Mi Lyrics*, ALLTHELYRICS.COM, http://www.allthelyrics.com/lyrics/sound_of_music/doremi-lyrics-655678.html (last visited Sept. 25, 2014).

60. *See* RULES OF THE ROAD, *supra* note 9, at 7-30.

61. DAVID BALL & DON KEENAN, REPTILE: THE 2009 MANUAL OF THE PLAINTIFF'S REVOLUTION 129-38 (2009).

62. *See, e.g.*, CASABLANCA (Warner Brothers 1942) (the story of two refugees trying to escape the Nazis during World War II leads to a critical decision, but only after we understand through flashback Rick's prior relationship with Ilsa); AMADEUS (Orion Pictures 1984) (the narrator tells the story of Mozart from his point of view as a rival composer, primarily through flashbacks, which allows the narrator to provide the crucial commentary on the meaning of those events); THE SHAWSHANK REDEMPTION (Castle Rock Entertainment 1994) (the flashbacks are strategically withheld until the end so that the tension of the story, told by a narrator, who is also part of the story, builds to a surprising ending which is then explained through a terrific series of short flashbacks). For examples of the story being told backwards, *see* THE HANGOVER (Warner Brothers 2009) (the story begins with an inexplicably odd scene, which leads the characters on a quest to discover how the situation came about); MEMENTO (Summit Entertainment 2000) (the story of a man's attempt to find his wife's murderer. The film goes backward through flashbacks, but is complicated by the man's short-term memory loss which means he cannot remember most of what each flashback reveals).

Professor James McElhaney gives a marvelous example of varying the start of the narrative in order to emphasize particular themes.[63] He begins with an accident at a factory where the plaintiff, a school teacher leading her class on a field trip, is injured by an exploding soda bottle during the bottling process. He then retells the story by starting it at a far-off corporate boardroom where the directors consider a report of recent accidents with the company-manufactured bottling machine and whether to investigate further. He then says, "They ignored it. They decided it was not worth their while to investigate . . . ." He transitions to the accident scene by showing how the consequences of that decision resulted in the school teacher's injuries while at the factory. Finally, to emphasize how telling the story may be started when the concern is more with damages than liability, McElhaney retells it by beginning at the emergency room when Sarah is first brought in for treatment, with a large shard of broken glass still lodged in her eye. The lesson from this is that the beginning of the narrative will depend on your theme. A story that starts without a theme in mind is likely to wander and the value of primacy is thereby lost.

For discussion of the law, the problem of where to begin is less complicated, but no less important. In a brief, you should try to start with the common ground (*i.e.*, what everyone would agree on) and move toward what the judge must resolve. You must answer for the judge: what do we already know and how does that help us to think about the current problem? The initial foundation is orientation. The opening paragraphs are not intended to be the complete argument. You are allowed to introduce without having to prove. You are allowed to give some orientation relating to the principal arguments. But the suspension of belief only lasts so long. Don't loiter on your introduction to the legal problem. Deal quickly with what the reader needs to know before the burden of persuasion begins.

The default position is to start where the courts start. Start the legal discussion where your own foundational cases start. Because you don't want to appear to be a novice, where the courts start with analysis of the problem should be the presumptive starting point. You don't necessarily need to reinvent the wheel. You should not depart from the norm unless there is a good reason to do so. For example, you are not obliged to accept the custom, if it is clear your client has been dealt a losing hand.[64] The best way to change this dynamic is to find a credible way to reframe the issue. You should also try to start with your best argument, if possible. You can't always do this because custom may dictate

63. JAMES W. MCELHANEY, TRIAL NOTEBOOK 32-35 (4th ed. 2006) (illustrating theme usage through a case example) [hereinafter TRIAL NOTEBOOK].

64. Please excuse the passive nature of this metaphor. Many times, the reason for the "losing hand" is that your client has intentionally, recklessly, or negligently dealt the cards. I couldn't think of how to convey this point without using another passive metaphor, like "before your client goes into the chute leading to the slaughter . . . ." The point is, the lawyer is not a "potted plant," to use yet another metaphor. Custom is okay, but your main task is to effectively represent your client's interest and that may require a creative starting point.

a given sequence. In such case, you must not lose the argument until you are in a position to win it.

Where to start is always an important decision. I believe that insufficient attention has been paid to this matter, both as to where to start the story and where to start the legal discussion. You owe it to the writer to provide an informed second opinion.

11. The Section is the Unit of Argument.

If the paragraph is the unit of composition, the section is the natural unit of argument. The paragraph is the right size to think about composition. The section is the right size to think about argument. This will help you (and the reader) to follow the argument, to see how the parts fit together, and to identify where the parts of the argument are weak or missing. Sections are typically identified by headings, numbers, or numbered headings. "Signposts," as it were, are not just for location, but also for directions and trip advisories. The structure of this unit is the traditional beginning, middle, and end. In a brief, this would be foundation, new authority,[65] application, and conclusion. In a law review article, a section may take many shapes, so beginning, middle, and end would probably be the best way for the editor to keep track.[66] The paragraph method of editorial diagnosis, described earlier,[67] will provide the framework for reviewing each section.

The section frames how to think about the particular part of the argument. It helps to focus attention on one part of the whole, while implicitly asking the reader to resist making judgment while the part is being described. The section (defined by the writer) provides boundaries for inclusion and exclusion and thus provides for a certain kind of housekeeping orderliness. Like with the discipline of the paragraph, the section helps to keep the writer on track. Have I said all that needs to be said with this part? Does this aspect of the argument fit better in another section or does something from another section work more effectively here? These are good questions to ask about the middle of the section. We also need to think specifically about beginnings and ends of sections.

Introductions to sections are tricky. They consist of a paragraph or two that allow the framing of the argument and setting the ground rules, without generating a separate fight. When introducing the argument, the writer does not bear the full burden of persuasion. There is an unspoken tendency to suspend

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65. In contrast to the foundation, with which everyone should agree, the "new authority" is urged as the specific legal foundation that should govern the court's analysis and lead to the advocate's recommended outcome. *Cf.* PLAIN ENGLISH, *supra* 12, at 58-60 (specifically Garner's "deep issue" statement).

66. The overall shape of the article would be the introduction (identification of the problem and brief spoiler of the ending), the legal landscape (foundation), exploration of options, including why certain solutions have not worked, and conclusion.

67. *See supra* Part II.1.

disbelief before the argument and its accompanying burden set in. Don't assume this suspension lasts more than two paragraphs, or three at the very most. The writer is trying to orient the reader before the argument begins. It is more than a ritual, like the touching of the gloves before a fight. The orientation has to be foundational. It must be purposeful. It should not generate resistance. To continue the metaphor, it might be more like the referee's instructions before the beginning of a fight. In any event, don't make the introduction to the argument go off track by generating resistance to the orientation. You should counterbalance the brief writer's natural aggression with a sense of how to formulate the introduction without generating a fight. You may also need to decide whether an introduction is even necessary.

A conclusion to a section is necessary. An argument cannot end abruptly with just argument. The section must be summarized, not simply restated, with the theme emerging, possibly in explicit form for the first time. To end a section without a conclusion is like ending a movie without music. The tone for the end of a section must be appropriate, however. It should not signal the ending (the "Big C" conclusion) like Tara's Theme will signal the end of the movie.[68] It is a "middle C" conclusion, signaling the end of the section, and warrants a different tone from the "small C" conclusion that ends a well-ordered paragraph. The fat lady doesn't have to sing at the end of a section, but there should be more fanfare than the warming up of the flute section. Make sure that any exhaustion of the writer at the end of a section is remedied by a conclusion that summarizes the section in its most concise and persuasive manner. This is a good spot for moral core advocacy.

Before leaving the matter of sections, I must address an issue with which I often have difficulty—that of section headings. I am speaking primarily of section headings in briefs. Section headings in law review articles are generally not problematic.[69] Section headings and subsection headings are not mere signposts. They are an advocacy opportunity. But, as Jack Warden said to Paul Newman in *The Verdict*, when Newman chose to forego trial preparation for a hot date: "Don't leave your best work between the sheets."[70] That is, don't put forth your best effort too early, when it doesn't count as much as the trial ahead. Don't put the best statement of the argument in the heading. The reader may not even read the heading. The best single line statement of the argument should be in the conclusion or in the first paragraph or both, taking advantage of both

68. *See Tara's Theme ~ Gone With The Wind*, YOUTUBE, (last visited Sept. 26, 2014). Actually, Tara's Theme doesn't signal the end of *Gone With The Wind*. It is a theme that is repeated throughout the movie. Think Tara's Theme when ending a section. But, you know when Tara's Theme is stated for the final time, in its most grand version, the end is near.

69. Law review titles are another matter. I cringe at some of mine, and they will not be repeated here. I have at least avoided, mostly, the turgid and the cute. My current strategy, as evidenced by the title of this piece, is minimalist.

70. THE VERDICT (20th Century Fox 1982).

primacy and recency.[71] There is something about a section heading in the form of a proposition that, like a quotation, makes the eyes skip over or read the sentence less carefully. This is true the longer the proposition. The temptation to do this may be an affliction stemming from high school and college debate days. I view it as self-defeating to attempt to state the entire argument in a section heading. You cannot win the argument there, but you could lose it. Practice advocacy in moderation when it comes to headings. Think of the section-heading proposition as the third best statement of the argument. The editor can play a key role here in finding a balance. It should not be a throw-away part of the brief. Section headings do not come naturally or easily, but contribute to the appearance of competency and confidence.

12. Think About Sequence. Don't Be Too Eager With Your Best Facts or Best Argument.

Where the writer begins will shape the sequence of the argument, but there are still several decisions ahead. The argument in a section will move through a series of strong propositions. Build the foundation and deliver the best stuff when the stage is set. This is similar to the strategy for an opening statement. Things should be revealed in their right place. Sequence is important.

Lay foundation first. Foundation should start with the givens, and you should try to hold off on arguing until after you have laid as much uncontroverted foundation as you can. Same thing with saving the conclusion until you have finished the argument. The longer you can hold off the punch line, the better the impact will be. For one thing, it provides an opportunity for the reader to get there first, making it more likely to stick because it becomes the reader's conclusion. In brief writing terms, not laying foundation first could be called "premature argumentation." Similarly, rushing to the "middle C" conclusion before you have finished the argument, could also be known as "premature celebration" (not to be confused with excessive celebration, for which there is a different penalty).

Once the beginning of a section has been determined, there is often a customary sequence that follows. For example, a statutory argument should begin with the statute. To do anything else would simply highlight the weakness of what the writer eventually has to say about the statute. If the argument is weak, do the best you can, but don't oversell the statute. Maybe the best argument is a defensive one, for example, that the statute is not dispositive. Maybe the strength of the argument lies with legislative history. Or maybe it lies

71. The writer should be careful when putting the best statement in the first paragraph of the section. You may abuse the unspoken suspension of disbelief with too much advocacy in an introductory paragraph. I'm not saying don't do it, just be careful. Perhaps the better way is to put your second best statement of the argument in the first paragraph and save the best for the conclusion. Start out strong and end stronger.

with regulations promulgated by the agency charged with enforcement, which are given deference under the *Chevron* standard.[72] It may be that you are not in a position to win the argument until you get to the cases that support your position. Don't oversell the weak arguments while waiting to deliver your best argument.

Another matter for sequence concerns judgment about when to play certain cards. The novice writer will be understandably anxious to use the best facts or the best legal points. Patience is key. Don't let the writer jump the gun. It shows inexperience and reminds us of the late night hard-sell infomercial. Desperation does not breed trust.

There is some tension between two principles here. One is to start with your best argument, if possible. The other is to follow the customary sequence, unless there is a good reason to do otherwise. The customary sequence may force your best argument to wait. One good reason to do otherwise is to avoid inevitable defeat. You are not obliged to lose. You are obliged to represent your client well and sometimes that means changing the framework of the debate in order to have a better chance to win. It does help, however, to be conscious about this decision. It may require the writer to be more defensive to keep the argument alive until you are in a position to win.

13. Do Your Side of the Argument, Then Deal With the Other Side.

This is related to sequence, but it has a different emphasis. Both sides of this proposition are important. Unless there is a good reason to do otherwise, marshal the affirmative side together before addressing the other side. However, don't impose blinders in the process. Deal with the pros and cons of *your* argument. State why your argument wins and why it does not lose. As you are laying out the affirmative side, you must deal with the natural objections or problems with your argument. With selling, objections and questions are what ultimately lead to sales. Just like a brief, if it appears as easy as the writer makes it out to be, something is missing and resistance begins to build.

After stating the affirmative argument, it is time to attack the other side. Lawyers are usually pretty good at attacking. But note that attacking first carries an implicit message. Why is there an attack? Is there nothing else besides *ad hominem*? If Barack Obama says "elect me because I'm not George W. Bush [or John McCain or Mitt Romney]," that may be a good argument, but it is not the one I would place in first position. When you start out with an attack, you imply that there isn't a strong affirmative argument. And if you don't have that, you usually lose.

72. Chevron U.S.A., Inc. v. Natural Resources Defense Council, Inc., 467 U.S. 837, 844-45 (1984) (holding that a government agency's interpretation of a statute it administers is entitled to deference by the courts).

Separate from the affirmative argument is why the other side does not win and why the other side loses. From an organizational standpoint, it helps to keep the affirmative and the negative arguments straight. If you don't marshal them together, you might give the impression that there is less to the argument than there actually is. When making the attack, be fair with the facts and the law. The writer wants to be the guide for the decision maker. This includes gaining trust on how to think about the other side's argument. Unfair spin jeopardizes trust.

When criticizing, describe first, then analyze. A novice writer tends to jump the gun. Don't criticize something you haven't adequately been able to describe. It will undermine trust. The guide wants to be able to convey to the decision maker: "I've been here before, and this is where the trail leads in the wrong direction." Make sure that the description of the other side's position is not so strong that you end up carrying water for the other side.[73] Laying foundation for the criticism to follow may clarify the other side's argument making it more persuasive. Describe only so much as to fairly permit criticism.

14. Brief Writing Involves a Fight for the High Ground. Find it and Claim it for Your Side.

In any close case, the winning argument involves a preliminary fight to define where, when, and how the battle will be fought. It may be how the issue is framed. It may be how the facts are stated. Other possibilities involve the standard of review, the key case, or the credibility of the witnesses. Because the writer has been researching, collecting, describing the legal landscape, and fashioning the legal argument, reflection about where the battle will ultimately turn may not yet be there. The editor must push for this focus.

Let me give an example from military history. In the movie *Braveheart*,[74] Mel Gibson gathers the brave lads, gives a stirring speech, and all run forward to meet the rival forces, with both sides attempting to beat the other senseless. Not much strategy there. By the time of the Civil War, however, there is noticeable strategy. Robert E. Lee's forces, though outnumbered and outgunned, were usually successful. Why? Because they were able to engage on more favorable terms. Most often, this involved occupying the high ground and cover while Union forces attacked under less favorable conditions. This didn't happen by accident. Lee would maneuver his troops in anticipation of where the battle should be fought and the Union generals would usually oblige.[75] Thus, a fight within a fight. Trial lawyers instinctively do this, visualizing the turning point and working to be there to make it happen. Similarly, the editor should help the

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73. *See Twenty-Five Propositions*, *supra* note 3, at 261-62.

74. BRAVEHEART (Paramount Pictures 1995).

75. *See, e.g.*, JAMES M. MCPHERSON, BATTLE CRY OF FREEDOM: THE CIVIL WAR ERA 476 (C. Vann Woodward, 1988).

writer to figure out where the fight will be won, and to be there and hold that ground, if it can be held.

Because the strategy of gaining the high ground is a staple of persuasive argument, it is not limited to brief writing. Look for this in all situations. It applies in negotiations, in mediation, and in client counseling (albeit in a more subtle form of helping the client to find the high ground, if any). I think it even applies to the law review model. The high ground will be found in one of the themes. Look for it and figure out a credible way of claiming it for your side.

15. Paragraphs Should be Built on Strong Propositions.

Use strong propositions to begin paragraphs.[76] A proposition is the statement of the paragraph in a clear, concise form. The proposition may vary from purely informational to highly partisan. A definite lean to the aggressive side is where the editor wants the writer to wind up. To check on where the writer is at, grade the propositions as plus, minus, or neutral. Does the proposition advance the argument, does it hurt the argument, or is it merely neutral? Use this as a marker, not a club. It is normal for the inexperienced writer to start out with more neutrals than pluses or minuses. In fact, this is probably where the inexperienced writer should be on the first draft. With too many pluses, the inexperienced writer will probably overshoot advocacy. There will be time later to turn up advocacy. This is a key role for the editor.

The most common neutral proposition will be: "In *Smith v. Jones*, the Supreme Court held . . . ."[77] The easiest way to move this over to the plus side is to state the principle of *Smith v. Jones* on your terms and then cite to *Smith v. Jones*. That, by itself, will give the paragraph formed around *Smith v. Jones* more edge. Two examples of enhancing the neutral proposition would, for example, include:

> This Court has repeatedly held that mere police questioning does not constitute a seizure. *Smith v. Jones*, —— U.S. —— (——).
>
> The police questioning in *Smith* took place on a crowded train, and yet this Court held that it did not implicate the Fourth Amendment. *Smith v. Jones*, —— U.S. —— (——).

Another technique is to broaden the scope of the proposition, state it, and then use the particular *Smith v. Jones* type examples above in a supporting role in the paragraph:

> Circuit courts also consider evasiveness, as well as nervousness, when determining if reasonable suspicion is warranted. In the case of *Smith v. Jones*, ...

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76. *See Twenty-Five Propositions*, *supra* note 3, at 255-56.

77. *Smith v. Jones* is used as a hypothetical case throughout this section to illustrate plus, minus, and neutral propositions.

Using strong propositions means that the beginning of each paragraph should not be merely informational. The information should have a point of view—an attitude advancing the argument. Generally, it is not a good idea to lead off a section with a quote. Quotes, especially lengthy ones, are not read with the same attention as regular prose. Only when the quote has the punch of a proposition will it work as intended. Here is one of my favorite quotes used as an opener:

> "The defining character of American constitutional government is its constant tension between security and liberty, serving both by partial helpings of each."[78]

This is a great opening proposition. It also states a theme that may be used appropriately by both sides.

While the law review style does not usually allow for the same intensity of advocacy, the editor should also insist on reasonably strong propositions to drive the argument. The article should have a clear point of view, expressed through propositions that move the argument through the section. For briefs and articles (and memoranda and letters), inexperienced writers will need help with achieving the right edge. This should be one of the primary tasks for the editor.

16. Watch for Special Problems with Description.

Don't let quotes carry the argument or analysis. Quotes are not as powerful as one might think because there is a tendency for the reader's eye to gloss over them. Especially block quotes.[79] It is similar to the problem of section headings. You get less "bang for the buck." Quotes are more effective for confirmation of the proposition and less so for the job of persuading itself.[80] Quotes are almost inherently taken out of context because they are put forth by others for their own purposes. The use of quotes is a classic instance of "cherry picking." The reader may even sense that the cited author would not agree to the point the quote is advancing. Thus, there is the potential for a false endorsement, or at least a misleading endorsement.[81] Bare quotes are like arguments from testimonials. The argument is made attractive or unattractive by the reputation of the person who said it, and not on the merits of what is said. Quotes work

78. Hamdi v. Rumsfeld, 542 U.S. 507, 545 (2004) (Souter, J., concurring in part and dissenting in part). Note that in brief writing, the citation to *Hamdi* would be in text directly after the quote. *See infra* Part II.23.

79. Block quotes are indented and single-spaced, making accessibility for the eye and mind more difficult.

80. Thomas Vesper's extensive collection of quotes is invaluable. VESPER, *supra* note 43. *See also* A SCHOLAR'S PURSUIT: THE JOHN HAGEMANN QUOTATION COLLECTION (2010).

81. There is also the negative endorsement, arguing against a position by showing that some notorious person, Adolf Hitler, for example, has said the same thing. This is a lazy form of argument because it attempts to win by attribution, *i.e.*, guilt by association.

best when used to confirm the argument, which is why they work well in the middle of a paragraph, following a proposition and leading to a conclusion.

There are a few occasions when you will lead off with a quote. One is a constitutional issue where the text, like the First Amendment or the Fourth Amendment, will shape the argument. Even here, however, it is probably better to have the text follow a proposition. Although the text is the starting point of the argument, a proposition is a superior vehicle for argument. You want to begin by claiming the high ground–the text–for your side. This is even more so with a statute. While the constitutional text is quite familiar and needs little or no introduction, a statute is not. Give it a proper introduction in the form of a strong proposition.

The tendency for inexperienced writers is to lean on quotes because they lack confidence. They seek safety in quotes, so they can't be wrong. The first step is paraphrasing, which is an important writing skill. Make sure the writer practices this skill without plagiarizing. Paraphrasing is not simply mechanical. The process requires shaping and focusing the paraphrased material to further the argument. It should strive to be a new, improved version of is the text being paraphrased.

The editor should also watch for repetition when the writer is describing or reporting. First drafts are notorious for unnecessary repetition of the subject. For example, the court considered, the court rejected, the court reasoned, the court held, etc., is easy enough to spot when you are looking for it, but less so when you are concentrating on the description. I have encountered this in a surprising number of "final" edits. Always be on the lookout for repetition of subject, verb, or object and for repetition of words and phrases generally.

17. Make Sure the Writer Doesn't Re-build After Something Has Already Been Established.

Some of the lawyer's wordiness can be attributed to the laudable desire to be precise. But precision may come at the expense of clarity, if it is achieved through repetition of what the writer has already established. I see it most often when sentences are viewed individually and are not allowed to help each other. What has been accomplished can be carried forward to subsequent sentences without the necessity of re-statement. A common example noted by Garner is the repetition of a proper name, rather than subsequent use of an appropriate pronoun.[82] This is a result of a lack of confidence in the reader.

The writer should expect that the reasonably attentive reader will pick up references from what has previously been described. The reader does not have amnesia, although some authors write as if this were the case. Have confidence that the meaning of prior sentences will carry through, without repeating as

82. THE WINNING BRIEF, *supra* note 40, at 135-38.

foundation for the present point. The editor will let the writer know if the reference is not clear. Such instances are relatively rare, when compared to the number of times the editor will be striking out words and phrases that are already implied from what was previously said. Let the whole carry the meaning.

Garner says this is a consequence of putting citations in the text:

> Many lawyers have gotten in the habit of putting a citation or two between sentences. That weakens the connection between consecutive sentences. So distrusting the reader to make a connection, they repeat the relevant part of the preceding sentence in the one that follows. The sentences get longer and longer and more and more repetitive. All this is anathema to a good writing style.[83]

I agree with Garner's description of the disease, but I do not share his diagnosis of the cause. The repetition problem is grounded in distrust of the reader to make connections, but I think he is reaching too far in blaming citations in the text for this (to support his controversial advocacy of dropping the citations in briefs to footnotes).[84] I have found this problem to be no less prevalent with law review articles, which customarily put the citations in footnotes.

This problem is also not limited to the inexperienced writer. In fact, it may even get worse as the lawyer, perhaps gun shy from prior experience with ambiguities, attempts to ratchet down with greater precision the intended effect of the words. This is a serious problem in legal writing and I would estimate that at least twenty percent of the unnecessary words struck by the editor will ultimately be attributed to this. The editor should be acutely aware of it and use judgment regarding the proper balance between economy of words and necessary repetition.

18. Watch for the Use of Passive Voice.

I don't believe there is a book on writing that does not caution against the use of passive voice. As the commercial says: "Everybody knows that."[85] But did you know that most would have trouble identifying what it is, what makes it problematic, and how to fix it? Fortunately, Bryan Garner's discussion in terms of identifying it, editing it, and using it appropriately will save you more than fifteen percent of your time otherwise spent wrestling with the matter.[86]

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83. *Id.* at 143.

84. *Id.* at 139-47.

85. *See, e.g.*, *GEICO Owl Commercial–Did You Know Some Owls Aren't That Wise?*, YOUTUBE, https://www.youtube.com/watch?v=j8N2SftkPmQ (last visited Sept. 29, 2014).

86. THE WINNING BRIEF, *supra* note 40, at 188-90. *See also* THE REDBOOK, *supra* note 28, at 198-99 (describing how to "[m]inimize the passive voice"); MODERN LEGAL USAGE, *supra* note 15, at 643-45 (explaining various types of passive voice).

Between a subject of a clause and its verb exists a relationship, known as voice; "if the verb performs the action of the subject (as in 'Jane hit the ball'), the verb is active, whereas if it is acted upon (as in 'The ball was hit by Jane'), the verb is passive."[87] "The unfailing test for passive voice is this: you must have a *be*-verb (or *get*) plus a past participle (usually a verb ending in *-ed*)."[88] Examples would include: is dismissed; are docketed; was vacated; were reversed; been filed; being affirmed; be sanctioned; and am honored.[89] "Sometimes, though, the *be*-verb won't appear. It's simply an implied word in the context."[90] For example, "I heard it suggested that we raise our offer. (Some *be*-verb is understood before *suggested*)."[91]

What are the problems that the use of passive voice brings? Passive voice and wordiness go together.[92] If it doesn't add unnecessary words, it will hide who has done what.[93] Passive voice covers up important actors and actions. This makes writing less clear. Of course, for some, this may be a feature, instead of a flaw.[94] Passive voice also "subverts the normal word order for an English sentence, thereby making it harder for readers to process the information."[95]

To balance this, Garner does not counsel avoidance altogether, but selective, correct usage. He cites Ed Good's eight situations in which the passive is appropriate:

When the actor is unimportant.

When the actor is unknown.

When you need to put the punch word at the end of the sentence.

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87. MODERN LEGAL USAGE, *supra* note 15, at 643.

88. THE WINNING BRIEF, *supra* note 40, at 189.

89. *Id.*

90. *Id.*

91. THE REDBOOK, *supra* note 28, at 198 (like, "was' or "has been"). The reasonably attentive reader will note that I am mostly carrying the argument with quotes. There is no better way here than the rules expressed by Garner. *See id.* (listing more active and passive voice examples).

92. THE WINNING BRIEF, *supra* note 40, at 189; THE REDBOOK, *supra* note 28, at 360; LESS THAN WORDS CAN SAY, *supra* note 4, at 10.

93. THE WINNING BRIEF, *supra* note 40, at 189.

94. On this point, Mitchell provides:

> Furthermore, the very way you consider the world, or the very way in which the world is considered by you, is subtly altered. You used to see a world in which birds ate worms and men made decisions. Now it looks more like a world in which worms are eaten by birds and decisions are made by men. It's almost a world in which victims are put forward as "doers" responsible for whatever may befall them and actions are almost unrelated to those who perform them. But only almost. The next step is not taken until you learn to see a world in which worms are eaten and decisions made and *all* responsible agency has disappeared. Now you are ready to be an administrator.
>
> This is a condition necessary to successful administration of any sort and in any calling. Letters are written, reports are prepared, decisions made, actions taken, and consequences suffered. These things happen in the world where agents and doers, the responsible parties around whose throats we like our hands to be gotten, first retreat to the more remote portions of prepositional phrases and ultimately disappear entirely. A too-frequent use of the passive is not just a stylistic quirk; it is the outward and visible sign of a certain *weltanschauung* [world view].

LESS THAN WORDS CAN SAY, *supra* note 4, at 10-11.

95. THE WINNING BRIEF, *supra* note 40, at 189.

When you want to hide the actor's identity.

When you want to avoid sexist language.

When the focus of the passage in on the thing being acted upon.

When you need to generalize without using *one* as the subject.

When the passive simply sounds better.[96]

Garner concludes: "Avoiding the passive is good general advice; but one should not make a fetish of it."[97]

The use of passive involves a frame of mind. You should not make it a habit. "[I]ts frequent use makes a piece of writing much less interesting and readable."[98] Until you know what it is and why it creates problems, it may sneak into your writing as easily as it did in grade school when you had to write the dreaded five hundred word essay and instinctively grasped for ways to get there. As Garner says, "[k]now what the passive voice is, and minimize it."[99]

19. Declarative Sentences are Good.

Clear writing relies on the simple declarative sentence; subject, verb, and object. A healthy percentage of subject, verb, and object is an essential part of persuasive writing. This advice is not intended to put the writer in line for a prize in literature. It just works; especially in legal writing. Why does it work? The discipline of subject, verb, and object leads to shorter sentences and keeps the writer away from distractions. When persuasion is the goal, directness is a virtue.

Watch out for too many dependent clauses, especially at the beginning of the sentence. This is a weakness for many writers. Dependent clauses have their place. They provide great transitions, for example, from a conclusion to the next topic sentence. They also express contrasts and nuance in elegant ways. There is a dark side, however. Dependent clauses at the beginning of the sentence delay the statement of the subject, verb, and object. Don't make the reader wait for the point. Dependent clauses are like a drug and, without adequate supervision, are often overused. Academics are particularly fond of dependent clauses and intervention becomes necessary when the percentage becomes too great.

If the discipline of the simple declarative sentence and the caution against overuse of dependent clauses is followed, there is less chance for trouble caused by clutter.[100] Simple means less clutter. If the writer has managed to go against form and the draft is too bare, the editor can supplement the simple sentence

96. *Id.* at 189-90 (citations omitted).

97. MODERN LEGAL USAGE, *supra* note 15, at 643.

98. *Id.*

99. THE WINNING BRIEF, *supra* note 40, at 188.

100. The long wait for the punch line in this topic sentence is offset by the transition from the first two paragraphs to the concluding paragraph. Dependent clauses can be very useful. Just don't overdo it.

framework to achieve a better balance. Recognize when the writer is one of those rare "few words" creatures and adjust accordingly.

20. Be Careful About the Use of Modifiers.

Argument by adjectives and adverbs is cheap argument. It is only slightly more sophisticated than *ad hominem*,[101] which in turn is only slightly more sophisticated than a fistfight outside of a bar. Argument by modifiers is lazy argument. Just as anyone can call names, anyone can label something with an adjective or adverb and pass that off as argument. Unreasonable demands, outrageous conduct, unduly burdensome, heavily slanted, inadequately funded, and even the staid, improvidently granted, are a few among countless examples. The more an argument depends on adjectives and adverbs, the weaker it is.[102]

Modifiers invite disagreement. Some beg the question, like clearly, obviously, certainly, definitely, distinctly, manifestly, doubtlessly, undeniably, and the like. If it were so clear, obvious, or certain, it would not need to be stated in an advocacy context. The very attempt to add a verbal exclamation point to end the argument actually undoes it. Modifiers also invite disagreement because they usually contain opinion, and everyone is entitled their opinion. Modifiers lean heavily to the opinion side on the fact/opinion spectrum. Thus, the vehicle was going too fast; the offer was unreasonably low; the weather that day was unbearably hot. These may be found to be true, but there is a built-in space for disagreement. "I don't know, it may have been hot, but if you think that day was unbearable, you should have been here when . . . ." It's the same problem with cross-examination. If you are trying to control the cross with leading questions, don't use adjectives or adverbs unless those are the same ones used in the witness's deposition or documents. Why? Because the witness will instinctively resist your characterizations (modifiers), even without knowing they are laden with opinion.

Argument by modifiers is soft argument. It allows argument by labels, rather than argument based on principles. It will fall short of persuasion because its opinion-based style generates sales resistance. It also is a form of editorializing because the modifiers interject the advocate's own characterization of the matter. The writer should use strong verbs and nouns to carry the argument instead.

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101. "[A]d hominem [L. 'to the man'] is shortened from the LATINISM *argumentum ad hominem* (= an argument directed not to the merits of an opponent's argument but to the personality or character of the opponent)." MODERN LEGAL USAGE, *supra* note 15, at 24. I think of it as Latin for "name calling."

102. Stephen King writes: "I believe the road to hell is paved with adverbs . . . ." ON WRITING, *supra* note 9, at 125. He admits they have a place in the writer's toolbox, but urges caution, lest their use takes over, like weeds. *Id.* King's remarks are more directed at adverbs in fiction writing. But his criticism of them works for legal writing as well.

21. Be Watchful for the Writer's Attempts to Editorialize.

This is a corollary of omit needless words. I see this all the time, even with experienced lawyers. Editorializing generates needless words and often initiates a confusing parallel line of argument, but it is even worse than that. When the writer editorializes, he or she is telling the reader what to think. This is particularly dangerous when addressing a judge. It is annoying as well and is likely to generate sales resistance. Nevertheless, lawyers editorialize all the time, believing this is part of effective advocacy. Here is a hypothetical, yet typical, example of the aggressive style using editorial comments to turn up the heat:

> First, Plaintiff argues, through a rambling and scattered pleading, that Defendant's position is trivial. On the same token, Plaintiff has not and cannot meet the substantial burden that is required to defeat this Motion. The Motion is simple and based on recently learned facts. Plaintiff desires to complicate this matter by advancing arguments that fly in the face of what your Honor has already ruled. Plaintiff's argument that was made first—with a straight face—that the case must be Transferred to Clay County is—using the most kind word—disingenuous.[103]

Sound familiar? I know this is a style accepted in the trade. Although it may be effective with the client, I don't think it is effective with the judge. It is condescending in that it tells the judge what to think about the other side's argument. This is argument by wishing it so. From your lips to God's ears, as it were.[104] It clutters the argument because there are two parallel lines here. One is the argument itself and the other is the running commentary on how the reader should view the other side's argument and tactics.[105]

In addition, as Garner notes, the use of capitalization and underlining for emphasis (as in "Transferred to Clay County") is "bad style."[106] This is similar to the distrust of the reader that clutters the argument with needless repetition. While there is plenty of room in oral advocacy for the equivalent in terms of delivery, by way of voice inflection, pace, and body language, it comes off in writing as annoying and counter-productive. Watch also for use of punctuation as not-so-subtle editorializing. Think of exclamation points that indicate emphasis or incredulity. Or question marks that indicate insincere puzzlement

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103. Note how much of this depends upon modifiers like "rambling," "scattered," "substantial," and "disingenuous." I have a growing dislike for the word "disingenuous." It's just an effete way of saying that the other lawyer is a clever liar. I would just as soon skip the *ad hominem*, whether vulgar or effete, because it distracts from the argument.

104. This is a Yiddish phrase that expresses a wish that the words just spoken will come true. *See* URBAN DICTIONARY, http://www.urbandictionary.com (last visited Nov. 15, 2014) (search "from your lips to God's ears").

105. It is like the little league coach or the tennis Dad yelling instructions while at the same time the poor kid is trying to deal with the opposing player.

106. THE REDBOOK, *supra* note 28, at 61. The same goes for underlining, as a means of emphasis. *Id.* at 79.

with the opposing argument. Or quotation marks to indicate disdain or skepticism. Same thing with the snide comments, like "so-called" preceding a term used by the other side. These are like interruptions when the other side is speaking. The editorializing writer cannot seem to let any point go unchallenged, without adding an immediate adverse spin, as if the reader (or judge) cannot be trusted to see the other side's error or deceit.

The lawyer has a duty to zealously advocate the client's position. Zealous advocacy does not necessarily mean loud, pound the table advocacy. To be sure, there are times for that. The lawyer's duty here is smart, effective advocacy. The editor can play an important role with good judgment to temper the adversarial excesses that sometimes occur in the heat of battle. There is a potential for diminishing returns when the advocacy itself generates resistance because the advocate does not leave the decision maker with enough space to come to the right decision.

Editorializing is like the guy sitting behind you in the movie theater, commenting to his buddy on each scene as it unfolds. With *Mystery Science Theater 3000*,[107] this can be quite amusing. In real life, it is very annoying. Have confidence in the argument and give the reader the space to decide. The writer is supposed to be the trusted guide, not the bully.

22. Think About Word Choices.

Mark Twain observed: "The difference between the right word and the almost right word is the difference between lightning and the lightning bug."[108] It's not that big a difference, but I like the underlying point that word choices are important. Word choices have consequences. They should be made in light of the theme or themes. The writer should have a thesaurus at hand; the editor should make sure they have a thesaurus close by. Use the thesaurus. The first choice is not necessarily the best one. It may be, but look over the other possibilities as well. Sensitivity to word choices is an essential skill for the writer (and the editor). It will take both to get it right.

Word choices should reflect the theme. If plaintiff is suing to enforce a contract and the theme is that promises should be kept, then words like "promise," "deal," "handshake," "word" (as in "gave his (or her) word"), and "bond" will work their way in, in preference to "pact," "bargain," or even "contract."[109] If the defendant admits liability, but defends on damages, then words like "reasonable," "responsibility," "mitigate," or "following doctor's orders" might come to the forefront. I believe the statement of facts in the brief

107. MYSTERY SCIENCE THEATER 3000, www.mst3k.com (last visited Nov. 16, 2014).
108. GOODREADS, http://www.goodreads.com (search "the difference between the right word").
109. *See* TRIAL NOTEBOOK, *supra* note 63, at 31-32.

should be treated with the same importance as the opening statement at trial. Effective storytelling requires careful attention to word choices.[110]

Make sure the tone of the piece is appropriate for what the writer is trying to accomplish. You will talk to a jury differently than you would to a trial judge. You talk (and act) differently in an appellate court than in a trial court. Your word choices will change accordingly.[111] Watch out for slang or colloquialisms. What comes off the tongue most easily when trying to put the words on paper (or on the screen) may not look as good in the final review. Watch out for jargon, especially when borrowing from another profession. Borrowing jargon may underscore the awkwardness of the point you are trying to make. Watch for clichés. Even though familiar, they are not safe harbors. They are more likely to be phrases that do nothing to further the argument and they can backfire.[112]

Metaphors have great power, for both good and bad.[113] The writer needs the editor to exercise a check on all metaphors in the piece. A good metaphor has great power to persuade. People relate to stories. Metaphors are compact stories. Even though there is great distrust of lawyers these days, a good metaphor can get past the natural resistance of the most ardent tort reform juror in the blink of an eye, before the barriers have a chance to go up. The editor's function is to render a second opinion on the metaphors so that they work as intended and do no harm, *i.e.*, that it cannot be turned around by the other side.

One final thought about word choices and the overall tone of the piece. Think about reading out loud. If the writing is ultimately completed in the reader's head,[114] why not, as an editor, read at least some of the problematic passages out loud to get a better sense of how the choices sound? I have found this useful. It is a different take than the silent read. Usually a better one.

23. Thoughts on Footnotes.

There is no single proposition for the topic of footnotes because the customs are very different for law review and for briefs. Law review style is marked by a heavy use of footnotes, in some cases, in excess. Brief writing is about advocacy and the relatively less frequent use of footnotes (or citations in the text) reflects that more focused purpose. Both formats require decisions about what belongs in the text and what belongs in the footnotes. Generally, use footnotes for "side-trips" that are significant, but not so important as to warrant inclusion in the main text.

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110. *See* Jonathan K. Van Patten, *Storytelling for Lawyers*, 57 S.D. L. REV. 239, 261-62 (2012).

111. For example, the recommended practice for telling the story to the jury is to use present tense, active voice. *See, e.g.*, TRIAL NOTEBOOK, *supra* note 63, at 191-92. That kind of intensity would be off-putting if used in the statement of the facts for an appellate brief.

112. *See, e.g*, JONAH GOLDBERG, THE TYRANNY OF CLICHÉS (2012-2013).

113. *See* Jonathan K. Van Patten, *Metaphors and Persuasion*, 58 S.D. L. REV. 295 (2013).

114. *See supr*a note 48 and accompanying text.

For law review, the balance between text and footnote leans much more toward footnotes. Law review articles are a research medium and the inclusion/exclusion decision discussed above allows a lower threshold for inclusion, so long as it doesn't detract from the text. Think of footnotes as a miniature, specialized library for the lawyer. This was especially important in the days before electronic legal research became widespread.[115] The caution here is that even though the law review format allows for greater inclusion of research, it does not suspend the requirement to think about what should be included and what should not. There will be a point where too much research detracts from the overall message. Most times, less is more.

Thinking of the law review footnote as a specialized library encourages the habitual use of parentheticals. If it is important enough to cite, it warrants explanation, unless the citation alone is sufficient to the reasonably experienced reader. Consider, for example, how useful the following hypothetical proposition and footnote would be without the parentheticals:

> To be certifiable, an interlocutory order must involve a "controlling question of law."[14]
>
> [14] *See, e.g.*, *Katz v. Carte Blanche Corp.*, 496 F.2d 747, 755 (3d Cir. 1974, cert. denied, 419 US 885 (1974) ("[a] controlling question of law must encompass at the very least every order which, if erroneous, would be reversible error on final appeal"). *See also In re Duplan*, 591 F.2d 139, 148 (2d Cir. 1978) (quoting 9 Moore, Federal Practice ¶ 110.22(2) at 260 (1975)) ("'[t]he courts have tended to make the 'controlling question' requirement one with the requirement that its determination 'may materially advance the ultimate termination of the litigation'"). Although the phrase "controlling question of law" has never been clearly defined, it would at least appear to exclude disputes over questions of fact. *See Chappell & Co. v. Frankel*, 367 F.2d 197, 200 n.4 (2d Cir. 1966) (doubting that denial of summary judgment involved a controlling question of law given involvement of questions of material fact).[116]

A footnote without parentheticals documents the authority. The one with parentheticals documents and explains it.

The same will apply with even more force in a brief. Consider your reaction to these two hypothetical examples:

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115. I moved to South Dakota in 1981, but continued to do research for my mentor in California, the late Robert Willard. I remember retrieving cases for him well into the 1990s because it was quicker and far less costly for me to download out of state cases from Westlaw and send them than it was for him to get in his car and travel to the county law library for the same. The law review footnote is like that. The writer has done the research on a particular point and is sharing that "library" with another interested party.

116. G. Eric Brunstad, Jr., *Appeals of Interlocutory Bankruptcy Court Orders: Resolution of a Conflict*, 1 J. OF BANKR. LAW & PRAC. 475, 478 n.14 (1992). I was looking for an example from this Journal in which I had published and found, to my delight, the above example from Eric Brunstad. I worked with him on a case (Fin-Ag, Inc. v. Pipestone Livestock Auction Mkt., Inc., 2008 SD 48, 754 N.W.2d 29). He is a great lawyer.

> [1] For an anonymous tip to meet the totality of the circumstances [test] both quantity and quality of the information possessed will be considered. *Cortez*, 449 U.S. at 417. If a tip has a relatively low degree of reliability, more information will be required [than] if the tip were more reliable. *White*, 496 U.S. at 330; *O'Connor v. Ortega*, 480 U.S. 709, 724 (1987); *New Jersey v. T.L.O.*, 469 U.S. 325, 341-42 (1985). If the information displays a sufficient indicia of reliability, reasonable suspicion will be fulfilled. *Florida v. J.L.*, 529 U.S. 266 (2000); *Williams*, 407 U.S.at 43; *Draper v. U.S.*, 358 U.S. 307 (1959).[117]
>
> [2] Another common difficulty with anonymous tips is that the caller cannot "be held responsible if her allegations turn out to be fabricated." *J.L.*, 529 U.S. at 270 (citing *Adams v. Williams*, 407 U.S. 143, 146-47 (1972)). As a result, information from a known citizen is more reliable than an anonymous tip. *Maumee v. Weisner*, 720 N.E.2d 507, 513 (Ohio 1999) (citing cases).[118] Thus, when a citizen places her credibility at stake by risking her anonymity, the tip instantly becomes more reliable. See *J.L.*, 529 U.S. at 275-76 (Kennedy, J., concurring) (brief face-to-face encounters and instant caller identification may lend greater reliability to an anonymous tip); *State v. Gomez*, 6 P.3d 765, 768 (Ariz. App. 2000) (where the caller had used 911 to report a driver, she "had placed her credibility sufficiently at risk to justify" the police stop of the vehicle). Whether the police are subsequently able to track down the informant is irrelevant; what matters is that the individual potentially risked her anonymity. *See United States v Valentine*, 232 F.3d 350, 355 (3d Cir. 2000), cert. denied, 532 U.S. 1014 (2001) ("[w]hat matters . . . is not that the officers could guarantee that they could track down the informant again," but rather, "whether the tip should be sufficiently trustworthy in light of the total circumstances").

The bare citation approach essentially tells the reader: "Here is the authority, but if you want to learn more about it, you will have to go look it up." I think parentheticals are well worth the extra effort. Parentheticals provide another important advocacy opportunity. A parenthetical allows for a mild "spin" on what the case teaches, rather than leaving it to the interpretation of the diligent lawyer who has been sent by the writer to the library to ascertain what the case may say. Watch out for too much "spin." The credibility of the writer can be lost with too much advocacy.

For briefs, the traditional use of footnotes occurs with far less frequency. Most citations are located within the text. I still prefer that format because it emphasizes what was called a "memorandum of points and authorities."

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117. Specific page cites are very helpful, if not required.

118. I would not have used this short form. If important enough to mention, it is important enough to cite. Here is where a footnote from the text would have handled the problem of citing the authority without making the text too long.

Proposition, supported by citation. Followed by the next proposition, supported by citation. The visual is important with the authority close by the proposition. It shows up very clearly with an authority-poor brief. That is, where the ratio of text to citation leans heavily towards the text, suggests that a brief lacks sufficient authority behind the propositions.

Bryan Garner advocates bringing the brief's citations down to the footnotes.[119] I'm not convinced yet, but his argument is almost convincing. The text is the most important and the citations placed within do break up the flow. I read briefs slowly and I still prefer point and authority before going on to the next point. On balance, I suspect that Garner is right, but I am hesitant to lead the way on this one. I do agree, for the most part, with his suggestion that the brief writer eliminate substantive footnotes.[120] His point is if it is important enough to warrant inclusion in the text, do so or leave it out entirely. Textual footnotes are clutter. I agree, generally. One use, however, is where you do not want discussion of an issue in the text because it would be a distraction, but you do not want the court to assume that you have missed the issue. I use a substantive footnote for that specific side-trip, to keep it out of the main discussion, and to account for, as the trusted guide, why a particular issue turns out to be a false trail.

24. When the Big Things are in Place, Spend the Time Needed to Polish.

Grammar, punctuation, and correct presentation are not little things. But, in the larger scheme of things, they come after structure – thesis, sequence, and paragraphing – is more or less settled. They are very important in their own way because even the slightest slip can undo the appearance of competency in a hurry.[121] Small mistakes, like typos, tend to be magnified. The suspicion will grow that if the final piece is imprecise on the small stuff, it might also be imprecise on the big stuff.

As an editor, you must insist that the writer gives you adequate time for review. You do not want to be squeezed out of your role simply because the clock is running out. This Article has made the case for a thorough review and this will take time. Here is Garner's summary on the editor's role:

> *Two readings necessary – three desirable.* No matter how good an editor you become, you will never do your best work until your second or third read-through and markup. Always have a pen in hand to make the most

119. THE WINNING BRIEF, *supra* note 40, at 139-47.

120. *Id.* at 140-41.

121. *See* LESS THAN WORDS CAN SAY, *supra* note 4, at 3. Mitchell provided the following which fittingly illustrates this point:

> Many years earlier I had returned a similar questionnaire, because the man who sent it had promised, in writing, to "analize" my "input." That seemed appropriate, so I put it in. But he didn't do as he had promised, and I had lost all interest in questionnaires.

Id. See also supra note 17.

> obvious corrections, but during your first read-through, try restricting yourself to low-level editing. Only after you read and understand the entire piece will you be able to make your best edits. They will be more detailed, more substantive, and more effective at achieving the goals of the writing. They will look beyond the immediate word or sentence to the fuller context and structure of the piece.[122]

The process should not end with the editing. It should continue with proofreading. The editor will be a part of this, but there is room for more proofreaders to bring fresh eyes to this process. Sometimes you would swear that mistakes are like mushrooms. Even after a very careful edit, they seem to magically appear the next day, as if they were not there before. A good practice for proofreading is to read and re-read until you have gone through at least twice without finding an error. Like editing, proofreading requires a slow pace. Be efficient, but don't hurry.

25. The Writing Should Have a Sense of Urgency.

The writer should never take advantage of the audience. Readers are not captive. They can easily walk away. They don't have to read further if the writer doesn't give them a good reason to.[123] Underlying the text should be the message: "This is important and here is why." This is not only good for the reader, it is a necessity for the writer.

The editor's job is to find the urgency – the reason for the writing – and to make sure that it comes through. This usually happens through the expression of the theme. Make sure that the writer and you have found at least one theme and, even if late in the process, do at least one more draft to see how the piece changes as a result. Earlier is best because it changes everything, especially word choices, but better late than never. This will supply the sense of urgency that will hold the reader for the length of the writing.

III. CONCLUSION

Basic editing involves taking out the clutter. Most writers bring too much to the table. Even the best are too wordy on occasion. Keep it simple is the editor's mantra. You can have a long career as an editor with this rule alone. But there is much more available to assist the writer. With the discipline of making the paragraph the unit of composition, you bring focus to the argument that will virtually organize itself – point by point and then section by section. Helping the writer to understand the underlying structure – foundation and

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122. THE REDBOOK, *supra* note 28, at 359.

123. *See generally* STEYNONLINE, http://www.steynonline.com (search "Good Will Hunting"). Another reader response is the famous line, attributed to Hollywood mogul Louis B. Mayer, that states: "I just read half of [your script] all the way through[.]" *Id.*

sequence, affirmative and responsive, offense and defense – will give your advice credibility. You will gain the writer's trust by identifying real problems and offering sensible fixes.

Advanced editing will help the writer to understand the piece better. Finding the moral center of the piece is essential, even for what initially might seem to be the most mundane of topics. With acting, it is important to remember "there are no small parts, only small actors."[124] With writing, there are no ordinary topics, only ordinary writers. And there are also ordinary editors. Don't be ordinary.

124. Attributed to Constantin Stanislavski, BRAINY QUOTES, http://www.brainyquote.com/quotes/quotes/c/constantin155177.html (last visited Nov. 16, 2014).