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Gerald Lebovits



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Gerald Lebovits is a judge at the New York City Civil Court, Housing Part, in Manhattan and an adjunct professor at St. John's University School of Law. For their research help, he thanks New York Law School students John Heagney and Jennifer Tranqui. Judge Lebovits's e-mail address is GLEbovits@aol.com.

Getting to the Point: Pointers About Point Headings

In earlier columns, the Legal Writer addressed deep issues in persuasive briefs.¹ The Legal Writer now journeys into structuring a key part of a brief's argument section: persuasive point headings.² Deep issues frame the advocate's questions. Point headings answer them.

Point headings are concise statements of the advocate's best arguments.³ They present a conclusion on the relief the advocate seeks and quickly explain why the court should grant that relief.

Good point headings give judges a glimpse of the facts and law in the table of contents, state why the advocate should win the case, and tell judges where to go for more information. Point headings help judges who don't have the time or interest to digest an entire brief to find the section they'd like to read. Point headings serve as transition points to alert judges to leading arguments. Point headings break the argument into comprehensible components. Instead of forcing judges to decipher the main points in the argument section, point headings convey arguments succinctly.

Point headings also help advocates. Point headings organize. Advocates should draft the point headings before they draft the brief's argument section. Doing so enables advocates to outline their arguments logically, eliminate gaps in analysis, and avoid repetitions. Point headings force advocates to make their arguments persuasive.

The Substance of Headings

Effective point headings provide a concise summary of the argument and

mirror each question presented.⁴ They inform judges of the advocate's legal points and outline those points.⁵ They argue applicable law, describe how the law applies to the facts, and lead to the advocate's conclusion.⁶ Winning advocates use point headings to explain the reasoning behind the outcome they want the court to adopt.

Advocates may use any of these formulas to draft their point headings:

(1) State the relief the client seeks.
and

(2) Advance the conclusion by applying the key facts to the controlling law.

or

(1) Advance the conclusion by applying the key facts to the controlling law.

and

(2) State the relief the client seeks.

or

(1) State why the court should rule in the client's favor.

Complex arguments should be broken down into subheadings. Subheadings are useful when advocates have an issue with more than one element or when several reasons justify the conclusion. Subheadings outline the arguments, focus on each subsection, and create a persuasive organizational structure.⁷

The subheadings must equal the point heading and relate to the point heading. Advocates strengthen a set of arguments by associating arguments with one another. Advocates then emphasize the association by placing them as multiple subheadings under

a point heading. Advocates should group similar ideas into one subheading to avoid a choppy brief.⁸

If advocates include subheadings, the point headings may be conclusory and short: The more specific the subheadings, the more conclusory and short the headings should be.

Advocates may draft subheadings in several ways. One way is to organize subheadings using the CRARC method. "CRARC" stands for "Conclusion," "Rule," "Application," "Rebuttal and Refutation," and "Conclusion." According to CRARC, advocates first present the conclusion on the issue. Then they state the rule, followed by statutes and case law. Then they support the argument by applying the law to the facts. Advocates follow this with the opponent's legal and factual arguments and then rebut the opposing arguments. Advocates finally conclude on the outcome they seek.

Subheadings can also trace the elements of a statute or a leading case. A plaintiff's point heading and subheading formula in a tort action could look like this:

I. PLAINTIFF'S SUMMARY
JUDGMENT SHOULD BE
GRANTED BECAUSE THE
EVIDENCE ESTABLISHES RES
IPSA LOQUITUR.

A. Plaintiff's Injuries Would
Not Have Occurred Absent
Defendant's Negligence.

B. Plaintiff's Injuries Occurred
While Under Defendant's
Exclusive Control.

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C. Plaintiff's Actions Did Not
Contribute to the Cause of the
Injuries.

Rules for Drafting Headings

Every word in a persuasive brief must advance the advocate's case.⁹ Point headings are no exception. Advocates should construct point headings when an argument is crystallized in their minds.¹⁰ Thought-out point headings are organized and assertive. They make it easy for the court to rule in the advocate's favor.

Divide headings and subheadings appropriately. Each independent ground for relief has a separate point heading. A point heading is complete if a judge who agrees with that point but disagrees with all else will grant the relief the client seeks.

Advocates who have only one point needn't designate the point heading numerically.¹¹

Advocates must never have a solitary subheading.¹² When a subheading has an "A" but no "B," advocates should incorporate subheading A into the point heading itself.¹³

Advocates must be prudent when dividing subheadings. Excessively subdividing an argument will interrupt the flow of a simple argument.¹⁴

Keep the number of point headings to a minimum. Advocates should use three or four point headings. Too many arguments suggest that advocates have non-meritorious arguments. That weakens an advocate's credibility. It also weakens good arguments.

Designate headings with numbers. Each point heading and subheading should have a roman numeral, letter, or figure to identify the heading's text. A roman numeral (I, II, III) precedes a point heading. Capital letters (A, B, C) precede subheadings. Arabic numerals (1, 2, 3) precede sub-subheadings.¹⁵ Lower-case letters (a, b, c) precede sub-sub-subheadings.¹⁶ Most advocates rarely go beyond sub-sub-subheadings. If they do, they're preceded by i, ii, and iii.

Order headings by strength.

Advocates should order their point headings from the strongest to the weakest. The advocate's strongest argument is the one most likely to convince a court to rule in the client's favor. Judges anticipate that advocates will present their strongest argument first and assume that weaker arguments will follow. Presenting the strongest points at the outset helps judges flag important points, follow the argument, and stay focused.

Advocates who have several equally strong arguments should lead with the one that obtains the greatest relief for the client. Relief for a defendant in a criminal appeal, for example, is ranked by outcome, ranging in strength from dismissal, to a new trial, to a reduced sentence.

Advocates should first present threshold issues,¹⁷ such as a lack of jurisdiction or a statute-of-limitations violation, before they argue the merits. Judges don't want to parse through an entire brief before realizing that they should dismiss the case on a threshold issue.

Advocates also use point headings to respond to an opponent's brief. Although some advocates match the format of an adversary's point headings, effective advocates order their opposing arguments based on the strength of their own arguments. To help judges understand how a brief rebuts an adversary's arguments, advocates may note the points addressed in the adversary's brief. For example:

I. THE MOTION TO QUASH
THE SUBPOENA DUCES
TECUM SHOULD BE GRANTED
BECAUSE DEFENDANT
HAS STANDING TO ASSERT
PRIVILEGES OVER DECEDENT'S
MEDICAL RECORDS.

(Addressing Appellant's Point III.)

Be concise. Judges lose focus when headings are wordy. Effective advocates include enough facts to make the argument's logic clear but avoid cluttering the heading with too much information. A heading that's too long

wastes an opportunity to persuade. Compare the following:

I THE TRIAL JUDGE WAS
ERRONEOUS IN DENYING
DEFENDANT'S MOTION
TO DISMISS BECAUSE THE
PROCESS SERVER DID NOT
PROPERLY SERVE PROCESS
TO THE DEFENDANT WHEN
HE IMPROPERLY SERVED THE
PETITION.

As opposed to:

I. THE TRIAL JUDGE LACKED
PERSONAL JURISDICTION
OVER DEFENDANT, WHO WAS
SERVED IMPROPERLY.

Write in the affirmative. Advocates present their arguments best with affirmative language. Negative statements are confusing and cowardly. For example:

I. THE TRIAL COURT DID NOT
ERR IN DENYING SUMMARY
JUDGMENT FOR THE
PLAINTIFF.

Affirmative language is assertive and readable. For example:

I. THE TRIAL COURT
RIGHTLY DENIED PLAINTIFF'S
SUMMARY-JUDGMENT
MOTION.

Avoid using "not" before "because" in the same sentence. If advocates must write in the negative, they should maximize readability by avoiding "not" before "because." Using "not/because" suggests that advocates have an explanation different from the one they intended. For example:

I. PLAINTIFF'S COMPLAINT
SHOULD NOT BE GRANTED
BECAUSE SHE FAILED TO
STATE A CAUSE OF ACTION.

The above example might mean that plaintiff's complaint should be granted, but for a reason other than plaintiff's failure to state a cause of action.

Advocates may, however, use "because" before "not." They should

use this technique sparingly. For example:

- I. BECAUSE PLAINTIFF FAILED TO STATE A CAUSE OF ACTION, HER COMPLAINT SHOULD BE DISMISSED.

Avoid beginning with “because.” For example:

- I. THE COMPLAINT SHOULD BE DISMISSED FOR FAILURE TO STATE A CAUSE OF ACTION.

Use “because” in short clauses only. Complex clauses confuse. Beware the “because” that refers to more than one thing. For example:

- I. PLAINTIFF ARGUES THAT DEFENDANT IS GUILTY AND SHOULD BE CHARGED WITH BURGLARY BECAUSE DEFENDANT ENTERED THE PREMISES AND WAS FOUND WITH BURGLAR’S TOOLS.

In this example, the “because” can refer to “plaintiff argues,” “that defendant is guilty,” or that defendant “should be charged with burglary.”

Here’s a better example:

- I. DEFENDANT IS GUILTY OF BURGLARY BECAUSE HE ENTERED THE PREMISES WITH BURGLAR’S TOOLS.

Don’t exaggerate. Point headings should be cautious with the facts.¹⁸ Advocates should also eliminate adjectives and adverbs.¹⁹ They exaggerate. So do italics, underlining, and quotation marks used for emphasis or sarcasm. This point heading in a car-accident case is overzealous:

- I. DEFENDANT VERY RECKLESSLY FLEW THROUGH THE INTERSECTION WITHOUT ANY REGARD FOR HUMAN LIFE AFTER THE LIGHT HAD BEEN RED FOR WHAT SEEMED LIKE AN *ETERNITY*, AND THEREFORE PLAINTIFF’S “MOTION” FOR SUMMARY JUDGMENT MUST OBVIOUSLY BE DENIED.

As opposed to:

- I. DEFENDANT DROVE THROUGH THE INTERSECTION SEVERAL SECONDS AFTER THE LIGHT HAD TURNED RED; THEREFORE, PLAINTIFF’S MOTION FOR SUMMARY JUDGMENT SHOULD BE DENIED.

Avoid undermining an argument.

If the first argument might not persuade, advocates should include alternative arguments if they have any. Advocates should relate alternative arguments to preceding arguments in terms that assume the first argument’s correctness. For example:

- I. THE LAW OF THIS JURISDICTION DOES NOT ALLOW RECOVERY FOR THE WRONGFUL DEATH OF A FETUS, EVEN IF THE FETUS WERE VIABLE AT THE TIME OF THE INJURY.²⁰

As opposed to:

- I. EVEN IF THE LAW ALLOWED RECOVERY FOR THE WRONGFUL DEATH OF A VIABLE FETUS, THE LAWRENCE FETUS WAS ONLY IN THE FIFTH MONTH OF GESTATION AND THEREFORE NOT VIABLE.

Be tactful. A court is more receptive to the position of an advocate who abstains from attacking an adversary or a judge. For example:

- I. THE TRIAL JUDGE WAS EGREGIOUSLY WRONG WHEN HE GRANTED PLAINTIFF’S FRIVOLOUS MOTION TO DISMISS.

Advocates should rephrase the above example:

- I. THE TRIAL COURT ERRED IN GRANTING PLAINTIFF’S MOTION TO DISMISS.

Avoid conclusory statements. Advocates lose an opportunity to persuade

when they show without telling. This conclusory example is unhelpful:

- I. THE TRIAL COURT ERRED.

Don’t assume. Advocates shouldn’t mention obscure cases or statutes as the point heading’s conclusion. For example, avoid stating: “The motion to dismiss should be granted because the contract complies with the ruling in *Smith v. Jones*.”²¹ Don’t assume that a judge will know the statute or case law. Advocates who name a well-known case, like *Brown v. Board of Education*, needn’t give the full citation. Full citations in headings and subheadings to cases, as opposed to statutes, are disfavored anyway. In addition, advocates mustn’t assume that a judge will be familiar with the facts or understand information not yet explicitly stated.²² For example:

- I. DEFENDANT’S MOTION SHOULD BE GRANTED BECAUSE OF WHAT HAPPENED TWO WEEKS AGO.

Instead, the point headings must allow judges unfamiliar with the facts or law of a case to understand an argument when reading it for the first time. A better example:

- I. THE MOTION TO QUASH THE SUBPOENA SHOULD BE GRANTED BECAUSE DEFENDANT HAS STANDING TO ASSERT PRIVILEGES OVER DECEDENT’S MEDICAL RECORDS.

Avoid vague words. Vague words compel judges to decipher an advocate’s argument and prevent them from understanding the advocate’s point.

- I. THE POLICE HAD SUFFICIENT PROBABLE CAUSE TO ARREST DEFENDANT.

As opposed to:

- I. THE POLICE HAD PROBABLE CAUSE TO ARREST DEFENDANT.

Eliminate vague referents. Vague referents are pronouns (e.g., “he,”

“she,” “it,” “they”) that might refer to more than one person or thing. Vague referents confuse. Who is the “he” — Jones or Andrew — in this example?

I. JONES ARGUES THAT ANDREW’S MEDICAL RECORDS ARE ADMISSIBLE BECAUSE HE WAIVED THE DOCTOR-PATIENT PRIVILEGE.

A clearer heading:

I. ANDREW’S MEDICAL RECORDS ARE ADMISSIBLE BECAUSE HE WAIVED THE DOCTOR-PATIENT MEDICAL PRIVILEGE.

Don’t order judges around. Don’t use “must.” Use “should.” For example:

I. THIS COURT MUST GRANT DEFENDANT’S MOTION TO DISMISS.

As opposed to:

I. THIS COURT SHOULD GRANT DEFENDANT’S MOTION TO DISMISS.

Avoid using “lower court.” When referring to a lower court, advocates must specify which lower court they’re referencing. Here’s an ambiguous point heading:

I. THE LOWER COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT.

As opposed to:

I. THE TRIAL COURT LACKED PERSONAL JURISDICTION OVER DEFENDANT.

Keep the subject and the verb next to one another. Advocates who place their subjects and verbs far apart make their point hard to understand.²³ For example:

I. THE TRIAL JUDGE, BECAUSE DEFENDANT WAS IMPROPERLY SERVED, ERRONEOUSLY DENIED DEFENDANT’S MOTION TO DISMISS.

As opposed to:

I. THE TRIAL JUDGE ERRONEOUSLY DENIED THE MOTION TO DISMISS BECAUSE DEFENDANT WAS SERVED IMPROPERLY.

Use parallel structure. Parallel structure conveys the same grammatical form. Nouns must match nouns and verbs must match verbs. *Incorrect:* “The judge found the lawyer credible, logical, and argued well.” *Correct:* “The judge thought that the lawyer argued credibly, logically, and well.”

Compare the following:

I. DEFENDANT IS GUILTY OF BURGLARY BECAUSE OF THE STOLEN PROPERTY, BURGLAR’S TOOLS, AND HE WAS FOUND ON THE PREMISES.

with

I. DEFENDANT IS GUILTY OF BURGLARY BECAUSE HE WAS FOUND ON THE PREMISES WITH STOLEN PROPERTY AND BURGLAR’S TOOLS.

Also compare:

I. THIS COURT SHOULD FIND THAT WITNESS TESTIFIED CREDIBLY, AND THE DOCUMENTS ARE RELIABLE.

with

I. THIS COURT SHOULD FIND THAT WITNESS TESTIFIED CREDIBLY AND THAT THE DOCUMENTS ARE RELIABLE.

Avoid nominalizations. Nominalizations are verbs or adjectives converted into nouns. Nominalized sentences are abstract and lengthy. Compare the following:

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE OF PLAINTIFF’S FAILURE TO STATE A CAUSE OF ACTION.

with

I. THE COMPLAINT SHOULD BE DISMISSED BECAUSE PLAINTIFF FAILED TO STATE A CAUSE OF ACTION.

Use the active voice. Advocates should strengthen point headings with the active voice. Two kinds of passives exist: single and double passives. Single passives occur when a sentence is converted to object, verb, and subject from subject, verb, and object. The active voice is succinct. It places the subject at the beginning of a clause or sentence. A single passive places the subject at the end of a clause or sentence. For example:

I. SUMMARY-JUDGMENT MOTION WAS INCORRECTLY DENIED BY THE TRIAL COURT.

As opposed to:

I. THE TRIAL COURT INCORRECTLY DENIED PLAINTIFF’S SUMMARY-JUDGMENT MOTION.

Advocates may use the double passive — in which the advocate doesn’t identify the actor — to obscure the actor in the sentence. Advocates might use this technique to acknowledge that a crime was committed without admitting that their client committed the crime.²⁴ Advocates may also use double passives when the actor is unknown. Otherwise, integrity requires that advocates avoid double passives.

Include margins. An aesthetically pleasing format allows judges to pinpoint the headings quickly without searching the surrounding text. Advocates can achieve this format by centering headings and subheadings with extra margins on both sides of the document and by adding white space above and below the headings and subheadings.²⁵

Eliminate widow-orphan errors. Widow-orphan errors occur when advocates isolate the heading from its text by placing the heading at the bottom of the page, with no text below it. Headings or subheadings appearing at the bottom of the page should be moved to the top of the next page.²⁶ To resolve widow-orphan errors, advocates should do their final edits on hard copy and then add page breaks.

Keep it consistent. Point headings in the table of contents should be identical to the point headings in the argument section.²⁷ To ensure that advocates correctly copy their point headings into their table of contents, they should cut and paste the headings from the body of the argument when the brief is completed.

Condense the headings. Point headings and subheadings should be single-spaced. They should also be conveyed in a single sentence, although advocates may use semicolons. Point headings should be limited to four single-spaced lines.²⁸

Capitalize letters in the argument section. Point headings in the table of contents and in the argument section are written in capital letters. The first letter of each word in each subheading is capitalized.²⁹

Use bold-face print in the argument section. In the argument section, point headings and subheadings may be in bold to draw attention to the headings. In the table of contents, point headings shouldn't appear in bold.³⁰

Use the correct format. Readers prefer unjustified — or right-ragged — text. But point headings and subheadings should be tabbed and then justified to draw attention to them.

Advocates may use either of these formatting options:

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS.

or

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS.

Use the correct font and point size. The text of a brief should be in a serif typeface, like Century. But headings and subheadings should be in a sans-serif typeface. Examples of sans-serif typefaces are Arial, Helvetica, and Gill Sans.³¹ The contrast will make the headings and subheadings jump off the page. The point size for the headings and subheadings should be the

same size as the document's text but shouldn't exceed 14 points.³²

Italicize subheadings in the argument section. Subheadings may be in italics to distinguish them from the point headings. They shouldn't be italicized in the table of contents.

Don't underline. Underlined headings and subheadings are difficult to read. For example:

I. THIS COURT SHOULD
QUASH THE SUBPOENA DUCES
TECUM.

Instead:

I. THIS COURT SHOULD
QUASH THE SUBPOENA DUCES
TECUM.

Add page numbers at the end. The page numbers listed in the table of contents must correspond to the argument's point headings. Advocates can achieve this by waiting until the brief is complete to add page numbers.

Don't obscure page numbers following dot leaders. Headings and subheadings in the table of contents shouldn't obscure the page numbers after the dot leaders. Headings and page numbers should be placed close together so that a judge can easily locate a point heading's corresponding page number. For example:

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS 1

As opposed to:

I. THE TRIAL COURT ERRED
IN GRANTING PLAINTIFF'S
MOTION TO DISMISS . . . 1

Conclusion

Point headings set the stage for an advocate's argument and play a powerful role in persuasion. When used correctly, point headings let advocates navigate straight to their point. ■

2. Objective memorandums also use point headings in the discussion section. For a good discussion on writing objective memorandums, see Helene S. Shapo et al., *Writing and Analysis in the Law* chap. 7 (5th ed. 2008).

3. Mary Beth Beazley, *A Practical Guide to Appellate Advocacy* 156 (2d ed. 2006).

4. Board of Advisers Harvard Law School, *Introduction to Advocacy: Research, Writing, and Argument* 60 (7th ed. 2002).

5. Mary Barnard Ray & Jill J. Ramsfield, *Legal Writing: Getting it Right and Getting it Written* 299 (4th ed. 2005).

6. Board of Advisers, *supra* note 4, at 60.

7. Linda H. Edwards, *Legal Writing: Process, Analysis, and Organization* 309 (4th ed. 2006).

8. Shapo et al., *supra* note 2, at 435.

9. Michael R. Fontham et al., *Persuasive Written and Oral Advocacy in Trial and Appellate Courts* 57 (2d ed. 2007).

10. Carol M. Henderson, 22 *Tips for Writing an Effective Appellate Brief*, 169 N.J. Law. 22, 24 (May/June 1995).

11. Fontham, *supra* note 9, at 58.

12. Richard K. Neumann, *Legal Reasoning and Legal Writing: Structure, Strategy, and Style* 349 (6th ed. 2009).

13. Shapo et al., *supra* note 2, at 435.

14. *Id.*

15. *Id.* at 434.

16. Beazley, *supra* note 3, at 156.

17. Fontham, *supra* note 9, at 15.

18. Elizabeth Fajans et al., *Writing for Law Practice* 303 (2004).

19. Board of Advisers, *supra* note 4, at 60.

20. This example and the next come from Edwards, *supra* note 7, at 314.

21. *Id.* at 274.

22. Neumann, *supra* note 12, at 351.

23. Ian Gallacher, *A Form and Style Manual for Lawyers* 33 (2005).

24. *Id.* at 29.

25. Neumann, *supra* note 12, at 349.

26. *Id.*

27. Gary Gaffney, *Drafting An Effective Appellate Brief*, 67 Fla. B.J. 43, 44 (Oct. 1993).

28. Ray & Ramsfield, *supra* note 5, at 300.

29. *Id.*

30. Neumann, *supra* note 12, at 349.

31. Gerald Lebovits, *The Legal Writer, Document Design: Pretty in Print — Part I*, 81 N.Y. St. B.J. 64, 64 (Mar./Apr. 2009).

32. *Id.*

1. See Gerald Lebovits, *The Legal Writer, You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part I*, 78 N.Y. St. B.J. 64 (May 2006); Gerald Lebovits, *The Legal Writer, You Think You Have Issues? The Art of Framing Issues in Legal Writing — Part II*, 78 N.Y. St. B.J. 64 (June 2006).